ADVISORY COMMITTEE ON APPELLATE RULES

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September 29-30, 1997

Agenda for Fall 1997 Meeting of
Advisory Committee on Appellate Rules
September 29 & 30, 1997
Santa Fe, New Mexico

I. Introductions

II. Approval of Minutes of April 1997 Meeting

III. Report on Actions of Standing Committee (6/97) and Judicial Conference (9/97)

IV. Brief Discussion of Possible Moratorium on Submission of New Changes for Public Comment

V. Presentation on Electronic Filing Technology (Immediately After Lunch on Sept. 29)

VI. Action Items

A. Item No. 97-15 (FRAP 40(a)(1) — 45 instead of 14 days to petition for rehearing in criminal cases)

B. Item No. 97-21 (FRAP 31(b) — require service of briefs on unrepresented parties)

VII. Discussion Items

A. Removal from Table of Agenda Items of Proposals Upon Which Advisory Committee, Standing Committee, and Judicial Conference Action is Completed

1. Item No. 89-5 (FRAP 35(c) — en banc timing)

2. Item No. 90-1 (FRAP 35(b) & (c) — "suggestion" to "petition")

3. Item No. 91-4 (FRAP 32 — typeface)

4. Item No. 91-9 (FRAP 32(a) — telephone numbers)

5. Item No. 91-24 (FRAP 29 — amicus briefs page limits and contents)

6. Item No. 91-25 (FRAP 35 — contents of rehearing petition)

7. Item No. 91-28 (FRAP 27 — updating rules re: motions)

8. Item No. 92-4 (FRAP 35 — intercircuit conflict as en banc grounds)

9. Item No. 93-3 (FRAP 41 — time for issuing mandate)

10. Item No. 93-4 (FRAP 41 — length of time for stay of mandate)

11. Item No. 93-5 (FRAP 26.1 — use of "affiliate" in disclosure statement)

12. Item No. 93-6 (FRAP 41 — effective date of mandate)

13. Item No. 95-9 (FRAP 5 — time for ordering transcripts)

14. Item No. 96-1 (Form 4 — information about living expenses)

B. Removal from Table of Agenda Items of Proposals That Have Been Withdrawn or Made Moot By Pending Rule Changes

1. Item No. 92-11 (requiring government attorneys to join local bars)

2. Item No. 97-17 (calculate Rule 60 deadline under FRCP)

C. Prioritization of Other Proposals on Table of Agenda Items

1. Questions

a. Should Proposal Remain on Table of Agenda Items?

b. If So, Should Advisory Committee Give "High," "Medium," or "Low" Priority to Proposal?

2. Proposals

a. Item Nos. 91-3 & 95-8 (finality/interlocutory appeals)

b. Item No. 91-17 (unpublished opinions)

c. Item No. 95-1 (FRCP 23 — standing of absent class members to appeal)

d. Item No. 95-2 (FRAP 3 & 24 — denial of IFP status)

e. Item No. 95-3 (FRAP 15(f) — petition for agency rehearing tolls time to appeal)

f. Item Nos. 95-4 & 97-1 (FRAP 26(a)(2) — harmonizing time calculation under FRCP and FRAP)

g. Item No. 95-5 (FRAP 31 — filing on computer disk)

h. Item No. 95-6 (FRAP 3(d) & 15(c) — replace clerk service with party service)

i. Item Nos. 95-7, 96-2, & 97-2 (FRAP 4 — standard for extending time to appeal)

j. Item No. 96-3 (FRAP 34 — presumption against oral argument)

k. Item No. 97-3 (FRAP 6 — service of statement of issues/ designation of record on all parties)

l. Item No. 97-4 (FRAP 15(c)(1) — service of petition for review of informal rulemaking)

m. Item Nos. 97-5 & 97-13 (PLRA & AEDPA)

n. Item No. 97-6 (FRAP 27(b) — appellate commissioners)

o. Item Nos. 97-7 & 97-26 (FRAP 28(j) — supplemental authorities)

p. Item No. 97-8 (FRAP 29 — amicus briefs by state agencies)

q. Item No. 97-9 (FRAP 32 — cover colors of rehearing petitions)

r. Item Nos. 97-10 & 97-28 (FRAP 36 — disposition without opinion)

s. Item Nos. 97-11 & 97-24 (FRAP 39 — attorneys' fees as costs)

t. Item No. 97-12 (FRAP 44 — constitutional challenges to federal regulations)

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

v. Item No. 97-16 (Wallace proposal re: CAFC)

w. Item No. 97-18 (FRAP 1(b) — FRAP's impact on jurisdiction)

x. Item No. 97-19 (FRAP 4(b)(1)(B)(ii) — ambiguity caused by "any defendant")

y. Item No. 97-20 (FRAP 27(a)(3)(A) — denying motion without awaiting response)

z. Item No. 97-22 (FRAP 34(a)(1) — statements re: oral argument)

aa. Item No. 97-23 (FRAP 34(g) — use of exhibits during oral argument)

bb. Item No. 97-25 (merge FRAP 35 & 40)

cc. Item No. 97-27 (FRAP 46(a)(1) — Northern Mariana Islands)

dd. Item No. 97-29 (FRAP 28(a)(5) — "deep issues")

ee. Item No. 97-30 (FRAP 32(a)(7)(C) — standard certificate of compliance with type-volume limitation)

ff. Item No. 97-31 (FRAP 47(a)(1) — require changes to local rules to take effect on December 1)

Please note: The proposals referred to in §§ VII(C)(2)(ee) & (ff) are not discussed in the Reporter's 8/15/97 memorandum. Please refer instead to L. Munford's 8/13/97 letter to W. Garwood.

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

IX. Adjournment



















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Advisory Committee on the Federal Appellate Rules
Table of Agenda Items — Revised August 1997

FRAP Item	Proposal	Source	Current Status
89-5	Amendment of FRAP 35(c).	Mr. Robert St. Vrain (CA-8)	Under study by reporter Discussion with Supreme Court Clerk to precede any further action 10/90 Additional drafts requested 12/91 Approved for submission to Standing Committee 4/92 Standing Committee requested that Advisory Committee reconsider 6/92 Draft approved for submission to Standing Committee 4/93. Check all other FRAP for cross-references to "suggestions" for rehearing en banc Approved by Standing Committee for publication to bench and bar 6/93 Publication delayed pending completion of Items 91-25 and 92-4, 9/93 Published 9/95 Approved for submission to Standing Committee 4/96 Tentatively approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97
90-1	Amend FRAP 35(b) and (c) to change "suggestion" for an en banc to a "petition" for an en banc.	Hon. Jon Newman (CA-2) Mr. St. Vrain (CA-8)	Under study See notes under item 89-5
91-3	Final decision by rule/expanding interlocutory appeal by rule. (Related to No. 95-8.)	Federal Courts Study Committee; Judicial Improvements Act of 1990, P.L. No. 101-650; and Federal Courts Administration Act of 1992, P.L. No. 102-572	Discussion on-going 4/91 Consideration of interlocutory review of rulings on class certification. Referral from Civil Rules Committee 6/93

Agenda Item I

FRAP Item	Proposal	Source	Current Status
91-4	Typeface, re: rule 32.	Mr. John Greacen (CA-4)	Reporter asked to draft language 12/91 Approved for submission to Standing Committee 11/92 Approved by Standing Committee for publication to bench and bar 12/92 Advisory Committee approved new drafts for submission to Standing Committee for re-publication 5/93 Standing Committee approved new draft for re-publication 6/93 Published 11/93 Advisory Committee approved new draft for submission to Standing Committee for republication 4/94 Approved by Standing Committee for republication 6/94 Published 9/94 New draft approved by Advisory Committee 4/95 Standing Committee referred back to Advisory Committee 6/96 New draft approved by Advisory Committee 10/95 Standing Committee approved new draft for publication 1/96 Published 4/96 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97

FRAP Item	Proposal	Source	Current Status
91-9	Amendment of Rule 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.	Local Rules Project	Approved for submission to Standing Committee 12/91 Approved by Standing Committee for publication 1/92 Approved for resubmission to Standing Committee 4/93 Approved by Standing Committee 6/93 but not forwarded to the Judicial Conference, republished along with other changes to Rule 32 under item 91-4 Published 11/93 Republished 9/94 New draft approved by Advisory Committee 4/95 Standing Committee referred back to Advisory Committee 6/95 New draft approved by Advisory Committee 10/95 Standing Committee approved new draft for publication 1/96 Published 4/96 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97

FRAP Item	Proposal	Source	Current Status
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Further study recommended 12/91
91-24	Page limits for and contents of amicus briefs (Rule 29).	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96 Tentatively approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97

FRAP Item	Proposal	Source	Current Status
91-25	Amendment of Rule 35 to specify contents of suggestions for rehearing en banc.	CA-5 in response to Local Rules Project	For future discussion 12/91 Approved in substance; Reporter to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96 Tentatively approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97

FRAP Item	Proposal	Source	Current Status
91-28	Updating Rule 27.	Advisory Committee	Mr. Kopp asked to prepare memo 12/91 Held over 10/92 Subcommittee appointed 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Approved for submission to Standing Committee 4/94 Approved by Standing Committee for publication 6/94 Published 9/94 Approved for resubmission to Standing Committee 4/95 Standing Committee referred back to Advisory Committee 6/95 New draft approved by Advisory Committee 10/95 Standing Committee approved new draft for publication 1/96 Published 4/96 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97

FRAP Item	Proposal	Source	Current Status
92-4	Amendment of Rule 35 to include intercircuit conflict as ground for seeking en banc.	Solicitor General Starr	Subcommittee consisting of Judges Logan and Williams and Mr. Kopp to consult with Reporter Report from FJC pending 1/93 On hold pending views of Solicitor General 4/93 Approved in substance; subcommittee to prepare new draft 9/93 Discussion of new draft postponed until fall meeting 4/94 Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96 Tentatively approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97
92-11	Consideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees.	Attorney General Barr and Standing Committee	On hold pending views of Solicitor General 4/93 Solicitor General withdrew suggestion 2/97

FRAP Item	Proposal	Source	Current Status
93-3	Amend Rule 41 re: 7-day period for issuance of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96 Tentatively approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97
93-4	Amend Rule 41 re: length of time for stay of mandate.	Advisory Committee	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96 Tentatively approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97

FRAP Item	Proposal	Source	Current Status
93-5	Amend Rule 26.1 to delete use of term "affiliate."	Mr. Joseph Spaniol	Draft approved 10/94 to be submitted to Style Subcommittee Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96 Tentatively approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97
93-6	Amend Rule 41 re: effective date of mandate.	Solicitor General Days	Draft approved 10/94 to be submitted to Style Subcommittee] Revised draft approved for submission to Standing Committee 4/95 Published 9/95 Approved for submission to Standing Committee 4/96 Tentatively approved by Standing Committee 7/96; will be forwarded to Judicial Conference with restyled rules 8/97 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97
95-1	Amend Civil Rule 23 so class members do not need to intervene to appeal.	Mr. Alan Morrison	Awaiting initial discussion
95-2	Amend Rules 3 and 24 re: denial of in forma pauperis status.	Mr. Wm. Johnson, Sr. & Mr. Kenneth Bonds	Awaiting initial discussion
95-3	Amend Rule 15(f) to conform to recent amendments to 4(a)(4).	Hon. Stephen Williams (CA-DC)	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
95-4	Amend computation of time to conform to Civil Rules method. (Related to No. 97-1.)	Mr. James B. Doyle	Awaiting initial discussion
95-5	Amend Rule 31 to require submission of digitally readable copy of brief, when available.	Hon. Frank Easterbrook (CA-7)	Awaiting initial discussion
95-6	Amend Rule 3(d) & 15(c) to require appellant/petitioner to serve copies of notice of appeal.	Advisory Committee	Awaiting initial discussion
95-7	Amend Rule 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period. (Related to Nos. 96-2 & 97-2.)	Advisory Committee	Awaiting initial discussion
95-8	Does Rule 4(a)(7) repeal collateral order doctrine? (Related to No. 91-3.)	Advisory Committee	Awaiting initial discussion
95-9	Amend Rules 5 & 5.1 so that time for ordering transcript runs from entry of order granting permission to appeal.	Advisory Committee	Approved for submission to Standing Committee 4/96 Approved by Standing Committee for publication 7/96 Published 8/96 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97
96-1	Amend Form 4 to obtain information about living expenses.	Wm. Suter, Clerk of the Supreme Court	Approved for submission to Standing Committee 4/96 Approved by Standing Committee for publication 7/96 Published 8/96 Revised draft approved by Advisory Committee for submission to Standing Committee 4/97 Approved by Standing Committee for submission to Judicial Conference 6/97

FRAP Item	Proposal	Source	Current Status
96-2	Amend Rule 4(b) so that an extension of time to file a notice of appeal can be granted in a criminal case even without excusable neglect. (Related to Nos. 95-7 & 97-2.)	Hon. R. Posner (CA-7)	Awaiting initial discussion
96-3	Add presumption against oral argument for all matters other than the substance of the appeal (in Rule 34?).	Advisory Committee	Awaiting initial discussion
97-1	Amend Rule 26(a) so that time computation is consistent with Fed.R.Civ.P. 6(a). (Related to No. 95-4.)	Advisory Committee & Los Angeles County Bar Assn.	Awaiting initial discussion
97-2	Amend Rule 4(a)(5)--standard for granting extension in 1st 30 days different than in 2nd 30 days. (Related to Nos. 95-7 & 96-2.)	Advisory Committee	Awaiting initial discussion
97-3	Amend Rule 6 to require service of statement of issues on all parties not just on appellee.	Francis Fox, Esq.	Awaiting initial discussion
97-4	Amend Rule 15(c)(1) re: informal rulemaking.	Advisory Committee & Jack Goodman, Esq.	Awaiting initial discussion
97-5	Amend Rule 24(a)(2) in light of Prisoner Litigation Reform Act.	Advisory Committee	Awaiting initial discussion
97-6	Amend Rule 27(b) to permit appellate commissioners to rule on procedural motions.	Los Angeles County Bar Assn.	Awaiting initial discussion
97-7	Amend Rule 28(j) to allow brief explanation and statement of significance. (Related to No. 97-26.)	Jack Goodman, Esq.	Awaiting initial discussion
97-8	Amend Rule 29 to permit a state agency or officer to file without consent or leave of court.	C. Catterson (Clerk, CA-9)	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
97-9	Amend Rule 32--cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion
97-10	Amend Rule 36 re: disposition without opinion. (Related to No. 97-28.)	Philip Lacovara, Esq.	Awaiting initial discussion
97-11	Amend Rule 39 re: procedure for determining award of attorney's fees for appeal. (Related to No. 97-24.)	Los Angeles County Bar Assn.	Awaiting initial discussion
97-12	Amend Rule 44 to apply to constitutional challenges to federal regulations.	Hon. Cornelia Kennedy (CA-6)	Awaiting initial discussion
97-13	Amendments made necessary by Antiterrorism and Effective Death Penalty Act of 1996.	Advisory Committee	Awaiting initial discussion
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion
97-15	Amend FRAP 40 to provide that a petition for rehearing in a criminal case in which U.S. is a party must be filed within 45 days.	Solicitor General	Awaiting initial discussion
97-16	Amend unspecified FRAP to address potential overlap in jurisdiction between Federal Circuit and regional circuits in patent cases.	Hon. J. Clifford Wallace (CA9)	Awaiting initial discussion
97-17	Amend FRAP 4 so that 10 day deadline for filing a FRCP 60 motion is calculated according to FRCP method.	Christopher A. Goelz (CA9 mediator)	Awaiting initial discussion
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
97-19	Amend FRAP 4(b)(1)(B)(ii) to clarify whether, in multi-defendant criminal cases, the government must file its notice of appeal within 30 days after the *first* notice of appeal is filed by a defendant or within 30 days after the *last* notice of appeal is filed by a defendant.	Advisory Committee	Awaiting initial discussion
97-20	Amend FRAP 27(a)(3)(A) by adding a sentence explicitly stating that a court need not give notice or await a response before *denying* a motion.	Advisory Committee	Awaiting initial discussion
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion
97-22	Amend FRAP 34(a)(1) to establish a uniform federal rule governing party statements as to whether oral argument should or should not be permitted.	Advisory Committee	Awaiting initial discussion
97-23	Amend FRAP 34(g) to specify whether an attorney or unrepresented party may, during oral argument, use a physical exhibit (such as a chart or diagram) that has not been admitted into evidence.	Advisory Committee	Awaiting initial discussion
97-24	Amend FRAP 38 or 39 to clarify whether it is the court of appeals or the district court that determines amount of attorneys' fees awarded as sanctions or costs on appeal. (Related to No. 97-11.)	Advisory Committee	Awaiting initial discussion
97-25	Merge FRAP 35 (governing en banc determinations) and FRAP 40 (governing panel rehearings) into a single rule.	Advisory Committee	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
97-26	Amend FRAP 28(j) to (1) require that parties attach copies of supplemental authorities to their letters, (2) require all 28(j) submissions to be made at least 24 hours before oral argument, and (3) limit 28(j) submissions to materials that did not become available until after the party filed its most recent brief. (Related to No. 97-7.)	Hon. Alex Kozinski (CA9)	Awaiting initial discussion
97-27	Amend FRAP 46(a)(1) to make eligible for admission to the bar of a court of appeals those attorneys who have been admitted to practice before the Supreme Court of the Commonwealth of the Northern Mariana Islands.	Michael Marks Cohen, Esq.	Awaiting initial discussion
97-28	Amend FRAP 36 to require that the court of appeals issue an opinion in every case in which a judgment is entered. Related to No. 97-10.)	Bruce Committe, Esq.	Awaiting initial discussion
97-29	Amend FRAP 28(a)(5) to require that the "statement of the issues presented for review" be phrased as "deep issues" — that is, in separate sentences that show how the legal question arises, in no more than 75 words, and with a question mark at the end.	Bryan A. Garner, Esq.	Awaiting initial discussion
97-30	Amend FRAP 32(a)(7)(c) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Munford, Esq.	Awaiting initial discussion
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1.	Luther T. Munford, Esq.	Awaiting initial discussion

Agenda Item II

DRAFT

MINUTES OF THE
ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 3 & 4, 1997

Judge James K. Logan, Chair of the Advisory Committee, called the meeting to order at 8:40 in the conference room of the Thurgood Marshall Federal Judiciary Building. The following Advisory Committee members were present: Judge Will Garwood, Judge Alex Kozinski, Judge Diana Gribbon Motz, Mr. Michael Meehan, Mr. Luther Munford, and Mr. John Charles Thomas. Mr. Robert Kopp was present representing the Solicitor General. Judge Stephen Williams, whose term on the Advisory Committee had recently expired, was in attendance. Judge Alicemarie Stotler who chairs the Standing Committee, Judge Frank Easterbrook who is the liaison from the Standing Committee, Judge James Parker who chairs the Standing Committee's Subcommittee on Style, and Professor Daniel Coquillette who is the Reporter for the Standing Committee were all present, as was Mr. Joseph Spaniol who is a consultant to the Standing Committee. Mr. Patrick Fisher, who represents the clerks, was present. Ms. Judy McKenna, from the Federal Judicial Center, and Mr. John Rabiej, of the Administrative Office, were also present. Mr. Bryan Garner was present for portions of the meeting via speaker phone connection.

Judge Logan introduced Judge Motz and welcomed her to the Advisory Committee.

Approval of Minutes

The minutes of the April 1996 meeting, and of the May 1, 1996, telephonic meeting, were approved without any additions or corrections.

Restylization of the Rules

The primary item on the Committee's agenda for the meeting was consideration of the packet of restyled rules published for comment during 1996. Each member of the Committee received copies of all comments submitted during the publication period. Prior to the meeting the Reporter summarized the comments and made recommendations concerning their implementation.

The reaction to the undertaking was strongly positive. Of the eighteen commentators who offered general observations on the value of the project, all but one was very favorable. The consensus was that substantial improvements had been made in both the language of the rules and in their structure, that the rules are easier to comprehend, and, that they are, as a result, fairer.

Rule 1

The Advisory Committee recommended making no post-publication changes in Rule 1. The Reporter had recommended changing Rule 1(a)(2) to state that "[w]hen these rules provide for making and filing a motion or other document in the district court, the procedure must comply with the practice of the district court." The Committee disagreed. To the extent that "making" is distinguished from "filing," it refers either to service - as in making a motion by serving it - or it refers to making an "oral" motion. To the extent that the Appellate Rules are concerned with district court practice, the rules deal only with the filing of papers in the district court.

Judge Easterbrook asked that Rule 1(b) be placed on the Committee's agenda for future consideration. He noted that it says that the appellate rules "do not extend or limit the jurisdiction of the court of appeals." Yet, the Supreme Court has clearly stated that failure to comply with Rules 3, 4, or 5 creates a jurisdictional defect. The recent amendments to the Rules Enabling Act permit the rules to define finality for purposes of appeal.

Rule 2

The Advisory Committee approved the minor style changes suggested by the Reporter.

Rule 3

The Advisory Committee approved one major change in Rule 3 and several minor changes.

The major change is to incorporate the sole remaining paragraph of Rule 3.1 as subparagraph 3(a)(3) and move existing subparagraph (3) to subparagraph (4).

Several commentators suggested that paragraph (b) of the published rule blurred the distinction between joint and consolidated appeals. The Committee rejected the suggested language aimed at clarifying the distinctions. In particular, the Committee found the description of consolidated cases misleading for two reasons: first, appeals from a single judgment may be consolidated rather than joined when the interests of the appellants are such that joinder is not practicable; second, the extent to which consolidated appeals functions as a single appeal is unclear. The Committee also decided to alter a provision, contained in the published version, requiring that a court "order" consolidation. The Committee agreed that consolidation should be court initiated, but that consolidation could be accomplished by court rule rather than by court order.

The Committee Note must be amended to reflect the changes made by the Committee.

Rule 3.1

The *Federal Courts Improvement Act of 1996,* Pub. L. 104-317, made 3.1(a) obsolete. It is no longer possible to consent to appeal to a district court following trial by a magistrate judge and, after the first appeal, to seek a discretionary appeal in the court of appeals. Appeal from a judgment entered after trial by a magistrate judge now lies directly to a court of appeals and is a matter of right.

The primary purpose of 3.1 was to establish the procedure to be used to obtain the second and discretionary appeal, following the initial appeal in the district court. Since the two-tiered discretionary appeal is no longer available, the Advisory Committee decided that the remaining provision (3.1(b)) could be incorporated in Rule 3(a).

The Committee Note will explain the abrogation of the rule.

Rule 4

In Rule 4(a)(4)(A)(vi), the Committee amended the provision to state that the 10-day period should be computed using Civil Rule 6(a). The amendment is intended to remove any confusion about whether to use the counting rule in FRAP 26 or its counterpart in the Civil Rules. Since the motion is filed in the district court, the amendment requires use of the district court rule. Because the issue was discussed in the published Committee Note, which indicated the Advisory Committee's belief that the Civil Rules counting method should be used, the Advisory Committee believes that this amendment can be made without republication.

In Rule 4(a)(5)(A)(i), the Committee approved changing "not later than" to "within." The term "within" denotes both a beginning and ending time; a paper filed before the beginning time is premature. The term "no later than" denotes only an ending time. Because an extension, especially for good cause, could appropriately be applied for prior to expiration of the time for filing a notice of appeal, "no later than" is the better term.

Two commentators objected to the amendment of (a)(6) that would preclude reopening the time for appeal if the movant received notice of entry of judgment from "the court". In contrast, under the existing rule only notice from a party or from "the clerk" bars reopening. The Committee decided to retain the amendment. Regardless of the way in which a party receives notice, a party who has received notice should not be able to reopen the time. Quite clearly, however, the party must receive notice that

judgment has been entered; in contrast, notice from a judge that the judge intends to enter judgment is not sufficient.

Rule 4(b)(1)(B)(ii) was changed back to the language in the existing rule so that it says the government may appeal within 30 days after entry of judgment or "the filing of a notice of appeal by any defendant." The published rule would have permitted the government to appeal within 30 days after "the filing of the last defendant's notice of appeal." The published version eliminated an ambiguity created by the term "any defendant." Requiring the government to appeal within 30 days after the filing of a notice by "any defendant" could mean that the government may file its notice of appeal as to all defendants as late as 30 days after the last notice is filed by any defendant. Conversely, it may mean that the government must file its notice within 30 days after the first defendant files a notice of appeal. The published version, however, created its own problems. One of the commentator's noted that a co-defendant can plead guilty and begin serving time perhaps a year or more prior to the sentencing of another co-defendant. The published language could permit the government to simultaneously appeal both sentences if the second defendant appeals. The government's appeal from the first sentence could, therefore, be filed long after the first defendant began serving time.

Before deciding to return to the current language, the Committee considered, and ultimately rejected, alternative solutions to the problem. The 4(b)(1)(B)(ii) problem is not solved by limiting the government's filing time to 30 days after judgment or "the filing of a notice of appeal by the defendant or, if there were multiple defendants, the filing of the last notice of appeal filed by any of the defendants who were tried together and whose judgments were entered on the same day." That solution is problematic because defendants who are tried on the same day often are not sentenced simultaneously, nor are their judgments entered by the clerk on the same day. Eliminating the requirement that the judgments be entered on the same day reopens the possibility of the government being able to appeal as much as a year, or more, after a co-defendant's judgment has been entered when there is a significant delay in the sentencing of one co-defendant. Another alternative considered was to allow the government to appeal within 30 days after the filing of the last notice of appeal by any of the defendants whose appeals were entered within 30 days of another co-defendant's appeal. The problem with that solution is that if there are more than two co-defendants there is still a rolling window. Appeal one could be followed by 30 days later by appeal two and appeal three could follow 15 days later, etc. As the discussion became increasingly convoluted, the Committee unanimously decided to return to the "ambiguous" existing language and to place the problem on Committee's docket for later thorough discussion.

Two commentators opposed the change in (c) that would require an inmate to use the special internal mail system for legal mail, if there is such a system. The

advantage of using the legal mail system is that the system usually records the date when mail is deposited in the system. The Committee decided to make no change.

Rule 5

The Reporter preceded the discussion of Rule 5 by recounting that in August 1996 a new Rule 5, that would have consolidated former Rules 5 and 5.1 into one rule, had been published for comment. Following publication, the *Federal Courts Improvement Act of 1996* made Rule 5.1 obsolete. Therefore, although not published as part of the style packet, abrogation of Rule 5.1 has become necessary, and the amendments suggested in the published Rule 5 should be considered at this point and, if approved by the Committee, included with the full body of the rules.

Only minor amendments were made in the text of the rule following publication; most of the changes were stylistic. Under Paragraph (a)(3) a district court "may amend" an order that a party wishes to appeal. That paragraph was amended to state that the amendment may be undertaken either *sua sponte* or in response to a party's request.

Rule 6

Only two minor word changes were made in Rule 6.

Rule 7

No changes were made in Rule 7.

Rule 8

In response to a commentator's suggestion, a new subparagraph, (a)(2)(E), was created by moving material from subdivision (b) to the new subparagraph. Otherwise, only minor language changes were made.

Rule 9

The last sentence of published Rule 9(a)(1) said that an appellant must file a transcript or "explain why a transcript was not obtained." To make it clear that the explanation should be written and filed, the sentence was changed to state that an appellant must "file a transcript of the release proceedings or an explanation of why a transcript was not obtained."

There was discussion about the necessity of retaining "judgment of" in the captions to subdivisions (a) and (b). Because of the ambiguity of the term "conviction"

and the need to clearly indicate that subdivision (a) applies to all phases preceding sentencing and that subdivision (b) applies to all phases after sentencing, the Committee decided not to amend the captions.

Rule 10

Only minor word changes were made in Rule 10.

Rule 11

Only minor word changes were made in Rule 11.

Rules 12, 13, and 14

No changes were made in Rules 12, 13, or 14.

Rule 15

Several punctuation changes and minor word changes were made in Rule 15. Paragraph 15(c)(1) was amended so that it more closely follows the current Rule. Existing Rule 15(c)(1) requires service "at or before the time of filing a petition for review." The published rule said that a petitioner must already have served a copy on other parties at the time of filing and one commentator objected to that change. Because no substantive change was intended, the Committee amended the rule to state that service must occur at or before the time of filing.

The rule requires the clerk to serve the petition for review on the respondent; the petitioner is required to serve each party admitted to participate in the agency proceedings other than the respondents. The Committee had previously discussed the uncertainty concerning the service obligations in proceedings involving informal agency rulemaking. The Committee reiterated its interest in pursuing the question and using the D.C. Circuit's local rule as a possible starting place.

Rules 15.1, 16, 17, 18, 19, and 20

No changes were made in Rules 15.1, 16, 17, 19 or 20. In Rule 18 a plural was changed to singular in 18(a)(2)(A)(ii).

Rule 21

Minor language changes were made in Rule 21. In 21(b)(4), the phrase indicating that a trial-court judge may "respond" only if invited to do so by the court of appeals was changed because it might cause confusion by implying that the trial judge

would then be a respondent. The word "respond" was deleted and changed to say that a trial judge, if invited to do so, could "address the petition."

Rule 22

To introduce the discussion, Judge Logan noted that the *Anti-Terrorism and Effective Death Penalty Act of 1996*, Pub. L. 104-132, amended the language of Rule 22. The Congressional amendment created two ambiguities. First, the caption of Rule 22 refers to 28 U.S.C. § 2255 but the text of the rule makes no mention of § 2255. Second, subdivision (b) leaves it unclear whether a district judge may issue a certificate of appealability. Judge Logan attempted to get both of these difficulties corrected before the legislation was passed but he was unsuccessful. After passage of the legislation, there was an attempt to ascertain how the Congress would like the ambiguities resolved, especially the uncertainty concerning the power of a district judge to issue a certificate of appealability. John Rabiej indicated that we received no direction other than that the problem could be worked out by the courts. In the interim, three circuits have determined that a district judge may issue a certificate of appealability. Judge Logan, therefore, recommended that the Committee adopt that approach.

Because of the statutory amendment, the Advisory Committee could not work with the published language, but worked with the statutorily amended Rule.

In subdivision (a), the only changes made were language changes to make the style of this rule consistent with the other rules. Most notably, the "shalls" were changed to "musts." There was a lengthy discussion about the prudence of making even minor stylistic changes in language that was only recently enacted by the Congress. The conclusion was that it was appropriate to make stylistic changes in subdivision (a), but not any substantive change.

In subdivision (b), paragraph (a), three substantive changes were made; the first two changes were necessary to eliminate ambiguities. First, in order to make the rule consistent with the statute (28 U.S.C. § 2253) the paragraph was made applicable to 28 U.S.C. § 2255 proceedings. The redrafting was guided by the statutory language in § 2253. Second, the rule was amended to state that a certificate of appealability may be issued by "a circuit justice or a circuit or district judge." The reference to a "circuit justice" was added to bring the rule into conformity with § 2253. The reference to a "district judge" was already in the rule as amended by Congress, but not clearly so in § 2253 (which says that a "circuit justice or judge" may issue a certificate of appealability). In light of the three recent circuit decisions, and in the absence of any other direction from the Congress, the Advisory Committee decided to amend the rule to state that all three (the circuit justice, a circuit judge, or a district judge) may issue a certificate. Third, the existing rule says that a certificate of appealability is not

necessary when an appeal is taken by the state or its representative. Because the rule now applies to § 2255 proceedings, the rule was amended to state that no certificate is necessary when the United States or its representative appeals.

The reporter was asked to draft a new Committee Note.

Rule 23

The only change was to correct a typographical error in the Committee Note.

Rule 24

Two minor stylistic changes were adopted.

Rule 25

The version of Rule 25(a)(2)(B)(ii) that became effective on December 1, 1996, said that a brief or appendix would be timely filed "if on or before the last day for filing, it is . . . dispatched to the clerk for delivery within 3 calendar days by a third-party commercial carrier." (Emphasis added.) The restyled version suggested that the word "calendar" be deleted. The Committee Note explained that suggested revision as follows:

> Deleting the word calendar means that under Rule 26(a)(2) Saturdays, Sundays, and legal holidays are not counted in the 3-day period. This is desirable because when the last day for filing is also the last day the courts are open before a three-day weekend, it may be difficult or impossible to get a commercial carrier to commit to delivery to the court within 3 calendar days, i.e. to delivery when the court is closed.

One commentator suggested that merely deleting the word "calendar" does not make it sufficiently clear that Saturdays, Sundays, and Holidays are not counted.

One member of the Advisory Committee suggested reinserting the word "calendar" because under Rule 26(a)(2), the 3-day period could become 6 days if the document is dispatched on a Friday before a 3-day weekend. Another member pointed out that Rule 26(a)(3) should eliminate any difficulty in getting a carrier to commit to delivery to the court within 3 calendar days. Rule 26(a)(3) provides that the last day of a period is not counted if it is a Saturday, Sunday, or legal holiday. Under that provision, if a brief or appendix were given to a carrier for delivery within "3 calendar days" and the carrier were given the document on Friday before a 3-day weekend, the carrier would have until Tuesday to deliver the document. A 3-calendar day period could become 4 days if the court is closed on the third day, but absent extraordinary circumstances 3 calendar days could not be longer than 4 days.

A 3-calendar-day period is also used in Rules 25(c) [dealing with manner of service] and 26(c) [dealing with a party's additional time to act after service by mail or commercial carrier].

Rule 26

The Advisory Committee's discussion of the meaning of "calendar days" in Rule 25 led the Committee to also recommend amendment of Rule 26(a)(2) to provide that Saturdays, Sundays, and legal holidays are not excluded when a period is stated in calendar days.

The discussion again surfaced about whether Rule 26(a)(2) should be amended to exclude intermediate Saturdays, Sundays, and holidays whenever a period is less than 11 days. That would make the appellate rule consistent with the civil rule. It was decided that such a substantive change should not be made at this point, but that it should be considered in the future.

Rule 26.1

The only changes suggested in Rule 26.1 were adopted following the publication of the rule in September 1995. The changes were tentatively approved by the Standing Committee in summer 1996.

The Committee Note developed in conjunction with the prior publication will be used. Minor modifications have been made so that it is consistent with the other notes in the style package.

Rule 27

Rule 27(a)(3)(A) was amended to clarify that if a court intends to grant a motion authorized by Rules 8, 9, 18, or 41, but the court does not want to await a response to such a motion, the court must give reasonable notice to the parties before the court grants the motion. The Committee agreed that it is implicit in the rule that a court may deny a motion at any time; a court need not await a response or give notice prior to denying a motion. There was discussion about the advisability of adding a sentence to Rule 27(a)(3)(A) stating that a motion may be denied at any time. It was decided that because of the substantive nature of the recommendation, consideration of any such language should be taken up at a later time. Because Rule 27(b) states that a court may act on a motion for a procedural order without awaiting a response, the reference in 27(a) to procedural orders was omitted.

It was also agreed that a court may act without awaiting a reply to a response. In an effort to remove any implication that there is an absolute right to file a reply

before the court acts, the language of Rule 27(a)(3)(4) was altered. The language was changed from "[t]he moving party may reply to a response within 7 days . . ." to "[a]ny reply to a response must be filed within 7 days . . ." The Committee Note was amended in a minor way also to remove any implication that there is an absolute right to file a reply. Since a court has general authority to shorten or extend the time, the Advisory Committee omitted that language from 27(a)(4).

The Committee Note was also amended to say that spiral binding and stapling satisfy the binding requirement.

The discussion of the restyled rules was briefly suspended to give Professor Daniel Coquillette, the Reporter for the Standing Rules Committee, the opportunity to discuss his work on the question of local rules governing attorney conduct.

Local Rules Governing Attorney Conduct

For the past two years the Standing Committee has been examining the local rules governing attorney conduct. In the district courts there is a wide disparity in the approaches taken by the district courts. The Standing Committee is likely to take some action this summer regarding district court rules governing attorney conduct. The Standing Committee may recommend a model local rule, or it may recommend a rather basic national rule. With regard to the rules in the courts of appeals, Dan began by stating that his examination of the local rules in the courts of appeals revealed the following:

- 4 circuits have no local rule,
- 2 circuits cover the topic in internal operating procedures,
- 5 circuits have rules similar to the model local rule being considered for the district courts, (the rules give some specificity to the term "conduct unbecoming a member of the bar") and
- 1 circuit has its own code.

On the face of it there is a great deal of diversity among the circuits. As a practical matter, Dan reported that there is not much of a problem. Over the past five years, in the courts of appeals, there were only 46 reported cases involving Rule 46 sanctions.

If the Standing Committee makes a recommendation for a model local rule for use in the district courts, Dan asked the Advisory Committee whether the recommendation should include the courts of appeals. Judge Logan asked whether the model local rule developed for the district courts could be used for the courts of appeals. Professor Coquillette responded that it could. The model local rule is likely to be one that adopts state standards in the absence of conflicting federal law and four of the circuits already have similar rules. The experts that participated in the special conferences sponsored by the Standing Committee concluded that it would be unwise to attempt to develop an entire body of federal rules on attorney conduct.

Dan indicated that the Advisory Committee need not make a decision on the issue at this time. Once the Standing Committee makes a recommendation at its June meeting, Dan suggested that it would be appropriate for the Advisory Committee to take up that specific recommendation at its next meeting. Dan's purpose in discussing the issue with the Advisory Committee at this time was simply to advise the Committee that the issue would be coming before the Standing Committee and the Advisory Committee will need to respond.

Restylization (continued)

Rule 28

No changes were recommended in Rule 28.

There was discussion about whether the Rule 28 list should include the statement regarding oral argument now authorized by Rule 34. (Rule 32(a)(7)(B)(iii) says that any statement with respect to oral argument does not count toward the length limitations for a brief.) Although Rule 34 permits a party to file a statement explaining why oral argument should, or should not, be permitted, no rule explains where the statement should be placed in the brief. One member opposed any mention of a statement concerning oral argument in Rule 28 because it would encourage such statements and he believes that they generally are not helpful. Discussion revealed that there are differences in the circuits concerning the use of such a statement and its placement. It was decided not to include in Rule 28 any reference to a statement regarding oral argument.

There was also discussion about the fact that the Rule 28 list does not include the certificate of service. In fact, it is not uncommon for a certificate of service to be filed separately from a brief. The Rule 28 list includes only items that must be included in a brief and, therefore, it would not be appropriate to include the certificate of service in that list.

Rule 29

Although several changes are recommended, most of them are the result of comments submitted following the September 1995 publication of Rule 29. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, were tentatively approved by the Standing Committee in July 1996.

After publication of the style packet only one substantive change was recommended. That change requires an amicus brief to state the source of its authority to file, i.e., whether it is by leave of court or with consent of all other parties. In

addition, minor style changes and a clarifying punctuation change were recommended.

Rule 30

Rule 30(a)(3) was amended to conform to Rule 31(b) so that an unrepresented party proceeding in forma pauperis need only file four copies of the appendix. Minor stylistic changes also were recommended. In 30(a)(3), there was an explicit decision to retain the reference to "memoranda" rather than changing it to singular.

Rule 31

Only minor stylistic changes were recommended.

It was noted that Rule 31(b) only requires a party to serve copies of the brief on "counsel for each separately represented party." There is no requirement of service on unrepresented parties. The Committee decided to place this item on its agenda.

Rule 32

In addition to stylistic changes, several substantive changes were recommended in order to simplify the rule. First, the length limitations based on character counts were deleted because some word processing programs treat spaces and punctuation as characters, while other programs do not. Second, the requirement that the average number of words per page not exceed 280 words was deleted. Third, in 32(a)(5), the provision permitting footnotes to be in 12 point type was deleted. Fourth, in 32(a)(6) the restrictions on the use of boldface type and of all capitals were deleted.

There was discussion about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief. Fourteen thousand is closer to the length of a professionally printed 50-page brief. One member pointed out that this rule had been quite controversial principally because lawyers suspected that we were trying to shorten the length of briefs. Over time the proposed rule has become less controversial. In order to avoid reopening the controversy, several members spoke in favor of retaining the 14,000 word limit. A majority favored staying with 14,000; therefore, the word limitation was not changed.

The commentator's suggestion that 32(d) be amended to emphasize that local variations concerning form are "one direction only" was discussed at length. Specifically the proposal was to state that a court may "waive" requirements but may not add to them. The suggestion was ultimately dismissed because the rule already makes it sufficiently clear that additional requirements may not cause a brief to be rejected.

There was discussion about the mixture of singular and plural nouns in the title of Rule 32. The Advisory Committee voted to make them all plural, but noted that the title of the rules do not consistently use either singulars or plurals. The Committee asked Bryan Garner to assume review of the titles.

The Advisory Committee noted that the Committee Note will need to be amended to conform to the changes made in the text of the rule. The Reporter was also asked to try to incorporate some of the examples found in the seventh circuit's explanation of its rule.

Rule 33

No changes were recommended in Rule 33.

Rule 34

The Reporter's memorandum suggested that any statement about oral argument must be included in the party's brief. One member objected to the suggestion, stating that the parties are in a better position to assess the need for oral argument after the briefs are filed. Another member suggested that Rule 34 should authorize local rules that require a party's principal brief to state whether the party requests oral argument. There was discussion about whether such a rule would violate Rule 32(d). Rule 32(d) restricts adoption of local rules concerning "form" and presumably would not preclude such a requirement.

The Committee decided not to direct when or how the statement should be filed. The Committee did recommend, however, a number of amendments to Rule 34(a). First, it was decided to authorize local rules that require parties to file a statement concerning oral argument. Second, the language was altered to make it clear that the statement may indicate that the parties do not want oral argument. Third, the first sentence of 34(a) was made a separate paragraph (1).

Because some members believed that a uniform federal rule governing the time and placement of statements concerning oral argument would be preferable to authorizing local rules, it was suggested that the consideration of a uniform federal rule should be added to the Committee's table of agenda items.

Judge Parker noted that subdivisions (a), (b), (d), (e), and (f) refer to a "party" but subdivisions (c) and (g) refer to "counsel". If an unrepresented party is not allowed to argue or bring physical exhibits to the argument, the distinctions are correct. But if unrepresented parties are allowed to so act, the distinctions may be problematic. Changing both (c) and (g) to passive voice would eliminate identification of the actor. But because an unrepresented party who presents the oral argument is acting as

counsel, and because the language distinctions have not caused any difficulties, the Advisory Committee agreed not to make changes in either (c) or (g).

Another problem that sometimes arises under Rule 34(g) is whether, during oral argument, an attorney may use a chart or diagram that has not been admitted into evidence. Disputes have arisen about whether the use of such a chart is an attempt to introduce new evidence at oral argument. A suggestion was made that Rule 34 should state that an exhibit that is not already a part of the record may be used only with consent of the other party, or with the court's permission. Most members of the committee understand the current rule to allow use of charts, etc, that have not been admitted into evidence. The fact that the rule permits the circuit clerk to destroy the exhibits if counsel does not reclaim them within a reasonable time indicates that the rule refers, at least in part, to items not admitted into evidence in the trial court. The circuit clerk may not, of course, destroy evidence. The Committee decided to add the issue to its table of agenda items.

Rule 35

Most of the recommended changes in this rule are the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, were tentatively approved by the Standing Committee in July 1996.

The only additional changes recommended were in subdivision (f) and some other minor style changes.

Within the last year new legislation was passed concerning participation of a senior judge in an en banc hearing. Congress, in Pub. L. 104-175, amended 28 U.S.C. § 46(c). As amended § 46(c) provides:

> A court in banc shall consist of all circuit judges in regular active service or such number of judges as may be prescribed in accordance with section 6 . . ., except that any senior circuit judge of the circuit shall be eligible
>
> (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or
>
> (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

The statutory language governs which judges can participate in an en banc

hearing or rehearing. It was noted that proposed subdivision (f), as published, does not govern who can sit with the en banc court or even who can vote on a petition. Subdivision (f) covers only who should receive a copy of the petition and who can call for a vote on the petition.

The first sentence of subdivision (f) governs who should receive a copy of the petition. During discussion, it was suggested that the sentence should be amended to state that a copy of the petition should be provided to "all panel members, if a panel has been assigned to hear the case," as well as to all judges of the court who are in regular active service. That formulation was ultimately rejected because it may not result in circulation of the papers to every judge who is entitled to sit as a member of the en banc court. The broadest construction of new § 46(c)(2) may mean that if Judge Jones was an active judge when the case was heard by a panel but took senior status prior to the en banc rehearing, Jones may sit as a member of the en banc court even though Jones was not a member of the panel. As an active member of the court at the time of the panel decision, the judge can be said to have participated in the case even though not a member of the panel because every panel decision is a decision of the court. Jones's participating in the en banc court would be a continuation of the earlier participation. Further construction difficulties arise when there is a second en banc hearing in the same case. Given the lack of certainty about who is eligible to vote on a petition to grant an en banc hearing or rehearing, the consensus was that the rule governing distribution of the petition should err, if at all, on the side of inclusiveness. That is, the rule should ensure that everyone who might be eligible to vote on a petition receives a copy of it.

It was ultimately decided to delete the first sentence of subdivision (f) for two reasons. First, construction of the new statutory language is still uncertain. Second, litigants do not need to know to whom the court circulates a petition. Which judges should receive a copy of a petition is really a matter of internal concern to the court and need not be in a rule.

The language of subdivision (f) which was approved by the Advisory Committee a year ago (following the September 1995 publication of this rule), and tentatively approved by the Standing Committee last July, was purposely vague about which judges can call for a vote. It says that a vote need not be taken "unless a judge requests a vote". In some circuits it is the practice that a senior judge can request a vote even though the senior judge is not a member of the panel and may not be entitled to vote on the question of whether the case will be heard or reheard en banc. The statute does not address the question of who can call for a vote and, although existing Rule 46(b) does not permit a senior judge who was not a member of the panel to call for a vote, the practice in some circuits has not followed the rule. The Committee confirmed its decision to simply state that "a judge" may request a vote.

Rule 36

The Advisory Committee recommended amendment of the title of Rule 36 so that it becomes: "Entry of Judgment; Notice".

Rules 37 and 38

No changes were recommended in either Rules 37 or 38. A commentator stated that Rule 38 violates the First Amendment because the right to petition the government for redress of grievances is not limited to non-frivolous petitions. Members of the committee noted, however, that the Supreme Court has decided that there is no constitutional right to file a frivolous law suit.

Rule 39

The Advisory committee recommended minor word changes in Rule 39. One commentator suggested amending the rule to clarify whether the court of appeals or the district court determines attorney's fees that are awarded as costs on appeal. Because such a change would be substantive, the Advisory Committee placed that suggestion on its agenda for future consideration.

Rule 40

The only change recommended was to amend the rule so that it consistently refers to "panel rehearing" rather than simply to "rehearing." Some time was spent comparing Rules 35 and 40 and any possible unintended effects flowing from the amendments of those two rules. One member asserted that until now Rule 40 governed both petitions for panel rehearing and for rehearing en banc. Another disagreed. Previously, Rule 35 governed "suggestions" for rehearing en banc and Rule 40 governed only "petitions" for rehearing. Given the fact that under the amended rules both panel rehearings and rehearings en banc will be requested in "petitions" the Advisory Committee concluded that it would be best to amend Rule 40 so that it clearly governs only "panel rehearings".

The difference between 35(e) and 40(a)(3) was discussed. Rule 35(e) says that a response to a petition may not be filed unless the court orders a response. Rule 40(a)(3) also says that an answer may not be filed absent court permission, but that a panel rehearing ordinarily will not be granted in the absence of the court's request for an answer. The consensus was that the distinctions are appropriate. When an en banc rehearing is granted, it is not as important that the winning party have an opportunity to speak before the court grants the rehearing. In those instances the winner will be heard during the rehearing. If a panel rehearing is granted, however, the court usually enters a new dispositive judgment and the winning party should have an opportunity to

be heard before the new judgment is entered.

The possible merger of Rules 35 and 40 was discussed and added to the Committee's table of agenda items. At least one difficulty with the merger was noted: Rule 35 governs initial en banc hearings as well as rehearings en banc. That is the apparent reason for the placement of Rule 35 prior to the rule governing Entry of Judgment (Rule 36) and before Rule 40.

Rule 41

All but one of the recommended changes were the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication and the Advisory Committee's post-publication recommendations were tentatively approved by the Standing Committee at its July 1996 meeting.

The one new change recommended by the Advisory Committee is in Rule 41(d)(2)(B). The change requires a party who files a petition for a writ of certiorari to notify the circuit clerk in writing that the petition has been filed.

Rule 42

No changes were recommended.

Rule 43

The only change recommended was to change "Office-Holder" to "Officeholder" in the caption of 43(c)(2).

Rule 44

No changes were recommended.

Rule 45

The only change recommended was to substitute "under the court's direction" for "under the direction of the court" in 45(b)(2).

Rule 46

A number of language changes were recommended in Rule 46(a)(2). First, the language stating that the form would be "furnished by the clerk" was deleted as

unnecessary. Second, the language requiring the applicant for admission to subscribe "at the foot of the application" was deleted as unnecessary. Third, the language requiring an applicant to "take" the oath was deleted as redundant in light of the fact that the applicant is required to subscribe to the oath and no oath is otherwise taken. There had been a motion to delete the second half of the first sentence (i.e. to delete "and furnished by the clerk, that contains the applicant's person statement showing eligibility for membership") but the motion was defeated.

The opening sentence of 46(a)(3) was rewritten to make it consistent with the style conventions.

Rule 46(b) was rewritten to have three paragraphs. Paragraph (1) was rewritten to have two subparagraphs.

In Rule 46(c) the caption and the first sentence were rewritten to make it consistent with the style conventions.

Rule 47

The Committee recommended changing 47(a) to refer to general directives to "parties or lawyers" rather than to "a party or a lawyer." If a directive is addressed to a specific party or specific lawyer, it may well be in the form of an order. It is only when the requirements are intended to affect the class of "parties" or "lawyers" that Rule 47 appropriately insists that the requirements be embodied in formal local rules.

Rule 47(b) was amended to allow the courts of appeals to regulate practice in a particular case "in any manner consistent with federal law, these rules, and local rules of the circuit." Although "federal law" could be construed to include the federal rules and local rules, the specification is in the current rule, has been helpful to practitioners, and probably should be continued lest its deletion be taken as a substantive change.

It was noted that the language changes discussed above did not disturb the consistency of Rule 47 with the parallel Civil Rule.

One commentator noted that the objective of 47(b) is to preclude sanctions unless an alleged violator received actual notice of the requirement before the alleged violation. The commentator suggested substituting the word "had" for "has". The Advisory Committee rejected the suggestion because making the change would make the Appellate Rule different from the Civil Rule which uses the phrase "has received."

Rule 48

The only change recommended in Rule 48 is to delete the phrase "make recommendations about" and to substitute "recommend" in the first sentence or 48(a).

Form 4

In August 1996 the Advisory Committee, with the approval of the Standing Committee, published proposed amendments to Form 4.

Mr. Fisher began the discussion by noting that the clerks oppose the length of the form but have not proposed an alternative.

There was discussion about whether it is fair to treat the assets of an applicant's spouse as available to the applicant. The Advisory Committee rejected the suggestion that if an applicant is not living with his/her spouse, the applicant could write "NA" in response to any question about the applicant's spouse. Although in some states a married person may not be responsible for legal costs incurred by the other, in other states a married person may be so responsible. The Committee decided to continue to request information about the spouse's assets. The form does not undertake to resolve the question of whether one spouse is responsible for the legal costs of the other. The form only requests information; the court determines what it does with the information. If the applicant is legally separated from his/her spouse or is unable to get the information from his/her spouse, the applicant can bring those facts to the attention of the court.

The Committee agreed to amend the form so that it requests employment history only for the preceding two years.

The statutory requirement that a prisoner attach a statement of the balances in the prisoner's institutional accounts applies only when the prisoner is seeking to appeal a judgment in a civil action or proceeding. The instruction was amended accordingly.

The form as amended was approved for submission to the Standing Committee.

Proposed Substantive Amendments

Several of the commentators on the restyled rules offered substantive suggestions for improving the rules. With the exception of certain substantive changes made necessary by recent statutory amendments, the Advisory Committee decided not to make any additional substantive changes that could delay, or possibly even derail,

the style project.

In addition to the topics enumerated during the Advisory Committee's discussion, the suggestions listed below were raised by various commentators. Each suggestion is followed by the Advisory Committee's recommendation as to whether the suggestion should receive further study by the Committee.

1. Rule 4 should clarify whether a cross-appeal is necessary to preserve an issue not addressed by the appellant.

   A complex jurisprudence treating this question has developed. The Advisory Committee concluded that the issue is substantive and not susceptible to solution by rule and therefore did not recommend placing the issue on the agenda.

2. The time computation problem addressed in Rule 4(a)(4)(vi) should be addressed by amending Fed. R. App. P. 26(a) so that it is consistent with Fed. R. Civ. P. 6(a).

   The Advisory Committee decided to place this suggestion on its table of agenda items.

3. Rule 4(a)(5) should not grant an extension of time for filing a notice of appeal upon a motion filed *ex parte*.

   The Advisory Committee decided not to place this suggestion on its agenda.

4. Rule 4(a)(5) should be amended to clarify that the standard for granting an extension during the first 30 days is different (i.e. more lenient) than during the second 30 days. (This suggestion was put forth by a committee member rather than one of the commentators.)

   The Advisory Committee decided to place this suggestion on its table of agenda items.

5. Rule 6 should require the appellant to serve the statement of issues on other parties, not just on the appellee.

   The Advisory Committee decided to place this suggestion on its table of agenda items.

6. Rule 6 should state which exhibits are too bulky or heavy for routine transmission to the court of appeals, and at what time arrangements must be made for sending such exhibits to the courts of appeals.

The Advisory Committee decided not to place this suggestion on its agenda.

7. Rule 8 should require a party appealing from a Bankruptcy Appeal Panel (B.A.P.) to first seek a stay from the B.A.P.

The Advisory Committee decided not to place this suggestion on its agenda. There are many places in the rules where references could be made to the B.A.P. but they have not been added.

8. A reference to the B.A.P. should be added to Rule 8(a)(2).

The Advisory Committee decided not to place this suggestion on its agenda.

9. Many appeals from agencies arise out of informal rulemaking proceedings. In such instances, it is not clear who is a party to the agency proceeding for purposes of the 15(c)(1) requirement to serve the petition on all parties "admitted to participate in the agency proceedings." One commentator suggests amending Rule 15 to incorporate the solution adopted by D.C. Cir. R. 15(a) which provides that "in cases involving informal rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute."

The Advisory Committee decided to place this suggestion on its table of agenda items.

10. Rule 24(a)(2) says that if the district court grants a motion to proceed IFP, "the party may proceed on appeal without prepaying or giving security for fees and costs." This may need to be amended in light of the Prisoner Litigation Reform Act. Prisoners must pay the filing fee, but need not prepay the full amount if they do not have it; partial payments will be collected by the court over time.

The Advisory Committee decided to place this suggestion on its table of agenda items.

11. Rule 25 should be amended to extend the "mailbox rule" to petitions for rehearing.

The Advisory Committee decided not to place this suggestion on its agenda.

12. Amend Rule 27(b) to permit appellate commissioners to rule on procedural motions.

The Advisory Committee decided to place this suggestion on its table of agenda items.

13. Amend Rule 28(j) so that the letter referencing new authorities can include a brief explanation of the new authority and a statement of its significance.

The Advisory Committee decided to place this suggestion on its table of agenda items. Although such explanations and statement are currently prohibited, they are submitted. It would be preferable to regulate the practice rather than to ignore it.

14. Amend Rule 29 to permit a state agency or state officer to file an amicus brief without consent of the parties or leave of court.

The Advisory Committee decided to place this suggestion on its table of agenda items.

15. Amend Rule 31 so that a court of appeals is permitted to "modify" rather than simply "shorten the time for briefs to be filed." The change would permit a court to shift the briefing schedule.

The Advisory Committee decided not to place this suggestion on its agenda.

16. Amend Rule 31 so that it is not necessary to serve 2 copies of a brief on counsel for each party to the appeal.

The Advisory Committee decided not to place this suggestion on its agenda.

(The agenda already includes a suggestion regarding electronic filing of briefs. A committee member suggested, and the Advisory Committee agreed, that the item should be expanded to include consideration of requiring service of a disk on the other parties.)

17. Amend Rule 32 to establish the cover color for a petition for rehearing, for a petition for rehearing en banc, for a response to either, and for a supplemental brief.

The Advisory Committee decided to place this suggestion on its table of agenda items.

18. Delete the third exception in Rule 34 (a court may dispense with oral argument if "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument").

The Advisory Committee decided not to place this suggestion on its agenda.

19. Amend Rule 36 to address the disposition of appeals without any explanatory opinion.

The Advisory Committee decided to place this suggestion on its table of agenda items.

20. Rule 36 should address the practice of issuing opinions that are not for publication.

This topic is already on the table of agenda items.

21. Amend Rule 39 to state whether the court of appeals or the district court determines the attorney's fees awarded as costs on appeal and the procedure (including time for filing) for determining those fees.

The Advisory Committee decided to place this suggestion on its table of agenda items.

22. Amend Rule 44 to apply to constitutional challenges to federal regulations.

The Advisory Committee decided to place this suggestion on its table of agenda items.

23. Amend Rule 46 so that once a person becomes a member of the bar of a court of appeals for any circuit, that person may appear as counsel in any other circuit without the need for admission to the bar of that court.

The Advisory Committee decided not to place this suggestion on its agenda.

In addition to those topics added to the table of agenda items as a result of the commentators' suggestions, the Advisory Committee decided to add consideration of the Effective Death Penalty Act. The Committee should determine whether additions or amendments are necessary to implement the new act.

Conclusion

Judge Logan announced that this meeting was the last that he would chair. He thanked all of the committee members for their hard work, their openness, and their cooperative spirit. He thanked in particular: Judge Stotler for her attendance at the meetings and her close attention to the work of this, as well as all of the other advisory committees; Judge Easterbrook for his expertise and assistance; John Rabiej and his office for all of the support they provide; and the reporter for her able assistance in preparing consistently high quality materials for the Committee's consideration.

The next meeting will be scheduled for the fall, tentatively September 29 and 30 in Bar Harbor (Maine), Santa Fe (New Mexico), or Williamsburg (Virginia).

The meeting adjourned at approximately 2:30 p.m. on April 4.

Respectfully submitted,

Carol Ann Mooney
Reporter

Agenda Item III

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Draft Minutes of the Meeting of June 19-20, 1997
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 19-20, 1997. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Judge Frank H. Easterbrook
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Judge Morey L. Sear
Chief Justice E. Norman Veasey
Acting Deputy Attorney General Seth P. Waxman
Judge William R. Wilson

Alan C. Sundberg, Esquire was unable to be present. Mr. Waxman was able to attend the meeting only on June 19. Ian H. Gershengorn, Esquire and Roger A. Pauley, Esquire represented the Department of Justice on June 20.

Supporting the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts: Mark D. Shapiro, senior attorney in that office: and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Advisory Committee on Criminal Rules
Judge D. Lowell Jensen, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Mary P. Squiers, project director of the local rules project; and James B. Eaglin, acting director of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler reported that the Judicial Conference had submitted its final report to the Congress on the Civil Justice Reform Act. She stated that the committee at its January 1997 meeting had been presented with a proposed draft of the Conference's report, prepared by a subcommittee of the Court Administration and Case Management Committee (CACM). The members had expressed a number of serious concerns with the document, which were later conveyed informally to the Administrative Office and CACM. As a result, the final Judicial Conference report was adjusted in several respects. Judge Stotler pointed out that the report included a number of specific recommendations concerning the Federal Rules of Civil Procedure.

Judge Stotler reported that the Judicial Conference at its March 1997 session had approved the committee's recommended changes in the civil and criminal rules to conform them to recent statutory amendments to the Federal Magistrates Act. The changes had been sent to the Supreme Court for action on an expedited basis.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 9-10, 1997.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Rabiej presented the report of the Administrative Office (AO), which consisted of: (1) a description of recent legislative activity; and (2) an update on various administrative steps that had been taken to enhance support services to the rules committees. (Agenda Item 3)

He reported that many bills had been introduced in the Congress that would amend the federal rules directly or have a substantial impact on them. He described several of the bills,

covering such diverse matters as grand jury size, scientific evidence, composition of the rules committees, offers of judgment, protective orders, cameras in the courtroom, forfeiture proceedings, and interlocutory appeals of class certification decisions.

Judge Stotler pointed out that Mr. Rabiej and the rules office had prepared written responses to the Congress setting forth the Judiciary's positions on these various legislative initiatives. She emphasized that the AO had prepared the responses in close coordination with the chairs and reporters of the Standing Committee and advisory committees. All the letters had been carefully written and approved, and the judiciary's positions had been formulated under very tight deadlines.

One of the members suggested that it might be productive for individual members of the rules committees to contact their congressional representatives on some of the legislative proposals. Judge Stotler responded that she would be pleased to take advantage of the services of the members, subject to maintaining consistency with any Judicial Conference choice as to a selected spokesperson.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Eaglin presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) Among other things, he reported that the Center was in the process of updating the manual on scientific evidence and hoped to have a new edition ready by the middle of 1998. He also pointed out that the Center was in the process of conducting a detailed survey of 2,000 attorneys to elicit their experiences with discovery practices in the federal courts. The results would be presented to the Advisory Committee on Civil Rules at the committee's September 1997 meeting.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Logan presented the report of the advisory committee, as set forth in his memorandum and attachments of May 27, 1997, and his memorandum of June 10, 1997 (Agenda Item 8).

He reported that the advisory committee had completed its style revision project to clarify and improve the language of the entire body of Federal Rules of Appellate Procedure. It now sought Judicial Conference approval of a package of proposed style and format revisions embracing all 48 appellate rules and Form 4. The comprehensive package had been developed by the committee in accordance with the *Guidelines for Drafting and Editing Court Rules* and with the assistance of the Standing Committee's Style Subcommittee and its style consultant, Bryan A. Garner.

Judge Logan stated that the public comments received in response to the package had not been very numerous, but they were very favorable to the revisions. He noted that judges and legal writing teachers had expressed great praise for the results of the project, and many judges had also commented orally that the revised rules were outstanding. Only one negative comment had been received during the publication period.

Rules With Substantive Changes

FED. R. APP. P. 5 and 5.1

Judge Logan reported that the Standing Committee had tentatively approved proposed consolidation of Rule 5 and Rule 5.1 and revisions to Form 4 at its June 1996 meeting, after the package of rules revisions had been published. Accordingly, these additional changes were published separately in August 1996.

Judge Logan pointed out that Rule 5 governs interlocutory appeals under 28 U.S.C. § 1292(b), while Rule 5.1 governs discretionary appeals from decisions of magistrate judges under authority of 28 U.S.C. § 636(c). The advisory committee had not contemplated making substantive changes in either of these two rules. But when the Advisory Committee on Civil Rules proposed publication of a new Civil Rule 23(f), authorizing discretionary appeals of class certification decisions, the appellate committee concluded that a conforming change needed to be made in the appellate rules. It decided that the best way to amend the rules was to consolidate rules 5 and 5.1 into a single, generic Rule 5 that would govern all present, and all future, categories of discretionary appeals. In late 1996, the Congress enacted the Federal Courts Improvements Act of 1996, which eliminated appeals from magistrate judges to district judges in § 636(c) cases and made Rule 5.1 obsolete.

Judge Logan said that following publication the advisory committee added language to paragraph (a)(3) to specify that the district court may amend its order to permit an appeal "either on its own or in response to a party's motion." It also added the term "oral argument" to the caption of subdivision (b), made other language changes, and included a reference in the committee note to the Federal Court Improvements Act of 1996.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP .P. 22

Judge Logan reported that the Anti-Terrorism and Effective Death Penalty Act of 1996 had amended Rule 22 directly. It also created two statutory inconsistencies. First, it extended the statutory habeas corpus requirements, including the requirement of a certificate of appealability, to proceedings under 28 U.S.C. § 2255. Accordingly, the caption to Rule 22, as

enacted by the statute, was amended to refer to 28 U.S.C. § 2255 proceedings. But the text of the rule made no reference to 28 U.S.C. § 2255. Second, the statute created an inconsistency between 28 U.S.C. § 2253, which provides that a certificate of appealability may be issued by "a circuit justice or judge," and Rule 22(b), which provides that the certificate may be issued by "a district or circuit judge." It was therefore unclear whether the statute authorizes a district judge to issue a certificate of appealability.

Judge Logan said that he had made telephone calls and had sent letters to the Congress when the legislation was pending, pointing to these drafting problems and offering assistance in correcting them. The Congress, however, did not undertake to correct the inconsistencies. Following enactment of the statute, additional attempts had been made to ascertain how the Congress would like to have the ambiguities resolved. Again, no direction was received, other than a suggestion that the problem should be resolved by the courts. Through case law development, three circuits have construed the reference in 28 U.S.C. § 2253 to a "circuit justice or judge" to include a district judge. The advisory committee followed that case law in revising the rule.

Judge Logan stated that the advisory committee had worked from the text of Rule 22, as enacted by the Congress, and had made several style improvements in it. It also recommended three substantive changes in subdivision (b) to eliminate the statutory inconsistencies.

1. The rule would be made explicitly applicable to 28 U.S.C. § 2255 proceedings.

2. The rule would allow a certificate of appealability to be issued by "a circuit justice or a circuit or district judge."

3. Since the rule would now govern 28 U.S.C. § 2255 proceedings, the waiver of the need for a certificate of appealability would apply not only when a state or its representative appeals, but also when the United States or its representative appeals.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 26.1

Judge Logan said that Rule 26.1, governing corporate disclosure statements, had been amended only slightly after publication. The advisory committee, for example, substituted the Arabic number "3" for the word "three." The proposal had been coordinated with the Committee on Codes of Conduct.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 27

Judge Logan stated that after publication the advisory committee had made a substantive change in Rule 27, dealing with motion practice. In paragraph (a)(3)(A), the committee provided that "[a] motion authorized by rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner." The committee was of the view that if a court acts on these motions, it should so notify the parties.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 28

Judge Logan stated that the advisory committee had made no changes in the rule, dealing with briefs, after publication.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 29

Judge Logan reported that the only significant change made in Rule 29 (brief of an amicus curiae) following publication was to add the requirement that an amicus brief must include the source of authority for filing the brief.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 32

Judge Logan said that following publication the advisory committee had made a few changes in Rule 32, governing the form of briefs.

The committee decided to retain 14-point typeface as the minimum national standard for briefs that are proportionally spaced. It had received many comments from appellate judges that the rule should require the largest typeface possible. But it then ameliorated the rule by giving individual courts the option of accepting briefs with smaller type fonts.

One of the members pointed out that the object of the advisory committee was to have a rule that governed all courts, making it clear that a brief meeting national standards must be accepted in every court of appeals. There was, however, substantial disagreement as to what the specific national standards should be. The compromise selected by the advisory committee was to set forth the minimum standard of 14-point typeface—meeting the needs of judges who want large type—but allowing individual courts to permit the filing of briefs with smaller type if they so chose.

Judge Logan pointed out that the advisory committee had eliminated the typeface distinction between text and footnotes and the specific limitation on the use of boldface. He added that the rule as published had included a limit of 90,000 characters for a brief. The advisory committee discovered, however, that some word processing programs counted spaces as characters, while others did not. Accordingly, the committee eliminated character count in favor of a limit of 14,000 words or 1,300 monofaced lines of text. He pointed out that a 50-page brief would include about 14,000 words.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 35

Judge Logan reported that the advisory committee had made post-publication changes in subdivision (f), dealing with a court's vote to hear a case en banc. He explained that the advisory committee had considered adopting a uniform national rule on voting, but the chief judges of the courts of appeals expressed opposition. There are different local rules in the courts of appeals on such issues as quorum requirements and whether senior judges may vote. The advisory committee decided, accordingly, to let the individual courts of appeals handle their own voting procedures.

Judge Stotler expressed concern about the special committee note to the rule. It would "urge" the Supreme Court to delete the last sentence of the Court's Rule 13.3 (which provides that a suggestion made to a court of appeals for a rehearing en banc is not a petition for rehearing within the meaning of that rule unless so treated by the court of appeals). She said that the note was designed to help practitioners avoid a trap in the rules, but suggested that it might be phrased simply to point out that the last sentence of the Supreme Court's rule might not be needed. Judge Logan responded that it would be better simply to delete the special note.

Judge Stotler also expressed concern that there might be debate or controversy in the Judicial Conference or the Supreme Court over the change in terminology from "in banc" to "en banc." Judge Logan replied that the advisory committee proposed including a special paragraph in the cover letters or memoranda to the Conference and the Court explaining the reasons for the change. He noted, for example, that the committee's research had shown that the Supreme Court

itself had used the term "en banc" 12 times as often in its opinions as it had used "in banc." Similarly, a review of the decisions of the courts of appeals also showed an overwhelming preference for "en banc." He added that the committee believed strongly that the rules revision package should not be held up over this usage and would urge that the package of revisions be approved, regardless of whether the Conference and the Court preferred "en banc" or "in banc."

Judge Logan added that a similar explanation was needed in the cover letters to explain the committee's use of "must," rather than "shall." The advisory committee would elaborate in the letters why it was preferable to follow that style convention, but it would also advise the Conference and the Court not to hold up the package of revisions over this particular usage.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. APP. P. 41

The amended rule provides that the filing of either a petition for rehearing en banc or a motion for a stay of mandate pending petition to the Supreme Court will delay the issuance of the mandate until the court disposes of the petition or motion. Judge Logan reported that the only change made by the advisory committee after publication was to provide that a stay may not exceed 90 days unless the party who obtained the stay files a petition for a writ of certiorari and notifies the clerk of the court of appeals in writing of the filing of the petition.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FORM 4

Judge Logan reported that the proposed revision of Form 4 (in forma pauperis affidavit) had been initiated at the request of the clerk of the Supreme Court, who had commented that the current form did not contain sufficient financial information to meet the needs of the Court. Shortly thereafter, the Congress enacted the Prison Litigation Reform Act of 1996, requiring prisoners filing civil appeals to provide more detailed information for the court to assess their eligibility to proceed in forma pauperis.

Judge Logan stated that the revised form was based in large part on the form used in the in forma pauperis pilot program in the bankruptcy courts. After publication, the advisory committee made two changes: (1) requiring the petitioner to provide employment history only for the last two years; and (2) making the form applicable to appeals of judgments in civil cases.

The committee voted without objection to approve the revised form and send it to the Judicial Conference.

Rules With Style Changes Only

Judge Logan reported that the advisory committee had made no post-publication changes in FED. R. APP. P. 1, 7, 12, 13, 14, 15.1, 16, 17, 19, 20, 33, 37, 38, 42, and 44.

He said that tiny grammatical changes had been made post-publication in FED. R. APP. P. 2, 6, 8, 10, 11, 15, 18, 23, 24, 36, 40, 43, 45, and 48. He also directed the committee's attention to minor changes made in FED. R. APP. P. 3, 4, 9, 21, 25, 26, 30, 31, 34, 39, 46, and 47, and to rule 3.1, which would be abrogated because of recent legislation..

Professor Mooney presented a number of minor style changes suggested by Mr. Spaniol to FED. R. APP. P. 3, 4, 10, 25, and the caption to title IV of the appellate rules.

Mr. Spaniol added that Form 4 was the only form being revised. He suggested that the committee might wish to state expressly in its report that no changes were being made in the other appellate forms (1, 2, 3, and 5). Alternatively, the committee might include the text of these unchanged forms in the package of revisions in the interest of having a complete package of all 48 rules and all five forms. Judge Logan agreed to the latter suggestion. He also agreed with Mr. Spaniol's suggestion that a table of contents be included in the package.

The committee voted without objection to approve the proposed amendments above and send them to the Judicial Conference.

Cover Memorandum

Judge Logan volunteered to prepare a draft communication for the Standing Committee to submit to the Judicial Conference explaining the style revision project and the style conventions followed by the advisory committee. He said that he would include in the communication a discussion of the committee's decisions to use:

1. "en banc" rather than "in banc";

2. "must" rather than "shall";

3. indentations and other format techniques to improve readability; and

4. a side-by-side format to compare the existing rules with the revised rules.

Judge Stotler inquired whether it would be advisable to send an advance copy of the style revision package to the Executive Committee of the Judicial Conference. One of the members responded that the Executive Committee might be asked to place the package on the consent calendar of the Conference.

Judge Stotler also stated that it was important to present the package of revisions to the Supreme Court and the Congress in the side-by-side format. She pointed out that the physical layout of the rules, including indentations, was an integral part of the package. She asked whether the Government Printing Office would print the material in that format. Mr. Rabiej replied that GPO would print the rules in whatever format the Supreme Court approved.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 12, 1997. (Agenda Item 10)

Revised Official Forms for Judicial Conference Approval

Judge Duplantier reported that the advisory committee's project to revise the official bankruptcy forms had been initiated in large part in response to comments from bankruptcy clerks of court that some of the existing forms were difficult for the public to understand and had generated numerous inquiries and requests for assistance. The advisory committee's subcommittee on forms worked on the revisions for about two years, and the package of revised forms attracted more than 200 comments during the publication period. The subcommittee and the full advisory committee made a number of additional changes in the forms as a result of the comments.

Judge Duplantier explained that the main purposes of the advisory committee were to make the forms clearer for the general public and to provide more complete and accurate descriptions of parties' rights and responsibilities. To that end, he said, the committee had to enlarge the typeface and expand the text of certain forms. As a result, some of the forms—such as the various versions of Form 9—will now have to be printed on both back and front sides, adding some cost for processing. The advisory committee, however, was satisfied that the marginal cost resulting from expansion of the forms would be more than offset by reductions in the number of inquiries made to clerks' offices and reductions in the number of documents that contain errors.

Judge Duplantier said that it would be advisable to specify a date for the revised forms to take effect. He pointed out that the revisions in bankruptcy forms normally take effect upon approval by the Judicial Conference. Several persons, however, had suggested to the committee that additional time was needed to phase in the new forms, to print them, to stock them, and to make needed changes in computer programs. Therefore, the advisory committee recommended that the revised forms take effect immediately on approval by the Judicial Conference in September 1997, but that use of them be mandated only on or after March 1, 1998.

FORM 1

Professor Resnick reported that Form 1 (voluntary petition) had been reformatted based on suggestions received during the public comment period. No substantive changes had been made by the advisory committee following publication.

FORM 3

Professor Resnick pointed out that the advisory committee had to make a policy decision with regard to Form 3 (application and order to pay a filing fee in installments). The current form, and rule 1006(b), on which it is based, provide that a debtor who has paid a fee to a lawyer is not eligible to pay the filing fee in installments. Neither the form nor the rule, however, prohibits the debtor from applying for installment payments if fees have been paid to a non-attorney bankruptcy petition preparer.

The advisory committee had received comments during the publication period that the disqualification from paying the filing fee in installments should apply if a debtor has made payments either to an attorney or to a bankruptcy petition preparer. Professor Resnick pointed out, though, that most debtors who apply for installment payments proceed pro se and may be unaware of the disqualification rule. The fiduciary responsibility that an attorney has to advise a debtor about the right to pay the filing fee in installments is not present when a non-attorney preparer assists the debtor.

Therefore, the advisory committee concluded that payment of a fee to a non-attorney bankruptcy petition preparer before commencement of the case should not disqualify a debtor from paying the filing fee in installments. Nevertheless, the bankruptcy petition preparer may not accept any fee *after* the petition is filed until the filing fee is paid in full.

FORM 6

Professor Resnick stated that the advisory committee had made only a technical change in Form 6, Schedule F (creditors holding unsecured nonpriority claims).

FORM 8

Professor Resnick said that no substantive changes had been made after publication in Form 8, the chapter 7 individual debtor's statement of intention regarding the disposition of secured property. He noted that the form had been revised to track the language of the Bankruptcy Code more closely and to clarify that debtors may not be limited to the options listed on the form.

FORM 9

Professor Resnick explained that Form 9 (notice of commencement of case under the Bankruptcy Code, meeting of creditors, and fixing of dates) was used in great numbers in the bankruptcy courts. He pointed out that the advisory committee made a number of changes following publication to refine and clarify the instructions for creditors and to conform them more closely to the provisions of the Bankruptcy Code. He added that the form had been redesigned by a graphics expert and expanded to two pages to make it easier to read.

FORM 10

Professor Resnick said that Form 10 (proof of claim) had been reformatted by a graphics expert. The advisory committee had made additional changes after publication to make the form clearer and more accurate. The revisions make it easier for a claimant to specify the total amount of a claim, the amount of the claim secured by collateral, and the amount entitled to statutory priority.

FORM 14

Professor Resnick said that no substantive changes had been made following publication in Form 14 (ballot for accepting or rejecting [a chapter 11] plan).

FORM 17

Professor Resnick pointed out that revised Form 17 (notice of appeal under § 158(a) or (b) from a judgment, order, or decree of a bankruptcy judge) took account of a 1994 statutory change providing that appeals from rulings by bankruptcy judges are heard by a bankruptcy appellate panel, if one has been established, unless a party elects to have the appeal heard by the district court. He noted that revised Form 17, as published, had included a statement informing the appellant how to exercise the right to have the case heard by a district judge, rather than a bankruptcy appellate panel. Following publication, the advisory committee expanded the statement to inform other parties that they also had the right to have the appeal heard by the district court.

FORM 18

Professor Resnick said that Form 18 (discharge of debtor) had been revised after publication to provide greater clarity. He noted that the instructions, which consist of a plain English explanation of the discharge and its effect, had been moved to the reverse side of the form.

FORMS 20A and 20B

Professor Resnick said that Forms 20A (notice of motion or objection) and 20B (notice of objection to claim) were new. He explained that many parties in bankruptcy cases do not have lawyers. They do not readily understand the nature of the legal documents they receive, such as motion papers and objections to claims. Thus, they do not know what they have to do to protect their rights. The new forms provide plain-English, user-friendly explanations to parties regarding the procedures they must follow to respond to certain motions and objections.

One of the members inquired as to the significance of the dates printed at the top of the forms. Judge Duplantier recommended that the date shown on each form should be the date on which it is approved by the Judicial Conference.

The committee voted without objection to approve all the proposed revisions in the forms and send them to the Judicial Conference, with a recommendation that they become effective immediately, but that use of the amended forms become mandatory only on March 1, 1988.

Rules Amendments for Publication

Judge Duplantier reported that the advisory committee had deferred going forward with minor changes in the rules in order to present the Standing Committee with a single package of proposed amendments. He pointed out that the package included amendments to 16 rules, seven of which dealt with a single situation (FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006).

FED. R. BANKR. P. 7062, 9014, 3020, 3021, 4001, 6004, and 6006

FED. R. BANKR. P. 7062 incorporates FED. R. CIV. P. 62, which provides that no execution may issue on a judgment until 10 days after its entry. Rule 7062 applies on its face to adversary proceedings, but it is also made applicable to contested matters through Rule 9014.

Professor Resnick explained that Rule 7062 had been amended over the years to make exceptions to the 10-day stay rule for certain categories of contested matters, i.e., those involving time-sensitive situations when prevailing parties have a need for prompt execution of judgments. The advisory committee had pending before it requests for additional exceptions.

The committee decided that it was not appropriate to have a long, and expanding, laundry list of exceptions for contested matters in a rule designed to address adversary proceedings. It decided, instead, to conduct a comprehensive review of all types of contested matters and determine which should be subject to the 10-day stay, taking into account such factors as the need for speed and whether appeals would be effectively mooted unless the order is stayed. As a

result of the review, the advisory committee concluded as a matter of policy that the 10-day stay should *not* apply to contested matters generally, unless a court rules otherwise in a specific case.

Accordingly, the advisory committee decided: (1) to delete the language in Rule 9014 that makes Rule 7062 applicable to contested matters; and (2) to delete the list of specific categories of contested matters in Rule 7062. Thus, as amended, Rule 7062 would apply in adversary proceedings, but not in contested matters.

Professor Resnick added that the advisory committee had decided that there should be four specific exceptions to the general rule against stay of judgments in contested matters. The exceptions should be set forth, not in Rules 7062 or 9014, but in the substantive rules that govern each pertinent category of contested matter. Accordingly, the advisory committee recommended that the following categories of orders be stayed for a 10-day period, unless a court orders otherwise:

1. FED. R. BANKR. P. 3020(e) and 3021 - an order confirming a plan;

2. FED. R. BANKR. P. 4001 - an order granting a motion for relief from the automatic stay under Rule 4001(a)(1);

3. FED. R. BANKR. P. 6004 - an order authorizing the use, sale, or lease of property other than cash collateral; and

4. FED. R. BANKR. P. 6006 - an order authorizing a trustee to assign an executory contract or unexpired lease under 11 U.S.C. § 365(f).

The committee voted without objection to approve the proposed amendments for publication.

FED. R. BANKR. P. 1017

Professor Resnick stated that Rule 1017, governing dismissal or conversion of a case, currently provides that all parties are entitled to notice of a motion by a United States trustee to dismiss a chapter 7 case for failure to file schedules. The advisory committee would revise the rule to provide that only the debtor, the trustee, and other parties specified by the court are entitled to notice. He pointed out that the revision would avoid the expense of sending notices to all creditors.

FED .R. BANKR. P. 1019

Professor Resnick reported that several changes were being proposed in Rule 1019, governing conversion of a case to chapter 7. He said that the revised rule would clarify that a

motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time expires. The amendments would also clarify ambiguities in the rule regarding the method of obtaining payment of claims for administrative expenses. The rule would specify that a holder of such claims must file a timely request for payment under § 503(a) of the Code, rather than a proof of claim, and would set a deadline for doing so. The committee would conform the rule to recent statutory amendments and provide the government a period of 180 days to file a claim.

FED. R. BANKR. P. 2002

Professor Resnick stated that the proposed revisions to Rule 2002(a)(4) would save noticing costs. Under the current rule, notice of a hearing on dismissal of a case for failure of the debtor to file schedules must be sent to every creditor. The rule would be amended to conform with the revised Rule 1017 requiring that notice be sent only to certain parties. The same revision would be made with regard to providing notice of dismissal of a case because of the debtor's failure to pay the prescribed filing fee.

FED. R. BANKR. P. 2003

Professor Resnick noted that Rule 2003(d)(3) governs the election of a chapter 7 trustee. It requires the United States trustee to mail a copy of a report of a disputed election to any party in interest that has requested it. The revised rule would give a party 10 days from the date the United States trustee files the report—rather than 10 days from the date of the meeting of creditors—to file a motion to resolve the dispute.

Professor Resnick pointed out that the Congress had amended the Bankruptcy Code in 1994 to authorize creditors to elect a trustee in a chapter 11 case. The advisory committee then amended Rule 2007.1 to provide procedures for electing and appointing a trustee. The revised rule—scheduled to take effect on December 1, 1997—provides that the election of a chapter 11 trustee is to be conducted in the manner provided in Rule 2003(b)(3) for electing a chapter 7 trustee. The proposed revisions to Rule 2003(d), governing the report of a trustee's election and the resolution of a disputed election, are patterned after newly-revised Rule 2007.1(b)(3).

FED. R. BANKR. P. 4004 and 4007

Professor Resnick said that the advisory committee made companion changes in Rule 4004, governing objections to discharge of the debtor, and Rule 4007, governing complaints to determine the dischargeability of a particular debt. The advisory committee proposed amending these rules to clarify that the deadline for filing a complaint objecting to discharge or dischargeability is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The committee would also revise both rules to provide that a motion for an extension of time to file a complaint must be filed before the time has expired.

FED. R. BANKR. P. 7001

Professor Resnick explained that Rule 7001, which defines adversary proceedings, would be amended to provide that an adversary proceeding is not necessary to obtain injunctive or other equitable relief if that relief is provided for in a reorganization plan.

FED. R. BANKR. P. 7004

Professor Resnick noted that Rule 7004(e), governing service, provides that service of a summons (which may be by mail) must be made within 10 days of issuance. The proposed revision would carve out an exception by providing that the 10-day limit does not apply if the summons is served in a foreign country.

FED. R. BANKR. P. 9006

Professor Resnick noted that Rule 9006(c)((2), as amended, would prohibit any reduction of the time fixed for filing a request for payment of an administrative expense incurred after commencement of a case and before conversion of the case to chapter 7.

The committee voted without objection to approve all the proposed amendments above for publication.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 5).

Amendments for Judicial Conference Approval

FED. R. CIV. P. 23

Judge Niemeyer reported that the advisory committee had studied class actions and mass tort litigation in depth for nearly six years. During the course of that study, it had actively solicited the views of lawyers, judges, and others on every aspect of class litigation. The advisory committee, he said, had concluded that most of the perceived problems affecting class litigation and mass torts simply could not be resolved through the federal rulemaking process. After intense investigation and discussion, the advisory committee published the following five relatively modest proposals to amend Rule 23:

1. Expanding the list of factors that a judge must consider under Rule 23(b)(3) in determining whether common questions of law or fact predominate over questions

affecting only individual class members and whether a class action is superior to other available methods for adjudicating the controversy;

2. Providing explicit authorization for a judge to certify a settlement class;

3. Requiring a judge to conduct a hearing before approving a settlement;

4. Requiring a judge to make a determination as to class certification "when practicable," rather than "as soon as practicable"; and

5. Authorizing a discretionary, interlocutory appeal of a class certification decision.

Judge Niemeyer stated that the advisory committee had received an enormous volume of responses on the proposed changes to Rule 23 and had conducted three public hearings . He stated that the comments had been very thoughtful and informative, and the debate had been conducted on the highest intellectual and practical level. Following the publication period and the hearings, the committee asked the Administrative Office to collect and publish the statements of lawyers, academics, and others for consideration by the Standing Committee and the advisory committees.

Judge Niemeyer reported that excellent points had been made by commentators on each side of each proposal. In the end, however, it was clear to the advisory committee that there are deep philosophical divisions of opinion on many of the issues. Moreover, the advisory committee had decided that it would have to defer further consideration of settlement class issues until the Supreme Court rendered a decision in *Amchem Products, Inc. v. Windsor.*

He stated that the advisory committee at this time was seeking Judicial Conference approval of only two proposed changes in Rule 23:

1. a new subdivision (f) that would authorize interlocutory appeals, and

2. an amendment to paragraph (c)(1) that would require a court to make a class certification decision "when practicable."

He added that the other proposed changes in the rule had either been withdrawn by the advisory committee or were being deferred for further study.

Rule 23(f) - Interlocutory Appeal

Judge Niemeyer stated that there was a strong consensus within the advisory committee and among the commentators in favor of permitting a court of appeals—in its sole discretion—to take an appeal from a district court order granting or denying class action certification. The

proposal would enable the courts of appeals to develop the law. This change alone, he said, might well prove to be the most effective solution to many of the problems with class actions. He emphasized that the advisory committee believed that appellate review of class action determinations was very beneficial and should not be impeded by the restraints imposed by mandamus and 28 U.S.C. § 1292(b). He added that the appellate review provision was not philosophically connected to any of the other proposed changes in Rule 23. Therefore, it should be separated from the other proposed changes and approved by the Judicial Conference immediately.

Several members pointed out that it was generally not appropriate to proceed with piecemeal changes in a rule, especially when additional changes in a rule are anticipated in the next year or two. But the consensus of the committee was that the proposed interlocutory appeal provision of Rule 23(f) was sufficiently distinct from the other changes in the rule under consideration and of sufficient benefit that it justified an exception to the normal rule.

One of the members said that the change might result in thousands of additional cases in the courts of appeals and add substantial costs to litigants, especially in civil rights cases. But many of the members of the committee, including its appellate judges, stated that the courts of appeals make prompt decisions—usually within a matter of days—on whether to accept an interlocutory appeal. And once they accept an interlocutory appeal, they normally decide it on the merits with dispatch. Several members emphasized that the courts of appeals simply will not take cases that do not appear to have merit. Some judges added that class action decisions were an important area of jurisprudence that could be helped by having more appellate decisions, especially at early stages of litigation before the parties incur great costs and delays.

The committee voted without objection to approve the proposed new Rule 23(f) and send it to the Judicial Conference.

Rule 23(c)(1) - "When practicable"

Some members observed that changing the time frame for the court to make a class action determination from "as soon as practicable" to "when practicable" merely conforms the rule to current practice in the federal courts. They were of the opinion that the amendment provides a district judge with needed flexibility to deal with the various categories and conditions of class actions in the district courts. Judge Niemeyer pointed out that district judges already exercise that flexibility without negative consequence, and no adverse comments had been received on the proposal during the public comment period.

Others thought that the proposed amendment would make a significant change in the rule because it could result in district judges delaying their certification decisions. They pointed out that in 1966 the drafters of Rule 23 had made a conscious decision to require the court to make a prompt class certification decision, leaving substantive decisions to be made later in the case

when they would be binding on all parties. It was suggested, too, that the impact of the class certification decision on absentees was a very serious question that needed to be addressed further.

Some members suggested that the proposed amendment be deferred for further consideration by the advisory committee and included eventually with the package of other proposed amendments to Rule 23.

The motion to approve the amendment to Rule 23(c)(1) and send it to the Judicial Conference failed.

Other proposed amendments to Rule 23

Judge Niemeyer reported that the advisory committee had decided not to proceed with proposed new subparagraph (b)(3)(A). It would have added as an additional matter pertinent to the court's findings of commonality and superiority "the practical ability of individual class members to pursue their claims without class certification." He explained that the advisory committee had decided that the benefits to be derived from the change were outweighed by the risk of introducing changes in the rule. The committee also abandoned further action on the proposed amendment to subparagraph (b)(3)(B), which slightly clarified the existing subparagraph (A).

Judge Niemeyer said that the advisory committee had decided to conduct further study on the proposed amendment to subparagraph (b)(3)(C). It would authorize the court to consider the maturity of related litigation involving class members in making its commonality and superiority findings. He pointed out that as a result of public comments, the committee had improved the language of the amendment to read as follows: "the extent and nature of any related litigation and the maturity of the issues involved in the controversy."

Judge Niemeyer advised that the proposed subparagraph (b)(3)(F) would add to the list of matters pertinent to the court's findings "whether the probable relief to individual class members justifies the costs and burdens of class litigation." He said that it had attracted an enormous amount of public comment, and articulate views had been expressed both in favor of and against the proposed amendment. He pointed out that the debate over the amendment had disclosed competing economic interests and basic philosophical differences as to the very purposes of Rule 23 and class actions.

He reported that the advisory committee had not made a final decision as to whether to proceed with the amended Rule 23(b)(3)(F). It would continue to study the matter further and consider five possible options at its next meeting.

He added that the advisory committee had also deferred action on the proposed new paragraph (b)(4), regarding settlement classes, until after Supreme Court action in *Amchem Products, Inc. v. Windsor.*

Judge Niemeyer reported that the advisory committee would consider all remaining class action proposals as part of a package at its October 1997 meeting. He reemphasized that the class action debate had evoked substantial public interest and had disclosed deep philosophical divisions. On the one hand, there had been a great deal of support for amending the rule to eliminate cited abuses in current practices, particularly class actions resulting in insignificant awards for individual, largely uninterested, class members and large fees for attorneys. On the other hand, many commentators argued that class actions, regardless of the monetary value of individual awards, serve vital social purposes.

He added that sentiment had also been expressed in favor of making no additional changes in the rule because: (1) resolution of the perceived problems may well lie beyond the jurisdiction of the rules committees to correct; and (2) the courts of appeals may resolve many of the problems through the development of case law.

Informational Items

Judge Niemeyer reported that the advisory committee was making good progress in its comprehensive study of discovery. It was evaluating the role of discovery in civil litigation, its cost, and its relation to the dispute-resolution process. As part of the review, the committee would consider whether any changes could be made to lessen the cost of discovery while retaining the value of the information obtained.

In addition, he pointed out that both the Civil Justice Reform Act of 1990 and the 1993 amendments to the Federal Rules of Civil Procedure had authorized substantial local court variations in pretrial procedures. He stated that the advisory committee would like to return to greater national uniformity in civil practice as a matter of policy, but it realized the difficulty of gaining acceptance of uniform national rules after several years of local variations.

Judge Niemeyer stated that the advisory committee had planned a major symposium on discovery, to be held in September 1997 at Boston College Law School. Knowledgeable members of the bar and the academic community had been invited to identify and explore issues and make recommendations to the committee. He invited the members of the Standing Committee to attend and participate in the conference.

He reported that the advisory committee had appointed an ad hoc subcommittee to review proposed changes in the admiralty rules. The subcommittee was working closely with the admiralty bar and the Department of Justice. He pointed out that the provisions in the admiralty rules dealing with forfeiture of assets were particularly important since the admiralty rules

govern, by reference, many categories of non-admiralty forfeiture proceedings As part of its drafting process, the subcommittee had concluded that the time limits set forth in the rules for regular admiralty cases should be different from those for other categories of forfeiture cases.

Judge Niemeyer expressed concern that several bills had been introduced in the Congress to legislate forfeiture proceedings. The drafters had not had the benefit of the broad input that the advisory committee and its subcommittee had received from the bar and others. As a result, the bills, among other things, overlooked important distinctions between admiralty proceedings and other types of forfeiture proceedings.

Judge Niemeyer reported that the Civil Rules Committee was studying the inconsistent and misleading provisions governing the timing of the answer to a writ of habeas corpus under Civil Rule 81(a)(2) and Rule 4 of the § 2254 Rules, which was adopted after Rule 81(a)(2) was last amended. Correcting Rule 81 would be directly affected by and dependent on any change in the rules governing § 2254 proceedings involving the timing of the habeas corpus answer. Accordingly, Judge Niemeyer recommended that this topic should be initially addressed by the Criminal Rules Committee. Judge Jensen and Professor Schlueter, chair and reporter, respectively of the Criminal Rules Committee agreed to have their committee study the issue.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Jensen presented the report of the advisory committee, as set forth in his memorandum of May 21, 1997 (Agenda Item 6).

Amendments for Judicial Conference Approval

FED. R. CRIM. P. 5.1 AND 26.2

Judge Jensen pointed out that the amendments to Rules 5.1 and 26.2 were companion amendments. Rule 26.2 governs the production of prior statements of a witness once the witness has testified on direct examination. It has been amended several times in recent years to expand its scope to other categories of criminal proceedings besides trials, such as sentencing hearings, detention hearings, and probation revocation hearings. The proposed amendments would extend the rule's application to preliminary examinations conducted under Rule 5.1.

One member raised the possibility that the rule might be read as encompassing a witness at a preliminary examination who has testified previously at a grand jury proceeding. Some members responded that the situation was at most a theoretical possibility, since preliminary examinations are not conducted once a grand jury returns an indictment.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

FED. R. CRIM. P. 31

Judge Jensen explained that the proposed amendments to Rule 31 would require that polling of a jury be conducted individually. He added, though, that the rule did not require individual polling as to each count.

The chair noticed that the text of the amended rule used "must," rather than "shall." She suggested that the use of "shall" might be more prudent in light of the Supreme Court's concern over making style changes in the rules on a piecemeal basis. Judge Jensen and Professor Schlueter concurred and said that the advisory committee would continue to use "shall" until it was ready to send forward a complete style revision of the entire body of criminal rules.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 33

Judge Jensen stated that under the current rule, a motion for a new trial based on newly-discovered evidence must be made within two years after the "final judgment." The proposed amendment, as published, would have established a time period of two years from "the verdict or finding of guilty." During the public comment period, the committee received comments that the proposal would seriously reduce the amount of time available to file a motion for a new trial under some circumstances. Accordingly, the advisory committee decided that an additional year was appropriate, and it set the deadline at three years from the verdict or finding of guilty.

One of the members questioned the use of the word "must" on lines 9 and 12. Following discussion, the consensus of the committee was that the use of "may" in the text of the existing rule should be retained.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 35

Judge Jensen pointed out that the proposed amendments to Rule 35(b) would allow a court to aggregate a defendant's pre-sentencing and post-sentencing assistance in determining whether to reduce a sentence to reflect the defendant's "substantial assistance" to the government.

Judge Jensen agreed to a suggestion to delete the comma in line five of the text. He did not agree to change the words "subsequent assistance" to "later assistance," because the words "subsequent assistance" are contained in the pertinent statute and have been used in the case law.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference

FED. R. CRIM. P. 43

Judge Jensen explained that the proposed amendment to the rule was intended to provide consistency in the situations when the defendant's presence is required at a resentencing proceeding.

Judge Jensen noted that Rule 35(a) deals with a situation when the sentence has been reversed on appeal and the case remanded for resentencing. This involves a "correction" of the sentence, and the defendant should be present for the resentencing. But a court should be permitted to reduce or correct a sentence under Rule 35(b) or (c) without the defendant being present. Rule 35(b) deals with reduction of a sentence for substantial assistance. Rule 35(c) gives the trial court seven days to correct a sentence for arithmetical, technical, or other clear error. There was also no need to require the presence of the defendant at resentencing hearings conducted under 18 U.S.C. § 3582(c). That statute governs resentencing conducted as a result of retroactive changes in the sentencing guidelines or a motion by the Bureau of Prisons to reduce a sentence based on "extraordinary and compelling reasons." Judge Jensen emphasized, however, that the court retains discretion to require or permit a defendant to attend any of these resentencing proceedings.

The committee voted without objection to approve the proposed amendment and send it to the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 6

Judge Jensen reported that the proposed amendments to the rule addressed two issues. First, under the present rule, necessary interpreters are authorized to be present during grand jury sessions, but not during grand jury deliberations. The proposed amendment would allow an interpreter for a deaf juror to be present while the grand jury is deliberating or voting.

Second, under the present rule, the entire grand jury must be present in the courtroom when an indictment is returned. The proposed amendment would authorize the foreperson or deputy foreperson to return the indictment in open court on behalf of the jury. The amendment

would save time, expense, and inconvenience by not requiring the whole grand jury to be transported to the courtroom.

In addition, Judge Jensen reported that legislation had just been introduced in the Congress by Representative Goodlatte, H.R. 1536, that would reduce the size of a grand jury to nine persons, with a minimum of seven needed to return an indictment. He pointed out that the advisory committee had not had the legislation on the agenda of its last meeting. Accordingly, it had not taken a position on its merits. Historically, however, the advisory committee from 1974 to 1977 favored a reduction in the size of the grand jury.

Judge Jensen said that the current legislation had been referred for response to the Judicial Conference's Court Administration and Case Management Committee and Criminal Law Committee. Both committees had considered the measure at their recent meetings and decided to recommend referring the matter to the Advisory Committee on Criminal Rules.

The members agreed that the proposal to reduce the size of grand juries should proceed through the normal Rules Enabling Act process, even though the process takes considerable time and the Congress might resolve the matter sooner by legislation. One member suggested, however, that the issue was potentially controversial and might not be enacted by the Congress. Judge Jensen stated that the advisory committee would consider the matter at its October 1997 meeting, and any proposed amendments to Rule 6 would proceed through the normal public comment process.

Judge Jensen argued that the two changes in Rule 6 recommended by the advisory committee should proceed to immediate publication without awaiting action regarding the size of grand juries. Several members concurred and urged publication of the current amendments.

Some members, however, questioned why the proposed amendment should be limited to interpreters for deaf jurors. And one member questioned the use of the word "deaf," favoring "hearing impaired" as the more appropriate characterization.

Judge Easterbrook moved to strike the word "deaf" from the amendment. The committee approved the motion, with four members opposed.

Judge Jensen and Professor Schlueter responded that the advisory committee was very reluctant to open up the exception by allowing all potential types of interpreters into the grand jury deliberations. Accordingly, it had specifically limited the amendment to interpreters for deaf jurors. One participant suggested that the advisory committee explicitly solicit public comments on whether the proposal should be broadened to cover other groups.

Judge Sear moved for reconsideration of Judge Easterbrook's amendment to strike the word "deaf" from the amendment. The committee approved the motion.

On reconsideration, the committee approved Judge Easterbrook's motion by a 6-5 vote. Then it approved without objection the amendments to Rule 5 for publication.

One of the members suggested that the committee note to the rule was inconsistent with the text. He recommended that the advisory committee rewrite the note to Rule 6(d) to notify the public that it was seeking input on the issue of how broad the exception for interpreters should be.

FED. R. CRIM. P. 11

Judge Jensen reported that the first proposed amendment in Rule 11 would merely update the rule by changing the term "defendant corporation" to "defendant organization, as defined in 18 U.S.C. § 18."

The committee voted without objection to approve the proposed amendment for publication.

The second amendment, referred to the advisory committee by the Criminal Law Committee, would add to the Rule 11(c) colloquy a requirement that the court inform the defendant of the terms of any provision in a plea agreement waiving the defendant's right to appeal or collaterally attack the sentence. He said that it was increasingly common for plea agreements to include an agreement by the defendant not to appeal. But the current rule does not require the court to inquire into the waiver of appeal. He suggested that the amendment would provide greater certainty as to the plea the defendant enters.

The committee voted without objection to approve the proposed amendment for publication.

Judge Jensen said that the final proposed changes to the rule govern plea agreements and plea agreement procedures under Rule 11(e). They had been coordinated with the United States Sentencing Commission and the Criminal Law Committee.

He explained that the rule had never been modified to take into account the impact of the sentencing guidelines, which have enlarged the very concept of a sentence and the procedures for reaching a sentence. A court, for example, now must determine whether a particular provision of the guidelines, a policy statement of the commission, or a sentencing factor is applicable in a case. Accordingly, the amendments to Rule 11(e) would recognize that a plea agreement may address not only a particular sentence but also the applicability of a specific sentencing guideline, sentencing factor, or Commission policy statement.

A member suggested that the proposed style change in lines 18-19—from "engage in discussions with a view toward reaching an agreement" to "discuss an agreement"—was inappropriate. He recommended that the language be amended to read "agree that."

Several members expressed concern that the proposed amendment to Rule 11(e)(1)(C) would authorize the defendant and the United States attorney to agree to "facts" that are not established facts. They argued that it would further remove the judge as a check on the integrity of the sentencing process and as a guardian in assuring equal treatment for all defendants. Judge Jensen acknowledged the concern and said that the Sentencing Commission also was aware of potential problems with inappropriate agreements. Nevertheless, the advisory committee and the Commission urged publication and public comment on the matter. Mr. Pauley added that Department of Justice's internal guidelines prohibit prosecutors from agreeing to unestablished facts. It was also pointed out by several members that the ultimate bulwark against abuse is the district judge's authority to reject the plea agreement.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 24

Judge Jensen explained that under the present rule, alternate jurors must be discharged when the jury retires to deliberate. The proposed amendments would eliminate this requirement, thereby giving the trial court discretion either to retain or discharge the alternate jurors.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 30

Judge Jensen stated that the proposed amendments would permit the trial court, in its discretion, to require or permit the parties to file any proposed instructions before trial.

The committee voted without objection to approve the proposed amendments for publication.

FED. R. CRIM. P. 32.2

Judge Jensen reported that the proposed new Rule 32.2 would consolidate several procedural rules governing the forfeiture of assets in a criminal case. The changes had been motivated in large measure by the Supreme Court's decision in *Libretti v. United States*, 116 S. Ct. 356 (1995), which made it clear that forfeiture is a part of the sentence. The proposed new rule, accordingly, would incorporate forfeiture into the sentencing process. He pointed out that

the rule addressed the problem of third parties whose property rights needed to be protected. It also recognized that forfeiture proceedings are akin to a civil case and, therefore, provided for appropriate discovery.

Judge Jensen said that competing bills had been introduced in the Congress dealing with forfeiture of assets. Judge Stotler added that the bills were replete with references to the federal rules. She said that she had been struck by the fact that the Congress apparently wanted to move quickly on forfeiture legislation, but the subject matter was very complex and not well understood by lawyers and judges. There were already more than 100 forfeiture statutes on the books, and the outcome of the various forfeiture bills in the Congress was uncertain. Judge Stotler pointed out that the rules committees had attempted to deal only with a small part of the forfeiture problem, and she suggested that it would be preferable if the Congress enacted a uniform forfeiture code or simply referred all procedural issues to the rules process.

Judge Jensen responded that the advisory committee's proposal dealt only with criminal forfeiture as a part of sentencing. Mr. Waxman added that it would be desirable to have a concordance between the various statutes and rules and between civil and criminal forfeiture. Nevertheless, he urged that the proposed new Rule 32.2 be published for comment. He stated that forfeiture was a controversial subject, and the Department of Justice preferred to have criminal forfeiture procedures enacted carefully through the Rules Enabling Act process, rather than by legislative happenstance in the Congress.

Some of the members expressed concern over the complexity of the proposed rule and its blending of civil and criminal concepts. They suggested that consideration might be given to drafting a simple rule declaring that the pertinent property was forfeited to the government. Interested third parties, accordingly, would have to file a civil suit to assert their property rights.

The committee voted without objection to approve the proposed new rule for publication.

FED. R. CRIM. P. 54

Judge Jensen explained that the proposed amendment to the rule was technical. It would merely eliminate the reference to the United States District Court for the District of the Canal Zone, which no longer exists.

The committee voted without objection to approve the proposed amendment for publication.

Informational Items

Judge Jensen reported that the advisory committee had received a recommendation from the Federal Magistrate Judges Association that Rule 5(c) be amended to delete its restriction on a magistrate judge continuing a preliminary examination. He said that the advisory committee had concurred with the association on the merits of the proposal, but it concluded that the restriction emanated from the underlying statute, 18 U.S.C. § 3060, on which the rule is based. Therefore, the committee recommended that the Standing Committee ask the Judicial Conference to seek legislation to amend the statute.

Mr. McCabe added that the recommendation of the advisory committee had just been endorsed by the Magistrate Judges Committee of the Judicial Conference.

Judge Easterbrook moved to reject the recommendation seeking amendment of 18 U.S.C. § 3060(c) on the grounds that the proposed change should be enacted through the Rules Enabling Act process, relying eventually on operation of the supersession clause. He pointed out that the Supreme Court recently had voided the service provisions in the Suits in Admiralty Act on supersession clause grounds. *Henderson v. United States,* 116 S. Ct. 1638 (1996).

The committee voted without objection to approve the motion.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Professor Capra presented the report of the advisory committee, as set forth in Judge Fern M. Smith's memorandum of May 1, 1997 (Agenda Item 9).

Amendments for Judicial Conference Approval

FED. R. EVID. 615

Professor Capra stated that the proposed amendment to the rule took account of recent statutory changes giving crime victims the right not to be excluded from criminal trials.

Judge Easterbrook expressed concern over incorporating references to specific statutes in the rules. He pointed out that statutes are frequently amended or superseded. Therefore, he argued for a generic reference to categories of persons who may not be excluded from proceedings. **He moved that the following language be added to the end of Rule 615: "(4) a person authorized by statute to be present."** Professor Capra responded that the advisory committee had included a specific statutory reference because it believed that a generic reference might not be strong enough in light of the Congress' express interest and recent actions regarding victims' rights.

The motion was approved without objection.

Professor Capra requested that the amendment be approved without publishing for public comment, since it was merely a conforming amendment. One of the members concurred and emphasized that it was very important to move quickly on the proposal because of congressional interest and policy in expanding victims' rights.

The committee voted without objection that the proposed amendment was conforming and approved the rule without publication for public comment.

Amendments for Publication

FED. R. EVID. 103

Professor Capra explained that proposed new subdivision (e) addressed the issue of when a party must renew at trial an in limine objection decided adversely to the party. He noted that a version of the proposal had been published once before, but later withdrawn by the advisory committee after public comments had revealed the text to be unclear. The advisory committee then redrafted the rule, patterning it in large part on a Kentucky state court rule. He pointed out that the third sentence of the new subdivision was intended to codify *Luce v. United States,* 469 U.S. 38 (1984), which held that a criminal defendant must testify at trial in order to preserve an objection to the trial court's decision admitting the defendant's prior convictions for purposes of impeachment.

In response to a question from one of the members, Professor Capra stated that the advisory committee had deliberately limited the sentence's application to criminal cases, believing that its extension to civil cases might cause problems.

Judge Easterbrook expressed several objections to the new subdivision and moved to send it back to the advisory committee for further drafting. He argued that, as formulated, the third sentence of the proposed text would apply only when the court's ruling is conditioned on "the testimony of a witness," rather than on the introduction of evidence. He pointed out that, although the *Luce* case involved testimony, the principle on which it rested is not limited to testimony. In other words, there is no logical distinction between testimony and documentary evidence. Therefore, the court's ruling should be conditioned on admissibility, rather than on testimony. In addition, the text of the third sentence implied that the court's ruling itself was conditional. In reality, it is merely dependent on a party's decision to introduce evidence.

He also questioned the formulation of the second sentence of the subdivision, which states that a motion for an advance ruling, when definitively resolved on the record, is sufficient to "preserve error" for appellate review. The implication of the text, he said, was that the movant may preserve the claim for review, but not the opponent. He added that use of the words

"preserve error" was inappropriate, since there is no intent to preserve error. Rather, the language should be recast to state that a party need not make an exception to a particular ruling in order to preserve the right to appeal. Moreover, it is the court's definitive ruling against a party that preserves the right to appeal, not "a motion for an advance ruling."

Several members expressed support for the substance of the proposal. One lawyer-member emphasized that it represented a significant improvement over the earlier draft. **The consensus of the committee, however, was that the subdivision should be returned to the advisory committee for redrafting in light of the comments made during the discussion.**

Informational Items

Professor Capra pointed out that the committee notes to several of the Federal Rules of Evidence contained inaccuracies. The notes had been prepared to support and explain the advisory committee's draft of the rules. But the rules ultimately enacted by the Congress differed in several respects from the committee's version.

He reported, for example, that the advisory committee had reviewed the notes recently and had discovered references in 21 notes to rules that were not in fact approved by the Congress. In some instances the committee notes were directly contrary to the positions eventually taken by the Congress. Accordingly, the committee notes were a potential trap for unwary attorneys.

He stated that the advisory committee was considering preparing a short list of editorial comments pointing out the discrepancies between the notes and the rules and asking law book publishers to include the comments in their publications of the rules. He explained that the proposed comments would consist of short bullets set forth at each troublesome section of the rules. The members were asked for their initial views of this proposed course of action.

A couple of participants suggested that it might be preferable to inform law book publishers that the committee notes are not meaningful and should no longer be included in their publications. Other participants, however, responded that the notes were a part of the legislative history of the rules and should continue to be made available. Some members suggested that any action that would help clarify the matter for users should be encouraged. Professor Coquillette added that the reporters had agreed to discuss the matter at their working luncheon.

STATUS REPORT ON THE ATTORNEY CONDUCT STUDY

Professor Coquillette reported that he had completed work on the several background studies of attorney conduct that the committee had requested of him. He pointed out that the last two studies—analyzing the case law under FED. R. APP. P. 46 and bankruptcy cases involving attorney conduct rules—were set forth as Agenda Item 7. He thanked the Federal Judicial Center

in general, and Marie Leary in particular, for invaluable assistance in conducting the studies, especially the survey of existing district court practices and preferences. He also thanked Judge Logan and Professor Mooney for their help in compiling the appellate court study and Patricia Channon for her help on the bankruptcy study. He concluded that the committee had now studied attorney conduct in the federal courts in every meaningful way.

Potential Courses of Action

Professor Coquillette suggested that the committee might wish to consider four possible courses of action regarding attorney conduct:

1. Do nothing.

2. Draft a model local rule on attorney conduct that could be adopted voluntarily by the district courts, and possibly by the courts of appeals.

3. Draft a small number of national rules to govern attorney conduct in the areas of primary concern to bench and bar.

4. Draft both a model local rule and uniform national rules.

He stated that the committee had conducted two special conferences on attorney conduct with knowledgeable lawyers, professors, and state bar officials. At the conferences, the participants had expressed a wide range of diverging views on how best to address attorney conduct issues. There was no clear consensus among the participants as to whether conduct matters should be governed by uniform national rules or by local court rules. Nevertheless, the one thing that all the participants agreed upon was that the present system was deficient in several respects and that the rules committees should take some kind of action.

He pointed out that the principal advantage of national rules is that they would set forth a uniform, national standard applicable in all federal courts. National rules, moreover, would have the benefit of public comment and national debate under the Rules Enabling Act process. On the other hand, a model local rule could be adopted more expeditiously and would not have to be submitted to the Congress. He noted that the recent Federal Judicial Center survey had shown that 30% of the courts favored national rules on attorney conduct, while 62% favored a local-rule approach. He added that, to guide the committee's deliberations, he had included in the agenda materials samples of: (1) a model local rule for the courts of appeals; (2) an amended version of FED. R. APP. P. 46; and (3) uniform federal rules of attorney conduct.

The members discussed generally the advantages and disadvantages of each approach. Several members emphasized that all attorneys as a matter of policy should be governed by the conduct rules of the states in which they are licensed to practice. They added, however, that it

might be appropriate to carve out a very limited number of exceptions for federal lawyers that would govern areas where there were overriding federal interests.

Concerns of Federal Lawyers

Mr. Waxman pointed out that federal lawyers face uncertainty in their practice and need, as a minimum, a clear federal law to govern conflicts between jurisdictions. He added that federal law was needed in certain limited situations that impacted on the work of federal attorneys. Chief Justice Veasey responded that the Department of Justice's interest in uniformity was understandable. Nevertheless, state bars also want uniformity for all lawyers in the state. There should not be one set of conduct standards in the state courts and a different standard for the federal courts of that state.

Mr. Waxman was asked which conduct issues were of particular concern to the Department of Justice and federal lawyers. He responded that there were no problems with the rules governing attorney conduct within a court setting. Rather, the Department's concern was limited to areas where state ethical rules reach, or purport to reach, conduct by federal prosecutors and other attorneys conducting investigations outside the court. These include such matters as contacts with represented parties, subpoenas directed to attorneys, and the presentation of exculpatory evidence to grand juries.

Concerns in Bankruptcy Cases

Professor Coquillette explained that attorney conduct in the bankruptcy courts raised certain unique problems. The local rules of the bankruptcy courts generally adopt the rules of the district courts. Nevertheless, actual practice in the bankruptcy courts is very different from that in the district courts. Bankruptcy judges usually look for guidance on matters of attorney conduct to the Bankruptcy Code and to the common law of bankruptcy. There are, he said, serious differences among the bankruptcy courts in applying these laws and a lack of clear and specific conduct case law and guidelines. He recommended that further research be conducted on attorney conduct issues and practices in the bankruptcy courts.

Judge Duplantier reported that the Advisory Committee on Bankruptcy Rules had a subcommittee in place that was considering attorney conduct issues in bankruptcy cases. Professor Resnick stated that contemporary bankruptcy practice—with thousands of creditors and claimants in an individual case—raises a number of specialized conduct issues that may not be addressed adequately by existing state rules or by model local court rules. He pointed out, for example, that the Bankruptcy Code itself defines a "disinterested person," and it requires court approval of certain appointments. The statutory definition, he said, was troublesome and had been interpreted in different ways by the various courts of appeals. He also noted that the advisory committee was considering potential amendments to FED. R. BANKR. P. 2014, which

requires an attorney, or other professional person, to disclose certain information to the court as part of the appointment process.

Committee Action

Professor Hazard moved that the committee begin drafting rules, identifying the problems, and eliciting discussion.

Judge Stotler concluded that there was a consensus among the committee members that work should begin on drafting a set of national rules providing that state law governs attorney conduct in the federal courts except in a few limited areas, such as certain investigatory functions and certain aspects of bankruptcy practice. She asked Professor Coquillette to continue with the work of drafting potential rules and making presentations on attorney conduct issues to the advisory committees.

POSTING LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON THE INTERNET

Mr. Rabiej reported that courts are required by statute and rule to send copies of their local rules to the Administrative Office. The AO maintains the rules in loose-leaf binders in its library. They are not readily available to the public.

He stated that the rules office intends to begin posting the local rules on the Internet as a service to public. He added that the office had also proposed posting the official bankruptcy forms on the Internet.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker, chair of the subcommittee, reported that the subcommittee had met with Professor Coquillette and had drafted a short set of proposed guidelines designed to expedite the process of reviewing proposed amendments for style. He pointed out that the advisory committees and their reporters faced extremely short deadlines for completing drafts of proposed amendments and committee notes.

Judge Parker said that the guidelines recommended that drafts be submitted by the respective reporters to the rules office in the AO at least 30 days in advance of an advisory committee meeting. The rules office immediately would send copies to the advisory committee, the style subcommittee, and Mr. Garner, the style consultant. Mr. Garner would then coordinate and consolidate the comments of the style subcommittee within 10 days and return them to the advisory committee reporter.

The reporter would then have 10 days to consider the comments of the style subcommittee, incorporate those he or she deemed appropriate, and return a revised draft to the rules office for transmission to the advisory committee members. Accordingly, the advisory committee members would have the original draft and the suggested style changes at least one week before the committee meeting. After the advisory committee meeting, the reporter would have one week to send a copy of the text and note, as approved by the committee, to the rules office. This would allow the style subcommittee sufficient time before the Standing Committee meeting to make any necessary last-minute changes.

COMMITTEE PRACTICES AND PROCEDURES

Judge Stotler reported that the Executive Committee of the Judicial Conference had requested the committee's views on certain Conference committee practices and procedures. She said that she had responded to an earlier inquiry by stating that there was no need for the rules committees to have liaison members to each of the circuits. Members of the rules committees should represent the system nationally, rather than circuit interests. She added that she proposed to have the committee stand on its previous position.

On the other hand, she emphasized that the use of liaisons between committees of the Judicial Conference had been very useful. She pointed out, for example, that members of the Court Administration and Case Management Committee and the Federal-State Jurisdiction Committee had been invited to attend rules committee meetings and that Judge Easterbrook had been in contact with the chair of the Court Administration and Case Management Committee on matters involving the Civil Justice Reform Act. She stated that the use of liaisons had opened up communications with other committees, and she asked for the committee's endorsement of the increased use of liaisons with other committees.

Mr. Rabiej added that the Executive Committee had asked for the committee's views on the use of subcommittees and the need for face-to-face subcommittee meetings. He pointed out that there was an attempt to reduce the number of subcommittees generally and to restrict their meetings to telephone conferences. He reported that it was the view of the advisory committees that the use of subcommittees was very beneficial and that there was a need for certain in-person subcommittee meetings. Other participants noted that much of the subcommittees' work is conducted by telephone, correspondence, and telefax. They argued strongly, however, that it was essential for the committees to have the flexibility to conduct face-to-face meetings when needed.

REPORT ON MEETING OF LONG RANGE PLANNING LIAISONS

Judge Niemeyer reported that he and Judge Stotler had participated in the meeting of long-range planning liaisons from 13 Judicial Conference committees on May 15, 1997. He

pointed out, among other things, that the liaisons had been asked to consider whether an ad hoc committee of the Conference should be appointed to consider mass tort litigation. Judge Stotler stated that Judge Niemeyer had made an impressive presentation on the extensive work of the Advisory Committee on Civil Rules over the past six years in studying mass torts in the context of class actions. Judges Stotler and Niemeyer added that the liaisons concluded that no new committee was needed, and that if any committee of the Conference were to consider mass torts, it should be the Advisory Committee on Civil Rules.

REPORT ON UNIFORM NUMBERING OF LOCAL RULES OF COURT

Professor Squiers reported that the Judicial Conference had approved the requirement that courts renumber their local rules of court by April 15, 1997, to conform with the numbering of the national rules. She stated that half the district courts had completed their renumbering, and the remaining courts were in the process of fulfilling the requirement.

FUTURE COMMITTEE MEETINGS

Judge Stotler reported that the winter meeting of the committee would be held on January 8-9, 1998. She invited the members to select the location for the meeting, and they expressed a preference for Marina del Rey, California, if hotel space were available at a reasonable rate.

Judge Stotler reported further that the mid-year 1998 meeting would be held on either June 11-12, 1998, or June 18-19, 1998.

Respectfully submitted,

Peter G. McCabe,
Secretary

REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

The Committee on Rules of Practice and Procedure met on June 19-20, 1997. All the members attended the meeting, except Alan C. Sundberg. Acting Deputy Attorney General Seth P. Waxman attended on June 19. The Department of Justice was represented on June 20 by Ian H. Gershengorn and Roger A. Pauley.

Representing the advisory committees were: Judge James K. Logan, chair, and Professor Carol Ann Mooney, reporter, of the Advisory Committee on Appellate Rules; Judge Adrian G. Duplantier, chair, and Professor Alan N. Resnick, reporter, of the Advisory Committee on Bankruptcy Rules; Judge Paul V. Niemeyer, chair, and Professor Edward H. Cooper, reporter, of the Advisory Committee on Civil Rules; Judge D. Lowell Jensen, chair, and Professor David A. Schlueter, reporter, of the Advisory Committee on Criminal Rules; and Professor Daniel J. Capra, reporter, of the Advisory Committee on Evidence Rules. Judge Fern M. Smith, chair of the Evidence Rules Committee, was unable to be present.

Participating in the meeting were Peter G. McCabe, the Committee's Secretary; Professor Daniel R. Coquillette, the Committee's reporter; John K. Rabiej, Chief, and Mark D. Shapiro,

attorney, of the Administrative Office's Rules Committee Support Office; Patricia S. Channon of the Bankruptcy Judges Division; James B. Eaglin of the Federal Judicial Center; Professor Mary P. Squiers, Director of the Local Rules Project; and Bryan A. Garner and Joseph F. Spaniol, consultants to the Committee.

AMENDMENTS TO THE FEDERAL RULES OF APPELLATE PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Appellate Rules completed its style revision project to clarify and simplify the language of the appellate rules. It submitted revisions of all forty-eight Rules of Appellate Procedure and a revision of Form 4 (no changes were made in Forms 1, 2, 3, and 5), together with Committee Notes explaining their purpose and intent. The comprehensive style revision was published for public comment in April 1996 with an extended comment period expiring December 31, 1996. Public hearings were scheduled but canceled, because no witness requested to testify.

The style revision has taken up most of the advisory committee's work during the past four years. The style changes were designed to be nonsubstantive, except with respect to those rules outlined below, which were under study when the style project commenced. A few additional substantive changes have been made necessary by legislative enactments or other recent developments. Almost all comments received from the bench, bar, and law professors teaching procedure and legal writing were quite favorable to the restyled rules. Only one negative comment was received—that to the effect "why change a system that has worked?"

The advisory committee recommended, and the Standing Rules Committee agreed, that the submission to the Judicial Conference and its recommendation for submission to the Supreme Court, if the changes are approved, should be in a different format from the usual

submission. Instead of striking through language being eliminated and underlining proposed new language, the changes made by the restylization project can best be perceived by a side-by-side comparison of the existing rule (in the left-hand column) with the proposed rule (in the right-hand column). Commentary on changes that could be considered more than stylistic—generally resolving inherent ambiguities—are discussed in the Committee Notes. A major component of the restylization has been to reformat the rules with appropriate indentations. Your Committee concurs with the recommendation of the advisory committee that the physical layout of the rules should be an integral part of any official version—and of any published version that is intended to reflect the official version.

In connection with the restylization project, the advisory committee and the Standing Rules Committee bring to the attention of the Judicial Conference two changes in the restyled rules—the use of "en banc" instead of "in banc" and the use of "must" in place of "shall." Although 28 U.S.C. § 46 has used "in banc" since 1948, a later law, Act of Oct. 20, 1978, Pub. L. No. 95-486, 92 Stat. 1633, used "en banc" when authorizing a court of appeals having more than fifteen active judges to perform its "en banc" functions with some subset of the court's members. Also the Supreme Court uses "en banc" in its own rules. *See* S. Ct. R. 13.3. The "en banc" spelling is overwhelmingly favored by courts, as demonstrated by a computer search conducted in 1996 that found that more than 40,000 circuit cases have used the term "en banc" and just under 5,000 cases (11%) have used the term "in banc." When the search was confined to cases decided after 1990, the pattern remained the same—12,600 cases using "en banc" compared to 1,600 (11%) using "in banc." The advisory committee decided to follow the most commonly used "en banc" spelling. This is a matter of choice, of course, but both committees recommend the more prevalent use to the Judicial Conference.

The advisory committee adopted the use of "must" to mean "is required to" instead of using the traditional "shall." This is in accord with Bryan A. Garner, *Guidelines for Drafting and Editing Court Rules* § 4.2 at 29 (1996). The advisory committee is aware that the Supreme Court changed the word "must" to "shall" in some of the amendments of individual rules previously submitted to the Court. In doing so, the Supreme Court indicated a desire not to have inconsistent usages in the rules, and concluded "that terminology changes in the Federal Rules be implemented in a thoroughgoing, rather than piecemeal, way." The instant submission is a comprehensive revision of all the appellate rules. Because of the potentially different constructions of "shall," *see* Garner, *A Dictionary of Modern Legal Usage* 939-42 (2d ed. 1995), the advisory committee eliminated all uses of "shall" in favor of "must" when "is required to" is meant. Both the advisory committee and the Standing Rules Committee recognized room for differences of opinion and do not want the restylization work rejected due to the use of this word.

Included in this submission are some rules that have substantive amendments, all of which have been published for public comment at least once except the proposed abrogation of Rule 3.1 and the proposed amendments to Rule 22. Both of the latter changes are responsive to recent legislation. The changes to Rules 26.1, 29, 35, and 41 were approved for circulation to the bench and bar for comment in September 1995. They were resubmitted for public comment in April 1996 as a part of the comprehensive style revision. After considering suggestions received during these two comment periods, they were approved with minor changes along with the restylized version of the rules. Revised Rules 27, 28, and 32 were approved for circulation for public comment in April 1996 along with the restylized rules—with special notations to the bench and bar that these three rules underwent substantive changes. Rules 5, 5.1 (the latter of which is proposed to be abrogated), and Form 4 were sent out for comment separately, after the

restylization package. Rules 5 and 5.1 were revised because of recent legislative changes and a proposed new Fed. R. Civ. P. 23(f); Form 4 was revised because of recent legislative changes and a request by the Supreme Court Clerk for a more comprehensive form. The substantive changes are summarized below, rule-by-rule in numerical order.

Rule 3.1 (Appeal from a Judgment of a Magistrate Judge in a Civil Case) would be abrogated under the proposed revision because it is no longer needed. The primary purpose for the existence of Rule 3.1 was to govern an appeal to the court of appeals following an appeal to the district court from a magistrate judge's decision. The Federal Courts Improvement Act of 1996, Pub. L. 104-317, repealed paragraphs (4) and (5) of 28 U.S.C. § 636(c) and eliminated the option to appeal to the district court. An appeal from a judgment by a magistrate judge now lies directly to the court of appeals.

The proposed consolidation of Rule 5 (Appeal by Permission Under 28 U.S.C. § 1292(b)) and Rule 5.1 (Appeal by Permission Under 28 U.S.C. § 636(c)(5)) would govern all discretionary appeals from a district or magistrate judge order, judgment, or decree. In 1992, Congress added subsection (e) to 28 U.S.C. § 1292 giving the Supreme Court power to prescribe rules that "provide for an appeal of an interlocutory decision to the Court of Appeals that is not otherwise provided for" in § 1292. The advisory committee believed the amendment of Rule 5 was desirable because of the possibility of new statutes or rules authorizing discretionary interlocutory appeals, and the desirability of having one rule that governs all such appeals. One possible new application appears contemporaneously in the proposed new Fed. R. Civ. P. 23(f) to allow the interlocutory appeal of a class certification order. Present Rule 5.1 applies only to appeals by leave from a district court's judgment entered after an appeal to the district court from

a magistrate judge's decision. The Federal Courts Improvement Act of 1996 abolished all appeals by permission that were covered by this rule, making Rule 5.1 obsolete.

The proposed amendments to Rule 22 (Habeas Corpus and Section 2255 Proceedings) conform to recent legislation. First, the rule is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132. Second, the amended rule states that a certificate of appealability may be issued by a "circuit justice or a circuit or district judge." Amended § 2253 requires a certificate of appealability issued by a "circuit justice or judge" in order to bring an appeal from denial of an application for the writ. The proposed amendment removes the ambiguity created by the statute and is consistent with the decisions in all circuits that have addressed the issue.

The proposed amendment of Rule 26.1 (Corporate Disclosure Statement) would eliminate the requirement that corporate subsidiaries and affiliates be listed in a corporate disclosure statement. Instead, the rule requires that a corporate party disclose all of its parent corporations and any publicly held company owning ten percent or more of its stock. The changes eliminate the ambiguity inherent in the word "affiliates" and identify all of those entities which might possibly result in a judge's recusal. The revised rule was submitted to the Committee on Codes of Conduct, which found it to be satisfactory in its revised form.

The proposed amendment of Rule 27 (Motions) would treat comprehensively, for the first time, motion practice in the courts of appeals. The rule is entirely rewritten to provide that any legal argument necessary to support a motion must be contained in the motion itself, not in a separate brief. It expands the time for responding to a motion from seven to ten days and permits a reply to a response—without prohibiting the court from shortening the time requirements or

deciding a motion before receiving a reply. It establishes length limitations for motions and responses, and states that a motion will be decided without oral argument unless the court orders otherwise.

The proposed amendment of Rule 28 (Briefs) is necessary to conform it to the proposed amendments to Rule 32. Page limitations for a brief are deleted from Rule 28(g), because they are treated in Rule 32.

Rule 29 (Brief of an Amicus Curiae) would be amended to establish limitations on the length of an amicus curiae brief. It adds the District of Columbia to those governments that may file without consent of the parties or leave of court. The amended rule generally makes the form and timing requirements more specific, and states that the amicus curiae may participate in oral argument only with the court's permission.

Rule 32 (Form of Briefs, Appendices, and Other Papers) would be rewritten comprehensively with a principal aim of curbing cheating on the traditional fifty-page limitation on the length of a principal brief. New computer software programs make it possible to use type styles and sizes, proportional spacing, and sometimes footnotes, to create briefs that comply with a limitation stated in a number of pages, but that contain up to 40% more material than a normal brief and are difficult for judges to read. The rule was amended in several significant ways. A brief may be on "light" paper, not just "white," making it acceptable to file a brief on recycled paper. Provisions for pamphlet-sized briefs and carbon copies have been deleted because of their very infrequent use. The amended rule permits use of either monospaced or proportional typeface. It establishes length limitations of 14,000 words or 1,300 lines of monospaced typeface (which equates roughly to the traditional fifty pages) and requires a certificate of compliance unless the brief utilizes the "safe harbor" limits of thirty pages for a principal brief and fifteen

pages for a reply brief. Requirements are included for double spacing and margins; type faces are to be fourteen-point or larger type if proportionally spaced and limited to 10½ characters per inch if monospaced. Treatment of the appendix is in its own subdivision. A brief that complies with the national rule must be accepted by every court; local rules may not impose form requirements that are not in the national rule. Local rules may, however, move in the other direction; they can authorize noncompliance with certain of the national norms. Thus, for example, a particular court may choose to accept pamphlet briefs or briefs with smaller typeface than those set forth in the national rules.

Rule 35 (En Banc Determination) would be amended to treat a request for rehearing en banc like a petition for panel rehearing, so that a request for rehearing en banc will suspend the finality of the district court's judgment and extend the period for filing a petition for a writ of certiorari. Therefore, a "request" for rehearing en banc is changed to a "petition" for rehearing en banc. The amendments also require each petition for en banc consideration to begin with a statement demonstrating that the cause meets the criteria for en banc consideration. An intercircuit conflict is cited as an example of a proceeding that might involve a question of "exceptional importance"—one of the traditional criteria for granting an en banc hearing.

Rule 41 (Mandate; Contents; Issuance and Effective Date; Stay) would be amended to provide that filing of a petition for rehearing en banc or a motion for stay of mandate pending petition to the Supreme Court for a writ of certiorari both delay the issuance of the mandate until disposition of the petition or motion. The amended rule also makes it clear that a mandate is effective when issued. The presumptive period of a stay of mandate pending petition for a writ of certiorari is extended to ninety days, to accord with the Supreme Court's time period.

Form 4 (Affidavit Accompanying Motion for Permission to Appeal In Forma Pauperis) would be substantially revised. The Clerk of the Supreme Court asked the advisory committee to devise a new, more comprehensive form of affidavit in support of an application to proceed in forma pauperis. A single form is used by both the Supreme Court and the courts of appeals. In addition, the Prison Litigation Reform Act of 1996 prescribed new requirements governing in forma pauperis proceedings by prisoners, including requiring submission of an affidavit that includes a statement of all assets the prisoner possesses. Form 4 was amended to require a great deal more information than specified in the current form, including all the information required by the recent enactment.

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Appellate Procedure, as recommended by your Committee, are in Appendix A with an excerpt from the advisory committee report.

Recommendation: That the Judicial Conference approve the proposed amendments to Appellate Rules 1-48 and to Form 4 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY PROCEDURE

Official Bankruptcy Forms Submitted for Approval

The Advisory Committee on Bankruptcy Rules submitted proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B. The proposed revisions mainly clarify or simplify existing forms. Several of the most heavily used forms were redesigned by a graphics expert, and instructions contained in forms often used by petitioners in bankruptcy or creditors were rewritten using plain English.

Official Form 1 (Voluntary Petition) would be amended to simplify the form and make it easier to complete. In particular, the amendments reduce the amount of information requested, add new statistical ranges for reporting assets and liabilities, and delete the request for information regarding the filing of a plan.

Official Form 3 (Application and Order to Pay Filing Fee in Installments) would be amended to include an acknowledgment by the debtor that the case may be dismissed if the debtor fails to pay a filing fee installment. It would also clarify that a debtor is not disqualified under Rule 1006 from paying the fee in installments solely because the debtor paid a bankruptcy petition preparer.

Official Form 6 (Schedule F) would be amended by adding to the schedule (which lists creditors holding an unsecured nonpriority claim) a reference to community liability for claims.

Official Form 8 (Chapter 7 Individual Debtor's Statement of Intention) would be amended to make it more consistent with the language of the Bankruptcy Code. Language would also be deleted from the present form that may imply that a debtor is limited to options contained on the form.

Official Form 9 (Notice of Commencement of Case Under the Bankruptcy Code, Meeting of Creditors and Fixing of Dates) includes eleven alternatives. Each form is designed for a particular type of debtor (individual, partnership, or corporation), the particular chapter of the Bankruptcy Code in which the case is pending, and the nature of the estate (asset or no asset). The forms are used in virtually all bankruptcy cases.

Form 9 and its Alternatives would be expanded to two pages to make them easier to read, and the explanatory material is rewritten in plain English. Several clerks of court expressed concern that the existing forms' instructions were difficult to understand, which resulted in many

questions from the public that consumed considerable staff resources. The advisory committee agreed that the existing instructions were inadequate. At the same time, it recognized that there would be added printing expense incurred in expanding the instructions. The advisory committee believed that better instructions were essential, and the savings realized from the expected reduction in calls to the clerks' offices asking for assistance probably would offset some of the added printing expenses. In addition, the advisory committee noted that the $30 administrative fee assessed against a debtor filing a chapter 7 or chapter 13 bankruptcy case was intended to pay for the cost of noticing. The fee would easily cover the added expense in expanding the form to two pages. On balance, the advisory committee concluded that the benefits to the public substantially outweighed the added expense.

Official Form 10 (Proof of Claim) would be amended to provide instructions and definitions for completing the form. The form also is reformatted to eliminate redundancies in the information request. Creditors are advised not to submit original documents in support of the claim.

Official Form 14 (Ballot for Accepting or Rejecting the Plan) would be amended to simplify its format and make it easier to complete.

Official Form 17 (Notice of Appeal from a Judgment, Order, or Decree of a Bankruptcy Court) would be amended to direct the appellant to provide the addresses and telephone numbers of the attorneys for all parties to the judgment, order, or decree appealed from, as required by Bankruptcy Rule 8001(a). It also informs other parties—in addition to the appellant—that they may elect to have the appeal heard by the district court, rather than by a bankruptcy appellate panel.

Official Form 18 (Discharge of Debtor) would be amended to simplify the form and clarify the effects of a discharge. A comprehensive explanation, in plain English, is added to the back of the form to assist both debtors and creditors to understand bankruptcy discharge.

Official Form 20A (Notice of Motion or Objection) and Form 20B (Notice of Objection to Claim) would be added to provide uniform, simplified explanations on how to respond to motions and/or objections that are frequently filed in a bankruptcy case.

The proposed revisions and additions to the Official Bankruptcy Forms, as recommended by your Committee, are in Appendix B together with an excerpt from the advisory committee's report.

> **Recommendation:** That the Judicial Conference approve the proposed revisions to Official Bankruptcy Forms 1, 3, 6F, 8, 9A-9I, 10, 14, 17, 18, and new Forms 20A and 20B.

Most debtors and creditors participating in bankruptcy rely on the private sector for copies of the Official Forms. There is usually a significant lag time between the promulgation of a form revision and the date when the private sector publishes the revised new forms. In addition, some of the amended forms are notices and orders generated by the courts' automated systems and the Bankruptcy Noticing Center. Court staff and the Noticing Center will need adequate time to implement the revisions to the forms. The advisory committee recommended that a reasonable transition of about five months be authorized during which continued use of superseded forms would be permitted.

> **Recommendation:** That the Judicial Conference promulgate the proposed revisions to the Official Bankruptcy Forms to take effect immediately, but permit the superseded forms to also be used until March 1, 1998.

Rules Approved for Publication and Comment

The Advisory Committee on Bankruptcy Rules submitted to your Committee proposed amendments to Bankruptcy Rules 1017, 1019, 2002, 2003, 3020, 3021, 4001, 4004, 4007, 6004, 6006, 7001, 7004, 7062, 9006, and 9014 and recommended that they be published for public comment.

The proposed amendments to Rule 1017 (Dismissal or Conversion of Case; Suspension) would specify the parties who are entitled to a notice of a United States trustee's motion to dismiss a voluntary chapter 7 or chapter 13 case based on the debtor's failure to file a list of creditors, schedules, or statement of financial affairs. Instead of sending a notice of a hearing in a chapter 7 case to all creditors, as presently required, the notice would only be sent to the debtor, the trustee, and any other person or entity specified by the court.

The proposed amendments to Rule 1019 (Conversion of Chapter 11 Reorganization Case, Chapter 12 Family Farmer's Debt Adjustment Case, or Chapter 13 Individual's Debt Adjustment Case to Chapter 7 Liquidation Case) would: (1) clarify that a motion for an extension of time to file a statement of intention regarding collateral must be filed or made orally before the time specified in the rule expires; (2) provide that the holder of a postpetition, preconversion administrative expense claim is required to file within a specified time period a request for payment under § 503(a) of the Code, rather than a proof of claim under § 501 of the Code or Rules 3001(a)-(d) and 3002; and (3) conform the rule to the 1994 amendments to § 502(b)(9) of the Code and to the 1996 amendments to Rule 3002(c)(1) regarding the 180-day period for filing a claim by a governmental unit.

Rule 2002(a)(4) (Notices to Creditors, Equity Security Holders, United States, and United States Trustee) would be amended to delete the requirement that notice of a hearing on dismissal

of a chapter 7 case based on the debtor's failure to file required lists, schedules, or statements must be sent to all creditors. The amendment conforms with the proposed amendment to Rule 1017, which requires that the notice be sent only to certain parties.

The proposed amendments to Rule 2003 (Meeting of Creditors or Equity Security Holders) would require the United States to mail a copy of the report of a disputed election for a chapter 7 trustee to any party in interest that has requested a copy of it. The amendment gives a party in interest ten days from the filing of the report—rather than from the date of the meeting of creditors—to file a motion to resolve the dispute.

The proposed amendments to Rule 3020(e) (Deposit; Confirmation of Plan in a Chapter 9 Municipality or a Chapter 11 Reorganization Case) would automatically stay for ten days an order confirming a chapter 9 or chapter 11 plan so that parties will have sufficient time to request a stay pending appeal.

Rule 3021 (Distribution under Plan) would be amended to conform to the amendments to Rule 3020 regarding the 10-day stay of an order confirming a plan in a chapter 9 or chapter 11 case.

A new subdivision (a)(3) would be added to Rule 4001 (Relief from Automatic Stay; Prohibiting or Conditioning the Use, Sale, or Lease of Property; Use of Cash Collateral; Obtaining Credit; Agreements) that would automatically stay for ten days an order granting relief from an automatic stay so that parties will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 4004(a) (Grant or Denial of Discharge) would clarify that the deadline for filing a complaint objecting to discharge under § 727(a) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. Rule 4004(b) is amended to clarify that a motion for an extension of time for

filing a complaint objecting to a discharge must be filed before the time specified in the rule has expired.

Rule 4007 (Determination of Dischargeability of a Debt) would be amended to clarify that the deadline for filing a complaint to determine dischargeability of a debt under § 523(c) of the Code is 60 days after the first date set for the meeting of creditors, whether or not the meeting is actually held on that date. The rule is also amended to clarify that a motion for an extension of time for filing a complaint must be filed before the time specified in the rule has expired.

Rule 6004(g) (Use, Sale, or Lease of Property) is added to automatically stay for ten days an order authorizing the use, sale, or lease of property, other than cash collateral, so that parties will have sufficient time to request a stay pending appeal.

A new subdivision (d) would be added to Rule 6006 (Assumption, Rejection and Assignment of Executory Contracts and Unexpired Leases) that would automatically stay for ten days an order authorizing the trustee to assign an executory contract or unexpired lease under § 365(f) of the Code so that a party will have sufficient time to request a stay pending appeal.

The proposed amendments to Rule 7001 (Scope of Rules of Part VII) would recognize that an adversary proceeding is not necessary to obtain injunctive relief when the relief is provided for in a chapter 9, chapter 11, chapter 12, or chapter 13 plan.

The proposed amendments to Rule 7004(e) (Process; Service of Summons, Complaint) would provide that the 10-day time limit for service of a summons does not apply if the summons is served in a foreign country.

The proposed amendments to Rule 7062 (Stay of Proceedings to Enforce a Judgment) would delete the references to the additional exceptions to Rule 62(a) of the Federal Rules of Civil Procedure. The deletion of these exceptions, which are orders in a contested matter rather

than in an adversary proceeding, is consistent with amendments to Rule 9014 that render Rule 7062 inapplicable to a contested matter.

Rule 9006(c)(2) (Time) would be amended to prohibit the reduction of time fixed under Rule 1019(6) for filing a request for payment of an administrative expense incurred after the commencement of a case and before conversion of the case under chapter 7.

Rule 9014 (Contested Matters) would be amended to delete the reference to Rule 7062 from the list of Part VII rules that automatically apply in a contested matter.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Civil Rules submitted proposed amendments to Rule 23(c)(1) and Rule 23(f) on class actions, together with Committee Notes explaining their purpose and intent. The proposed amendments were part of a larger package of proposed revisions to Rule 23 circulated to the bench and bar for comment in August 1996. Public hearings on the proposed amendments were held in Philadelphia, Dallas, and San Francisco. The Standing Rules Committee approved new subdivision (f), but recommitted the proposed amendments to (c)(1) to the advisory committee.

The advisory committee's work on these proposed amendments began in 1991, when it was asked by the Judicial Conference to act on the recommendation of the Ad Hoc Committee on Asbestos Litigation to study whether Rule 23 should be amended to facilitate mass tort litigation. To understand the full scope and depth of the problems, the advisory committee sponsored or participated in a series of major conferences at the University of Pennsylvania, New York

University, Southern Methodist University, and the University of Alabama, as well as studied the issues at regularly scheduled meetings elsewhere. During these conferences, the advisory committee heard from experienced practitioners, judges, academics, and others. To shore up the minimal empirical data on current class action practices, the Federal Judicial Center, at the request of the advisory committee, completed a study of the use of class actions terminated within a two-year period in four large districts.

In the course of its six-year study, the advisory committee considered a wide array of procedural changes, including proposals to consolidate (b)(1), (b)(2), and (b)(3) class actions, to add opt-in and opt-out flexibility, to enhance notice, to define the fiduciary responsibility of class representativeness and counsel, and to regulate attorney fees. In the end, with the intent of stepping cautiously, the committee opted for what it believed were five modest changes which were published for comment in August 1996.

During the six-month commentary period, the advisory committee received hundreds of pages of written comments and testimony from some 90 witnesses at the public hearings. Comments and testimony were received from the entire spectrum of experienced users of Rule 23, including plaintiffs' class action lawyers, plaintiffs' lawyers who prefer not to use the class action device, defendants' lawyers, corporate counsel, judges, academics, journalists, and litigants who had been class members. The work of the advisory committee and the information considered by it, including all the written statements and comments and transcripts of witnesses' testimony, filled a four-volume, 3,000 page compendium of the committee's working papers published in May 1997.

Although five general changes were published for comment, the advisory committee decided to proceed with only the proposed amendments to Rule 23(c)(1) and (f) at this time. The

change to Rule 23(c)(1) would clarify the timing of the court's certification decision to reflect present practice. New subdivision (f) would authorize a permissive interlocutory appeal, in the sole discretion of the court of appeals, from an order granting or denying class certification. The remaining proposed changes either were abandoned or deferred by the advisory committee after further reflection, or set aside in anticipation of the Supreme Court's decision in *Amchem Products, Inc. v. Windsor*, No. 96-270 (decided June 25, 1997) — a Third Circuit case holding invalid a settlement of a class action that potentially consisted of tens of thousands of asbestos claimants. The advisory committee carefully considered whether to delay proceeding on the proposed amendments to Rule 23 (c)(1) and (f) and wait until action on the remaining proposed amendments to Rule 23 was completed. But it concluded unanimously that the changes to (c)(1) and (f) were important and distinct from the remaining proposed changes and needed to be acted on expeditiously. In particular, the proposed change to Rule 23(f) could have immediate and substantial beneficial impact on class action practice.

New subdivision (f) would create an opportunity for interlocutory appeal from an order granting or denying class action certification. The decision whether to permit appeal is in the sole discretion of the court of appeals. Application for appeal must be made within ten days after entry of the order. District court proceedings would be stayed only if the district judge or the court of appeals ordered a stay. Authority to adopt an interlocutory appeal provision was conferred by 28 U.S.C. § 1292(e).

The advisory committee concluded that the class action certification decision warranted special interlocutory appeal treatment. A certification decision is often decisive as a practical matter. Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. Alternatively, certification can exert enormous pressure to settle.

Because of the difficulties and uncertainties that attend some certification decisions—those that do not fall within the boundaries of well-established practice—the need for immediate appellate review may be greater than the need for appellate review of many routine civil judgments. Under present appeal statutes, however, it is difficult to win interlocutory review of orders granting or denying certification that present important and difficult issues. Many such orders fail to win district court certification for interlocutory appeal under 28 U.S.C. § 1292(b), in part because some courts take strict views of the requirements for certification. Resort has been had to mandamus, with some success, but review may strain ordinary mandamus principles.

The lack of ready appellate review has made it difficult to develop a body of uniform national class-action principles. Many commentators and witnesses advised the advisory committee that district courts often give different answers to important class-action questions, and that these differences encourage forum shopping. The commentators and witnesses who testified on proposed Rule 23(f) provided strong, although not universal, support for its adoption.

The main ground for opposing the proposed amendment was that applications for permission to appeal would become a routine strategy of defendants to increase cost and delay. The advisory committee recognized that there might be strong temptations to seek permission to appeal, particularly during the early days of Rule 23(f). It hoped that lawyers would soon recognize that appeal would be granted only in cases that present truly important and difficult issues, and that the potential for many ill-founded appeal petitions would quickly dissipate. In any event, it relied on the advice of many circuit judges that applications for permission to appeal under 28 U.S.C. § 1292(b) are quickly processed, adding little to the costs and delay experienced by the parties and trial courts, and imposing little burden on the courts of appeals. The committee was confident that, as with § 1292(b) appeals, Rule 23(f) petitions would be quickly

resolved on motion. The advisory committee concluded that the benefits of the proposal greatly outweighed the small additional workload burden.

The Standing Rules Committee concurred with the advisory committee's recommendation to add a new Rule 23(f). The proposed amendments to the Federal Rules of Civil Procedure, as recommended by your Committee, are in Appendix C with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed new Civil Rule 23(f) and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

In many class action cases, the decision to certify is the single most important judicial event, which often sets into motion a series of actions inexorably leading to settlement. The advisory committee heard much testimony about the intense pressure placed on the defendant to settle once a class action had been certified, rather than risk any chance of losing. The proposed amendment of Rule 23(c)(1) would amend the requirement that the class action certification determination be made "as soon as practicable." The advisory committee's proposed change to "when practicable" was designed to confirm present practice, which permits a ruling on a motion to dismiss or for summary judgment before addressing certification questions.

The Standing Rules Committee recognized that in most class action cases a judge needs sufficient information, which often requires adequate time for discovery, before making the critical class action certification decision. But concern was expressed that a delay in the certification decision might as a practical matter eliminate any real relief to some injured parties under certain circumstances, particularly when their claims may become moot if not acted on expeditiously. In addition, the advisory committee continues to study proposed revisions to other parts of the rule and could further consider the change to (c)(1) at the same time. Accordingly,

your Committee voted to recommit the proposed amendments to Rule 23(c)(1) to the advisory committee for further consideration.

Scope and Nature of Discovery

With the goal of reducing cost and delay in litigation, the advisory committee has embarked on a major review of the general scope and nature of discovery. As part of this overall discovery project, the advisory committee will address the discovery-related recommendations contained in the Judicial Conference's report to Congress on RAND's Civil Justice Reform Act study, including the need to revisit the "opt-in" "opt-out" mandatory disclosure provisions.

A subcommittee was appointed to explore discovery issues. It convened a conference of about 30 prominent attorneys and academics to discuss discovery problems. Building on that meeting, the advisory committee, along with the Boston College School of Law, is sponsoring a symposium on discovery in September 1997. Academics will present papers that will later be published by the school's law review. Several panels of experienced practitioners and judges will also address distinct discovery issues at the conference. The advisory committee plans to meet in October to decide which specific discovery issues discussed at the symposium it will pursue.

AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

Rules Recommended for Approval and Transmission

The Advisory Committee on Criminal Rules submitted proposed amendments to Federal Rules of Criminal Procedure 5.1, 26.2, 31, 33, 35, and 43 together with Committee Notes explaining their purpose and intent. The proposed amendments had been circulated to the bench and bar for comment in August 1996. A public hearing was scheduled for Oakland, California, but no witnesses requested to testify.

The proposed amendments to Rule 5.1 (Preliminary Examination) would require production of a witness statement after the witness has testified at a preliminary examination hearing. The proposal is similar to current provisions in other rules that require production of a witness statement at other pretrial proceedings.

Rule 26.2 (Production of Witness Statements) would be amended to include a cross-reference to the proposed amendment to Rule 5.1, extending the requirement to produce a witness statement to a preliminary examination.

The proposed amendment to Rule 31 (Verdict) would require individual polling of jurors when polling occurs after the verdict, either at a party's request or on the court's own motion. The amendment confirms the existing practice of most courts.

Rule 33 (New Trial) would be amended to require that a motion for a new trial based on newly discovered evidence be filed within three years after the date of the "verdict or finding of guilty." The current rule uses "final judgment" as the triggering event, but courts have reached different conclusions on when a final judgment is entered. As a result of the disparate practices, the time to file the motion has varied among the districts. The published version of the proposed amendment fixed a clear starting point to begin the time period and set two years as the outside limit. The advisory committee was persuaded by the public comment, however, that an additional year was necessary. Defense attorneys often concentrate their available time and resources prosecuting an appeal immediately after the verdict or finding of guilty and only begin considering filing a motion for a new trial when they have completed the appeal.

Rule 35 (Correction or Reduction of Sentence) would be amended to permit a court to aggregate a defendant's assistance in the prosecution or investigation of another offense rendered

before and after sentencing in determining whether a defendant's assistance is "substantial" as required under Rule 35(b). The proposed amendment is intended to recognize a defendant's significant assistance rendered before and after sentencing, either of which viewed alone would be insufficient to meet the "substantial" level.

The proposed amendment to Rule 43 (Presence of the Defendant) would clarify that a defendant need not be present: (1) at a Rule 35(b) reduction of sentence proceeding for substantial assistance rendered by the defendant; (2) at a Rule 35(c) correction of sentence proceeding for a technical, arithmetical, or other clear error; or (3) at a 18 U.S.C. § 3582(c) resentencing modifying an imposed term of imprisonment. In virtually all these proceedings, the modification of a sentence can only inure to the benefit of the defendant, and the defendant's attendance is not necessary. The court does, however, retain the power to require or permit a defendant to attend any of these proceedings in its discretion. A defendant's presence would still be required at a resentencing to correct an invalid sentence following a remand under Rule 35(a).

The Standing Rules Committee concurred with the advisory committee's recommendations. The proposed amendments to the Federal Rules of Criminal Procedure, as recommended by your Committee, are in Appendix D with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendments to Criminal Rules 5.1, 26.2, 31, 33, 35, and 43 and transmit them to the Supreme Court for its consideration with the recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.

Rules Approved for Publication and Comment

The Advisory Committee on Criminal Rules submitted proposed amendments to Criminal Rules 6, 11, 24, 30, and 54, abrogation of Rules 7(c)(2), 31(e), 32(d)(2), and 38(e), and a new Rule 32.2 with a recommendation that they be published for public comment.

Rule 6 (The Grand Jury) would be amended to permit the grand jury foreperson or deputy foreperson to return an indictment in open court without requiring the presence of the entire grand jury as mandated under present procedures. The amendment would be particularly helpful when the grand jury meets in places other than in the courthouse and needs to be transported to discharge a ministerial function. The second proposed amendment would allow the presence of an interpreter who is necessary to assist a juror in taking part in the grand jury deliberations. The advisory committee recommended that the exception be limited solely to interpreters assisting the hearing impaired. But the Standing Rules Committee concluded that it would be more helpful to obtain public comment on an expanded exception to the rule that would allow any interpreter found to be necessary to assist a grand juror.

The proposed amendment of Rule 11 (Pleas) would require the court to determine whether the defendant understands any provision in a plea agreement that waives the right to appeal or to collaterally attack the sentence. The advisory committee first considered the proposed amendment at the request of the Committee on Criminal Law. The amendment also conforms Rule 11 to current practices under sentencing guidelines and makes it clear that a plea agreement may include an agreement as to a sentencing range, sentencing guideline, sentencing factor, or policy statement. It also distinguishes plea agreements made under Rule 11(e)(1)(B), which are not binding on the court, and agreements under Rule 11(e)(1)(C), which are binding.

Rule 24 (Alternate Jurors) would permit the court to retain alternate jurors during the deliberations if any other regular juror becomes incapacitated. The alternate jurors would remain insulated from the other jurors until required to replace a regular juror. The option would be particularly helpful in an extended trial when two or more original jurors could not participate in the deliberations because otherwise a new trial would be required.

The proposed amendments to Rule 30 (Instructions) would permit a court to require or permit the parties to file any requests for instructions before trial. Under the present rule, a court may direct the parties to file the requests only during trial or at the close of the evidence.

New Rule 32.2 (Forfeiture Procedures) consolidates several procedural rules governing the forfeiture of assets in a criminal case, including existing Rules 7(c)(2), 31(e), 32(d)(2), and 38(e). In *Libretti v. United States*, 116 S. Ct. 356 (1995), the Supreme Court held that criminal forfeiture constitutes an aspect of the sentence imposed in a criminal case, and that the defendant has no constitutional right to have the jury determine any part of the forfeiture. The proposed amendment was originally suggested by the Department of Justice and sets up a bifurcated post-guilt adjudication forfeiture procedure. At the first proceeding, the court determines what property is subject to forfeiture. At the second, the court rules on any petition filed by a third party claiming an interest in the forfeitable property and otherwise conducts ancillary proceedings. Parties are permitted to conduct discovery in accordance with the Federal Rules of Civil Procedure to the extent determined necessary by the court.

A technical amendment is proposed to Rule 54 removing the reference to the court in the Canal Zone, which no longer exists.

The Committee voted to circulate the proposed amendments to the bench and bar for comment.

Informational Items

The Standing Committee voted to reject the recommendation of the advisory committee to seek legislation amending 18 U.S.C. § 3060 to permit a magistrate judge to conduct a preliminary examination over the defendant's objection. Criminal Rule 5(c) tracks the statutory provision, and it would also need to be amended to conform to a statutory change. At the request

of the Committee, the Committee on the Administration of the Magistrate Judges System was asked to review the advisory committee's recommendation. It agreed with the substance of the proposal and endorsed the necessary legislative and rule changes. Your Committee concluded that the proposed change should be recommitted to the advisory committee to consider action under the rulemaking process. A parallel statutory change could be pursued at the appropriate time.

A bill was introduced in the House of Representatives (H.R. 1536) that would amend 18 U.S.C. § 3321 and reduce the number of grand jurors from a range of 16-23 to 9-13, with 7 jurors instead of 12 jurors necessary to concur in an indictment. Criminal Rule 6 tracks the language of the current statutory provision. The Advisory Committee on Criminal Rules has placed the matter on the agenda of its next meeting in October 1997, which is consistent with the recommendations of the Committee on Court Administration and Case Management and the Committee on Criminal Law.

AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed amendments to Federal Rules of Evidence 615 (Exclusion of Witnesses). The amendment would expand the list of witnesses who may not be excluded from attending a trial to include any victim as defined in the Victim's Rights and Restitution Act of 1990 and the Victim Rights Clarification Act of 1997. The amendment is intended to conform to the two Acts. These laws provide that: (1) a victim-witness is entitled to attend the trial unless the witness' testimony would be materially affected by the testimony at trial; and (2) a victim-witness who may testify at a later sentencing proceeding cannot be excluded from the trial for that reason.

The advisory committee's proposed amendment was limited to witnesses specifically defined by the two victim rights' statutes. The Standing Rules Committee concluded that a more expansive amendment was preferable to account for any other existing or future statutory exception. It revised the proposed amendment to extend to any "person authorized by statute to be present." The Committee also agreed with the request to forward the proposed amendments directly to the Judicial Conference without publishing them for public comment. Under the governing, *Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure* the "Standing Committee may eliminate the public notice and comment requirement if, in the case of a technical or conforming amendment, it determines that notice and comment are not appropriate or necessary." The Standing Rules Committee determined that the proposed amendment, as revised, was a conforming amendment.

The proposed amendment to the Federal Rules of Evidence, as recommended by your Committee, appears in Appendix E together with an excerpt from the advisory committee report.

> **Recommendation:** That the Judicial Conference approve the proposed amendment to Evidence Rule 615 and transmit it to the Supreme Court for its consideration with the recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

Informational Items

The Standing Rules Committee recommitted to the advisory committee for further study proposed amendments to Evidence Rule 103 (Rulings on Evidence) that would add a new subdivision governing *in limine* practice. The present rules do not address *in limine* practice, and this has resulted in some conflict in the courts and confusion in the practicing bar. Proposed amendments to Evidence Rule 103 were published for comment in 1995, but were eventually withdrawn. Although generally inclined to publish for comment another proposed *in limine* rule,

several members of the Standing Rules Committee expressed concern regarding certain technical issues that they believed needed first to be addressed by the advisory committee. The Committee agreed that further study by the advisory committee would be helpful before publishing another proposed change to Rule 103.

The advisory committee has refrained from considering amending Evidence Rule 702 to account for the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and later decisions generated by it, until a time when the district courts and courts of appeals have had an opportunity to explore some of the decision's far-reaching implications. Several years have now passed. *Daubert* case law has rapidly developed and involves many areas not considered nor in issue in the 1993 case. The advisory committee has concluded that the time is now right for a review of Evidence Rules 702 and 703 and has placed the matter on its agenda for its October meeting. In addition, both the Senate and the House of Representatives are considering bills to codify the Court's decision.

RULES GOVERNING ATTORNEY CONDUCT

A study by the Committee's reporter of appellate and bankruptcy cases involving rules of attorney conduct and a Federal Judicial Center empirical study on rules governing attorney conduct have now been completed. The Committee was also advised of the current status of meetings between the Department of Justice and the Conference of Chief Justices on contacting represented parties. The Committee's reporter was asked to prepare some specific proposals for the Committee's consideration at its next meeting in January.

UNIFORM NUMBERING SYSTEM FOR LOCAL RULES OF COURT

Amendments to the Federal Rules of Practice and Procedure took effect on December 1, 1995, which required that all local rules of court "must conform to any uniform numbering

system prescribed by the Judicial Conference." In March 1996, the Conference prescribed a numbering system for local rules of court to implement the 1995 rules amendments. The Conference set April 15, 1997, as the effective date of compliance with the uniform numbering system so that courts would have sufficient time to make necessary changes to their local rules.

Slightly less than half of the courts were able to renumber their local rules by April 15, 1997. Several additional courts completed their renumbering before the Standing Rules Committee met in June. Other courts have advised the Committee that they are nearing completion of their local rules renumbering. The Committee continues to encourage those courts that have not yet adopted a uniform numbering system to renumber their local rules. The Committee finds promising the recent increase in the number of courts adopting a uniform numbering system, and it will continue to offer to help the courts that are in the process of renumbering their local rules.

LONG RANGE PLANNING

The chairs of the Standing Rules Committee and the Advisory Committee on Civil Rules participated in the May 15, 1997, meeting of the Judicial Conference committee liaisons on the judiciary's *Long Range Plan.* During the discussion on mass torts, the advisory committee chair described the extensive work of the Advisory Committee on Civil Rules on the study of mass torts in the context of class actions during the past six years. As previously noted, the advisory committee garnered substantial information and data on class action and mass torts practice, which were compiled into a four-volume compendium of working papers. The rules committee chairs favored the consensus of the liaisons that the individual Conference committees should continue to coordinate their respective work with the other committees involved in the study of mass tort litigation.

LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON INTERNET

The Committee was advised of ongoing efforts in the Administrative Office to place local rules of court and Official Bankruptcy Forms on the Internet. Rather than furnishing paper copies of local rules of court and any amendments to the Administrative Office—as presently required by 28 U.S.C.§ 2071(d)—courts could fulfill this statutory responsibility by placing and updating their local rules directly on the Internet. It is expected that Internet access to the rules would benefit lawyers researching local practices and relieve the clerks' offices of some of their burden in providing copies of local rules and otherwise responding to inquiries regarding them. Access to Official Bankruptcy Forms would benefit practitioners and pro se claimants in bankruptcy. Paper copies of most of these forms are not available from the courts, but must be obtained from private sector sources. The advantages of having public access to the forms on the Internet are clear.

REPORT TO THE CHIEF JUSTICE

In accordance with the standing request of the Chief Justice, a summary of issues concerning select new amendments and proposed amendments generating controversy is set forth in Appendix F.

STATUS OF PROPOSED AMENDMENTS

A chart prepared by the Administrative Office (reduced print) is attached as Appendix G, which shows the status of the proposed amendments to the rules.

Respectfully submitted,

Alicemarie H. Stotler
Chair

Frank W. Bullock, Jr.	Alan W. Perry
Frank H. Easterbrook	Sol Schreiber
Seth P. Waxman	Morey L. Sear
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APPENDICES

Appendix A —	Proposed Amendments to the Federal Rules of Appellate Procedure
Appendix B —	Proposed Amendments to the Federal Rules of Bankruptcy Procedure
Appendix C —	Proposed Amendments to the Federal Rules of Civil Procedure
Appendix D —	Proposed Amendments to the Federal Rules of Criminal Procedure
Appendix E —	Proposed Amendments to the Federal Rules of Evidence
Appendix F —	Report to the Chief Justice on Proposed Select New Rules or Rules Amendments Generating Controversy
Appendix G —	Chart Summarizing Status of Rules Amendments

PROPOSED SELECT NEW RULES OR RULES AMENDMENTS GENERATING SUBSTANTIAL CONTROVERSY

The following summary outlines considerations underlying the recommendations of the advisory rules committees and the Standing Rules Committee on certain new rules or controversial rules amendments. A fuller explanation of the committees' considerations was submitted to the Judicial Conference and is sent together with this report.

Federal Rules of Appellate Procedure

The proposed style revision of the Appellate Rules is intended to improve the rules' clarity, consistency, and readability. The advisory rules committee identified and eliminated ambiguities and inconsistencies that inevitably had crept into the rules since their enactment in 1976. The style changes are designed to be nonsubstantive, unless otherwise specified and except with respect to several rules that were under study when the style project commenced. Virtually all comments from the bench, bar, and law professors on the stylized rules were favorable.

The style revision has taken up most of the advisory committee's work during the past four years. The revision of the appellate rules completes the first step of a long-term plan to re-examine all the procedural rules. The rules committees do not, however, plan to revise the Evidence Rules for style purposes because of the disruptive effect it would have on trial practice. Judges and lawyers are familiar with, and rely heavily on, the current text and numbers of the Evidence Rules during trial proceedings. The style project was launched originally by Judge Robert E. Keeton, former chairman of the Standing Rules Committee, and Professor Charles Alan Wright, the first chairman of the Style Subcommittee. The consultant enlisted by them created *Guidelines for Drafting and Editing Court Rules*, which provides a uniform set of conventions for all future writing.

Two style changes are brought to the attention of the Court — the use of "en banc" instead of "in banc" and the use of "must" in place of "shall." Like several other style changes made in the rules, these two changes represent the consensus of the rules committees on a style issue that required a decision that would be adhered to uniformly throughout the rules for purposes of consistency. The committee recognizes room for differences of opinion and does not want the restylization work to be rejected due to the adoption of either usage.

Two other rules, published and commented on for revision other than style, drew notable comment. Rule 32 is of interest because it incorporates generally the acceptability of computerized word-processing programs that assist the bench and bar in determining the proper length of briefs and size of typeface for text. The proposed amendments addressed concerns expressed by many commentators that were aimed at earlier drafts of the rule. As revised in light of these comments, the amended rule was well received by the bench and bar. Rule 35 was rewritten after careful deliberations with representatives of the Department of Justice as well as careful attention to other

proposed word choices, to the extent of setting aside preferred style conventions, in order to improve the rule.

I. Use of "en banc" instead of "in banc"

A. Brief Description

The proposed amendment to Rule 35 substitutes the word "en banc" for "in banc."

B. Arguments in Favor

- "En banc" is the common usage and is overwhelmingly favored by the courts. More than 40,000 published opinions in circuit cases referred to "en banc" and just under 5,000 opinions used the term "in banc." A similar pattern was evidenced in Supreme Court opinions, with 950 opinions using "en banc" while only 46 opinions used "in banc." The Supreme Court rules refer to "en banc."

- "En banc" was used by Congress in a statute when authorizing a court of appeals having more than fifteen judges to perform its "en banc" functions. Act of Oct. 20, 1978, Pub. L. No. 95-486.

C. Objections

- 28 U.S.C. § 46(c) sets out the requirements for an "en banc" proceeding and uses the term "in banc."

D. Rules Committees' Consideration

Both the advisory rules committee and the Standing Rules Committee decided that the most commonly used spelling should be followed in the stylized rules. No objection from any committee member was expressed to the proposed use of "en banc."

II. Use of "must" instead of "shall"

A. Brief Description

The word "must" is used throughout the stylized rules whenever "is required to" is intended, instead of using the more traditional "shall."

B. Arguments in Favor

- The meaning of "must" is clear in all contexts.
- The meaning of the word "shall" is ambiguous and changes depending on the context of the sentence in which it is used. In fact, the word "shall" can shift its meaning even in midsentence. It has as many as eight senses in drafted documents. It is also commonly used as a future tense modal verb, which is inconsistent with present-tense drafting.

C. Objections

- The sound of "must" is jarring in many sentences. Statutes and current rules commonly use "shall."

D. Rules Committees' Consideration

Both the advisory rules committee and the Standing Rules Committee initially expressed skepticism about the use of "must" instead of "shall." But on careful consideration, both committees agreed that the use of "shall" has generated much unwarranted satellite litigation over its meaning. Case law is replete with examples of courts and litigants attempting to discern its precise meaning in various contexts. "Must" has the virtue of universal and uniform meaning. Both committees are sensitive to concerns over piecemeal stylistic changes and adopted the convention of using "must" in every instance that "is required to" is intended in the rules.

Federal Rules of Civil Procedure

I. Rule 23(f) (Interlocutory Appeal of Class Action Certification)

A. Brief Description

A new subdivision (f) would permit an interlocutory appeal from an order granting or denying class action certification in the sole discretion of the court of appeals. District court proceedings would be stayed only if the district judge or the court of appeals ordered a stay.

B. Arguments in Favor

- The proposed amendment would facilitate the establishment of a body of uniform class-action certification principles.

- Denial of certification can toll the death knell in actions that seek to vindicate large numbers of individual claims. A grant of certification can exert a reverse death knell, creating enormous pressure to settle that is often decisive as a practical matter. The need for immediate appellate review may be greater than the need for appellate review of many routine final civil judgments.

- Final judgment appeal, review on preliminary injunction appeal, certification for permissive appeal under § 1292(b), and mandamus together often fail to provide effective review. One response has been to strain ordinary mandamus principles.

- The committee was confident that, as with § 1292(b) appeals, the courts of appeal would act quickly and at a low cost in determining whether to grant permission to appeal. Significant costs would be incurred only in cases presenting such pressing issues as to warrant permission to appeal. In addition, the committee believed that although requests for interlocutory appeal may initially be frequent, that number would fall as the bar acquired experience with the rule and the appellate courts' responses to such requests.

- The committee also noted that a similar proposal had been introduced in Congress.

C. Objections

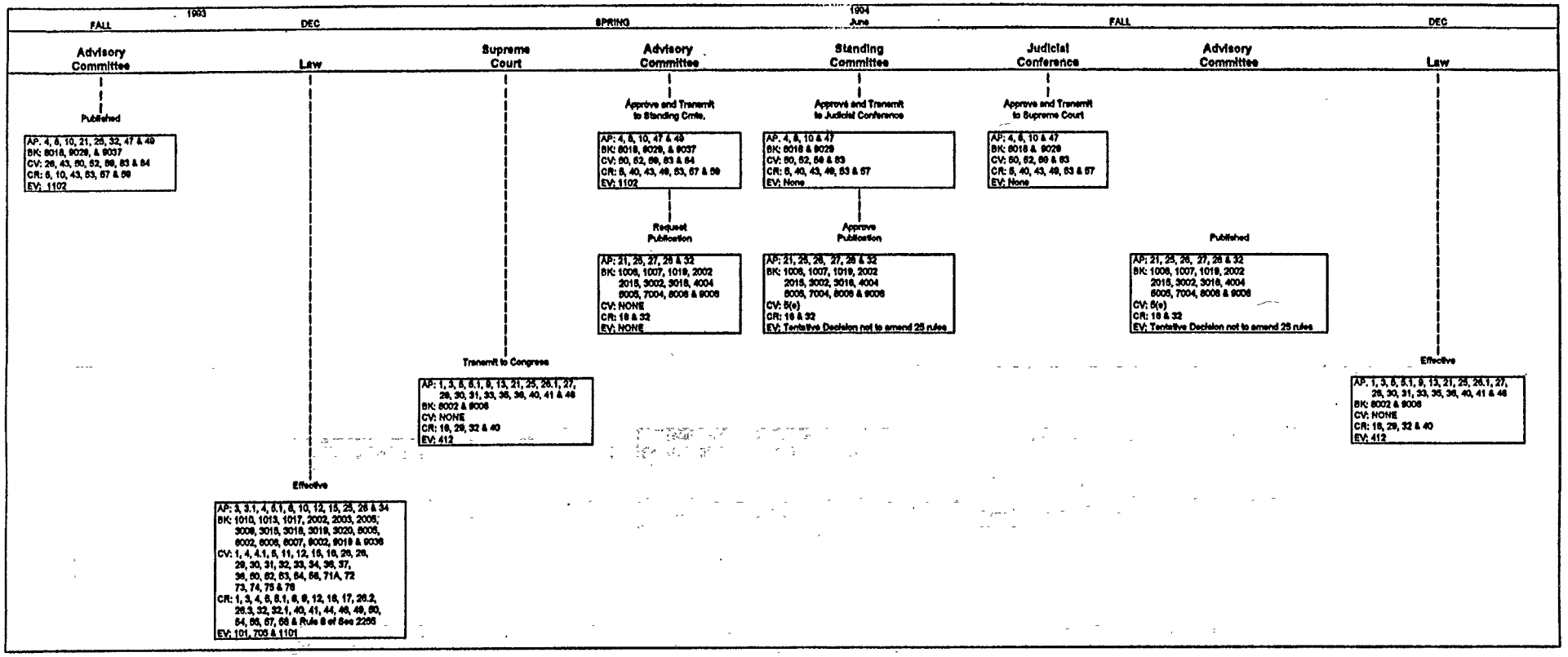
- Applications for permission to appeal would become a routine strategy to increase costs and delay.

- The proposed amendment would add hundreds, maybe thousands, of motions to the already overburdened workloads of the courts of appeals.

D. Rules Committees Consideration

Both committees agreed that the benefits of the proposed amendment greatly outweigh the predictably lesser disadvantages.

PROMULGATION OF RULES AMENDMENTS



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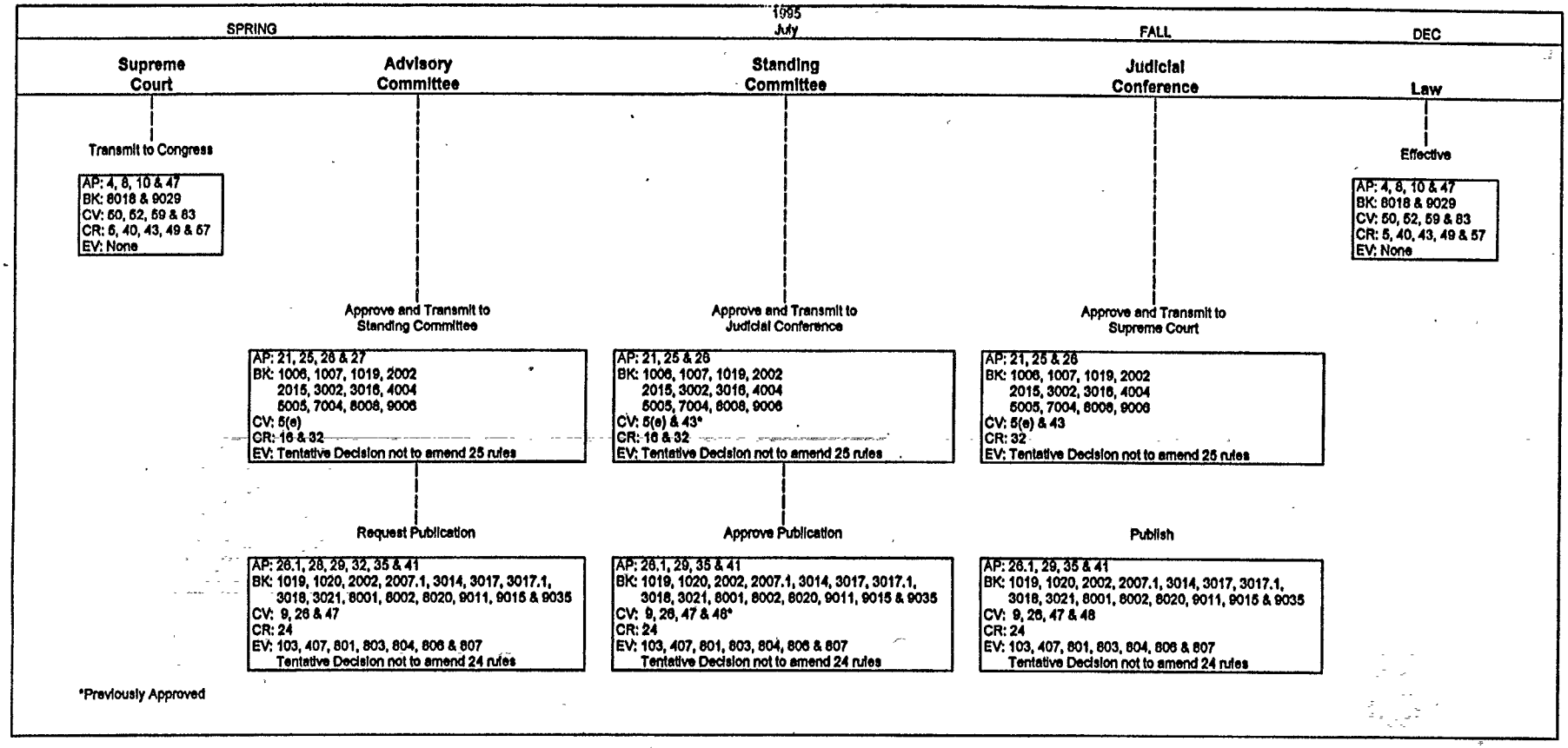

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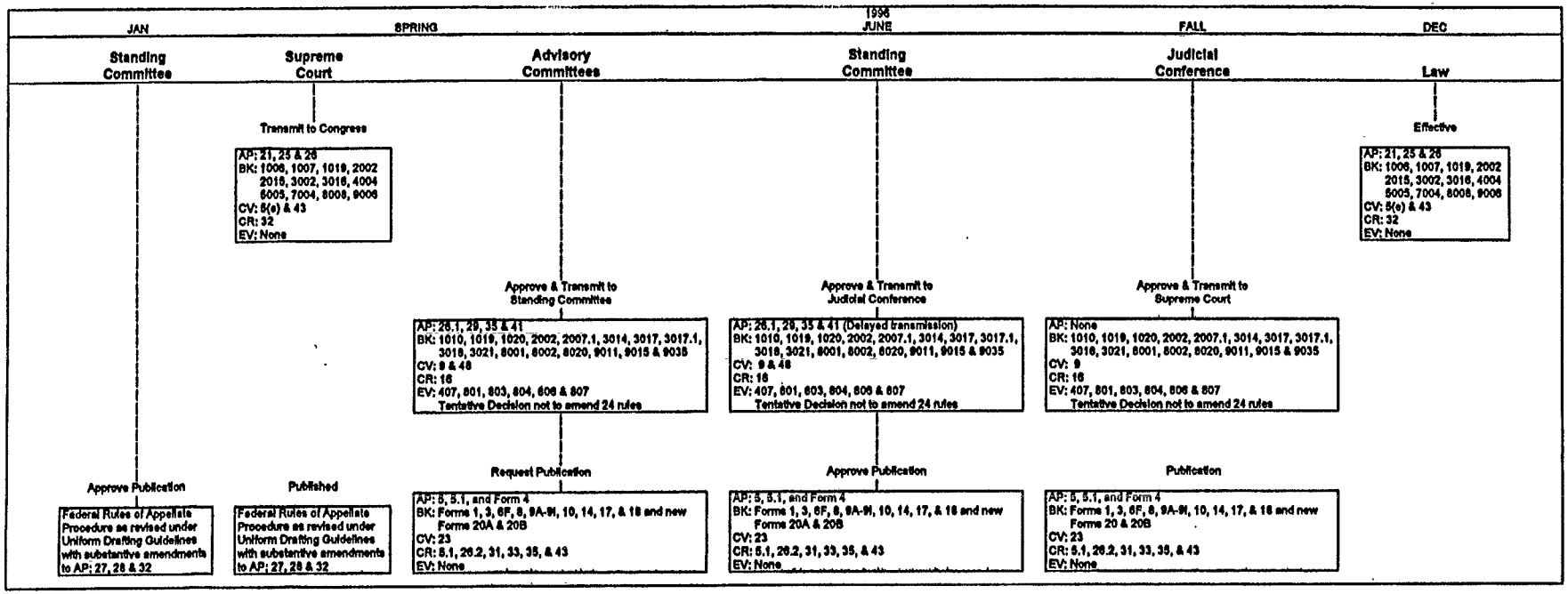

PROMULGATION OF RULES AMENDMENTS
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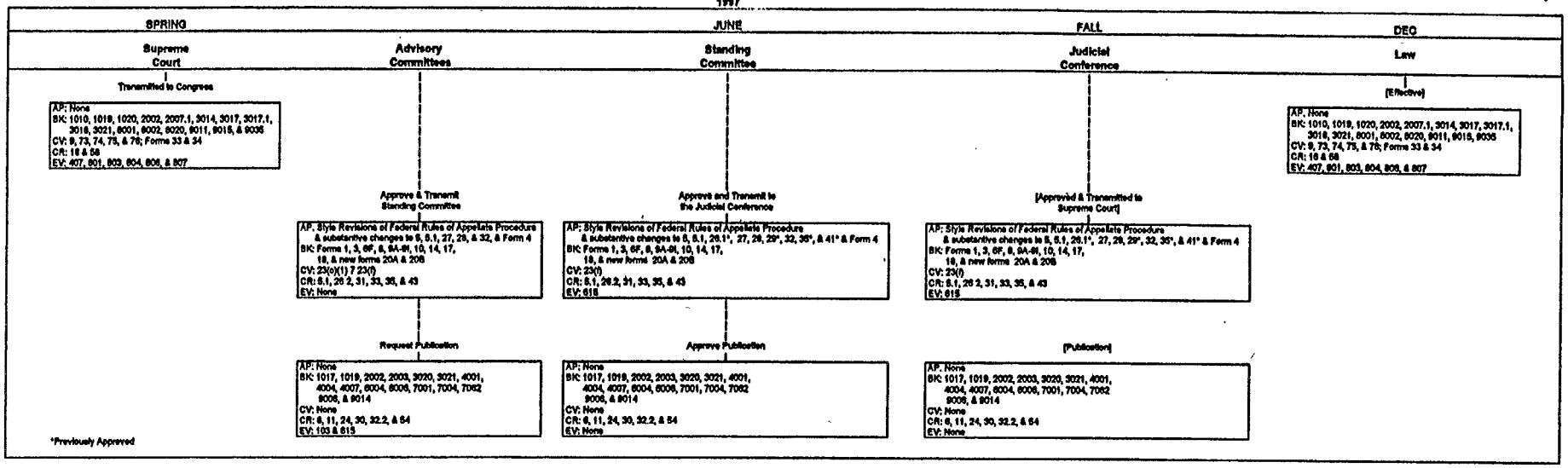

Agenda Item IV - V

DISCUSSION

AND

PRESENTATION

Agenda Item VI-A

MEMORANDUM

DATE: August 14, 1997

TO: Members of the Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-15

FRAP 40(a)(1) generally requires that a petition for panel rehearing be filed within 14 days after entry of judgment. In 1994, at the request of the Solicitor General, the Rule was amended to lengthen the time for filing a rehearing petition to 45 days in *civil* cases in which the United States is a party. (Under FRAP 35(c), these same deadlines apply to petitions for rehearing en banc.) The Solicitor General now requests that the Rule be amended again so that the deadline is extended to 45 days in *any* case — civil or criminal — in which the United States is a party.

The 1994 amendment to FRAP 40(a) was first requested in a January 15, 1991 letter from Solicitor General Starr to James Macklin. General Starr explained the need for the amendment as follows:

> [C]ompliance with Rule 40(a) without an extension of time is virtually impossible for the United States in a very large number of cases. In many instances, the responsible litigating division at the Department of Justice does not receive a copy of the court of appeals opinion until well into the 14-day period. If there is any reasonable possibility of seeking rehearing, all interested agencies and offices must then be consulted, and internal recommendations made. My staff must then study the matter and present it to me for my personal action. If a rehearing petition is authorized, there must then be time to draft and file it.

General Starr pointed out that the 14 day deadline required his office to seek an extension of time in every case in which it was possible that the United States would petition for rehearing. In many of these cases, the United States eventually decided not to file a rehearing petition, meaning that the time the government spent preparing and the time the court spent considering the motion to extend the deadline was wasted.

General Starr originally requested that the time for filing a rehearing petition be extended from 14 to 45 days in *all* cases. However, on February 22, 1991, General Starr wrote to Mr. Macklin and asked that his original suggestion be "limited to civil cases." He said:

> We believe that the longer rehearing period is not necessary in criminal cases, and could have adverse consequences in terms of finality in such matters. Given the speed with which criminal cases are generally to be treated, we think that the 14-day period is more appropriate.

As noted, FRAP 40(a) was amended as the Solicitor General requested in 1994. The Advisory Committee Note to the 1994 amendment stated:

> The amendment makes nation-wide the current practice in the District of Columbia and the Tenth Circuits, *see* D.C. Cir. R. 14(a), 10th Cir. R. 40.3. This amendment, analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing.

On June 12, 1997, Acting Solicitor General Dellinger wrote to Judge Logan to report that "experience has shown that the longer rehearing time actually *is* necessary in criminal cases in which the United States is a party for the same reasons it is necessary in civil cases." General Dellinger said that "[i]t has been difficult, if not impossible for the United States in criminal cases to resolve within 14 days from the issuance of an opinion whether a rehearing petition and/or rehearing en banc petition should be filed." He requested that FRAP 40(a)(1) be amended to extend the deadline to 45 days in *criminal* cases as well. Note that, if General Dellinger's proposal is approved, criminal defendants, as well as the government, will have 45 days in which to file rehearing petitions.

Local practice on this issue varies only slightly among the circuits. CADC generally provides 30 days for parties to file rehearing petitions and extends that deadline to 45 days in *all* cases — civil and criminal — in which the United States is a party. D.C. Cir. R. 35(a). CA11 provides 21 days for the filing of rehearing petitions, except in *civil* cases in which the United States is a party, where the deadline is 45 days. 11th Cir. R. 35-2 & 40-2. All of the other circuits either do not have a local rule on the matter or expressly adopt the time limits set forth in FRAP 35 and 40.

Attached to this memo are a draft amendment to FRAP 40(a)(1), a draft Advisory Committee Note, a copy of General Starr's Jan. 15, 1991 letter to Mr. Macklin, a copy of General Starr's Feb. 22, 1991 letter to Mr. Macklin, and a copy of General Dellinger's June 12, 1997 letter to Judge Logan.

Rule 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But ~~in a civil case,~~ if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

Advisory Committee Note

Subdivision (a)(1). A party to a civil or criminal case generally must file its petition for panel rehearing within 14 days after entry of judgment. In 1994, this deadline was extended to 45 days for civil cases in which the United States or its officer or agency is a party. The deadline was extended in recognition of the fact "that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." Advisory Committee Note to 1994 Amendment to Rule 40(a). Experience has demonstrated that the process by which the Solicitor General decides whether to request rehearing in criminal cases is no less difficult or time consuming than the process by which that decision is made in civil cases. Thus, the Rule is amended to provide that in any case — civil or criminal — in which the United States or its officer or agency is a party, the deadline for filing a petition for panel rehearing is 45 days.

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

JAN 15 1991

James E. Macklin, Jr.
Deputy Director
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. Macklin:

I am writing to you in your capacity as the Secretary for the Standing Committee on Rules of Practice and Procedure, and also as the Secretary for the Advisory Committee on Appellate Rules, of which I am a member. My purpose is to urge the Advisory Committee to recommend changes in Federal Rules of Appellate Procedure 40(a) and 41(a), in order to lengthen the time for filing a petition for rehearing from 14 to 45 days in cases involving the United States, or its agencies or officers. This change would make nation-wide the current practice in the District of Columbia and Tenth Circuits, which for a number of years have successfully allowed the longer period. I hope that this suggestion will lead to a change in these rules pursuant to the provisions of 28 U.S.C. 2072 through 2074.

Under Rule 40(a), "[a] petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule." Under regulations of the United States Department of Justice, I am responsible for authorizing all petitions for rehearing -- if they include an in banc suggestion -- to be filed in the courts of appeals in cases within the litigation authority of the Attorney General. See 28 C.F.R. 0.20(b).

Under these circumstances, compliance with Rule 40(a) without an extension of time is virtually impossible for the United States in a very large number of cases. In many instances, the responsible litigating division at the Department of Justice does not receive a copy of the court of appeals opinion until well into the 14-day period. If there is any reasonable possibility of seeking rehearing, all interested agencies and offices must then be consulted, and internal recommendations made. My staff must then study the matter and present it to me for my personal action. If a rehearing petition is authorized, there must then be time to draft and file it.

Because these steps take considerable time -- especially in the more important cases in which rehearing is most likely to be

sought and granted -- we routinely are required to seek from the courts of appeals extensions of time for the filing of a petition. Our motions usually seek an additional 30 days and are almost always granted by the courts of appeals, which seem to be aware of the process by which rehearing determinations are made here. See Fourth Circuit I.O.P. 40.2 ("The need of the Office of the Solicitor General for time to conduct a thorough review of the merits of a case will be considered legitimate grounds for [extending the rehearing time]"). In many instances, we do not actually file a rehearing petition, but, as we inform the courts, need the extra time to study the matter in order to make the necessary determination.

As you are no doubt aware, the D.C. Circuit has a high proportion of cases involving the Federal Government. Recognizing that the 14-day rehearing petition rule is impractical, that court some time ago adopted a rule that makes the filing of these extension motions unnecessary. Its Local Rule 15(a) provides that "[i]n all cases in which the United States or an agency or officer thereof is a party, the time within which any party may seek rehearing or suggest rehearing en banc shall be forty-five days after entry of judgment or other form of decision." We have found that this rule works quite well, and it is extremely rare that we need to seek any extension for rehearing in the D.C. Circuit. Thus, both we and that court are spared the burden of dealing with the extension motions that we so often must file in the other courts.

The Tenth Circuit (Local Rule 40.3) also provides 45 days in cases involving the Government, its agencies, or officers. (The Eleventh Circuit (Local Rule 40-2) provides a 20-day rehearing period for all cases.)

I recommend that the Federal Rules of Appellate Procedure be changed in order to adopt the practice of the D.C. and Tenth Circuits. Thus, Rule 40(a) would then provide a time limit of 45 days for rehearing petitions in cases involving the United States, or its agencies or officers.

This change is appropriate because, as described above, the current rule is impractical and requires us to file so many extension motions. Moreover, the United States actually seeks rehearing in a comparatively small number of cases; we are thus not seeking a major change in court practice. In addition, I note that the federal procedural rules already recognize the special decision making process involved in Federal Government cases because FRAP 4(a)(1) provides 60 days -- double the usual period -- for notices of appeal in government cases. Further, in those rare instances in which a court of appeals believes it necessary to restrict the time for filing a rehearing petition, it can do so because Rule 40(a) explicitly retains the authority to shorten rehearing time by order.

If this change to Rule 40(a) is made, Rule 41(a) should also be altered to conform. That rule currently provides that the mandate shall issue 21 days after entry of judgment, unless a timely petition for rehearing is filed, in which event the mandate will issue seven days after such a petition is denied. The current version would mean that the mandate could issue while I am still considering whether or not to seek rehearing. Thus, it would make sense to change Rule 41(a) to provide that the mandate will issue seven days after the expiration of the time in which to file a rehearing petition. If a timely rehearing petition is filed, the timing of issuance of the mandate would remain the same. (D.C. Circuit Local Rule 15(b)(2) currently so provides.)

This conforming amendment to Rule 41(a) should not be controversial since the rule also explicitly provides that the mandate can issue earlier by order. Thus, if a court believes that a mandate must issue quickly -- before the 45-day period has run -- it is free to so order.

If you or the Advisory Committee have questions about this proposal, I or my staff will be pleased to answer them. I have attached a suggested mark-up of Rules 40(a) and 41(a) to reflect the changes described above. I hope that these changes will be adopted because they will save precious resources both in the courts and the Department of Justice.

Sincerely,

/s/

Kenneth W. Starr
Solicitor General

cc: Honorable Kenneth F. Ripple
Chairman
Advisory Committee on Appellate Rules
United States Circuit Judge
310 Federal Building
204 South Main Street
South Bend, Indiana 46601

Assistant Dean Carol Ann Mooney
Reporter
Advisory Committee on Appellate Rules
University of Notre Dame Law School
Notre Dame, Indiana 46556

Suggested Changes for Federal Rules of Appellate Procedure 40 and 41

RULE 40 Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. [In all cases in which the United States, or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment.] The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court shall issue ~~21~~ [7] days after the ~~entry of judgment~~ [expiration ~~of~~ the time for filing a petition for rehearing] unless [such a petition is filed or] the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

NOTE: Suggested changes are marked by brackets and bold type, or strike-overs.

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

February 22, 1991

James E. Macklin, Jr.
Deputy Director
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. Macklin:

On January 15, 1991, I wrote to you in your capacity as the Secretary for the Standing Committee on Rules of Practice and Procedure, and also as the Secretary for the Advisory Committee on Appellate Rules in order to urge that the Advisory Committee recommend a change in Federal Rules of Appellate Procedure 40(a) and 41(a). In that letter, I explained that it would save considerable resources for both the courts of appeals and the Department of Justice if the time for seeking rehearing in cases involving the United States, or its agencies or officers were changed from 14 to 45 days. This suggestion was patterned after the current version of D.C. Circuit Local Rule 15(a), and Tenth Circuit Local Rule 40.3.

After I made my suggestion, it has come to my attention that my proposal was not as narrowly phrased as it should have been. As the Tenth Circuit rule provides, my suggestion should have been limited to civil cases. We believe that the longer rehearing period is not necessary in criminal cases, and could have adverse consequences in terms of finality in such matters. Given the speed with which criminal cases are generally to be treated, we think that the 14-day period is more appropriate.

Thus, my earlier suggestion for a 45-day rehearing period for any party in a case involving the United States, or its agencies or officers should apply in all civil cases. I have attached a revised suggested revision of the text of Rule 40. There is no need to change my earlier suggested revision to Rule 41, concerning issuance of the mandate, because that change would cover both a 14-day and a 45-day rehearing period.

Sincerely,

Kenneth W. Starr
Solicitor General

Revised Suggested Changes for Federal Rules of Appellate Procedure 40 and 41

RULE 40 Petition for Rehearing

(a) Time for Filing; Content; Answer; Action by Court if Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order or by local rule. [In all civil cases in which the United States, or an agency or officer thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment.] The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or may make such other orders as are deemed appropriate under the circumstances of the particular case.

Rule 41. Issuance of Mandate; Stay of Mandate

(a) Date of Issuance. The mandate of the court shall issue ~~21~~ [7] days after the ~~entry of judgment~~ [expiration of the time for filing a petition for rehearing] unless [such a petition is filed or] the time is shortened or enlarged by order. A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless otherwise ordered by the court. If the petition is denied, the mandate shall issue 7 days after entry of the order denying the petition unless the time is shortened or enlarged by order.

NOTE: Suggested changes are marked by brackets and bold type, or strike-overs.

JUN 12 1997

U.S. Department of Justice
Office of the Solicitor General

Washington, D.C. 20530

The Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66051-0790

Re: Proposal to Amend Federal Rule of Appellate Procedure 40

Dear Judge Logan:

In 1994, Federal Rule of Appellate Procedure 40 was amended to allow 45 days for filing a petition for rehearing in a civil case in which the United States or its officer or agency is a party. That amendment "recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." FRAP 40, Advisory Committee Note.[1]

At the Department's request, the 1994 amendment to FRAP 40 was drafted so it does not cover criminal cases. As Solicitor General Starr noted in his February 22, 1991 letter to the Committee in that regard, the Department at that time believed that the longer rehearing period was not necessary in criminal cases and that it could have adverse consequences in terms of finality in such cases.

Since that time, experience has shown that the longer rehearing time actually is necessary in criminal cases in which the United States is a party for the same reasons it is necessary in civil cases. It has been difficult, if not impossible for the United States in criminal cases to resolve within 14 days from the issuance of an opinion whether a rehearing and/or rehearing en banc petition should be filed. As Solicitor General Starr's letter of January 15, 1991 (copy attached) mentions, all interested agencies and offices must be consulted whenever there is any reasonable possibility of seeking rehearing. Once internal recommendations are received, the staff of the Solicitor General's office must have time to study the matter and present it to the Solicitor General for action, and if a petition is approved there must be time to draft and file it.

---

1. Pursuant to FRAP 35(c), a suggestion for rehearing en banc must be filed within the time prescribed for filing a petition for rehearing. Thus, the 45-day period that applies to the filing of a petition for rehearing in civil cases in which the United States is a party under FRAP 40 also governs the filing of a suggestion of rehearing en banc in such cases.

The Department has concluded, based on this recent experience, that the benefits of extending the 45-day period discussed above to criminal cases outweigh any adverse effects on the finality of judgments in such cases. Therefore, the Department would like to propose that FRAP 40 be amended to allow the parties 45 days to file a petition for rehearing in all cases where the United States is a party. To effect that change, we recommend removing from FRAP 40 the language that currently limits the 45-day period to civil cases. Making that change would cause the version of FRAP 40 that the Committee approved at its April, 1997 meeting in reviewing the proposed restylization of the Appellate Rules to read as follows:

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. ~~But in a civil case,~~ [I]f the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

We would appreciate it if this proposal could be added to the Committee's docket and placed on the agenda for the Committee's Fall, 1997 meeting.

Sincerely,

Walter Dellinger
Acting Solicitor General

cc: Professor Carol Ann Mooney
Vice President and Associate Provost
University of Notre Dame
202 Main Building
Notre Dame, Indiana 46556

Robert E. Kopp
Director, Appellate Staff
Civil Division

Attachments

Agenda Item VI B

MEMORANDUM

DATE: August 14, 1997

TO: Members of the Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-21

FRAP 31(b) provides that "[t]wenty-five copies of each brief must be filed with the clerk and 2 copies must be served on counsel for each separately represented party." Oddly, FRAP 31(b) does not require service of briefs on *un*represented parties. A member of the Advisory Committee pointed out this omission at the Committee's April 1997 meeting, and the Committee added the matter to its study agenda.

Undoubtedly, those who drafted FRAP 31(b) did not mean to imply that unrepresented parties should not be served with briefs, but rather to make clear that when one attorney represents two or more parties, each of those jointly represented parties need not be separately served. Ideally, Rule 31(b) would be redrafted to state that, while briefs must be served on unrepresented parties as well as represented parties, unrepresented parties who are in the same functional position as jointly represented parties can be served together. Unfortunately, though, I have not been able to come up with a concise way of drafting that notion into the Rule. Thus, I have used the last two sentences of the Advisory Committee Note to encourage the circuits to make use of the authority Rule 31(b) gives them to define service requirements by local rule or by order in particular cases.

Attached to this memo are a draft amendment to FRAP 31(b), a draft Advisory Committee Note, and a copy of the relevant excerpt from the minutes of the April 1997 meeting.

Rule 31. Serving and Filing Briefs

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

Advisory Committee Note

Subdivision (b). In requiring that two copies of each brief "must be served on counsel for each separately represented party," Rule 31(b) may be read to imply that copies of briefs need not be served on unrepresented parties. The Rule has been amended to clarify that briefs must be served on all parties, including those who are not represented by counsel. The courts of appeals have authority under the last sentence of the Rule to provide by local rule or by order that briefs need be served on only one of two or more unrepresented parties who are proceeding jointly. For example, a local rule might provide that when two unrepresented appellants have filed a joint notice of appeal and a joint brief, the brief of the appellee need only be served on one of them.

97-21

DRAFT

MINUTES OF THE
ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 3 & 4, 1997

Judge James K. Logan, Chair of the Advisory Committee, called the meeting to order at 8:40 in the conference room of the Thurgood Marshall Federal Judiciary Building. The following Advisory Committee members were present: Judge Will Garwood, Judge Alex Kozinski, Judge Diana Gribbon Motz, Mr. Michael Meehan, Mr. Luther Munford, and Mr. John Charles Thomas. Mr. Robert Kopp was present representing the Solicitor General. Judge Stephen Williams, whose term on the Advisory Committee had recently expired, was in attendance. Judge Alicemarie Stotler who chairs the Standing Committee, Judge Frank Easterbrook who is the liaison from the Standing Committee, Judge James Parker who chairs the Standing Committee's Subcommittee on Style, and Professor Daniel Coquillette who is the Reporter for the Standing Committee were all present, as was Mr. Joseph Spaniol who is a consultant to the Standing Committee. Mr. Patrick Fisher, who represents the clerks, was present. Ms. Judy McKenna, from the Federal Judicial Center, and Mr. John Rabiej, of the Administrative Office, were also present. Mr. Bryan Garner was present for portions of the meeting via speaker phone connection.

Judge Logan introduced Judge Motz and welcomed her to the Advisory Committee.

Approval of Minutes

The minutes of the April 1996 meeting, and of the May 1, 1996, telephonic meeting, were approved without any additions or corrections.

Restylization of the Rules

The primary item on the Committee's agenda for the meeting was consideration of the packet of restyled rules published for comment during 1996. Each member of the Committee received copies of all comments submitted during the publication period. Prior to the meeting the Reporter summarized the comments and made recommendations concerning their implementation.

The reaction to the undertaking was strongly positive. Of the eighteen commentators who offered general observations on the value of the project, all but one was very favorable. The consensus was that substantial improvements had been made in both the language of the rules and in their structure, that the rules are easier to comprehend, and, that they are, as a result, fairer.

addition, minor style changes and a clarifying punctuation change were recommended.

Rule 30

Rule 30(a)(3) was amended to conform to Rule 31(b) so that an unrepresented party proceeding in forma pauperis need only file four copies of the appendix. Minor stylistic changes also were recommended. In 30(a)(3), there was an explicit decision to retain the reference to "memoranda" rather than changing it to singular.

Rule 31

Only minor stylistic changes were recommended.

It was noted that Rule 31(b) only requires a party to serve copies of the brief on "counsel for each separately represented party." There is no requirement of service on unrepresented parties. The Committee decided to place this item on its agenda. | 97-21

Rule 32

In addition to stylistic changes, several substantive changes were recommended in order to simplify the rule. First, the length limitations based on character counts were deleted because some word processing programs treat spaces and punctuation as characters, while other programs do not. Second, the requirement that the average number of words per page not exceed 280 words was deleted. Third, in 32(a)(5), the provision permitting footnotes to be in 12 point type was deleted. Fourth, in 32(a)(6) the restrictions on the use of boldface type and of all capitals were deleted.

There was discussion about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief. Fourteen thousand is closer to the length of a professionally printed 50-page brief. One member pointed out that this rule had been quite controversial principally because lawyers suspected that we were trying to shorten the length of briefs. Over time the proposed rule has become less controversial. In order to avoid reopening the controversy, several members spoke in favor of retaining the 14,000 word limit. A majority favored staying with 14,000; therefore, the word limitation was not changed.

The commentator's suggestion that 32(d) be amended to emphasize that local variations concerning form are "one direction only" was discussed at length. Specifically the proposal was to state that a court may "waive" requirements but may not add to them. The suggestion was ultimately dismissed because the rule already makes it sufficiently clear that additional requirements may not cause a brief to be rejected.

Agenda Item VII

MEMORANDUM

DATE: August 15, 1997

TO: Members of the Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Table of Agenda Items (Revised August 1997)

At present, there are 56 proposals on the Table of Agenda Items. Two proposals (Item Nos. 97-15 and 97-21) are scheduled for Advisory Committee action at the September 1997 meeting. Judge Garwood intends to ask the Advisory Committee to remove from the Table of Agenda Items 14 proposals upon which the Advisory Committee, the Standing Committee, and the Judicial Conference have completed action. (Item Nos. 89-5, 90-1, 91-4, 91-9, 91-24, 91-25, 91-28, 92-4, 93-3, 93-4, 93-5, 93-6, 95-9, and 96-1.) Judge Garwood also intends to ask the Advisory Committee to remove from the Table of Agenda Items two other proposals: Item No. 92-11, which has been withdrawn by the Solicitor General, and Item No. 97-17, which appears to have been fully addressed in the stylized rules.

Thirty-eight other proposals remain on the list. Most of these proposals are awaiting initial discussion; a couple have been the subject of cursory discussions in the past. Judge Garwood intends to ask the Advisory Committee to decide, with respect to each of these proposals, whether it should remain on the Table of Agenda Items and, if so, whether it should receive "high," "medium," or "low" priority over the next couple years.

This memorandum is intended to assist the deliberations of the Advisory Committee. It sets forth with respect to each of the 56 proposals on the Table of Agenda Items:

- the number of the item;
- the title of the item;
- the source of the item;
- the status of the item;
- a brief description of the item; and
- a description of what documents related to the item are appended to this memorandum.

I hope that this memorandum is helpful.

No. 89-5 Amendment of FRAP 35(c).

Source: Robert D. St. Vrain (CA8 Clerk)

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 90-1 Amend FRAP 35(b) & (c) to change "suggestion" for an en banc to a "petition" for an en banc.

Source: Hon. Jon O. Newman (CA2) & Robert D. St. Vrain (CA8 Clerk)

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 91-3 Final decision by rule/expanding interlocutory appeal by rule.

Source: Federal Courts Study Committee; Judicial Improvements Act of 1990 (Pub. L. No. 101-650); & Federal Courts Administration Act of 1992 (Pub. L. No. 102-572)

Status: Consideration of interlocutory review of rulings on class certification; referral from Civil Rules Committee (6/93)

Related to No. 95-8. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to "define [by rule] when a ruling of a district court is final for the purposes of appeal under section 1291 [of title 28]." 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the Rules Enabling Act process to promulgate rules that "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for [in § 1292]." 28 U.S.C. § 1292(e). The Advisory Committee on the Civil Rules was the first to take advantage of this new authority; it proposed, and the Standing Committee has approved and forwarded to the Judicial Conference, new FRCP 23(f), which permits discretionary appeals from district court orders granting or denying class action certification. New FRAP 5 was drafted to accommodate such appeals, and any other interlocutory appeals that might be authorized in the future.

The question for the Advisory Committee is whether it wants to go further and use the authority provided in §§ 2072(c) and 1292(e) to define in FRAP the circumstances under which district court orders will be considered final and/or the circumstances under which interlocutory appeals will be permitted. For example, the Advisory Committee could attempt to codify the much litigated collateral order rule, as it has been developed in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and its many progeny.

There does not seem to be any hue and cry for the Committee to do so. The amendments to §§ 2072(c) and 1292(e) were the result of a single "informal suggestion" made to the Federal Courts Study Committee ("FCSC") and were not studied by either the FCSC or Congress. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 726 (1993). For several decades now, various proposals have been made to "fix" the final judgment rule and the rules regarding interlocutory appeals, *see. id.* at 748-70, but none has yet generated much interest.

Attempting to define finality and/or to define the circumstances under which interlocutory appeals will be permitted would be an enormously complex task. Many regard the task as "virtually impossible." *Id.* at 775. Others are not as pessimistic, although they concede that codification would be difficult. *See* Thomas D. Rowe, Jr., *Defining Finality and Appealability by Court Rule: A Comment on Martineau's "Right Problem, Wrong Solution"*, 54 U. PITT. L. REV. 795 (1993). There have been hundreds of judicial opinions (dozens by the Supreme Court alone) and thousands of pages of law review articles written on the topics of finality and interlocutory appeals. Doing this work well would require a major commitment of Committee time and resources over at least the next couple years. As is true with respect to No. 91-17, if the Committee decides to take on this issue, it might be advisable for the Committee to solicit input from the bench, bar, and academy — and particularly from such experts as Profs. Paul Carrington, Edward Cooper, Robert Martineau, Martin Redish, Thomas Rowe, and Michael Solimine — before attempting to draft a rule.

> *Included in agenda book:* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717 (1993); Thomas D. Rowe, Jr., *Defining Finality and Appealability by Court Rule: A Comment on Martineau's "Right Problem, Wrong Solution"*, 54 U. PITT. L. REV. 795 (1993).

No. 91-4 Typeface re: FRAP 32.

Source: John M. Greacen (CA4 Clerk)

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 91-9 Amendment of FRAP 32(a) to require counsel to include their telephone numbers on the covers of briefs and appendices.

Source: Local Rules Project

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 91-17 Uniform plan for publication of opinions.

Source: Local Rules Project & Federal Courts Study Committee

Status: Further study recommended (12/91)

Over the past several years, the Advisory Committee has been asked on various occasions to recommend to the Standing Committee uniform rules governing:

1. The circumstances (if any) under which a judgment may be entered without any explanation, whether published or unpublished. *See* Nos. 97-10 and 97-28.

2. The circumstances (if any) under which a circuit court may designate one of its opinions as unpublished.

3. When (if ever) unpublished opinions may be electronically disseminated (*e.g.*, via Westlaw or LEXIS).

4. The circumstances (if any) under which an unpublished opinion may be cited. And

5. The precedential effect (or lack of precedential effect) of unpublished opinions.

The circuits currently have varying and conflicting rules on these issues. The Advisory Committee needs to decide whether it wishes to recommend uniform national rules.

Needless to say, this would be a substantial undertaking. The issues are complex, and people feel strongly about them. (One of my colleagues aptly calls this the "designated hitter rule" of appellate practice.) There have been almost 30 major law review articles published on the subject of unpublished opinions since 1980, and dozens of articles published in newspapers, magazines, bar journals, and other periodicals. If the Committee decides to address this issue, it may want to solicit comments from the bench and bar before attempting to draft a rule. It will certainly want to study the various local rules on the topic. It may also be advisable to appoint a subcommittee to work on the issue and to make recommendations to the full Committee.

Included in agenda book: Relevant excerpt from Federal Courts Study Committee Report; 3/13/91 letter from K. Ripple to R. Keeton; 3/18/91 letter from K. Ripple to R. Keeton; relevant excerpt from 1/8/92 memo from Advisory Committee to Standing Committee re: Local Rules Project.

No. 91-24 Page limits for and contents of amicus briefs (FRAP 29).

Source: CA5 (in response to Local Rules Project)

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 91-25 Amendment of FRAP 35 to specify contents of suggestions for rehearing en banc.

Source: CA5 (in response to Local Rules Project)

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 91-28 Updating FRAP 27.

Source: Advisory Committee

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 92-4 Amendment of FRAP 35 to include intercircuit conflict as ground for seeking en banc.

Source: Solicitor General

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 92-11 Consideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees.

Source: Attorney General (11/24/92 letter to W. Rehnquist) & Standing Committee

Status: Solicitor General withdrew suggestion (2/6/97 letter to J. Logan)

In November 1992, Attorney General Barr wrote to Chief Justice Rehnquist to express concern over the fact that, while some of the courts of appeals exempt government attorneys from the requirement that they join their local bars (and pay the requisite admissions fee) before appearing before them, other courts of appeals do not. Attorney General Barr asserted that this situation created a hardship for the government and appeared to violate federal law. Chief Justice Rehnquist referred the matter to the Standing Committee, which referred it to the Advisory Committee. In April 1993, Acting Solicitor General Bryson asked the Advisory Committee to delay action on the matter until it could be examined by the new administration. In September 1993, Solicitor General Days reported that the Department of Justice was "just beginning [its] study of the proposal," and again asked that the Advisory Committee take no action. Finally, in February 1997, Acting Solicitor General Dellinger informed Judge Logan that "[t]he Department has now determined that it will not, at this time, pursue this matter further before the Advisory Committee." The question for the Advisory Committee is whether it now wishes to drop the matter or instead wishes to pursue the matter on its own.

Included in agenda book: Acting Solicitor General Dellinger's letter.

No. 93-3 Amend FRAP 41 re: 7-day period for issuance of mandate.

Source: Advisory Committee

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 93-4 Amend FRAP 41 re: length of time for stay of mandate.

Source: Advisory Committee

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 93-5 Amend FRAP 26.1 to delete use of term "affiliate."

Source: Joseph F. Spaniol, Jr., Esq.

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 93-6 Amend FRAP 41 re: effective date of mandate.

Source: Solicitor General

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 95-1 Amend FRCP 23 so class members do not need to intervene to appeal.

Source: Alan Morrison, Esq. [actually Brian Wolfman of Public Citizen Litigation Group] (4/10/95 letter to P. McCabe)

Status: Awaiting initial discussion

There is a sharp split in authority over whether an absent class member who has appeared before the district court and objected to a proposed class action settlement must formally intervene as a party in order to have standing to appeal a judgment approving the settlement to which he or she objected. Some circuits (*e.g.*, CA5, CA8, and CA10) hold that such intervention is necessary, while others (*e.g.*, CA3, CA7, and CA9) hold that it is not. Public Citizen Litigation Group has urged that FRCP 23(e) be amended to provide that no such intervention is necessary. If such an amendment is adopted, Public Citizen suggests that a "conforming amendment" to FRAP "may also be appropriate."

Included in agenda book: Mr. Wolfman's letter.

No. 95-2 Amend FRAP 3 & 24 re: denial of in forma pauperis status.

Source: William Lynn Johnson, Sr. (3/28/95 memo to Judicial Conference) & Kenneth Earl Bonds (3/29/95 memo to Judicial Conference)

Status: Awaiting initial discussion

Messrs. Johnson and Bonds are two prisoners incarcerated in Memphis. They appear to be experienced litigators. They have submitted identical statements that are somewhat difficult to follow, but the gravamen of their complaint appears to be as follows:

1. In the Western District of Tennessee, the district clerk does not promptly notify litigants when the district court denies them leave to proceed on appeal IFP.

2. When the district clerk does notify a litigant that his or her motion to proceed on appeal IFP has been denied, the clerk does not affirmatively advise the litigant that he or she has only 30 days within which to seek permission from the court of appeals to proceed IFP.

3. The district court often denies permission to proceed on appeal IFP in the same order in which it denies the relief sought by the plaintiff. This triggers two 30 day deadlines: The deadline under FRAP 4(a)(1) to file a notice of appeal, and the deadline under FRAP 24(a)(5) to move in the court of appeals for permission to proceed IFP. Although the former deadline can be extended by the district court for excusable neglect or good cause (FRAP 4(a)(5)) and "tolled" through the filing

of one of the motions listed in FRAP 4(a)(4)(A), the latter cannot, putting the litigant in the awkward position of having to petition for permission to proceed on appeal IFP before the litigant even knows whether he or she will be appealing.

Included in agenda book: Mr. Johnson's memo.

No. 95-3 Amend FRAP 15(f) to conform to recent amendments to FRAP 4(a)(4).

Source: Hon. Stephen F. Williams (CADC) (7/26/95 letter to J. Logan)

Status: Awaiting initial discussion

FRAP 4(a)(4)(A) provides that if a party timely files in the district court any of several specified motions — *e.g.*, a motion for a new trial under FRCP 59 — "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." FRAP 4(a)(4)(B)(i) further provides that if a party files a notice of appeal after the court announces or enters its judgment, but before the court disposes of any of the motions listed in FRAP 4(a)(4)(A), "the notice becomes effective . . . when the order disposing of the last such remaining motion is entered."

Judge Williams has proposed that FRAP 15 be amended so that petitions to review or applications to enforce agency orders are treated the same as appeals from district court orders. First, Judge Williams suggests that FRAP 15 be amended so that if a party petitions an agency to rehear, reopen, or reconsider an order, the time to file a petition to review or application to enforce that order would not begin to run until the agency disposes of the last such petition outstanding. Second, Judge Williams suggests that FRAP 15 be amended so that a petition to review or application to enforce an agency order that is filed after the order has been entered or announced, but before the agency has disposed of any petitions to rehear, reopen, or reconsider the order, would become effective when the agency disposes of the last such petition outstanding.

The first change would, in essence, codify existing case law. The consensus of the circuit courts after *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1988), is that they lack jurisdiction to review agency actions while petitions for rehearing, reopening, or reconsideration are pending before the agency. *See, e.g., United Transp. Union v. ICC*, 871 F.2d 1114, 1118 (D.C. Cir. 1989). The second change would resolve the following question: Should a premature petition for review of agency action — that is, a petition filed while a petition for rehearing, reopening, or reconsideration was still pending before the agency — be treated as *incurably* premature (as the circuits apparently hold)? Or should it be treated as a premature notice of appeal of a court order is treated under FRAP 4(a)(4)(B)(i) — that is, considered effective upon the agency's disposition of the last remaining petition for rehearing, reopening, or reconsideration?

It should be noted that Judge Williams' proposal may be more complicated than appears at first glance. First, there are significant differences between motions that, under FRAP 4(a)(4)(A), "toll" the time for filing a notice of appeal, and motions to rehear, reopen, or reconsider agency action. One prominent difference is that, while FRAP 4(a)(4)(A) motions must be brought relatively soon after the district court proceeding ends — *e.g.*, a FRCP 60 motion tolls the time to appeal only if it is "filed no later than 10 days . . . after the judgment is entered" — motions to reopen agency proceedings are sometimes made months or even years after those proceedings conclude. Second, while procedure in the federal district courts is governed by a uniform set of easily accessible rules, procedure in the federal agencies is governed by myriad and sometimes obscure statutes. That is why FRAP prescribes the time within which a notice of appeal must be filed in most civil and criminal cases, *see* FRAP 4, but says nothing with respect to a petition for review of an agency order other than that the petition must be filed "within the time prescribed by law," FRAP 15(a)(1). In short, Judge Williams' proposal involves attempting to impose a uniform rule in an area that has been made quite "non-uniform" by Congressional command.

CADC does not appear to have a local rule addressing this subject.

Included in agenda book: Judge Williams' 4/21/95 and 7/26/95 letters to Judge Logan (with attachments).

No. 95-4 Amend computation of time to conform to FRCP method.

Source: James B. Doyle, Esq. (7/21/95 letter to P. McCabe)

Status: Awaiting initial discussion

Related to No. 97-1. The Federal Rules of *Civil* Procedure compute time differently than the Federal Rules of *Appellate* Procedure. FRCP 6(a) provides that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." FRAP 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under FRCP than they are under FRAP. Mr. Doyle recently ran afoul of this trap when the district court certified an issue for interlocutory appeal under 28 U.S.C. § 1292(b). Under § 1292(b) (and old FRAP 5(a)), Mr. Doyle had 10 days to apply for permission to appeal; he calculated the 10 days using the FRCP method (weekend days and holidays not counted) instead of using the FRAP method (weekend days and holidays counted) and missed the deadline.

The only real "substantive" problem created by the differing methods of calculating time has been solved in the new rules. *See* No. 97-17. What remains is the question whether the Advisory Committee wishes to amend FRAP 26(a)(2) to remove this trap for unwary litigants.

At its April 1997 meeting, the Advisory Committee considered amending FRAP 26(a)(2) to make it consistent with FRCP 6(a); "[i]t was decided that such a substantive change should not be made at this point, but that it should be considered in the future." (Minutes p. 9.)

Included in agenda book: Mr. Doyle's letter.

No. 95-5 Amend FRAP 31 to require submission of digitally readable copy of brief, when available.

Source: Hon. Frank H. Easterbrook (CA7) (7/24/95 letter to J. Logan)

Status: Awaiting initial discussion

Judge Easterbrook has suggested amending FRAP 32 to require counsel to file one copy of each brief on digital media — that is, on a computer disk — and to serve a copy of the disk on each party separately represented. This would permit judges with impaired vision to enlarge the text and all judges to search the text for particular words or citations.

Included in agenda book: Judge Easterbrook's letter.

No. 95-6 Amend FRAP 3(d) & 15(c) to require appellant/petitioner to serve copies of notice of appeal.

Source: Advisory Committee

Status: Awaiting initial discussion

FRAP 3(d)(1) requires that notice of the filing of a notice of appeal must be given by the district clerk, rather than by the party who files it. Likewise, FRAP 15(c) requires that notice of the filing of a petition for review or application for enforcement of an agency order must be given by the circuit clerk, rather than by the filing party. A member of the Advisory Committee apparently suggested that the Rules be amended to require service by the filing party instead of by the clerk. Prof. Mooney does not have any documents relevant to this suggestion.

Included in agenda book: Nothing.

No. 95-7 Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.

Source: Advisory Committee (11/15/95 letter from L. Munford to C. Mooney)

Status: Awaiting initial discussion

Related to Nos. 96-2 and 97-2. On its face, FRAP 4(a)(5) permits a district court to extend the time to file a notice of appeal if two conditions are met:

> First, a party must move for an extension "no later than 30 days after the time prescribed by this Rule 4(a) expires." FRAP 4(a)(5)(A)(i). In general, FRAP 4(a) requires a notice of appeal in a civil case to be filed within 30 days (60 days if the United States is a party) after the judgment or order appealed from is entered. Thus, generally speaking, a party must seek an extension within 60 days of entry of the judgment or order.
>
> Second, a party must "show[] excusable neglect or good cause." FRAP 4(a)(5)(A)(ii).

With one exception, FRAP 4(a)(5) does not distinguish between the "original" 30 day period — that is, the 30 days following entry of the judgment or order — and the "second" 30 day period — that is, the 30 days following expiration of the original deadline for filing a notice of appeal. (The exception is that a motion to extend the time to file a notice of appeal may be heard *ex parte* if it is filed during the original 30 day period, but only upon notice to the other parties if it is not filed until the second 30 day period.) Thus, the Rule seems to provide that a district court may grant a motion for an extension — regardless of whether it is filed during the original or second 30 day period — if the movant shows *either* excusable neglect *or* good cause.

Almost all of the courts of appeals do not interpret the rule in this manner. Rather, the courts have distinguished between motions made during the original 30 day period and those made during the second 30 day period, holding that the "good cause" standard applies to the former, while the "excusable neglect" standard applies to the latter. *See, e.g.*, *Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir.1991) (collecting cases from CA2, CA5, CA6, CA7, CA8, CA9, and CA11); *Allied Steel v. City of Abilene*, 909 F.2d 139, 143 n.3 (5th Cir. 1990); *Parke-Chapley Constr. Co. v. Cherrington*, 865 F.2d 907, 909-10 (7th Cir. 1989); *Oregon v. Champion Int'l. Corp.*, 680 F.2d 1300, 1301 (9th Cir.1982). In making this distinction, these courts have relied heavily upon the Advisory Committee Note to the 1979 Amendment to FRAP 4(a)(5), which provides in relevant part:

> The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b), seems to be more appropriate.

CA1 does not follow the majority rule. It holds that whether a motion for an extension is examined under the "excusable neglect" or "good cause" standard depends not upon *when* the motion was filed, but upon whether the reason given for requesting the extension involves

neglect on the part of the movant. If it does, then the "excusable neglect" standard applies. If it does not — as would be the case, for example, if the original notice of appeal was not timely filed because of a mistake made by the Postal Service (*see Scarpa v. Murphy*, 782 F.2d 300, 301 (1st Cir.1986)) — then the "good cause" standard applies. *See Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 453 (1st Cir. 1995).

A member of the Advisory Committee (Luther T. Munford, Esq.) has suggested that, if the Committee agrees with the "majority" construction of FRAP 4(a)(5), then the Rule should be amended so that it better reflects the manner in which it is being applied, and so that the Rule will be applied consistently in all of the circuits. In other words, Mr. Munford suggests that, if the Committee agrees with the majority rule, FRAP 4(a)(5) should be amended to explicitly direct that the "good cause" standard be applied during the original 30 day period and that the "excusable neglect" standard be applied during the second 30 day period.

Included in agenda book: Mr. Munford's letter (with attachment).

No. 95-8 Does FRAP 4(a)(7) repeal collateral order doctrine?

Source: Advisory Committee

Status: Awaiting initial discussion

Related to No. 91-3. Prof. Mooney does not have any information regarding this suggestion, and we are not aware of the precise reason why a member of the Advisory Committee was concerned that FRAP 4(a)(7) might repeal the collateral order doctrine.

Included in agenda book: Nothing.

No. 95-9 Amend FRAP 5 & 5.1 so that time for ordering transcript runs from entry of order granting permission to appeal.

Source: Advisory Committee

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 96-1 Amend Form 4 to obtain information about living expenses.

Source: William Suter (SCt Clerk)

Status: Approved by Standing Committee for submission to Judicial Conference (6/97)

No further Advisory Committee consideration is necessary.

Included in agenda book: Nothing.

No. 96-2 Amend FRAP 4(b) so that an extension of time to file a notice of appeal can be granted in a criminal case even without excusable neglect.

Source: Hon. Richard A. Posner (CA7) (*see* 3/4/96 letter from J. Logan to R. Posner)

Status: Awaiting initial discussion

Related to Nos. 95-7 and 97-2. Under FRAP 4(b)(1)(A), a defendant in a criminal case must file a notice of appeal within 10 days after entry of judgment against him. The district court may extend the deadline, but only "[u]pon a finding of excusable neglect or good cause." FRAP 4(b)(4). In *United States v. Marbley*, 81 F.3d 51, 53 (7th Cir. 1996), Judge Posner expressed dissatisfaction with FRAP 4(b), describing it as "ripe for reexamination," and suggesting that "[i]t might be better to permit untimely appeals in any criminal case in which the district judge and the court of appeals agreed that the appeal should be heard." Judge Posner pointed out that "today the right of a criminal defendant to appeal is considered so fundamental that the usual consequence of an inexcusable failure to perfect the appeal is merely to have the appeal heard later through the Sixth Amendment route." Judge Posner communicated his displeasure with FRAP 4(b) to Judge Logan, and Judge Logan put Judge Posner's suggestion on the study agenda.

Included in agenda book: Judge Logan's letter; *United States v. Marbley.*

No. 96-3 Add presumption against oral argument for all matters other than the substance of the appeal (in FRAP 34?).

Source: Advisory Committee (5/1/96 Minutes p. 2)

Status: Awaiting initial discussion

FRAP 5(b)(3) provides that oral argument will not be heard on a petition seeking permission to bring a discretionary appeal or on an answer in opposition to such a petition "unless the court of appeals orders otherwise." The Advisory Committee discussed this provision during a May 1996 telephone conference. In the course of that discussion, a member of the Committee "suggested that there should be a provision in the rules, perhaps in Rule 34, that oral argument is heard as to the substance of an appeal, but as to all other matters the

presumption is that there will be no oral argument." The Reporter was asked to add this suggestion to the study agenda.

Note that FRAP 27(e) provides that "[a] motion will be decided without oral argument unless the court orders otherwise," and FRAP 40(a)(2) provides that "[o]ral argument is not permitted" on a petition for panel rehearing. By contrast, Rule 35 says nothing regarding oral argument of a petition for hearing or rehearing en banc.

Included in agenda book: Relevant excerpt from minutes.

No. 97-1 Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a).

Source: Advisory Committee (4/97 Minutes p. 20) & Los Angeles County Bar Association (12/31/96 letter to P. McCabe)

Status: Awaiting initial discussion

Related to No. 95-4. This proposal appears to be identical to No. 95-4. Please see the discussion of that item.

Included in agenda book: L.A. County Bar Association's letter.

No. 97-2 Amend FRAP 4(a)(5) — standard for granting extension in first 30 days different than in second 30 days.

Source: Advisory Committee (4/97 Minutes p. 20)

Status: Awaiting initial discussion

Related to Nos. 95-7 and 96-2. This proposal appears to be identical to No. 95-7. Please see the discussion of that item.

Included in agenda book: Relevant excerpt from minutes.

No. 97-3 Amend FRAP 6 to require service of statement of issues on all parties not just on appellee.

Source: Francis H. Fox, Esq. (5/10/96 letter to A. Stotler) & Advisory Committee (4/97 Minutes p. 20)

Status: Awaiting initial discussion

FRAP 6(b)(2)(B)(i) requires that, in a bankruptcy case, the appellant must file with the clerk possessing the record and "serve on the appellee" a statement of the issues that the appellant intends to pursue on appeal and a designation of the parts of the record to be sent to the appellate court. Mr. Fox asks why the appellant should not be required to serve the statement of issues and record designation on *all* parties. And Mr. Fox makes a similar point about FRAP 6(b)(2)(B)(ii), which requires an appellee who wishes to designate additional parts of the record to be sent to the appellate court to serve that designation only "on the appellant." At its April 1997 meeting, the Advisory Committee placed Mr. Fox's suggestion on its study agenda.

I do not know much about bankruptcy, but I suspect that one reason that FRAP 6(b)(2)(B) may be written as it is, and one reason that Mr. Fox's proposal may be more complicated than it appears, is that bankruptcy proceedings can involve dozens of parties. Also, as I recall, various orders entered in a single bankruptcy proceeding may be appealed at various times, and a particular order that has been appealed may affect all, some, or only a couple of the parties to the underlying proceeding. In any event, this is something for the Advisory Committee to consider.

Included in agenda book: Mr. Fox's letter.

No. 97-4 Amend FRAP 15(c)(1) re: informal rulemaking.

Source: Advisory Committee (4/97 Minutes pp. 6 & 21) & Jack N. Goodman, Esq. (8/14/96 letter to P. McCabe)

Status: Awaiting initial discussion

FRAP 15(c)(1) requires the petitioner to serve a copy of its petition for review or application for enforcement of an agency order "on each party admitted to participate in the agency proceedings." A problem arises when the agency order has resulted from an informal rulemaking process. Agencies do not "admit" parties to "participate" in such proceedings; rather, they solicit comments, both formal and informal, and sometimes receive comments from thousands of persons. In such cases, upon whom should a petition for review be served? The Advisory Committee expressed interest in pursuing this issue at its April 1997 meeting; it suggested at that time the possibility of patterning an amendment to FRAP 15(c)(1) after CADC Local Rule 15(a) (which provides that "in cases involving informal agency rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute").

Included in agenda book: Mr. Goodman's letter; relevant excerpts from minutes; D.C. Cir. R. 15.

No. 97-5 Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.

Source: Advisory Committee (4/97 Minutes p. 21)

Status: Awaiting initial discussion

Related to No. 97-13. FRAP 24(a)(2) provides that, if the district court grants a motion to proceed IFP, "the party may proceed on appeal without prepaying or giving security for fees and costs." FRAP 24(a)(2) may need to be amended in light of the Prisoner Litigation Reform Act of 1996, Pub. L. No. 104-134. The PLRA requires that "[a] prisoner seeking to . . . appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor" must file "a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the . . . notice of appeal." 28 U.S.C. § 1915(a)(2). The PLRA also requires that a prisoner who "files an appeal in forma pauperis . . . shall be required to pay the full amount of the filing fee," § 1915(b)(1), although a prisoner unable to afford to prepay the entire fee may make an initial partial payment and then make subsequent partial payments until the entire fee has been paid. (A prisoner who has "no assets and no means by which to pay the initial partial filing fee" is not required to do so. § 1915(b)(4).)

Included in agenda book: Relevant excerpt from minutes; 28 U.S.C. § 1915.

No. 97-6 Amend FRAP 27(b) to permit appellate commissioners to rule on procedural motions.

Source: Los Angeles County Bar Association (12/31/96 letter to P. McCabe)

Status: Awaiting initial discussion

FRAP 27(b) provides that a court of appeals "may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions." The Los Angeles County Bar Association suggests that the Rule might be amended so that courts could also authorize "appellate commissioners" to rule on procedural motions. Appellate commissioners are apparently routinely used in CA9. (I have not been able to find any reference to the office of appellate commissioner in any federal statute, regulation, or rule.) At its April 1997 meeting, the Advisory Committee put this suggestion on its study agenda. (Minutes p. 22.)

Included in agenda book: L.A. County Bar Association's letter.

No. 97-7 Amend FRAP 28(j) to allow brief explanation and statement of significance.

Source: Jack N. Goodman, Esq. (8/14/96 letter to P. McCabe)

Status: Awaiting initial discussion

Related to No. 97-26. FRAP 28(j) permits a party to notify the court of "pertinent and significant authorities" that come to the party's attention after the party's brief has been filed, but before decision. A party is authorized to notify the court of such authorities by letter, but parties are warned that "[t]he letter must state without argument the reasons for the supplemental citations" and that "[a]ny response . . . must be similarly limited." In fact, FRAP 28(j) is widely violated; parties often are unable to resist the temptation to slip in a few words of argument. Mr. Goodman argues that in some circumstances — such as when "the relevance of a new authority to a particular argument may not be immediately obvious" — "both counsel and the courts would be better served if the rule permitted a *brief* explanation of the new authority and its significance to be included in the letter." At its April 1997 meeting, the Advisory Committee decided to place on its study agenda the question whether "[i]t would be preferable to regulate the practice rather than to ignore it." (Minutes p. 22.)

Included in agenda book: Mr. Goodman's letter.

No. 97-8 Amend FRAP 29 to permit a state agency or officer to file without consent or leave of court.

Source: Cathy A. Catterson (CA9 Clerk) (1/9/97 letter to P. McCabe)

Status: Awaiting initial discussion

FRAP 29(a) permits "[t]he United States or its officer or agency" to file an amicus brief without the consent of the parties or leave of the court. It permits "a State" to do likewise, but says nothing about an "officer or agency" of a state. Ms. Catterson forwarded to the Advisory Committee a 11/6/96 memorandum from Cole Benson, Esq., in which he recommends that FRAP 29(a) be amended so that state officers and agencies are treated the same as federal officers and agencies. Mr. Benson reports that "[s]tate attorney[s] general[] have noted this inconsistency, and no rationale to support the distinction comes to mind." At its April 1997 meeting, the Advisory Committee put this issue on its study agenda. (Minutes p. 22.)

Included in agenda book: Ms. Catterson's letter; Mr. Benson's memorandum.

No. 97-9 Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.

Source: Paul Alan Levy, Esq. & Public Citizen Litigation Group (12/11/96 letter to P. McCabe)

Status: Awaiting initial discussion

The Public Citizen Litigation Group asks for a uniform national rule regarding the color of the cover of (1) a petition for rehearing (or rehearing en banc); (2) a response to a petition for rehearing (or rehearing en banc); and (3) supplemental briefs. Local practice among the circuits varies. At its April 1997 meeting, the Advisory Committee decided to put this issue on its study agenda. (Minutes p. 22.)

Included in agenda book: Mr. Levy's letter.

No. 97-10 Amend FRAP 36 re: disposition without opinion.

Source: Philip Allen Lacovara, Esq. (10/3/96 letter to P. McCabe)

Status: Awaiting initial discussion

Related to No. 97-28. FRAP 36(a)(2) contemplates that a court of appeals can render a judgment without an opinion. Mr. Lacovara objects to this practice — which, he says, is particularly prevalent in CA11 — and recommends that "the Committee should seriously consider proposing to amend Rule 36 to provide that the courts of appeals will issue opinions (or at least brief explanatory memoranda) in every case, unless the panel concludes that the appeal was frivolous." Mr. Lacovara argues that "the practice of routinely utilizing one-line affirmances is unfair to the litigants and creates unnecessary doubts about how the court reached and justified its ultimate decision." Mr. Lacovara also complains that a one-line affirmance "effectively — and unfairly — insulates the appellate court's judgment from a rehearing petition and from a petition for certiorari." At its April 1997 meeting, the Advisory Committee put Mr. Lacovara's suggestion on its study agenda. (Minutes p. 23.)

Included in agenda book: Mr. Lacovara's letter; 2/18/97 memo from Mark Shapiro to Judge Logan and Prof. Mooney regarding the practice of entering judgment without opinion.

No. 97-11 Amend FRAP 39 re: procedure for determining award of attorney's fees for appeal.

Source: Los Angeles County Bar Association (12/31/96 letter to P. McCabe)

Status: Awaiting initial discussion

Related to No. 97-24. The Los Angeles County Bar Association suggests that FRAP 39 be amended to set forth the procedure under which fees can be requested "as an element of costs on appeal" and to specify whether it is the court of appeals or the district court that determines the amount of those fees. As described below (under No. 97-24), this suggestion is ambiguous, as Rule 39 does not authorize an award of attorneys' fees "as an element of costs on appeal," and thus the issue should never arise.

The only explanation given by the Association is as follows: "The Ninth Circuit, for example, requires a *separate* request for attorney's fees and requires that a party intending to request attorney's fees state that intent in its first brief." The Association is referring to Circuit Rule 39-1.6, which provides that "[a] request for attorneys' fees . . . must be filed separately from any cost bill" and that "[a] party who intends to request attorneys [*sic*] fees on appeal shall include in its opening brief a short statement of the authority pursuant to which the request will be made." But these provisions are written broadly enough to apply to *all* requests for attorneys' fees, and my brief review of CA9 case law suggests that most published decisions citing Circuit Rule 39-1.6 have involved requests for awards of attorneys' fees as *sanctions* under FRAP *38* or as costs under a specific statute, but not as costs under FRAP 39. *See, e.g., Payne v. Exxon Corp.*, 1995 WL 766016, at *5-*6 (9th Cir. Dec. 29, 1995); *NLRB v. Unbelievable, Inc.*, 71 F.3d 1434, 1442 (9th Cir. 1995); *Banks v. Prudential California Realty*, 1994 WL 6572, at *6 (9th Cir. Jan. 10, 1994); *Kamakahi v. United Airlines*, 1991 WL 260006, at *2-*3 (9th Cir. Dec. 5, 1991).

In short, if the Advisory Committee wishes to address the Association's concern, it may be more appropriate to focus on FRAP 38 instead of — or in addition to — FRAP 39.

Included in agenda book: L.A. County Bar Association's letter.

No. 97-12 Amend FRAP 44 to apply to constitutional challenges to federal regulations.

Source: Hon. Cornelia G. Kennedy (CA6) (5/10/96 letter to P. McCabe)

Status: Awaiting initial discussion

FRAP 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. At its April 1997 meeting (Minutes p. 23), the Advisory Committee decided to give further consideration to Judge Kennedy's suggestion that FRAP 44 be expanded to require notice in cases in which a party questions the constitutionality of a federal *regulation*.

According to the 1967 Advisory Committee Note, FRAP 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

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

Thus, FRAP 44 likely does not extend to federal regulations because § 2403(a) is limited to "any Act of Congress." Interestingly, though, § 2403(b) contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state, and yet that duty is not implemented in FRAP 44. The Committee may want to consider whether FRAP 44 should be amended to require any party who questions "the constitutionality of any statute of [a] State" in a case "to which [that] State or any agency, officer, or employee thereof is not a party" (§ 2403(b)) to provide written notice of that challenge to the clerk.

Included in agenda book: Judge Kennedy's letter.

No. 97-13 Amendments made necessary by Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132).

Source: Advisory Committee (4/97 Minutes p. 23)

Status: Awaiting initial discussion

Related to No. 97-5. The two major problems created in FRAP by the Antiterrorism and Effective Death Penalty Act — amending the caption of current FRAP 22 to refer to "section 2255 proceedings" when the rule itself does not mention § 2255 and creating an ambiguity regarding whether a district court judge may issue a certificate of appealability — were addressed in the new rules. At its April 1997 meeting, the Advisory Committee put on its study agenda the question whether any further amendments to FRAP are necessitated by the Act. I am not aware of any additional problems in FRAP created by passage of the Act, nor were any such problems suggested by the law review articles about the Act that I have read. However, the Act "is not well drafted" and uses "extraordinarily arcane verbiage that will require considerable time and resources to sort out." Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 381 (1996). That being the case, the Committee may want to devote further study to the matter, perhaps seeking the advice of an expert on the Act (such as Prof. Larry W. Yackle of Boston University).

Included in agenda book: Relevant excerpt from minutes.

No. 97-14 Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.

Source: Standing Committee (*see* 5/10/97 memo to Standing Committee from D. Coquillette)

Status: Awaiting further discussion

For over two years, the Standing Committee has been studying the wide variety of local rules governing attorney conduct in the district courts and the courts of appeals. The primary focus of the study has been on the standards governing attorney conduct in the district courts. The courts of appeals have made relatively infrequent use of FRAP 46 (the Rule has been cited in only 37 appellate opinions since 1990), and, for the most part, FRAP 46 has been applied to conduct that is universally considered sanctionable (such as making misrepresentations to the court).

At the April 1997 meeting of the Advisory Committee, Prof. Daniel R. Coquillette, the Reporter to the Standing Committee, predicted that the Standing Committee would take some action at its June 1997 meeting regarding district court rules governing attorney conduct. He thought it likely that the Standing Committee would recommend either that "a rather basic national rule" be promulgated through the Rules Enabling Act process or that the Judicial Conference promulgate a model local rule and urge its adoption by each district.

In preparation for the June 1997 meeting, Prof. Coquillette provided the Standing Committee with several memoranda, one of which summarized his findings regarding the use of FRAP 46. That memo also discussed the diversity among circuits in whether and how they give specific content to the "conduct unbecoming" standard of FRAP 46(b)(1)(B). The Supreme Court has interpreted "conduct unbecoming" to mean "conduct contrary to professional standards," *In Re Snyder*, 472 U.S. 634, 645 (1985), but it has not specified *which* professional standards. The circuit courts have given inconsistent answers to that question. Prof. Coquillette's memo recommended that circuit practice be made more consistent either through a model local rule or through a uniform rule in FRAP. However, Prof. Coquillette cautioned that:

> Attorney conduct is primarily a problem for district courts, where there are many more reported cases. There are relatively few cases in the courts of appeals. Given that both the model local rule option and the uniform rule option are reasonable solutions for the courts of appeals, the circuits should probably follow whatever option is eventually adopted for the district courts. Either a new model local rule or a new uniform federal rule will provide better guidance for attorneys practicing before the courts of appeals than the existing Rule 46 jurisprudence. . . . Again, the option ultimately recommended for courts of appeals should depend primarily on the [Standing] Committee's judgment about what is best for the district courts.

Prof. Coquillette attached to the memo, "for example only," drafts of a revised FRAP 46 and a proposed model local rule. (Prof. Coquillette noted that he had been asked by the Standing Committee not to submit specific proposed rules until all of his studies were completed and reviewed by the Standing Committee.)

At the Standing Committee's meeting in June, Prof. Coquillette presented a status report on his work. He noted that at two special conferences held on the issue, the participants agreed

"that the present system was deficient in several respects," but "expressed a wide range of diverging views on how best to address attorney conduct issues." Prof. Coquillette suggested that the Standing Committee consider four possible options: (1) Do nothing. (2) Draft a model local rule "that could be adopted voluntarily by the district courts, and possibly by the courts of appeals." (3) Draft national rules governing those types of attorney misconduct that were of "primary concern" to the bench and bar. (4) Draft both a model local rule and national rules.

Upon further discussion, a consensus emerged among members of the Standing Committee that the Standing Committee should draft "a set of national rules providing that state law governs attorney conduct in the federal courts except in a few limited areas, such as certain investigatory functions and certain aspects of bankruptcy practice." The reference to "certain investigatory functions" relates to the concern of the Department of Justice that federal prosecutions are sometimes hindered through application of state rules of professional conduct to "such matters as contacts with represented parties, subpoenas directed to attorneys, and the presentation of exculpatory evidence to grand juries." Prof. Coquillette was directed to draft potential rules.

As Prof. Coquillette asserted in his memo to the Standing Committee, it appears that, with respect to this issue, the district courts are the dog and the appellate courts are the tail. For example, the Advisory Committee cannot decide whether an amendment to FRAP should refer to "the Federal Rules of Attorney Conduct located in Rule 83, Appendix A, Federal Rules of Civil Procedure" (as Prof. Coquillette recommends) until the Committee knows whether such rules will *exist*. It may therefore be advisable to let the Standing Committee take the lead in drafting rules for the district courts and then draft conforming rules for the courts of appeals.

Included in agenda book: Relevant excerpt from minutes of April 1997 Advisory Committee meeting; Prof. Coquillette's memo to the Standing Committee (with attachments); relevant excerpt from minutes of June 1997 Standing Committee meeting.

No. 97-15 Amend FRAP 40(a)(1) to provide that a petition for rehearing in a criminal case in which the United States is a party must be filed within 45 days.

Source: Solicitor General (6/12/97 letter to J. Logan)

Status: Awaiting initial discussion

FRAP 40(a)(1) requires that a petition for panel rehearing be filed within 14 days after entry of judgment, but extends the deadline to 45 days in *civil* cases in which the United States is a party. Through operation of FRAP 35(c), these same deadlines apply to petitions for rehearing en banc.

The Solicitor General has requested that FRAP 40(a)(1) be amended to extend the deadline to 45 days in *criminal* cases as well. He states that the longer rehearing time is necessary because "[i]t has been difficult, if not impossible" for the government to decide whether to petition for rehearing within 14 days, because of the need to consult "all interested agencies and offices," the need of the Solicitor General's staff to "study the matter and present it to the Solicitor General for action," and the need of the Solicitor General's office to prepare and file the petition.

Given that the government is a party to virtually every criminal case, amending FRAP 40(a)(1) as the Solicitor General requests would, as a practical matter, mean that the deadline for petitioning for rehearing in *every* criminal case would be 45 days. And it is important to note that, at least as Rule 40(a)(1) is currently structured, that 45 day deadline would apply to petitions filed by *defendants* as well as to petitions filed by the government.

This matter has not been discussed by the Advisory Committee.

Included in agenda book: Judge Garwood has designated this as an "action item" for the September 1997 meeting. Please see my separate memorandum regarding this proposal.

No. 97-16 Amend unspecified FRAP to address potential overlap in jurisdiction between the Federal Circuit and the regional circuits in patent cases.

Source: Hon. J. Clifford Wallace (CA9) (4/8/96 memorandum to L. R. Mecham)

Status: Awaiting initial discussion

Judge Wallace is a persistent foe of specialized courts in general, and of CAFC in particular. In 1996, he contacted the Administrative Office to describe a series of cases that (in his view) support his contention that the exclusive patent jurisdiction of CAFC should be eliminated.

In May 1990, FilmTec sued Hydranautics for patent infringement in the U.S. District Court for the Southern District of California. In August 1991, the District Court ruled that FilmTec held a valid patent on a reverse osmosis membrane and that Hydranautics had willfully infringed that patent. CAFC reversed, holding that the United States, and not FilmTec, held the patent on the membrane, and therefore that FilmTec did not have standing to sue. *FilmTec Corp. v. Hydranautics*, 982 F.2d 1546 (Fed. Cir. 1992), *cert. denied*, 510 U.S. 824 (1993).

Following its victory in CAFC, Hydranautics did two things:

1. It moved to amend its answer in FilmTec's infringement action to add a counterclaim against FilmTec for engaging in "predatory" patent litigation in an

effort to monopolize the market for reverse osmosis membranes. Hydranautics argued that FilmTec's patent infringement suit had been "a sham" and therefore outside the protection of the *Noerr-Pennington* doctrine.

2. It filed a separate antitrust lawsuit against FilmTec, based upon the same allegations.

In response to Hydranautics' motion for leave to add the counterclaim, FilmTec argued that the motion should be denied because of undue delay and because FilmTec was immune from antitrust liability under *Noerr-Pennington*. In response to the separate antitrust action, FilmTec moved to dismiss under FRCP 12(b)(6), arguing that Hydranautics' claim should have been brought as a compulsory counterclaim in the patent infringement litigation, and thus was barred by FRCP 13(a).

The District Court agreed with FilmTec. It refused to give Hydranautics permission to amend its answer in the patent infringement action to add the antitrust counterclaim (citing undue delay), and it dismissed Hydranautics' separate antitrust lawsuit (as being barred by Rule 13(a)). Hydranautics appealed the first ruling — the refusal to grant leave to amend — to CAFC, and the second ruling — the dismissal of the separate lawsuit — to CA9.

CAFC affirmed the District Court's denial of leave to amend. It disagreed with the District Court that Hydranautics had delayed unduly in bringing its motion. But, treating the material facts as "undisputed," it held as a matter of law that Hydranautics' proposed counterclaim would be "futile" because Hydranautics could not prove that FilmTec's patent infringement suit — which, after all, had been *successful* in the District Court — was a "sham" and thus unprotected by *Noerr-Pennington*. CAFC therefore affirmed the District Court's denial of leave to amend. *FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 935-39 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 62 (1996).

A month later, CA9 reversed the District Court's dismissal of Hydranautics' separate antitrust action. It first held that Hydranautics' antitrust claim did not arise out of the same transaction or occurrence as FilmTec's patent infringement claim, and therefore was not a compulsory counterclaim barred by FRCP 13(a). *Hydranautics v. FilmTec Corp.*, 70 F.3d 533, 536-37 (9th Cir. 1995). It then held that the issue of FilmTec's immunity under the *Noerr-Pennington* doctrine would have to be litigated and would "depend on [the] evidence." *Id.* at 537. CA9 expressly disagreed with CAFC that the material facts were undisputed, *id.* at 538 n.1, finding instead that FilmTec would not be immune if it had originally obtained the patent by fraud, and that a dispute of fact existed over that question, *id.* at 537-38.

In April 1996, Judge Wallace wrote a memorandum to Ralph Mecham about the *FilmTec* litigation, expressing concern that because of the "overlap[]" in jurisdiction between CA9 and CAFC, Hydranautics was able to "get[] two bites from the proverbial apple," creating inconsistent "appellate determinations of the same issue," and providing further proof of the

"intractable jurisdictional and administrative difficulties which plague the Federal Circuit and which support . . . abolition of its patent jurisdiction." Judge Wallace described how *FilmTec* had "create[d] an extra level of appellate forum shopping" in cases in which a party has a choice either to bring a permissive counterclaim in a patent infringement suit (creating appellate jurisdiction in CAFC) or to file a separate action (creating appellate jurisdiction in a regional circuit). Judge Wallace concluded by urging that CAFC's exclusive patent jurisdiction be abolished or that, "[a]t the very least," FRAP be revised "to prevent the recurrence of the [*FilmTec*] procedural pattern."

Mr. Mecham forwarded Judge Wallace's memorandum to the Judicial Conference Committee on Federal-State Jurisdiction. Judge Glenn Archer, Chief Judge of CAFC, noticed Judge Wallace's proposal on the agenda for the Committee's June 1996 meeting and wrote to Judge Stephen Anderson, Chair of the Committee. Judge Archer argued that "the two parallel appeals on the same issue in *FilmTec* should not cause concern about the Federal Circuit's jurisdiction." According to Judge Archer, the *FilmTec* case was "an aberration" and "a rarity." Neither he nor any of his colleagues on CAFC could recall "any other similar situation occurring since the Federal Circuit was created in 1982." Judge Archer expressed his "doubt that a rule revision is needed to respond to one strange case." (Judge Archer also implied strongly that, in his view, the real problem in *FilmTec* was CA9 getting it wrong on the merits.)

At its meeting, the Committee on Federal-State Jurisdiction considered and rejected Judge Wallace's proposal that the exclusive patent jurisdiction of CAFC be eliminated. John Rabiej then forwarded Judge Wallace's memo to this Advisory Committee. Mr. Rabiej stated that, although "[t]he Federal/State Jurisdiction Committee's action on Judge Wallace's suggestion officially completes action on Judge Wallace's suggestion . . . the Appellate Rules Committee can consider the matter sua sponte."

One additional consideration should be taken into account: In a series of cases, the courts of appeals have held that they already enjoy an "inherent power" to transfer a case from one circuit to another. *See generally* 16 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3944, at 845-48 (1996). This power is distinct from the authority granted in 28 U.S.C. § 1631 to transfer appeals where there is a want of jurisdiction and from the authority granted in 28 U.S.C. § 2112(a) to transfer one of two or more appeals of the same agency order. However, while Wright, Miller & Cooper state that they think it would be "desirable" for the courts "to continue to recognize a residual power to transfer when strong reasons appear," they warn that "[t]hese inherent power decisions all have acquired a certain age," that their viability following the adoption of § 1631 is in doubt, and that "[i]t would be difficult, if possible at all, to rely on inherent power simply to frustrate an exercise of the forum-shopping authority established by a statute." *Id.* at 848.

Included in agenda book: Judge Wallace's memorandum to Mr. Mecham; Judge Archer's 5/29/96 letter to Judge Anderson.

No. 97-17 Amend FRAP 4 so that the 10 day deadline for filing a FRCP 60 motion is calculated according to the FRCP method.

Source: Christopher A. Goelz (CA9 mediator) (11/12/96 letter to P. McCabe)

Status: Awaiting initial discussion

Under old FRAP 4(a)(4), if a party files a timely motion for a new trial under FRCP 59 or files a timely motion for relief under FRCP 60 "no later than 10 days after the entry of judgment," the time for appeal for all parties does not begin to run until the district court disposes of the motion.

> For a Rule 59 motion to be "timely," it must, according to FRCP 59(b), be filed "no later than 10 days after entry of the judgment." But because this 10 day deadline is in *FRCP*, it is calculated in the "FRCP way" — that is, excluding Saturdays, Sundays, and legal holidays. *See* FRCP 6(a).
>
> According to old FRAP 4(a)(4)(F), a Rule 60 motion will toll the time to appeal only if it is "filed no later than 10 days after the entry of judgment." This 10 day deadline, being in *FRAP*, is calculated in the "FRAP way" — that is, *including* Saturdays, Sundays, and legal holidays. *See* FRAP 26(a).

There is no logical reason for treating FRCP 59 motions differently than FRCP 60 motions, and the discrepancy means that, when a post-judgment motion is filed after 10 calendar days but within 10 court days, the court of appeals must undertake to distinguish a FRCP 59 motion from a FRCP 60 motion, which can be difficult. Mr. Goelz suggests that FRAP 4 be amended so that the 10 day deadline for filing FRCP 60 motions is calculated in the same manner as the 10 day deadline for filing FRCP 59 motions.

The problem described by Mr. Goelz will be solved by new FRAP 4(a)(4)(A)(vi), which specifically states that the 10 day deadline for filing FRCP 60 motions should be "computed using Federal Rule of Civil Procedure 6(a)." It appears that the Advisory Committee needs to do nothing more than request that Mr. McCabe notify Mr. Goelz of the change.

Included in agenda book: Mr. Goelz's letter.

No. 97-18 Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."

Source: Hon. Frank H. Easterbrook (CA7) (4/97 Minutes p. 2)

Status: Awaiting initial discussion

At the April 1997 meeting of the Advisory Committee, Judge Easterbrook, the liaison from the Standing Committee, suggested that FRAP 1(b) is misleading or untrue in asserting that "[t]hese rules do not extend or limit the jurisdiction of the courts of appeals." The Supreme Court has held that the time limits imposed by FRAP 3, 4, and 5 are jurisdictional. *See, e.g., Smith v. Barry*, 502 U.S. 244 (1992); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988). Moreover, the Advisory Committee Note accompanying Rule 3 specifically states (quoting *United States v. Robinson*, 361 U.S. 220, 224 (1960)) that the timely filing of a notice of appeal under Rules 3 and 4 "is 'mandatory and jurisdictional.'" Thus, certain of the Rules *do* "extend or limit the jurisdiction of the courts of appeals." Moreover, the recent enactment of 28 U.S.C. § 1292(e), which gives the Supreme Court authority to define in FRAP when interlocutory appeals will be permitted, further illustrates the jurisdictional nature of the Rules. Judge Easterbrook asked that the Advisory Committee give consideration to amending or deleting FRAP 1(b).

Included in agenda book: Relevant excerpt from minutes.

No. 97-19 Amend FRAP 4(b)(1)(B)(ii) to clarify whether, in multi-defendant criminal cases, the government must file its notice of appeal within 30 days after the *first* notice of appeal is filed by a defendant or within 30 days after the *last* notice of appeal is filed by a defendant.

Source: Advisory Committee (4/97 Minutes p. 4)

Status: Awaiting initial discussion

FRAP 4(b)(1)(B) provides that, when the government is entitled to bring an appeal in a criminal case, its notice of appeal must be filed "within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant." The use of the phrase "any defendant" creates an ambiguity in multi-defendant cases: Does the 30 days begin to run after the *first* notice of appeal is filed by a defendant or not until the *last* notice of appeal is filed by a defendant? The Committee took a stab at correcting this problem at its April 1997 meeting, but the complexity of the problem soon became apparent, and the Committee decided to postpone further discussion.

Included in agenda book: Relevant excerpt from minutes.

No. 97-20 Amend FRAP 27(a)(3)(A) by adding a sentence explicitly stating that a court need not give notice or await a response before *denying* a motion.

Source: Advisory Committee (4/97 Minutes p. 9)

Status: Awaiting initial discussion

FRAP 27(a)(3)(A) provides:

> **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within 10 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the 10-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

At its April 1997 meeting, the Advisory Committee expressed its understanding that FRAP 27(a)(3)(A) implicitly provided that a circuit court could *deny* any motion without giving notice or awaiting a response. However, the Committee questioned whether FRAP 27(a)(3)(A) should be amended to make that authority explicit. (One concern, not mentioned at the April 1997 meeting, is that by expressly providing that "[t]he court may act on a motion for a *procedural* order . . . at any time without awaiting a response," FRAP 27(b) implies that a court may *not* act on any other type of motion without awaiting a response.) The Committee decided to take up the question at a later time.

Included in agenda book: Relevant excerpt from minutes.

No. 97-21 Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."

Source: Advisory Committee (4/97 Minutes p. 12)

Status: Awaiting initial discussion

FRAP 31(b) provides that "[t]wenty-five copies of each brief must be filed with the clerk and 2 copies must be served on counsel for each separately represented party." By its terms, then, FRAP 31(b) does not require service of briefs on *un*represented parties. At its April 1997 meeting, the Advisory Committee added to its study agenda the question whether FRAP 31(b) should be amended to require service of briefs on unrepresented parties.

Included in agenda book: Judge Garwood has designated this as an "action item" for the September 1997 meeting. Please see my separate memorandum regarding this proposal.

No. 97-22 Amend FRAP 34(a)(1) to establish a uniform federal rule governing party statements as to whether oral argument should or should not be permitted.

Source: Advisory Committee (4/97 Minutes p. 13)

Status: Awaiting initial discussion

FRAP 34(a)(1) states that "[a]ny party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted." The Rule does not specify when such a statement should be filed, nor does it say anything about the manner in which such a statement should be made. At the April 1997 meeting of the Advisory Committee, several members suggested that FRAP 34(a)(1) should be amended to establish a uniform national rule governing statements by parties concerning the need for oral argument.

Included in agenda book: Relevant excerpt from minutes.

No. 97-23 Amend FRAP 34(g) to specify whether an attorney or unrepresented party may, during oral argument, use a physical exhibit (such as a chart or diagram) that has not been admitted into evidence.

Source: Advisory Committee (4/97 Minutes p. 14)

Status: Awaiting initial discussion

Disputes have sometimes arisen regarding whether an attorney (or unrepresented party) may, during oral argument before the court of appeals, make use of a chart, diagram, or other physical exhibit that was not admitted into evidence by the district court or agency. Some members of the Advisory Committee regard the use of such physical exhibits to be *implicitly* permitted by FRAP 34(g), which provides that "[t]he clerk may destroy or dispose of the exhibits" if they are not reclaimed by counsel. The argument is that, if the exhibits were evidentiary materials, then under FRAP 45(d) the clerk could not destroy them in the manner suggested by FRAP 34(g). (Note, though, that FRAP 45(d) applies only to "the court's records and papers" — that is, its *documents* — while FRAP 34(g) applies only to "physical exhibits *other than* documents." Thus, FRAP 45(d) may not imply much about whether the exhibits mentioned in FRAP 34(g) must have been admitted into evidence.)

The Advisory Committee decided to add to its study agenda the question whether this issue should be more explicitly addressed in FRAP 34(g).

Included in agenda book: Relevant excerpt from minutes.

No. 97-24 Amend FRAP 38 or 39 to clarify whether it is the court of appeals or the district court that determines the amount of attorneys' fees awarded as sanctions or costs on appeal.

Source: Advisory Committee (4/97 Minutes p. 16)

Status: Awaiting initial discussion

Related to No. 97-11. At its April 1997 meeting, the Advisory Committee put on its study agenda a suggestion from one commentator that Rule 39 be amended "to clarify whether the court of appeals or the district court determines attorney's fees that are awarded as costs on appeal." I am unclear about this proposal. Rule 39 does not permit the recovery of attorneys' fees as "costs." *See Hirschensohn v. Lawyers Title Ins. Corp.*, 1997 WL 307777, at *6 (3rd Cir. June 10, 1997) ("The leading treatises reflect the prevailing view that attorneys' fees are not recoverable as 'costs' under Rule 39."). There are specific statutes — most notably, the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 — that, in the context of particular types of actions, define attorneys' fees as an element of recoverable "costs." But the courts of appeals hold that assessing costs under one of these statutes "is separate and distinct from the question of 'costs' under Rule 39." *McDonald v. McCarthy*, 966 F.2d 112, 116 (3rd Cir. 1992). I am thus not certain whether the commentator was suggesting that Rule 39 be amended to specify the process by which attorneys' fees will be awarded as "costs" under statutes such as § 1988, or whether instead the commentator meant to address the award of attorneys' fees as a *sanction* under FRAP *38*. (Attorneys' fees may be awarded as "just damages" under FRAP 38. *See* 16A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3984, at 593 (1996).)

Included in agenda book: Relevant excerpt from minutes.

No. 97-25 Merge FRAP 35 (governing en banc determinations) and FRAP 40 (governing panel rehearings) into a single rule.

Source: Advisory Committee (4/97 Minutes p. 17)

Status: Awaiting initial discussion

At its April 1997 meeting, the Advisory Committee decided to add to its study agenda the question whether FRAP 35 (which governs en banc determinations) and FRAP 40 (which governs panel rehearings) should be merged into a single rule. The Committee has not otherwise discussed this issue.

Included in agenda book: Relevant excerpt from minutes.

No. 97-26 Amend FRAP 28(j) to (1) require that parties attach copies of supplemental authorities to their letters, (2) require all 28(j) submissions to be made at least 24 hours before oral argument, and (3) limit 28(j) submissions to materials that did not become available until after the party filed its most recent brief.

Source: Hon. Alex Kozinski (CA9) (2/18/97 letter to J. Logan)

Status: Awaiting initial discussion

Related to No. 97-7. Judge Kozinski reports that his court receives FRAP 28(j) submissions "in a high percentage of cases," that the letters often do not attach the authorities they cite, that the submissions sometimes arrive minutes before oral argument, and that the authorities cited often were available at the time the briefs were filed, but were simply overlooked by counsel. He proposes amending FRAP 28(j) to (1) "require the parties to attach copies of the cases or statutes to their letters," (2) "require that, absent extraordinary circumstances, all 28(j) submissions be made at least 24 hours before oral argument," and (3) "limit 28(j) submissions to materials that became available after the filing of the party's most recent brief." Judge Kozinski's proposal has not been discussed by the Advisory Committee.

Included in agenda book: Judge Kozinski's letter.

No. 97-27 Amend FRAP 46(a)(1) to make eligible for admission to the bar of a court of appeals those attorneys who have been admitted to practice before the Supreme Court of the Commonwealth of the Northern Mariana Islands.

Source: Michael Marks Cohen, Esq. (5/21/97 letter to P. McCabe)

Status: Awaiting initial discussion

FRAP 46(a)(1) provides that an attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral character and is admitted to practice before the United States Supreme Court, "the highest court of a state," another court of appeals, or "a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands)." Mr. Cohen reports that there are *two* courts in the Northern Mariana Islands from which appeals may be taken to CA9: the U.S. District Court for the Northern Mariana Islands and the Supreme Court of the Commonwealth of the Northern Mariana Islands. He suggests that FRAP 46(a)(1) be amended so that lawyers who are admitted to practice before the latter are eligible for admission to the bar of a court of appeals. The Advisory Committee has not discussed this proposal.

Included in agenda book: Mr. Cohen's letter.

No. 97-28 Amend FRAP 36 to require that the court of appeals issue an opinion in every case in which a judgment is entered.

Source: Bruce Committe, Esq. (12/23/96 letter to J. Logan)

Status: Awaiting initial discussion

Related to No. 97-10. Mr. Committe complains that FRAP 36(a)(2), which contemplates that a court of appeals can render a judgment without an opinion, is inconsistent with the "fundamental requirement of due process that the decision maker state the reason for his

opinion." He recommends that FRAP 36 be amended to require that a court of appeals explain its reasoning in every case in which it renders a judgment. The Advisory Committee has not discussed this proposal.

Included in agenda book: Mr. Committe's letter.

No. 97-29 Amend FRAP 28(a)(5) to require that the "statement of the issues presented for review" be phrased as "deep issues" — that is, in separate sentences that show how the legal question arises, in no more than 75 words, and with a question mark at the end.

Source: Bryan A. Garner, Esq. (in article, put on agenda by J. Logan in 1/14/97 letter to C. Mooney)

Status: Awaiting initial discussion

In an article in the 1994-95 edition of *The Scribes Journal of Legal Writing*, Mr. Garner advocated what he referred to as the "deep issue" approach to framing legal questions. Under this approach, a description of an issue presented to an appellate court for review should (in Mr. Garner's words):

- Consist of separate sentences.
- Contain no more than 75 words.
- Incorporate enough detail to convey a sense of story.
- End with a question mark.
- Appear at the very beginning of a memo, brief, or judicial opinion — not after a statement of facts.
- Be simple enough that a stranger, preferably even a nonlawyer, can read and understand it.

At the end of his article, Mr. Garner proposed two alternative amendments to FRAP 28(a)(5) (which, as written, simply requires that a brief contain "a statement of the issues presented for review"). These amendments would require attorneys to use the "deep issue" framework in describing the issues presented for review. Judge Logan asked that Mr. Garner's proposal be put on the study agenda.

Included in agenda book: Mr. Garner's article.

ITEM NO. 91-3

DEFINING FINALITY AND APPEALABILITY BY COURT RULE: RIGHT PROBLEM, WRONG SOLUTION

*Robert J. Martineau**

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I. INTRODUCTION

In 1990 and 1992 Congress enacted two acts, each implementing some of the recommendations the Federal Courts Study Committee ("FCS Committee") made in its report dated April 2, 1990.[1] In that report the FCS Committee offered a wide range of proposals concerning the federal court system, extending from the near abolition of diversity jurisdiction to calls for further studies of such topics as appellate procedure and structure and scientific and technical litigation management techniques.[2]

Neither act embraced any of the FCS Committee's major or more controversial recommendations but rather included mostly administrative measures.[3] Two FCS Committee proposals included in the acts, neither of which appear on their face to be significant, allow changes in the final judgment rule as contained in sections 1291 and 1292 of title 28 of the U.S. Code. Section 315 of the 1990 Act[4] amended 28 U.S.C. § 2072, which gives the Supreme Court rulemaking power over practice and procedure. Section 315 allows the rules to "define when a ruling of a district court is final for the purposes of appeal under section 1291" of title 28 of the Code.[5] Section 101 of the 1992 Act[6] amended 28 U.S.C. § 1292 to permit the Supreme Court by rule "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for" under section 1292.[7] This article explores the ramifications of these little noticed[8] and seemingly innocuous provi-

1. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE (1990) [hereinafter REPORT]. This Committee was appointed under Title I of the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, 102 Stat. 4642 (1988) [hereinafter Act]. The FCS Committee was established in response to concern over the congestion, delay, expense and expansion of the federal court system. REPORT, *supra*, at 3.

2. REPORT, *supra* note 1, at 38, 97, 116-17.

3. For a description of the relationship between the recommendations in the REPORT and the 1990 enactment *see* William K. Slate II, *Report of the Federal Courts Study Committee: An Update*, 21 SETON HALL L. REV. 336, 344-45 (1991).

4. Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (1990) [hereinafter 1990 Act].

5. *Id.* § 315.

6. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 (1992) [hereinafter 1992 Act].

7. *Id.* § 101.

8. The REPORT, the 1990 Act, or both have been discussed in the following articles: George D. Brown, *Nonideological Judicial Reform and Its Limits—The Report of the Federal Courts Study Committee*, 47 WASH. & LEE L. REV. 973 (1990) (criticizing the FCS Committee for not discussing ideological issues in the REPORT); Gregory E. Maggs, *Reducing the Costs of Statutory Ambiguity: Alternative Approaches and the Federal Courts Study Committee*, 29 HARV. J ON LEG. 123 (1992) (discussing the proposals of the FCS Committee for reducing ambiguity in statutes); Maurice Rosenberg, *The Federal Courts in the 21st Century*, 15 NOVA L. REV. 105 (1991) (also briefly describing the REPORT and the 1990 Act); Slate, *supra* note 3 (briefly describing the REPORT and the 1990 Act); Dana B. Taschner & Robin L. Fihion, *The Judicial Improvements Act of 1990*, 23 HAWAII BUS. J. 41 (1991) (discussing only pendent and ancillary jurisdiction, venue, removal, and statute of limitations sections of the 1990 Act); Michael Wells, *Against an Elite Federal Judiciary: Comments on the Report of the Federal Courts Study Committee*, 1991 B.Y.U. L. REV. 923 (criticizing the FCS Committee for recommending against more federal judges and in favor of cutting back federal jurisdiction). In all of the foregoing, the only mention of the finality and appealability recommendations of the FCS Committee is in the Slate article, which only states that Congress enacted the recommendation relating to defining "final" by rule. Slate, *supra* note 3, at 345. The only article that is devoted to the power to define "final" by rule is Veronica L. Bowen, *Finality-Appealability: Trying to Clarify Prejudgment Appeals*, 59 DEF COUNS. J. 50 (1992). The focus of this article, however, is the constitutionality of the grant of power to the Supreme Court under separation of powers doctrine and not whether the power will solve the finality-appealability problem.

9. FEDERAL COURTS STUDY COMM., TENTATIVE RECOMMENDATIONS FOR PUBLIC COMMENT 104 (1989) [hereinafter TENTATIVE RECOMMENDATIONS], *reprinted in* 2 FEDERAL COURTS STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS (1990) [hereinafter WORKING PAPERS] (discussing appellate caseload). The FCS Committee reported that in the past three decades the appellate caseload has multiplied nearly fifteen-fold, while the number of appellate judges has only trebled. *Id. See also* REPORT, *supra* note 1, at 5 (noting that between 1958 and 1988 the number of cases filed in the federal district courts trebled and the number filed in the courts of appeals increased more than ten-fold); ADMINISTRATIVE OFFICE OF UNITED STATES COURTS, 1990 FEDERAL COURT MANAGEMENT STATISTICS (1990) (reporting that total number of cases terminated on the merits in the federal courts of appeals in 1982 was 16,369, while the number of such cases for 1990 was 20,989).

sions. Parts III and IV examine the historical development of the final judgment rule, the present exceptions to it, and the problems created by the exceptions. Part V reviews other proposals to change the final judgment rule that have been made but not adopted. Part VI then evaluates both the FCS Committee's recommendations as well as other suggestions for changes in the final judgment rule and finds that they are inherently flawed and will increase rather than decrease litigation over what is final or appealable of right. This article concludes that the only solution to the problems created by the final judgment rule is contained in the approach advocated by the American Bar Association in its *Standards Relating to Appellate Courts* and adopted successfully in Wisconsin. Under that approach, only true final judgments are appealable of right and all other rulings are appealable only in the discretion of the appellate court.

II. CONGRESSIONAL RESPONSES TO INCREASED CASELOADS

One of the realities of the federal court system for the past three decades has been dramatically increasing caseloads.[9] Congress has re-

sponded principally by creating more federal Article III judgeships.[10] Congress has also established court administrators,[11] the Federal Judicial Center as a research arm of the federal courts,[12] a new Eleventh Circuit out of three states formerly in the Fifth Circuit,[13] and a Court of Appeals for the Federal Circuit in place of the former Court of Customs and Patent Appeals but with expanded jurisdiction.[14] In addition, Congress created new judicial positions of bankruptcy judges and magistrate judges to relieve the burden on district judges.[15] The courts themselves, particularly the courts of appeals, have made significant changes in their rules and internal operating procedures designed to

10. *See* REPORT, *supra* note 1, at 5.

11. *See* 1990 Act, *supra* note 4, at Title II. Title II of the Judicial Improvements Act, entitled the Federal Judgeship Act of 1990, provided for the appointment of 11 additional circuit court judges, raising the total number of circuit judges from 168 to 179. *Id.* The Act also provided for the appointment of 61 additional, permanent district court judges, and 13 temporary district judges. *Id.*

The administrative response to the increasing caseload has been to create "a host of diverse judicial adjuncts and surrogates." REPORT, *supra* note 1, at 5. Federal magistrates have succeeded the old United States commissioners, staff attorneys have been added, the number of law clerks has increased, and positions of circuit executives have been created to help administer the judicial system. *Id.* To demonstrate the increasing role these administrators are playing, the percentage of federal court employees who are judges has fallen from 10% in 1958 to 3% in 1990. This, despite an increase in the actual number of judges. *Id.*

12. 28 U.S.C. § 620 (1988). The Federal Judicial Center was established in 1967, and was assigned the following functions:

> (1) to conduct research and study of the operation of the courts of the United States, and to stimulate and coordinate such research and study on the part of other public and private persons and agencies;
>
> (2) to develop and present for consideration by the Judicial Conference of the United States recommendations for improvement of the administration and management of the courts of the United States;
>
> (3) to stimulate, create, develop, and conduct programs of continuing education and training for personnel of the judicial branch of the Government . . . including, but not limited to, judges . . . clerks of court, [and] probation officers . . . and
>
> (4) insofar as may be consistent with the performance of the other functions set forth in this section, to provide staff, research, and planning assistance to the Judicial Conference of the United States and its committees. . . .

Id.

13. Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980). Judges in service in Louisiana, Mississippi and Texas were assigned to the new Fifth Circuit. Judges in service in Alabama, Florida, and Georgia were assigned to the Eleventh Circuit. *Id.*

14. Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (1982) (codified as amended at 28 U.S.C. § 171 (1988)).

15. *See also* 28 U.S.C. § 636 (1988). The statute allows judges to designate magistrates to hear and determine pretrial matters; conduct hearings; and conduct proceedings in a jury or non-jury civil matter upon the consent of the parties. *Id.*

increase the number of cases per judge disposed of by both district courts and courts of appeals.[16]

Before 1988 there had been only one major study of the federal courts by a committee established by Congress.[17] In 1972 Congress created the Commission on Revision of the Federal Court Appellate System and asked it first to consider the geographic boundaries of the circuits and then generally the structure and procedures of the courts of appeals.[18] The Commission filed two reports, the first in 1973 and the second in 1975. The first dealt only with the question of subdividing the Fifth and Ninth Circuits.[19] The second report recommended the creation of a national court of appeals,[20] revision of the operating procedures of the courts of appeals,[21] adding judges,[22] limiting the size of en banc courts,[23] and a number of less significant proposals.[24]

Other than the division of the Fifth Circuit into the Fifth and Eleventh Circuits in 1981 and the addition of new judges, the work of the Commission was reflected primarily within the courts of appeals.[25] The national court of appeals concept never garnered much support, particularly among members of the Supreme Court. Since 1975 the

16. SUBCOMM ON THE ROLE OF THE FEDERAL COURTS AND THEIR RELATION TO THE STATES, FEDERAL COURTS STUDY COMM., REPORT OF THE SUBCOMMITTEE ON FEDERAL COURTS AND THEIR RELATIONSHIP TO THE STATES 46-93, *reprinted in* 1 WORKING PAPERS, *supra* note 9. The FCS Committee reported that appellate judges have reduced the time they spend learning about a case "by limiting or eliminating oral argument and by relying more on staff attorneys and law clerks to provide information." *Id.* at 66. The judges reportedly reduce "the time needed to dispose of cases by holding fewer and shorter conferences, deciding cases without opinions or [without published opinions], and [by] delegating research and opinion-writing to clerks and staff." *Id.*

17. Act of Oct. 13, 1972, Pub. L. No. 92-489, 86 Stat. 807 (1972).

18. *Id.*

19. H.R. REP. No. 1390, 96th Cong., 2d Sess. 6 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4236, 4241.

20. COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURE, RECOMMENDATIONS FOR CHANGE 5-39 (1975) [hereinafter INTERNAL PROCEDURE], *reprinted in* 67 F.R.D. 195, 208-46 (1976). The Commission maintained that a national court of appeals would "increase the capacity of the federal judicial system for definitive adjudication of issues of national law." *Id.* at 5, *reprinted in* 67 F.R.D. at 208.

21. *Id.* at 41-53, *reprinted in* 67 F.R.D. at 247-60.

22. *Id.* at 56, *reprinted in* 67 F.R.D. at 263. The Commission recognized three approaches to accommodating mounting caseloads: "diverting cases to specialized tribunals, fashioning new procedures for the rapid disposition of large numbers of cases, or creating additional judgeships." *Id.* It recommended the last alternative as the most preferable. *Id.*

23. *Id.* at 60-62, *reprinted in* 67 F.R.D. at 268-70. The Commission recommended limiting en banc courts to nine judges. *Id.*

24. *Id.*

25. *See* INTERNAL PROCEDURE, *supra* note 20, *reprinted in* 67 F.R.D. 195.

caseloads of the courts of appeals continued to grow faster than the addition of new judges, so once again the study commission process was recommended.[26] Congress, never opposed to authorizing and funding studies, responded favorably. In November, 1988, with the support of Chief Justice Rehnquist, Congress created within the Judicial Conference of the United States a fifteen member Federal Courts Study Committee. Congress directed the FCS Committee to make a "complete study of the courts of the United States and of the several States" and to report to federal and state officials by April 2, 1990.[27] The next month the Chief Justice appointed the members of the FCS Committee, including federal and state judges, members of Congress, and several attorneys.[28] U.S. Circuit Judge Joseph F. Weis, Jr. of the Third Circuit served as chairman.[29] The FCS Committee published a preliminary report containing its tentative recommendations in December, 1989.[30] During January, 1990, the FCS Committee held a series of public hearings on the tentative recommendations and, consistent with its statutory directive, filed its final report on April 2, 1990.[31] The FCS Committee subsequently published several volumes of supporting studies and data, which it designated as Part III of its report.[32]

The recommendations of the FCS Committee ranged from reallocating business between state and federal courts by eliminating diversity jurisdiction to authorizing federal district courts to call their clerks of court "district court administrators."[33] All but a few of the proposals were addressed to Congress and the federal courts. In chapter 5 of its report, the FCS Committee made recommendations to Congress designed "to reduce unnecessary litigation, to simplify unnecessarily

26. Act, *supra* note 1.

27. *Id.* Section 105 of the Act directed the FCS Committee to complete a study of the courts within 15 months of the effective date of the Title. *Id.*

28. REPORT, *supra* note 1, at 31.

29. *Id.* at 193. Judge Weis has served on the United States Court of Appeals for the Third Circuit since 1973. Prior to that, he had served as both a United States district judge and as a state common pleas judge. He chaired the Judicial Conference Standing Committee on Rules of Practice and Procedure from 1987 to 1991. Prior to that he served as chairman of the Advisory Committee on Civil Rules. *Id.*

30. TENTATIVE RECOMMENDATIONS, *supra* note 9.

31. REPORT, *supra* note 1.

32. WORKING PAPERS, *supra* note 9.

33. REPORT, *supra* note 1, at 38-48, 153. The FCS Committee recommended that Congress limit federal jurisdiction based on diversity of citizenship to complex multi-state litigation, interpleader, and suits involving aliens. *Id.* at 38. The FCS Committee recommended that the term "district court administrator" be used instead of "clerk of court" because the latter term may not convey the "multi-faceted management role" that is now expected of clerks of court. *Id.* at 153.

complex litigation, and to help federal courts process litigation as effectively as possible."[34] In recommendation 5.B.4., the FCS Committee proposed that:

> To deal with difficulties arising from definitions of an appealable order, Congress should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals.[35]

The FCS Committee offered only two relatively short paragraphs in support of the recommendation. The first described the present state of the law on appealability as unsatisfactory for four reasons: (1) the law produces much litigation that is purely procedural; (2) appeals are dismissed as premature; (3) litigants may lose their right to appeal because it is unclear when a decision is final; and (4) decisional doctrines such as "practical finality" and the "collateral order rule" blur the edges of the finality principle, requiring repeated attention by the Supreme Court, and in some circumstances restricting too sharply interlocutory appeals.[36]

The second paragraph described the proposals as allowing the rulemaking process under the Rules Enabling Act "to refine and supplement definitions of appellate jurisdiction."[37] It specifically called attention to the limitation contained in 28 U.S.C. § 2072 that rules adopted by the Supreme Court under the Act may not "abridge, enlarge or modify any substantive right."[38] The FCS Committee noted that its proposal had two elements. The first element would allow changes "by broadening, narrowing, or systematizing" decisions applying the finality rule under section 1291.[39] The second, and more important, element would permit the Court to "add to—but not subtract from—the list of categories of interlocutory appeal" allowed under section 1292.[40] Finally, the FCS Committee suggested that a favorable experience under these two grants of authority "might later support a broader delegation of power to treat the entire area of appealability

34. *Id.* at 89.

35. *Id.* at 95.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 96.

40. *Id.*

. . . by rule rather than statute."[41] The comments were followed by a statement, also found after most of its other recommendations, that additional material would be found in Part III of the report entitled "Detailed Analyses of Selected Issues."[42] Notwithstanding this statement, there was nothing on the subject in the studies and analyses published as Part III of the FCS Committee's report.[43]

The origin of the FCS Committee's recommendations to authorize the Supreme Court by rule to define "final" and to make additional interlocutory orders immediately appealable of right is not easy to locate. Interestingly, these recommendations were not included in the FCS Committee's tentative recommendations made in December, 1989.[44] The FCS Committee, having completed its work, disbanded as did its staff. In the absence of alternatives, this author wrote the chairman of the FCS Committee, Judge Weis, seeking information on the source of the recommendations.[45] Judge Weis replied that the proposal was made at a general meeting of the FCS Committee by Professor Thomas D. Rowe, Jr., who had served as one of the FCS Committee's five reporters.[46] Judge Weis indicated that he had "been concerned for some time about the lack of specificity on finality for jurisdictional purposes."[47] He did not think that turning this technical matter over to Congress was advisable, and for that reason thought Professor Rowe's suggestion was a good way to solve the problem.[48]

Inquiry of Professor Rowe produced the comment that there was nothing submitted to the FCS Committee that was not in its final report.[49] He did, however, provide a copy of a letter he had written earlier in 1991 to U.S. Circuit Judge Kenneth F. Ripple, chairman of the Advisory Committee on Appellate Rules of the U.S. Judicial Conference.[50] This committee has the responsibility for proposing changes in the Federal Rules of Appellate Procedure and would be the initiating body for any rule adopted by the Supreme Court that would define "final" as contemplated by the 1990 amendment to 28 U.S.C. § 2072. Judge Ripple had inquired of Professor Rowe what lay behind the FCS Committee's recommendation. In his letter to Judge Ripple, Professor Rowe noted that although the FCS Committee's preliminary report did not include anything on the subject, a witness at one of the FCS Committee's January, 1990, hearings suggested that the FCS Committee consider making a recommendation on the final judgment rule problem.[51] Professor Rowe was asked to study whether there was anything the FCS Committee could recommend. He reviewed the literature, and recalled finding a suggestion for delegating to the rulemaking process authority over the definition of appealability in a 1984 symposium in a law review.[52] He brought the proposal to the final meeting of the FCS Committee. After some discussion of how far the proposal should go, the FCS Committee adopted what became Recommendation 5.B.4. in its final report.[53]

Professor Rowe gave several justifications for his proposal to the FCS Committee. One was to permit the FCS Committee to propose something "serious and possibly constructive about appealability without having to wrestle with technicalities."[54] But more importantly, he believed that questions of appealability should be addressed by a body other than Congress, which has too many other things to do, or the courts, which are bound by the words of the statute.[55] He concluded the best place would be a group between Congress and the courts, and that meant the body responsible for ruledrafting. Professor Rowe believed that the ruledrafters with their quasi-legislative authority over

41. *Id.*
42. *Id.*
43. *See* WORKING PAPERS, *supra* note 9.
44. *See* TENTATIVE RECOMMENDATIONS, *supra* note 9.
45. Letter from Professor Robert J. Martineau, University of Cincinnati College of Law, to Hon. Joseph Weis, Jr., Judge, United States Court of Appeals for the Third Circuit (May 9, 1991) (on file with author).
46. Letter from Hon. Joseph Weis, Jr., Judge, United States Court of Appeals for the Third Circuit, to Professor Robert J. Martineau, University of Cincinnati College of Law (May 13, 1991) (on file with author).
47. *Id.*
48. *Id.*
49. Letter from Professor Thomas D. Rowe, Duke University School of Law, to Professor Robert J. Martineau, University of Cincinnati College of Law (Sept. 30, 1991) (on file with author).
50. Letter from Professor Thomas D. Rowe, Duke University School of Law, to Hon. Kenneth F. Ripple, Judge, United States Court of Appeals for the Seventh Circuit (May 24, 1991) (on file with author).
51. *Id.*
52. *Id.* It should be noted that the proposals of Professors Paul Carrington and Maurice Rosenberg made in articles in the 1984 issue of *Law and Contemporary Problems* discussed *infra* in part V.B.1. concern only the authority of the Supreme Court to designate by rule interlocutory orders immediately appealable of right. Neither suggested giving the Supreme Court authority to define "final" by rule.
53. REPORT, *supra* note 1, at 95.
54. Letter from Professor Thomas D. Rowe, Duke University School of Law, to Hon. Kenneth F. Ripple, Judge, United States Court of Appeals for the Seventh Circuit 2 (May 24, 1991) (on file with author).
55. *Id.*

rules, should have the authority to define finality, which the Court has already said is a fairly elastic concept, as well as to enlarge the classes of interlocutory orders appealable before final judgment.[56]

The finality and appealability recommendations of the FCS Committee were treated as noncontroversial by Congress. This recommendation was included in the 1990 and 1992 Acts without public debate or discussion.

The legislative history of section 315 of the 1990 Act and section 101 of the 1992 Act are set out in substantial detail for several reasons. One is to record legislative history of the two enactments. A second and even more important reason, however, is to provide students of the legislative process with a case study of that process in action. The almost casual manner in which an informal suggestion concerning the final judgment rule produced two separate congressional enactments authorizing changes in a cornerstone of federal appellate practice since 1789 defies rational explanation. Further, the legislative history should sharply limit any presumption that the enactments are the products of careful study by both a prestigious committee and two sessions of Congress and thus should be implemented by those involved in the Federal rulemaking process.

III. Historical Development of the Federal Final Judgment Rule

The final judgment rule[57] and the problems it causes were introduced to the federal legal system by three sections of the statute that established the federal court system, the Judiciary Act of 1789.[58] Each

56. *Id.*

57. "Final judgment" as used in this article means a decision, judgment, decree, order or other action that meets the definition of a "final decision" expressed by the Supreme Court in Catlin v. United States, 324 U.S. 229, 233 (1945) ("one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment"). "Interlocutory order" means any action or nonaction that is not a final judgment.

58. Judiciary Act of 1789, 1 Stat. 73 (1789). Three sections of the Act provide for appeals:

> [Section 21: F]rom final decrees in a district court in causes of admiralty and maritime . jurisdiction, where the matter in dispute exceeds the sum of value of three hundred dollars, exclusive of costs, an appeal shall be allowed to the next circuit court . . . .
>
> [Section 22: F]inal decrees and judgments in civil actions in a district court, where the matter in dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court . . . upon a writ of error . . . [a]nd upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court . . . where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court. . . .

of the three sections granted jurisdiction to appellate courts over appeals from only a final decree in admiralty and a final judgment or decree at either law or equity,[59] making no exception for any type of interlocutory order.

The legislative history of the 1789 Act is silent as to both the choice of language limiting the right to appeal to final judgments and the decision to apply that requirement to equitable as well as legal proceedings.[60] The final judgment requirement, however, was by 1789 a basic feature of Anglo-American jurisprudence. The common law courts of England required a final disposition of an entire controversy before a writ of error, the principal means of appellate review, would lie.[61] On the equity side of the English court system, however, the courts of chancery allowed free resort to interlocutory review.[62] That the Americans borrowed the final judgment rule from the English writ of error procedure is a virtual certainty.[63] The uncertainty lies in determining why drafters of the Judiciary Act adopted it and decided to apply it to equity as well as law. Some commentators have declared that the drafters' motive "must be left largely to conjecture."[64]

> [Section 25: A] final judgment or decree in any suit, in the highest court of law or equity of a State in which a decision in the suit could be had . . . may be re-examined and reversed or affirmed in the Supreme Court of the United States upon a writ of error . . . .

Id. Interestingly, section 21 refers to allowing an appeal from a final decree, while sections 22 and 25 are in terms of granting jurisdiction to the higher court to review a final decree or judgment of a lower court. Both types of provisions are treated as granting both a right to appeal and a review on the merits of the final decree of judgment. This point is, however, never discussed by the courts or commentators. It is for this reason that the author believes the view expressed by Professor Rowe in his comment on this article is not valid. In this article, the grant of jurisdiction will be referred to as the right to appeal. In only one state, New Hampshire, has the state supreme court held that a grant of jurisdiction over final judgments means only that an aggrieved party has the right to ask the appellate court to review the final judgment but not a right to review of the merits. State v. Cooper, 498 A.2d 1209, 1213 (N.H. 1985).

59. Judiciary Act of 1789, 1 Stat. 73 (1789).

60. Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539, 548, 549 n.48 (1932). *See also* Charles Warren, *New Light on the History of the Federal Judiciary Act of 1789*, 37 HARV. L. REV. 49, 105 (1923) (noting that the sections of the Judiciary Act of 1789 providing for appeals of final judgments or decrees were adopted by the Senate substantially as originally drafted).

61. *See, e.g.*, 1 JULIUS GOEBEL, JR., HISTORY OF THE SUPREME COURT OF THE UNITED STATES 19-22 (1971); Crick, *supra* note 60, at 541-44.

62. Crick, *supra* note 60, at 545-48.

63. *See* McLish v. Roff, 141 U.S. 661, 665 (1891) ("It is true that the Judiciary Act of 1789 limited the appellate jurisdiction of this court to final judgments and decrees, in the cases specified. This, however, in respect to writs of error was only declaratory of a well settled and ancient rule of English practice."); Crick, *supra* note 60, at 548-51.

64. 15 CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE

The earliest references to the statutory requirement by the Supreme Court were mere acknowledgements of the rule, the Court stating simply that the words of the Act allowed a writ of error only in the case of a final judgment.[65] It was some forty years before the Supreme Court extolled the wisdom of the final judgment rule, and elaborated upon its deemed purpose of preventing delays.[66] In 1830 Justice Story praised the Act for discouraging excessive appeals, saying that it was important to the administration of justice to allow appeals only from final judgments because if cases were fragmented by successive appeals "[i]t would occasion very great delays and oppressive expenses."[67] Likewise, Chief Justice Marshall also surmised that Congress intended the final judgment rule to be a mechanism to avoid "all the delays and expense incident to a repeated revision" of fragmented appeals of a single issue.[68] Chief Justice Taney made similar comments in *Forgay v. Conrad*.[69] One commentator noted, perhaps ironically, that the timing of these proclamations coincided with a time when appellate courts were becoming greatly overworked and congested.[70]

In 1891, the Evarts Act established the federal courts of appeals.[71] In granting jurisdiction to those courts, Congress empowered them to review "by appeal or by writ of error final decision[s] in the district court."[72] The language restricting appellate review was thereby changed from a limitation of appeals to those sought from "judgments or decrees" as provided in the original Judiciary Act, to appeals from

426 (1st ed. 1976). The authors suggest that one possible explanation is that framers of the Judiciary Act wanted to avoid the "interminable" delays that were possible in English chancery proceedings. *Id.* at 426 n.4. *See also* Crick, *supra* note 60, at 548. The author notes that "[t]he almost complete lack of historical research in American legal history makes it difficult, if not impossible, to trace with any accuracy the breaking up of the old English system of dual appeals into the conglomerate mass which constitutes our modern appellate procedure." *Id.*

65. *See, e.g.*, Rutherford v. Fisher, 4 U.S. (4 Dall.) 22 (1800) (holding that order denying statute of limitations defense is interlocutory and not appealable).

66. *See* Canter v. American Ins. Co., 26-27 U.S. (3 Pet.) 427 (1830) (holding that circuit court decision which left open the question of damages was interlocutory and therefore not appealable).

67. *Id.* at 430.

68. United States v. Bailey, 32-33 U.S. (9 Pet.) 354, 355-56 (1835) (finding multiple appeals would cause expense and delay, and noting that "Congress did not intend to expose suitors to this inconvenience").

69. 44-46 U.S. (6 How.) 653, 654-56 (1847).

70. Crick, *supra* note 60, at 551.

71. Evarts Act, ch. 517, 26 Stat. 826 (1891). Section 2 of the Act provides for the creation of a circuit court of appeals for each federal circuit, each of which were to have the appellate jurisdiction established by this Act. *Id.*

72. *Id.* § 6.

"decision[s]."[73] That change was not perceived as a substantive one.[74] The Supreme Court declared that both phrases had the same meaning in regulating appellate jurisdiction.[75] Eventually the final judgment rule was embodied in 28 U.S.C. § 1291, which provides that "the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts."[76] Surprisingly, the Court for a long time did not develop a general definition of final judgment. It was not until the Court's opinion in *Catlin v. United States*,[77] a 1945 decision, that the Court defined a final judgment as one that ends the litigation on the merits, leaving only execution to be completed.

IV. Exceptions to the Final Judgment Rule

The comprehensiveness of the definition of the final judgment rule as expressed in *Catlin* is such that it can best be understood by examining the exceptions that have been made by statute, court rule, and judicial decision. This part describes each exception, the principal judicial decisions construing it, and comments on the significance of each exception. As part V will demonstrate, the unanimous view of commentators is that the rule has either too many or too few exceptions, but in any event requires revision.

A. Statutory

1. 28 U.S.C. § 1292

Section 1292 makes several exceptions to the final judgment rule as embodied in section 1291.

(a) Section 1292(a)(1)

Under section 1292(a)(1),[78] a court of appeals has jurisdiction

73. *Id.*

74. *See Ex parte* Tiffany, 252 U.S. 32 (1919) (holding that district court decision denying application of receiver to have assets turned over to him was final, appealable decision).

75. *Id.* ("The words: 'final decisions in the district courts' mean the same thing as 'final judgments and decrees' as used in former acts regulating appellate jurisdiction.").

76. 28 U.S.C. § 1291 (1988).

77. 324 U.S. 229, 233 (1945).

78. 28 U.S.C. § 1292(a)(1) (1988) provides:

> (a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continu-

over any interlocutory order of a district court relating to injunctive relief.[79] This means that there is a concomitant right to appeal any order of this type. The section is expansive in describing the orders appealable as those "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions."[80] The courts have interpreted this definition to include any type of relief that may be considered to be injunctive in nature or effect, without regard to whether it is formally labelled an injunction.[81] Until recently, when a district court decided to hear a claim equitable in nature before hearing a claim legal in nature, the ruling was considered an injunction and thus immediately appealable.[82] In 1988, the Supreme Court finally overruled the old but illogical precedent that established this rule.[83] Temporary restraining orders, however, are not covered by section 1292.[84]

By its terms and as construed, section 1292(a)(1) creates a broad exception to the final judgment rule. In an effort to limit the size of the exception, the Supreme Court has imposed two limitations on the section found neither in its language nor its legislative history. In *Switzerland Cheese Assoc. v. E. Horne's Market, Inc.*,[85] the Court considered an appeal of the denial of the plaintiff's motion for summary judgment in an action seeking a permanent injunction. The plaintiff argued that the denial of the motion was the denial of a preliminary injunction and

ing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

79. *Id.*

80. *Id.*

81. *See, e.g.*, Carson v. American Brands, Inc., 450 U.S. 79 (1981). In *Carson*, the Supreme Court held that an interlocutory order of the district court denying a joint motion of the parties to enter a consent decree was an appealable order under § 1292(a)(1). *Id.* at 90. The consent decree would have required the respondents in the Title VII action to give hiring and seniority preferences to black employees and to fill a certain number of supervisory roles with black workers. *Id.* at 81. The Court noted that the decree would have enjoined respondents from discriminating. *Id.* at 84. Therefore, while the Court order did not in terms refuse an injunction, "it nonetheless had the practical effect of doing so." *Id.* at 83.

82. *See* cases summarized in ROBERT J. MARTINEAU, MODERN APPELLATE PRACTICE FEDERAL AND STATE CIVIL APPEALS § 4.4 (1983) (Patricia A. Davidson Supp. 1992) [hereinafter MARTINEAU, MODERN APPELLATE PRACTICE]. More problems of appealability are created when a subsequent interlocutory order arguably modifies a previously issued injunction. *See* Robert A. Morse, Annotation, *When Does Interlocutory Order of Federal District Court, Concerning Previously Issued Injunction, Modify or Continue Such Injunction So As To Be Appealable Under 28 USCS § 1292(a)(1)*, 106 A.L.R. FED. 500 (1992).

83. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

84. *See* 28 U.S.C. § 1292 (1988).

85. 385 U.S. 23 (1966).

thus appealable under section 1292(a)(1).[86] The Court disagreed, holding that the order denying the summary judgment motion, even though an interlocutory order, was not an interlocutory order within the meaning of the statute.[87] The Court viewed the order as deciding only that there were unresolved issues of fact and thus the case should go to trial.[88] It stated: "Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view 'interlocutory' within the meaning of § 1292(a)(1). We see no other way to protect the congressional policy against piecemeal appeals."[89]

In *Carson v. American Brands, Inc.*,[90] the Court again refused to follow the plain language of the section and imposed its own restrictions on what type of injunctive order is immediately appealable of right. In an opinion by Justice Brennan, the Court stated that for an interlocutory order to be appealable under section 1292(a)(1), it is not enough that the order qualify as one concerning an injunction.[91] Characterizing the section as creating only a limited exception to the final judgment rule because of the general congressional policy against piecemeal review, the Court held that for an interlocutory order to be appealable under section 1292(a)(1), the appellant must show that the order "might have a 'serious, perhaps irreparable, consequence,' and that the order can be 'effectually challenged' only by immediate appeal."[92] Notwithstanding this limitation, a court of appeals has no discretion whether to hear the appeal once the *Carson* test has been satisfied. A court of appeals could, of course, use the two part test as a device to exercise discretion in whether to hear the appeal, but there is nothing in the *Carson* opinion to suggest that the Court intended to convert the right to appeal under section 1292(a)(1) to a discretionary appeal.

The combined effect of *Switzerland Cheese* and *Carson* has been to limit sharply the potential for section 1292(a)(1) to be a major exception to the final judgment rule, even though the Court had to ignore the plain language of the statute to achieve this result. Under *Switzerland Cheese*, any interlocutory order that grants or denies some type of

86. *Id.* at 24.

87. *Id.* at 25.

88. *Id.*

89. *Id.*

90. 450 U.S. 79 (1981).

91. *Id.* at 84. The Court noted that because § 1292(a)(1) "was intended to carve out only a limited exception to the final-judgment rule," the Court had construed the statute narrowly. *Id.*

92. *Id.*

relief that might be described as injunctive, such as one ordering discovery or maintaining the status quo pending resolution of the basic dispute, is not immediately appealable even though coming within the language of section 1292(a)(1). Similarly, the necessity under *Carson* of proving harm that cannot be remedied on a final appeal, such as by the payment of money, imposes an almost impossible burden on a litigant seeking to overturn a grant or denial of injunctive type relief pending a final judgment.

(b) Section 1292(a)(2) and (3)

Subsections (a)(2) and (3)[93] of section 1292 include two other exceptions to the final judgment rule. The former allows an appeal of right from an interlocutory order appointing a receiver, as well as from a refusal of an order relating to the winding up of receiverships, including refusal to order the sale of property.[94] This last clause of subsection (a)(2) covers the opposite of the type of order held appealable in *Forgay v. Conrad*,[95] which ordered the transfer of property.[96] Subsection (a)(3) of the statute allows an immediate appeal from interlocutory orders determining the rights and liabilities of parties to admiralty cases.[97] Neither subsection is a major crack in the final judgment rule, either in terms of its language or as construed. Subsection (a)(2) does not have the common sense logic of *Forgay*, which concerned an order to transfer property that did have an irreparable effect.[98] An interlocutory order refusing to take an action that would have irreparable effect such as refusing to sell property, however, should not be appealable under any circumstances.

(c) Section 1292(b)

Section 1292(b)[99] is different from both section 1292(a) and all

93. 28 U.S.C. § 1292 (1988). Section 1292(a)(2) provides: "(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property." *Id.* § 1292(a)(2). Section 1292(a)(3) provides: "(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." *Id.* § 1292(a)(3).

94. 28 U.S.C. § 1292(a)(2) (1988).

95. 47 U.S. (6 How.) 201 (1848).

96. *See infra* notes 130-36 and accompanying text.

97. 28 U.S.C. § 1292(a)(3).

98. 47 U.S. (6 How.) at 204.

99. 28 U.S.C. § 1292(b) (1988). Subsection (b) provides:

other exceptions to the final judgment rule in that while it allows an appeal of an interlocutory order, it does not create an appeal of right.[100] Under subsection (b), if a district judge believes that an interlocutory order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal of the order may materially advance . . . termination of the litigation," the judge may so state in the order.[101] In that event, an aggrieved party may take an appeal within ten days of the order.[102] A court of appeals, however, has absolute discretion to refuse to hear the appeal.[103] Thus for an appeal under section 1292(b) to be heard, both the district court and the court of appeals must agree to the early appeal. If the district court refuses to include the statutorily required statement in the order or if the court of appeals refuses to hear the appeal even after the district court certifies the order, the appeal is not heard.[104] For these reasons, section 1292(b) by its terms is the most limited exception to the final judgment rule, statutory or otherwise.

Not only does the language of section 1292(b) indicate that it is a narrow exception to the final judgment rule, but the courts of appeals have not read the statute broadly.[105] The major restrictive interpretation limits accepting appeals under section 1292(b) to "big, excep-

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

Id.

100. *See id.*

101. *Id.*

102. *Id.*

103. Coopers & Lybrand v. Livesay, 437 U.S. 463, 474 (1978).

104. *See, e.g.*, Hewitt v. Joyce Beverages, Inc., 721 F.2d 625 (7th Cir. 1983). *Hewitt* is representative of how strictly courts construe the requirements of § 1292(b). The court criticized a district court order which stated that the court "certifies the instant ruling for interlocutory appeal pursuant to section 1292(b)." *Id.* at 626. The court "strongly" recommended that in the future district courts track the specific language of § 1292(b) when certifying interlocutory appeals under that statute. *Id.* at 627.

105. *See* Michael E. Solimine, *Revitalizing Interlocutory Appeals in the Federal Courts*, 58 GEO. WASH. L. REV. 1165 (1990). Solimine outlines and criticizes the narrow construction given § 1292(b). *Id.* at 1171-74, 1193-96.

tional" cases.[106] Although not all circuits agree on this restriction and some authors criticize it, the restriction does reflect a desire to limit an already narrow exception to the final judgment rule.[107] Even more significant is the fact that in a substantial percentage of cases the courts of appeals exercise their discretion to refuse to hear appeals certified by a district court under section 1292(b).[108] The Supreme Court has expressly stated that a court of appeals may refuse to hear a section 1292(b) appeal "for any reason, including docket congestion."[109] A recent article by Professor Michael Solimine has called for an expanded use of section 1292(b), primarily to permit clarification of legal issues that do not ordinarily reach the courts of appeals, especially in mass tort or other complex litigation, but it does not appear that the courts of appeals have accepted this view.[110]

2. *9 U.S.C. § 16*

The most recent statutory exception to the final judgment rule was made in 1988 by the addition of a new section 16 to the Federal Arbitration Act.[111] In essence, section 16 allows an immediate appeal from

106. *See, e.g.*, Milbert v. Bison Lab., Inc., 260 F.2d 431, 433 (3d Cir. 1958). In *Milbert*, the court determined that Congress intended § 1292(b) to be used sparingly. *Id.* The court stated:

> It is to be used only in exceptional cases where an intermediate appeal may avoid protracted and expensive litigation and is not intended to open the floodgates to a vast number of appeals from interlocutory orders in ordinary litigation. Both the district judge and the court of appeals are to exercise independent judgment in each case and are not to act routinely.

Id. Professor Solimine comments that the cases do not give a definition of "big" but usually merely state that the particular case before them does not qualify as big. Solimine, *supra* note 105, at 1173 n.51.

107. See Solimine, *supra* note 105, at 1171-74, 1193-96, for a discussion of the conflicting interpretations of the statute, and criticism of the narrow reading.

108. *Id.* at 1199. The author of that article studied the petitions filed in the Sixth Circuit Court of Appeals in 1987 and 1988 that requested the court to accept a § 1292(b) appeal. The study showed that the circuit only accepted 27% of those appeals. *Id.*

109. Coopers & Lybrand v. Livesay, 437 U.S. 463, 475 (1978).

110. Solimine, *supra* note 105.

111. 9 U.S.C. § 16 (Supp. III 1991). The Federal Arbitration Act provides:

> § 16. Appeals
> (a) An appeal may be taken from—
> (1) an order—
> (A) refusing a stay of any action under section 3 of this title,
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
> (C) denying an application under section 206 of this title to compel arbitration,
> (D) confirming or denying confirmation of an award or partial award,

an interlocutory order that does not favor arbitration, but does not allow an immediate appeal if the order favors arbitration. Examples of the former are an order that refuses a stay pending arbitration or that refuses to order arbitration. Examples of the latter are an order granting a stay pending arbitration, compelling an arbitration, or refusing to enjoin an arbitration. This section is obviously result oriented in terms of favoring arbitration. Section 16 is neutral insofar as the final judgment rule is concerned, however, because it allows appeals of some otherwise unappealable interlocutory orders but disallows appeals of orders otherwise appealable under the "effectively out of federal court" rule of *Moses H. Cone Memorial Hospital v. Mercury Construction*,[112] discussed below in part IV.C.3., such as the granting of a stay pending arbitration that may preclude resolution of the dispute by a federal court.

Section 16(a)(3) has caused some problems. It permits an appeal from "a final decision with respect to arbitration that is subject to" the Federal Arbitration Act.[113] The courts of appeals for the Fourth and Sixth Circuits have held that because section 16 does not define "final" as used in the section, the courts had to rely on the traditional definition of final decision, that is, one that ends litigation on the merits and leaves nothing for the court other than to execute the judgment.[114] Both courts concluded that in a proceeding in which the sole issue is whether a dispute is subject to arbitration, an order compelling arbitration is appealable as a final decision under section 16(a)(3).[115] These courts reasoned that they could not ignore the clear language of section

> or
> (E) modifying, correcting, or vacating an award;
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
> (3) a final decision with respect to an arbitration that is subject to this title.
> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
> (1) granting a stay of any action under section 3 of this title;
> (2) directing arbitration to proceed under section 4 of this title;
> (3) compelling arbitration under section 206 of this title; or
> (4) refusing to enjoin an arbitration that is subject to this title.

Id.

112. 460 U.S. 1 (1983).

113. 9 U.S.C. § 16(a)(3) (Supp. III 1991).

114. Drexel Burnham Lambert, Inc. v. Mancino, No. 91-3213, 1991 U.S. App. LEXIS 30181, at *3 (6th Cir. Dec. 19, 1991); Stedor Enter., Ltd. v. Armtex, Inc., 947 F.2d 727, 731 (4th Cir. 1991).

115. *Drexel*, 1991 U.S. App. LEXIS 30181, at *3; *Stedor*, 947 F.2d at 731-32.

16 to accommodate the general purpose favoring arbitration that underlies the section.[116]

B. Court Rule

Federal Rule of Civil Procedure 54(b) is the only exception to the final judgment rule found in federal procedural rules heretofore adopted by the Supreme Court.[117] Under this rule, in a case in which there are multiple claims or multiple parties, a district court may direct entry of a separate judgment as to one or more but less than all of the claims or parties if the judge makes an express determination that there is no just reason to delay entry and expressly directs entry.[118] The issue then arose whether a Rule 54(b) judgment became immediately appealable as a "final decision" under section 1291. Even though Rule 54(b) appeared to violate the accepted definition of "final decision" in section 1291, the Supreme Court in *Sears Roebuck & Co. v. Mackey*[119] rejected an argument that Rule 54(b) made an exception to section 1291 and was thus beyond the rulemaking power. In *Mackey*, the Court stated that the rule

> does not supersede any statute controlling appellate jurisdiction. It scrupulously recognizes the statutory requirement of a 'final decision' under section 1291 as a basic requirement for an appeal to the Court of Appeals. It merely administers that requirement in a practical manner in multiple claims actions and does so by rule instead of judicial decision.[120]

The Court justified its conclusion by indicating that before the adoption of the Federal Rules of Civil Procedure appealability was governed by the concept of the entire case constituting a single judicial unit.[121] It noted, however, that the judicial unit concept "was developed from the common law which had dealt with litigation generally less complicated than much of that of today."[122] The Court pointed to the fact that one of the purposes of the Federal Rules of Civil Procedure was to allow liberal joinder of claims and that "this, in turn, demonstrated a need for relaxing the restriction upon what should be treated as a judicial

116. *Drexel*, 1991 U.S. App. LEXIS 30181, at *3; *Stedor*, 947 F.2d at 732.
117. FED. R. CIV. P. 54(b).
118. *Id.*
119. 351 U.S. 427, 436 (1956).
120. *Id.* at 438.
121. *Id.* at 437.
122. *Id.* at 432.

unit for purposes of appellate jurisdiction."[123] According to the Court, this did not mean that the standard of finality had to be relaxed for individual claims, but rather that "in multiple claims actions some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on all of the claims."[124] Thus, the Court stated that Rule 54(b) "may be said to have modified the single judicial unit practice which had been developed by court decisions."[125] In essence, what the Court said was that because both the judicial unit concept and the definition of "final" were judicially created, they could be judicially changed without being considered an amendment to section 1291. The Court also noted that the Federal Rules of Civil Procedure were "promulgated . . . through joint action of Congress and [the] Court," implying that even if Rule 54(b) did modify section 1291 to some extent, the modification had congressional approval and consequently was unobjectionable.[126]

The Supreme Court's rationale is not persuasive unless one accepts the position that the word "final" in section 1291 means only what the Court says it means, or that the Court can do by an exercise in rulemaking anything it can do by an exercise in rulemaking because statutory construction is a joint effort of Congress and the Court and thus any rule has at least implicit legislative approval. Rule 54(b) does, in fact, expand the definition of final judgment to include a judgment that finally disposes of fewer than all of the claims against all of the parties if certified as final by the district judge.

Once a Rule 54(b) judgment is entered there is a right to appeal it immediately.[127] If the judgment is not appealed immediately, it cannot be appealed when the judgment disposing of all remaining claims is entered. The result is that the likelihood of multiple appeals in a case in which a Rule 54(b) judgment is entered is substantially increased. Thus, Rule 54(b) must be viewed as a major exception to the final judgment rule.

C. Judicially Created Exceptions

There is little disagreement that the final judgment rule can lead to harsh results in individual cases. Because of this potential for harsh

123. *Id.*
124. *Id.*
125. *Id.* at 437.
126. *Id.* at 433.
127. *Id.* at 437-38.

results, courts have performed a myriad of legal gymnastics to recharacterize interlocutory orders. The resulting exceptions have turned the final judgment rule into what one commentator has called a "spectacle of a labor saving device which causes more labor than it saves."[128] The commentator further observed that courts have "create[d] machines within machines in order to exclude or include given sets of cases as the situation may require."[129]

1. Forgay v. Conrad *Rule*

The judicial effort to mitigate the harshness of the final judgment rule began early. In *Forgay v. Conrad*,[130] an 1848 decision, the Supreme Court permitted an appeal in a case brought by an assignee in bankruptcy from an order setting aside conveyances and directing disputed property to be conveyed to the plaintiff. The trial court did not enter a final judgment but kept jurisdiction for an accounting.[131] The Supreme Court permitted the appeal even though the judgment was not final because the order had finally settled the rights of the parties and to deny an immediate appeal would cause irreparable harm to the defendants.[132] The Court acknowledged that the decree from which the assignee appealed was undoubtedly

> not final, in the strict, technical sense of that term. But this court has not heretofore understood the words "final decrees" in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the legislature.[133]

The Court restricted the effect of the decision by stating that it was limited to cases in which property is transferred to or sold for the benefit of a party or when the immediate payment of money is ordered.[134] The Court criticized the lower court for ordering the transfer of property before the accounting was completed.[135] In accordance with the opinion, the *Forgay* rule is usually applied only to property that is

128. Crick, *supra* note 60, at 558.
129. *Id.*
130. 47 U.S. (6 How.) 201 (1848).
131. *Id.* at 203.
132. *Id.* at 204.
133. *Id.* at 203.
134. *Id.* at 204-05.
135. *Id.* at 205.

transferred before the final judgment.[136] Consequently, the *Forgay* rule is not a major exception to the final judgment rule.

2. Collateral Orders

The principal exception to the final judgment rule created by judicial decision was established in 1949 by the Supreme Court in *Cohen v. Beneficial Industrial Loan Corp.*[137] In an opinion by Justice Jackson, the Court construed section 1291 to permit the immediate appeal of an order requiring the plaintiff in a stockholder's derivative action in federal court under diversity jurisdiction to post security for the payment of the expenses of the defense if the plaintiff were unsuccessful in the suit, as mandated by a statute of the forum state.[138] After quoting section 1291, the Court in *Cohen* referred to section 1292(a), commenting that it was not material to the case except that it indicated the congressional purpose to allow "appeals . . . from orders other than final judgments when they have a final and irreparable effect on the rights of the parties."[139] The Court then noted that if Congress allowed appeals only from final judgments that terminate the action, the order in question would not be appealable.[140] Justice Jackson went on to justify treating the order as final and thus appealable. He stated that the effect of section 1291 was to disallow a decision that is "tentative, informal or incomplete."[141] According to Justice Jackson, "so long as the matter remains open, unfinished or inconclusive" the order may not be appealed.[142] He further stated that section 1291 does not permit appeals from even fully consummated decisions when the decisions are but steps toward the final judgment into which they will merge. The purpose of the section, he noted, is to combine in one appeal all orders that may be effectively reviewed and corrected on appeal from the final judgment.[143] The opinion characterized the security posting order, however, as not being a step toward final disposition on the merits and as not merging into the final judgment.[144] The Court stated that "[w]hen

136. *See* ROBERT J. MARTINEAU, CASES AND MATERIALS ON APPELLATE PRACTICE AND PROCEDURE 162 (1987).
137. 337 U.S. 541 (1949).
138. *Id.* at 545-46.
139. *Id.* at 545.
140. *Id.*
141. *Id.* at 546.
142. *Id.*
143. *Id.*
144. *Id.*

that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably."[145]

The *Cohen* opinion established three criteria for determining when an order would be appealable immediately. First, the order must be "separable from, and collateral to, rights asserted in the action."[146] Second, it must be "too important to be denied review."[147] Third, it must be "too independent of the cause itself" to require that appellate review await the final judgment.[148] In an effort to justify this apparent modification of the finality requirement of section 1291, the Court commented that it "has long given this provision of the statute this practical rather than a technical construction."[149]

The Court added one qualifier to its decision that the security order was appealable. It denied that it intended to make every security order appealable.[150] The case before the Court presented "a serious and unsettled question" because the applicability of the state statute in federal court proceedings had never been established.[151] The Court distinguished other cases in which the right to a security bond was admitted or clear or only the amount of security was involved.[152]

The collateral order doctrine became a frequent device of courts of appeals to avoid the strictures of the final judgment rule.[153] There were few orders that a determined court of appeals could not qualify under the *Cohen* opinion. In this process, the "serious and unsettled question" addendum was largely ignored.

For two decades the Supreme Court did not interfere with the liberal use of the collateral order doctrine. Beginning in 1978, however, the Supreme Court did an about-face, prompted perhaps by the burgeoning caseloads of the courts of appeals. Starting with its decision in *Coopers & Lybrand v. Livesay*,[154] the Court in a series of cases sent a clear message to the courts of appeals that *Cohen* was to be applied narrowly. In *Coopers & Lybrand*, the Court rejected the "death knell" doctrine of the Second Circuit.[155] Under that doctrine, the Court of Appeals for the Second Circuit held that a denial of a motion to certify a class was a collateral order and thus immediately appealable when it was not economically feasible, in light of the amount of the individual plaintiffs' claims, their financial resources, and the cost of the litigation, for the plaintiffs to pursue their individual claims.[156] Put more simply, if the case could not proceed as a class action, it would not proceed at all.

In an opinion by Justice Stevens, the Court first restated the three part test of *Cohen*: the order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment."[157] The Court found that the certification order did not meet any of these criteria because it was subject to revision at any time by the district court, involved considerations "enmeshed in the factual and legal issues comprising the plaintiff's cause of action," and was subject to effective review at the end of the case, either on appeal of the individual plaintiffs or members of the putative class.[158]

The key point made in the *Coopers & Lybrand* opinion was that the Court rejected the notion that appealability should turn on the "court's perception of that [economic] impact in the individual case," that is that the individual plaintiff in the particular case would decide not to proceed alone because the expense of the litigation would outweigh the potential recovery.[159] The Court stated that the "formulation of an appealability rule that turns on the amount of the plaintiff's claim is plainly a legislative, not a judicial, function."[160]

Since *Coopers & Lybrand*, the Supreme Court has held not appealable as a collateral order those orders that disqualify or refuse to disqualify counsel in either a criminal[161] or a civil case,[162] deny a mo-

145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.* (citing Bank of Columbia v. Sweeny, 24-25 U.S. (1 Pet.) 701, 701-02 (1828); United States v. River Rouge Improvement Co., 269 U.S. 411, 414 (1926); Cobbledick v. United States, 309 U.S. 323, 328 (1940)).
150. *Id.* at 547.
151. *Id.*
152. *Id.* The Court noted that in those cases the issue of appealability "would present a different question." *Id.*
153. *See, e.g.*, Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 169-72 (1974) (order imposing on defendants most of the costs of notice of a class action is immediately appealable under *Cohen*); *see also* Theodore D. Frank, *Requiem for the Final Judgment Rule*, 45 TEX L. REV. 292 (1966) (discussing widespread use of collateral order rule to avoid final judgment requirement).
154. 437 U.S. 463 (1978).
155. *Id*
156. *Id.* at 469-70.
157. *Id.* at 468.
158. *Id.*
159. *Id* at 471.
160. *Id.* at 472.
161. Flanagan v. United States, 465 U.S. 259 (1984).

tion to dismiss on the ground that a defendant is immune from civil process,[163] deny a motion to dismiss because of *forum non conveniens*[164] or a forum selection clause,[165] or deny a motion to stay or dismiss because a similar action is pending in a state court.[166] The only orders the Court has found to satisfy the collateral order doctrine are those that involve a right that will be "irretrievably lost" absent an immediate appeal[167] such as immunity from suit.[168]

In applying the *Coopers & Lybrand* test the Supreme Court has consistently held that the trouble and expense of litigation, even if the litigation is held to be ultimately unnecessary, are not to be taken into consideration in deciding whether an order qualifies as collateral and thus appealable. It is, rather, a legal right that must be in danger of being lost, not simply money.[169] This principle suggests that the rule the Court has established is one that requires irreparable harm to a legal right before the order is immediately appealable of right. Interestingly, under this formulation neither the grant nor the denial of the security order in *Cohen* would qualify as an appealable collateral order because the order would not prevent continuation of the suit, but at worst would require only the posting of security. Thus, the harm to either party would be financial, not legal.

Notwithstanding the severe limitations put on the collateral order doctrine by the Court, the doctrine is nonetheless a major exception to the final judgment rule. Under this doctrine, orders that do not meet the definition of final made in *Catlin* are immediately appealable, not by virtue of congressional action but because of judicial action.[170] The reliance by Justice Jackson in the *Cohen* opinion on the exception made

162. Richardson-Merrell Inc. v. Koeller, 472 U.S. 424 (1985).

163. Van Cauwenberghe v. Biard, 486 U.S. 517 (1988).

164. *Id.*

165. Lauro Lines v. Chasser, 490 U.S. 495 (1989).

166. Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271 (1988).

167. Richardson-Merrell Inc. v. Koeller, 472 U.S. 424, 430-31 (1985) ("The collateral order doctrine is a 'narrow exception' . . . whose reach is limited to trial court orders affecting rights that will be irretrievably lost in the absence of an immediate appeal.").

168. Nixon v. Fitzgerald, 457 U.S. 731 (1982) (absolute immunity); Mitchell v. Forsyth, 472 U.S. 511 (1985) (qualified immunity); Puerto Rico Aqueduct and Sewer Auth. v. Metcalf Eddy, Inc., 61 U.S.L.W. 4045 (Jan. 12, 1993) (Eleventh Amendment immunity).

169. *Lauro Lines*, 490 U.S. at 499; Van Cauwenberghe v. Biard, 486 U.S. 517, 524 (1988); *Richardson-Merrell*, 472 U.S. at 431.

170. A recent example is Acosta v. Tenneco Oil Co., 913 F.2d 205 (5th Cir. 1990), in which an order for a party to undergo a vocational examination was held to be appealable as a collateral order. Holding to the contrary, a mental examination was not held to be appealable as a collateral order in Reise v. Board of Regents, 957 F.2d 293 (7th Cir. 1992).

to section 1291 by section 1292(a) was remarkable because the opinion took a very limited statutory modification of the finality requirement, which Justice Jackson conceded was not relevant to the order before the Court, and used it to establish a judicial modification covering virtually any order that might cause irreparable harm. It would have been far more consistent with the traditional manner in which the Court construes specific statutory exceptions to a general statute to hold that the legislature did not intend to create an exception broader than that created by the terms of the statute.

3. *Stay Orders*

The Supreme Court created another exception to the final judgment rule in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*[171] In an opinion by Justice Brennan, the Court held that a stay of a federal court action to compel arbitration of a contractual dispute, pending resolution of a previously filed state court action involving the same issues, was appealable as a final decision under section 1291.[172] The Court reasoned that because the federal and state suits involved the identical issue, a prior ruling in the state court would be res judicata in the federal court,[173] thus precluding further federal litigation. The plaintiff would be deprived of a federal forum, effectively putting the plaintiff out of federal court. The Court also held that the stay was appealable under the collateral order doctrine, essentially for the same reason.[174] The rationale of the *Mercury Construction* decision is not limited to arbitration cases but applies to any stay of a federal case pending resolution of state court proceedings involving the same issue. Whether appealable as a stay or as a collateral order, the exception is a narrow one of limited applicability and is thus not a major exception to the final judgment rule.

171. 460 U.S. 1 (1983).

172. *Id.*

173. *Id.* at 10.

174. *Id.* at 11. The Court determined that the stay met the first of the *Cohen* criteria, that it conclusively determined the disputed question, because there was no basis to suppose that the district judge contemplated a reconsideration of his decision to defer to the state suit. *Id.* at 12-13. The stay amounted to a refusal to adjudicate on the merits, and so amounted to an important issue distinct from the merits as required by the second prong of the *Cohen* test. *Id.* at 12. Finally, the stay satisfied the final *Cohen* criteria of being effectively unreviewable on appeal because once the state court decided the issue of arbitrability, res judicata would require the federal court to honor that determination. *Id.*

4. Attorney Fee Orders

Perhaps the most arbitrary exception to the final judgment rule made by judicial decision concerns attorney fees awarded by district courts. The Supreme Court in *Budinich v. Becton Dickinson & Co.*[175] adopted a "bright line" standard, making all awards of attorney fees appealable independently of the final judgment on the merits, without regard to whether the fees were originally requested in the complaint or not until after a final judgment.[176] The Court's rationale was based on the practical benefits of the "operational consistency and predictability in the overall application of § 1291" over the "preservation of conceptual consistency in the status of a particular fee authorization as 'merits' or 'nonmerits,'" as it had attempted to do in earlier decisions.[177] The Court stated that no interest pertinent to section 1291 was served by the distinction, but that its "bright line" rule would clarify an issue of jurisdictional significance.[178]

The *Budinich* attorney fee exception to the final judgment rule is objectionable for two reasons. First, the exception creates the potential for two appeals in the ever increasing number of federal cases in which attorney fees can be awarded or shifted.[179] This potential necessarily weakens the policy against piecemeal appeals that the Court has often said lies behind section 1291. It is difficult to understand how the Court could say that this policy is not adversely affected by its decision in *Budinich*. Second, and perhaps even more disturbing, is the Court's arbitrary abandonment of its previous efforts to classify attorney fee requests and awards as they relate to the relief requested in the complaint in favor of the adoption of a "bright line" test for no better reason than it was easier to administer. The Court's action is the exercise of judicial power in its rawest form.

It would have been far preferable for the Court to recognize that its merits/no merits distinction created a problem and either ask Congress or direct the Court's standing committee on rules of practice and procedure to solve the problem. The standing committee could have proposed a rule, for example, that would require attorney fee requests

175. 486 U.S. 196 (1988).
176. *Id.* at 202.
177. *Id.*
178. *Id.*
179. HERBERT B. NEWBERG, ATTORNEY FEE AWARDS § 28.01 (1986) lists 135 federal statutes that permit a court to award attorney fees. A district court can also award attorney fees as a sanction under FED. R. CIV. P. 11.

to be made in the complaint or within thirty days of the entry of judgment on the merits. Under the proposed rule, the filing of the fee request could have the same effect as a request filed under Federal Rule of Civil Procedure 59(e), that is, it would defer the running of the appeal time period as to the judgment on the merits until the attorney fee request was determined. The rule change procedure would have taken more time, but it would have preserved the integrity of section 1291 and the final judgment rule embraced by it. In fact, in 1991 the Advisory Committee on Civil Rules proposed an amendment to Federal Rule of Civil Procedure 54(b) that would require a fee request to be filed within fourteen days of judgment. The request would not, however, affect the finality or appealability of the final judgment.[180]

5. Bankruptcy Orders

Another judicial exception to the final judgment rule concerns 28 U.S.C. § 158(d), which provides for courts of appeals' jurisdiction over "all final decisions, judgments, orders, and decrees" entered by district courts or appellate panels in bankruptcy matters.[181] Although the language of section 158(d) is essentially the same as section 1291 and thus appears to incorporate the final judgment rule, courts of appeals, according to one treatise, have stated consistently that "bankruptcy proceedings justify a distinctive and more flexible definition of finality."[182] The courts of appeals treat bankruptcy proceedings as essentially different from the normal civil case because many interlocutory orders made in the proceedings are conclusive as to the rights of individuals or effectively determine the outcome of the proceeding.[183] To require persons aggrieved by the orders to wait until the proceeding is finally closed would make the right to appeal ineffective. The Court of Appeals for the Eighth Circuit has taken this approach, stating that it weighs three factors in determining whether a bankruptcy order is final and thus appealable: (1) whether the order would leave only execution by the bankruptcy court to be done; (2) whether delaying review would

180. Advisory Committee on Civil Rules, Proposed Rule Amendments, 137 F.R.D. 136-39 (1991).
181. 28 U.S.C. § 158(d) (1988).
182. 16 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3926, at 123 (1992 Supp.).
183. *See, e.g., In re* Mason, 709 F.2d 1313, 1317 (9th Cir. 1983) ("[C]ertain proceedings in a bankruptcy case are so distinct and conclusive either to the rights of individual parties or the ultimate outcome of the case that final decisions as to them should be appealable as of right.").

prevent effective review; and (3) whether a delayed reversal would require recommencement of the entire proceeding.[184] These factors do not meet the test of a true final judgment because they presume a continuation of the bankruptcy proceeding. The Court of Appeals for the Eighth Circuit is merely listing factors that will determine whether it will exercise discretion to review the order sooner rather than later.

Another problem that has arisen under section 158(d) is whether it precludes the application of section 1292(b) in bankruptcy proceedings. The Court of Appeals for the Second Circuit held that it does, but the Supreme Court has disagreed.[185]

The flexible approach to finality in bankruptcy proceedings is a perfect example of how the final judgment rule may be inappropriate when applied to certain types of orders in certain types of proceedings. This inappropriateness forces courts to carve out exceptions to the final judgment rule to avoid irrational results. The difficulty with this approach is that it requires a modification of the definition of "final" to respond to the exigencies of the particular case. Compounding the problem is the unpredictability of the decision of a court of appeals on whether the interlocutory order is final and thus appealable immediately. The aggrieved party does not know until it asks, and thus it must ask by appealing immediately. If the party does not attempt to appeal immediately, the order may later be held to have been final and thus the appeal at the end of the case would be legally too late. The later appeal may also be ineffective in not being able to undue the order, thus making the appeal too late as a practical matter even if legally timely. These are the same evils that prompted the Federal Courts Study Committee to make its recommendations on finality and appealability, as discussed above in part II.

D. Extraordinary Writs

Notwithstanding the oft-stated rule that a writ of mandamus or prohibition is not to be used as a substitute for appeal, courts of appeals have sometimes resorted to this device to avoid the strictures of the final judgment rule.[186] The courts of appeals found temporary support for doing so in two Supreme Court decisions, one in 1957[187] and the other in 1964.[188] Beginning in 1967, the Court has taken an increasingly restrictive attitude toward this technique for avoiding the final judgment rule.[189] In spite of the restrictive trend of the Supreme Court decisions, some courts of appeals still use the writs to review interlocutory orders, once again demonstrating the fatal attraction of avoiding the final judgment rule when the circumstances of the particular case are particularly strong against postponing review.[190] In 1950, a student commentator argued for expanded use of mandamus because of the potential unfairness of the final judgment rule in certain cases.[191] This same argument could be made again in light of the Supreme Court's recently revived enthusiasm for the rule. If the Supreme Court sought to expand interlocutory review without changing its definition of final judgment or otherwise allowing exceptions to the rule, it could do so by relaxing its restrictions on the use of the writs. The Court has not shown, however, a tendency to do so.

184. *In re* Olson, 730 F.2d 1109, 1109 (8th Cir. 1984).

185. Germain v. Connecticut Nat'l Bank, 926 F.2d 191 (2d Cir. 1991), *rev'd*, 112 S. Ct. 1146 (1992). One commentator advocates the application of the statutes to bankruptcy appeals. Judy B. Sloan, *Appellate Jurisdiction of Interlocutory Appeals in Bankruptcy 28 U.S.C. Section 158(d): A Case of* Lapsus Calami, 40 CATH. U. L. REV. 265 (1991).

186. JAMES M. MOORE ET AL., 9 MOORE'S FEDERAL PRACTICE ¶ 110.28 (2d ed. 1992 Supp.).

187. La Buy v. Howes Leather Co., 352 U.S. 249 (1957). The Court affirmed the Seventh Circuit's decision to grant a writ of mandamus in a case that had been referred to a master over the objection of all the parties. The Court stated: "We believe that supervisory control of the District Courts by the Courts of Appeals is necessary to proper judicial administration in the federal system. The All Writs Act confers on the Courts of Appeals the discretionary power to issue writs of mandamus in the exceptional circumstances existing here." *Id.* at 259-60.

188. Schlagenhauf v. Holder, 379 U.S. 104 (1964). The Court observed that while the writ of mandamus is not to be used as a substitute for appeal, it is appropriate to issue the writ to review an usurpation of judicial power or an abuse of discretion. *Id.* at 110.

189. Will v. United States, 389 U.S. 90, 95 (1967) ("[O]nly exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."); Kerr v. U.S. Dist. Court, 426 U.S. 394 (1976); Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33 (1980).

190. For example, the U.S. Court of Appeals issued a writ of mandamus vacating a district court's certification of a class in *In re* Bendectin Products Liability Litigation, 749 F.2d 300 (6th Cir. 1984). The Court of Appeals for the Second Circuit will treat an improvident appeal as a petition for a writ of mandamus when there is a strong public interest in a state official's actions. Corcoran v. Ardra Ins. Co., 842 F.2d 31, 35 (2d Cir. 1988). See MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 82, § 19.2 (1983 & Patricia A. Davidson Supp. 1992) for summaries of cases using the writ.

191. *See* Note, *The Writ of Mandamus: A Possible Answer to the Final Judgment Rule*, 50 COLUM. L. REV. 1102, 1111-12 (1950) (noting that "[t]he writ of mandamus . . . stands as a ready-made remedy [to the rigors of the final judgment rule], without violating the letter of the final judgment rule or the policy that justifies it") [hereinafter *The Writ of Mandamus*]. More recent articles discussing the writ are Maryellen Fullerton, *Exploring the Far Reaches of Mandamus*, 49 BROOK. L. REV. 1131 (1983); Robert S. Berger, *The Mandamus Power of the United States Court of Appeals: A Complex and Confused Means of Appellate Control*, 31 BUFF. L. REV. 37 (1982); Note, *Supervisory and Advisory Mandamus Under the All Writs Act*, 86 HARV. L. REV. 595 (1973).

V. PROPOSALS FOR CHANGE

While there is general agreement on both the advantages provided by the final judgment rule as well as the need for exceptions to the rule, a consensus also exists that the rule and its exceptions are in need of clarification. Until recently Congress has largely ignored this clarification problem. When Congress has acted, it has in some instances added to the confusion by leaving scant legislative history.[192] More fruitful sources of possible solutions to the uncertainties surrounding the final judgment rule and its exceptions are the many articles and commentaries addressing if, when, and under what circumstances an appeal should be permitted. These proposals range from suggested statutory amendments[193] to a variety of possible judicial interpretations of the existing statutory provisions governing appeals and extraordinary writs.[194] The proposals provide a backdrop for assessing the recommendations of the FCS Committee. For this reason this part will examine these proposals. Each proposal will not be criticized individually or collectively in this part. Instead, the author will set out at the beginning of part VI his own basis for analyzing the final judgment rule and the problems created by it. Then that analysis will be applied to critique and to assess the merits of both the proposals of the FCS Committee and others.

A. Legislative Proposals

In addition to the statutory exceptions to the final judgment rule described above in part IV.A., Congress considered other proposals for additional exceptions only one other time, in 1987.[195] In light of the continuing problems that the Supreme Court and federal courts of appeals have had with the final judgment rule, it is noteworthy that even though Congress created a commission in 1972 to study the federal court appellate system and that this commission made proposals on a wide variety of matters concerning federal appeals, the commission did

192. *See* Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 368 (1961) (noting the absence of legislative history surrounding § 1292(a)(1)); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 YALE L.J. 333, 339-40 (1959) (noting uncertainty regarding scope of § 1292(b) due to lack of legislative history) [hereinafter Note, *Discretionary Appeals*].

193. See *infra* notes 198-288 and accompanying text for a discussion of proposed statutory amendments.

194. See *infra* notes 289-330 and accompanying text for a discussion of various suggestions for judicial interpretation of the statutory provisions governing appeals.

195. *See infra* note 197 and accompanying text.

not consider the final judgment rule.[196] Not until 1987 was a bill introduced in Congress to modify substantially the final judgment rule. The bill incorporated the proposals made in an article written by Professor Paul D. Carrington and discussed below in part V.B.1.[197] A subcommittee of the House Judiciary Committee held hearings on the bill, but the bill was never acted upon by the subcommittee and thus died.

B. Proposed Amendments to Existing Statutory Provisions

1. Ordinary Cases

Many commentators agree that the best method for resolving the confusion surrounding the final judgment rule and its exceptions is statutory amendment.[198] Suggested legislative action includes repealing all statutes granting an unqualified right to appeal,[199] increasing the number of statutorily defined interlocutory orders appealable of right,[200] or making interlocutory orders appealable only in the discretion of an ap-

196. See *supra* notes 19-25 and accompanying text for citations to and a discussion of the recommendations of that commission.

197. H.R. 3152, 100th Cong., 1st Sess. § 702(a) (1987). *See Court Reform and Access to Justice Act: Hearings on H.R. 3152 Before the Subcomm. on Courts, Civil Liberties and the Administration of Justice of the House Comm. on Judiciary*, 100th Cong., 1st & 2d Sess. 303-08 (1987-1988) (reprinting Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, LAW & CONTEMP. PROBS., Summer 1984, at 165).

198. See *infra* notes 204-88 and accompanying text for citations to these commentaries and a discussion of them.

199. *See* Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 605-06 (1985) (quoting Justice Rehnquist, Address at the 75th Anniversary of the University of Florida College of Law and Dedication of Bruton-Greer Hall (Sept. 15, 1984) who suggested that "the time has come to abolish appeal as a matter of right from the district courts to the courts of appeals, and allow such review only when it is granted in the discretion of a panel of the appellate court"); *id.* at 606 (United States Solicitor General Rex Lee stated that "there is nothing in the Constitution and nothing in common sense that says that decisions of an appellate court are more likely to be right than a district court") (citing Overend, *Right to Choose Cases Called Way to Ease Caseloads*, L.A. TIMES, Dec. 23, 1984, at 3); *see also* Harlon L. Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62 (1985) (questioning the necessity of allowing appeal as of right); Donald P. Lay, *A Proposal for Discretionary Review in Federal Courts of Appeals*, 34 SW. L.J. 1151 (1981) (arguing that review on the merits should be had only in cases chosen for oral argument); Paul D. Carrington, *The Function of a Civil Appeal: A Late-Century View*, 38 S.C. L. REV. 411, 429-31 (1987) (discussing proposals to limit the right to appeal); Bernard G. Barrow, *The Discretionary Appeal: A Cost Effective Tool of Appellate Justice*, 11 GEO. MASON U. L. REV. 31 (1988) (a favorable recounting of the experience in Virginia in which there is no right to appeal).

200. *See, e.g.*, Lawyers Conference Committee on Federal Courts and the Judiciary, *The Finality Rule: A Proposal for Change*, JUDGES' J., Fall 1980, at 33, 35-36 (proposing that all judicially created exceptions to final judgment rule be codified) [hereinafter Lawyers Conference Committee].

pellate court.[201] Only a few have questioned the soundness of allowing an appeal as of right.[202] Most commentators begin with the assumption that a right to appeal exists once a final judgment has been rendered. They then suggest how the statute should define "final" and what exceptions to the finality requirement the statute should permit.[203]

One of the earliest commentators on the final judgment rule, Carleton M. Crick, advocated abolishing both the right to appeal and the final judgment rule.[204] Crick noted the large amount of litigation that had been generated as a result of the confusion over which decisions and orders were final and thus appealable of right.[205] He asserted that "[w]e are really seeking to determine whether this is the sort of decision which the appellate court wishes to hear, but we spend our time arguing the question of whether the decision is a final judgment."[206] In addition, Crick observed that those types of decisions that should be granted immediate review today should not necessarily be granted immediate review tomorrow.[207] Crick offered some suggestions as to what could replace the right to appeal and the final judgment rule.[208] The possibilities included an increase in the number of statutory exceptions to the rule, the use of extraordinary writs of mandamus and prohibition as a substitute for appeal, and making certain types of decisions appealable of right with the grant of discretion to the courts of appeals to review any other order.[209] He concluded, however, that allowing an appeal only in the discretion of an appellate court was the best solution.[210] In deciding whether to review a decision, he urged that

201. *See, e.g.*, Edward H. Cooper, *Timing as Jurisdiction: Federal Civil Appeals in Context*, LAW & CONTEMP. PROBS., Summer 1984, at 157, 163-64 (advocating the eventual elimination of present rules governing interlocutory appeals and granting to courts of appeals complete discretion to grant review).

202. *See* Crick, *supra* note 60; *see also* Irving Wilner, *Civil Appeals: Are They Useful in the Administration of Justice?*, 56 GEO. L.J. 417 (1968) (questioning the validity of any appellate review, of right or discretionary).

203. See *infra* notes 212-65 and accompanying text for a discussion of these kinds of proposals.

204. *See* Crick, *supra* note 60, at 560-63 (stating that "the concept of the final judgment is wholly unsatisfactory as a method of" restricting appeals).

205. *See id.* at 562-63. According to Crick, "it [the final judgment rule] would appear upon analysis to cause about as much labor as it saves, because it requires repeated litigation over the question of what is or is not a final judgment." *Id.*

206. *Id.* at 558.

207. *Id.* at 561. Crick stated that "[t]here is no particular reason why the decisions which may be appealed should be the same yesterday, today and forever." *Id.*

208. *Id.* at 563-65.

209. *Id.*

210. *Id.* at 564.

a court of appeals take into consideration its own caseload and that of the trial court as well as whether denying review would result in an injustice.[211]

Judge Jerome Frank in 1951 presented a proposal to the United States Judicial Conference that a court of appeals be granted discretion to review an interlocutory order if it finds that review is necessary to avoid substantial injustice.[212] Judge Frank suggested that discretionary review be permitted in addition to, and not instead of, review of right from interlocutory orders then permitted.[213] The committee to which the Judicial Conference referred the proposal concluded that such a provision "would unduly encourage fragmentary and frivolous appeals with the evils and delays incident thereto" and recommended disapproval of the proposal.[214] The Judicial Conference adopted the findings of the committee, thus killing the Frank proposal.[215]

A student commentator, in advocating the propriety of conditioning an appeal on the consent of the appellate court within broad statutory guidelines, noted the disadvantages of statutorily defining appealable interlocutory orders.[216] When these orders are statutorily defined, unnecessary appeals may be permitted while necessary appeals are denied.[217] While applauding Congress' addition of section 1292(b) as an

211. *Id.* at 561.

212. JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32 (1951) [hereinafter 1951 JUDICIAL CONFERENCE REPORT]. *See* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 HARV. L. REV. 607, 610 & n.13 (1975) (discussing the 1952 proposal); Solimine, *supra* note 105, at 1171-72 (discussing the 1952 proposal and its rejection).

213. 1951 JUDICIAL CONFERENCE REPORT, *supra* note 212, at 32. Judge Frank proposed the following:

> In addition to appeals from interlocutory orders, judgments and decrees permitted as of right under section 1292, a court of appeals, on the application of a party, may in its discretion authorize an appeal from an interlocutory order, judgment or decree if such court determines that such authorization is necessary or desirable to avoid substantial injustice. . . . Failure to take or apply for an appeal under this section or section 1292 shall not bar an appeal from any order, judgment or decree when it becomes final.

Id.

214. Judicial Conference of the U.S., *Report of Judicial Conference Special Session March 20-21, 1952*, *in* REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES app. 203 (1952) [hereinafter *1952 Judicial Conference Special Session Report*].

215. *Id.*

216. Note, *Appealability in the Federal Courts*, *supra* note 192, at 352-53.

217. *Id.* at 352. The author noted that "the application of a statutory definition often gives rise to substantial litigation before the appellate tribunal, and sometimes permits appeal where it is not needed or, still worse, prevents appeal when immediate review is warranted." *Id.* (footnote omitted).

attempt to grant the district courts more discretion, the author noted that the section is not broad enough to permit appeal of so called "hardship orders."[218]

The American Bar Association's *Standards Relating to Appellate Courts* (the "ABA *Standards*") set forth yet another method of defining appealability.[219] Section 3.12 of the ABA *Standards* provides that an appeal of right should be available only after a final judgment.[220] The section defines a final judgment as one that decides all claims or an order that is immediately enforceable, such as an order for contempt.[221] To alleviate the harsh results that such a strict definition of final judgment might create, the ABA provided for immediate review of an interlocutory order at the discretion of an appellate court when the court finds that immediate review would "(1) [m]aterially advance the termination of the litigation or clarify further proceedings therein, (2) [p]rotect a party from substantial and irreparable injury; or (3) [c]larify an issue of general importance in the administration of justice."[222] The ABA chose to vest the discretionary power in the appellate courts, but it noted that the lower court may be permitted to give a nonbinding opinion about the appropriateness of review.[223] Furthermore, the ABA *Standards* would not require an appellate court to give its reasons for granting or denying a request for immediate review of an interlocutory order, and a denial of the request would not preclude review of the order after a final judgment was rendered.[224]

218. *Id.* at 378-82.

219. ABA COMM'N ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS § 3.12, at 25 (1977) [hereinafter ABA STANDARDS RELATING TO APPELLATE COURTS]. The Standards Relating to Appellate Courts were approved by the House of Delegates of the ABA in February, 1977. *Id.* at vii.

220. *Id.* § 3.12, at 25. The text of section 3.12 reads as follows:

3.12 Appealable Judgments and Orders.

(a) Final Judgment. Appellate review ordinarily should be available only upon the rendition of final judgment in the court from which appeal or application for review is taken.

(b) Interlocutory Review. Orders other than final judgments ordinarily should be subject to immediate appellate review only at the discretion of the reviewing court where it determines that resolution of the questions of law on which the order is based will:

(1) Materially advance the termination of the litigation or clarify further proceedings therein;

(2) Protect a party from substantial and irreparable injury; or

(3) Clarify an issue of general importance in the administration of justice.

Id.

221. *Id.* at 26.

222. *Id.* at 25.

223. *Id.* at 28-29.

224. *Id.* at 29-30.

Another student commentator has advocated the adoption of a provision that would permit discretionary interlocutory review when the right of ultimate review would be rendered valueless by a delayed review.[225] This student suggested the addition of a subsection (c) to section 1292 which would permit a court of appeals in its discretion to review immediately an interlocutory order not listed in section 1292(a) and not certified by the district court under section 1292(b) when (1) a delayed review would render the right to appeal from the final judgment valueless, (2) the cost to the appellant of delaying review would be greater than the cost to the appellee of delaying the trial, and (3) the order is likely to be reversed.[226] This proposal was based on the author's conclusion that the current patchwork of judicially and statutorily created exceptions to the final judgment rule is both over-inclusive and under-inclusive.[227] A provision that allowed a court of appeals to examine the hardship and the cost to the parties on a case-by-case basis would ensure that only those orders that would result in great cost and hardship would be reviewed immediately.[228] The student author's proposed section 1292(c) also contained a statement that section 1292 constituted the only exceptions to section 1291, an effort to eliminate

225. Randall J. Turk, Note, *Toward a More Rational Final Judgment Rule: A Proposal to Amend 28 U.S.C. § 1292*, 67 GEO. L.J. 1025, 1040 (1979).

226. *Id.* Proposed § 1292(c) provides:

Section 1292(c)(1). When the court of appeals shall be of the opinion that delaying review of a district court order not otherwise appealable under this section may render the right of ultimate appeal of little or no value to the appellant, and that the cost of delay in review to the appellant outweighs the cost of delay in trial to the appellee, then it may permit an appeal to be taken from such order if, in its discretion, it deems it likely that the order appealed from will be reversed.

(2) In determining the respective costs to the parties, among the factors to be considered are the type and degree of threatened harm and the relative financial ability of each litigant to bear such costs.

(3) In the event that the order appealed from is upheld, the court of appeals shall require the appellant to pay the appellee's reasonable expenses for his delay, including attorney's fees, unless the court finds that the award of expenses would be unjust.

(4) Section 1292 shall constitute the sole exceptions to section 1291.

Id.

227. *Id.* at 1026. The student stated that "although the present patchwork of statutory and judicial exceptions provides relief in a variety of situations, it fails to effectively or consistently afford appellate review in all hardship cases." *Id.*

228. *Id.* at 1038-39. The student noted that

enacting an amendment to section 1292 that weighs hardship and cost to the litigants . . . would permit courts to do through the front door what they have attempted to do through the back door for years: provide relief to litigants in those rare cases in which denial of an appeal will result in severe hardship.

Id. at 1039.

judicially created exceptions.[229] To prevent abuses of the rule, the proposed subsection (c) also permitted an award of attorney fees if a court of appeals upheld the appeal.[230]

The ABA Lawyers Conference Committee on Federal Courts and the Judiciary (the "ABA Committee") concurred in the belief shared by many commentators that reform must come in the form of legislative action.[231] The ABA Committee recommended that all of the judicial exceptions to the final judgment rule be codified.[232] After suggesting that section 1292(a)(1)-(4) remain the same, the ABA Committee proposed new subsections (5)-(8) to permit interlocutory review of collateral orders that: cannot be effectively reviewed after final judgment; direct the execution of a money or property award that is unlikely to be returned if the order were reversed after final judgment; effectively terminates the case; and directs a disclosure order over a claim of governmental privilege.[233] These new subsections would merely codify the existing judicially created exceptions to the final judgment rule.[234] The ABA Committee asserted that its codification would result in a more consistent interpretation of the exceptions among the circuits.[235]

Federal Civil Appellate Jurisdiction: An Interlocutory Restatement (the "Restatement"), a student work, was the first of two issues of Law and Contemporary Problems devoted to state and federal civil appeals. The second issue contained articles by Professors Paul Carrington, Maurice Rosenberg and Edward Cooper focusing on the federal final judgment rule. The Restatement attempted to restructure existing case law surrounding sections 1291 and 1292 to create a more simplified framework that reflected not only the decisions of courts but also the reasoning behind those decisions.[236] The Restatement began with a provision that permitted an appeal of right in a civil action by a party adversely affected by a final judgment.[237] In addition, section 11 of the Restatement contained a provision permitting immediate appeal of an interlocutory order when (1) a district judge certifies that there is "substantial doubt" about a controlling question of law and that immediate review would save "substantial litigation costs and/or judicial energies," and (2) the court of appeals grants leave to appeal.[238] The comment following section 11 explained that the section permits certification only when the order (1) involves a controlling question of law, (2) about which there is substantial room for a difference of opinion, and (3) immediate review would save substantial litigation and judicial time and costs.[239] The third requirement, according to the comment, prohibits certification of orders in cases that could be decided in a few days.[240] As can be seen, section 11 is essentially the same as present section 1292(b).

Section 12 of the Restatement also permits an appeal of right of an interlocutory order when review is necessary to protect substantial

229. *Id.* at 1040, 1042.

230. *Id.*

231. Lawyers Conference Committee, *supra* note 200, at 35-36.

232. *Id.*

233. *Id.* at 35-38. Subsections (5)-(8) provide:

(5) An order purporting to dispose, finally, of an issue that has no substantial relationship to the decision on the merits of the case, when the order threatens an important loss or injury, and it is unlikely that its harm can be remedied by review of final judgment in the case.

(6) An order directing the execution of an award of property or money, if it is unlikely that the recipient of the award will restore the property or make the restitution should the order be reversed after final judgment.

(7) An order which effectively terminates the action.

(8) An order directing the disclosure of information over a claim of governmental privilege.

Id. at 36.

234. Subsection (5) is intended as a codification of the collateral order doctrine, subsection (6) as a codification of the *Forgay* doctrine, and subsection (7) as a codification of the death knell doctrine. *Id.* at 36-37.

235. *Id.* at 37.

236. *Federal Civil Appellate Jurisdiction: An Interlocutory Restatement*, 47 LAW & CONTEMP. PROBS., Spring 1984, at 13 [hereinafter *Interlocutory Restatement*]. The editors' purpose in drafting the Restatement was "to integrate the various doctrinal exceptions and qualifications to the final decision requirement into one coherent conception of the role and limits of interlocutory appeal that is compatible with the existing patterns of decisions." *Id.* at 15. In addition, the editors noted that they "[strove] to identify and illuminate the operative principles, even if these [were] not always articulated in the decisions which we presume[d] to synthesize." *Id.*

237. *Id.* at 19. Section 1 of the Restatement provided in pertinent part that "[a] party to a civil action who is adversely affected by a final decision of a district court may appeal of right." *Id.*

238. *Id.* at 75-76. Section 11 of the Restatement provided in pertinent part:

(A) A nonfinal order is subject to interlocutory review when

(1) The judge or magistrate making the order certifies that there is

(a) Substantial doubt regarding the controlling principle of substantive or adjective law and

(b) A prospect that substantial litigation costs and/or judicial energies may be saved by an early decision on the matter by the court of appeals; and

(2) Leave to appeal is granted by the court of appeals.

Id.

239. *Id.* at 77-80.

240. *Id.* at 79 ("This language clearly makes certification unavailable in trials that can be disposed of on the merits in a few days' time or in instances where certification would raise the possibility of a further appeal, as in the case of a [sic] an order granting a new trial.").

rights that "cannot be adequately enforced by review after final decision."[241] This section contemplated the abolition of all existing exceptions to the final judgment rule—the statutory interlocutory appeals listed in section 1292(a), collateral orders, and mandamus—and allowed an appeal of right when the appeal would fulfill the purpose behind all these exceptions, which is the protection of a right that cannot be effectively protected after a final judgment.[242] The Restatement lists a broad range of types of decisions that qualify as final or as interlocutory orders appealable of right immediately under the current law.[243]

241. *Id.* at 82. Section 12 of the Restatement provides in pertinent part:

> (A) A nonfinal order is subject to interlocutory review without certification by the district court only for the restricted purpose of protecting specific substantial rights of the appellant which cannot be adequately enforced by review after final decision. The specific rights to be so protected as to most nonfinal orders are identified in sections 14-43 of this Interlocutory Restatement. Interlocutory appeal from other nonfinal orders of district courts is restricted to the protection of similar specific substantial rights.
>
> . . . .
>
> (C) A noncertified appeal from a nonfinal order which does not irreparably jeopardize a specific substantial right of the appellant shall be dismissed for lack of jurisdiction regardless of whether such objection is raised by the appellee.

Id.

242. *Id.* at 85-86 ("It is an important purpose of this Interlocutory Restatement to urge abandonment of the unhelpful language of these various doctrines and to state the law governing interlocutory appeals in a manner that will clarify the nature and purpose of all such proceedings.").

The state of Washington has adopted a similar approach to interlocutory appeal. *See generally* Geoffrey Crooks, *Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure*, 61 WASH. L. REV. 1541 (1986) (discussing Washington Rules of Appellate Procedure governing interlocutory appeal). In Washington, pursuant to the appellate procedure rules that became effective in 1976, there are two ways to obtain review of a trial court's decision: review as a matter of right and discretionary review. *Id.* at 1541-42. An appeal of right can be taken from a final judgment and certain interlocutory orders designated in the rule. The discretionary review provision of the appellate procedure rules replaced all other procedures for obtaining interlocutory review including the use of extraordinary writs. *Id.* at 1541-43. Under Washington Appellate Procedure Rule 2.3(b), an appellate court may, in its discretion, grant a request for immediate review only:

> (1) If the superior court has committed an obvious error which would render further proceedings useless, or
>
> (2) If the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act, or
>
> (3) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court.

Id. at 1545 (citing WASH. R. APP. P. 2.3(b)); *see also id.* at 1545-51 (explaining the requirements listed in rule 2.3(b)).

243. *Interlocutory Restatement*, *supra* note 236, at 96-248. For example, § 18 of the Restatement provides that an order compelling or refusing to compel arbitration is only reviewable after a final decision has been rendered in the case, while "[a]n order granting or denying a stay of arbitration proceedings" is immediately reviewable. *Id.* at 128. The latter provision is similar to § 16 of the Federal Arbitration Act enacted in 1988. *See supra* part IV.A.2.

Professor Carrington in his article proposed a statutory scheme that involved a combination of the Restatement provisions and a granting of authority to the Supreme Court to define by rule those interlocutory orders appealable of right.[244] The latter is, of course, the source for the second recommendation of the FCS Committee and the subsequent congressional enactment previously described in parts I and II to allow the Supreme Court to designate by rule interlocutory orders appealable of right immediately. Interestingly, Carrington did not propose granting the same authority to define "final decision" as used in section 1291, as was recommended by the FCS Committee and already enacted into law again as discussed in parts I and II above. Carrington proposed keeping the current language of section 1291 regarding appeal of right from final decisions. Carrington would also add a subsection (b) to section 1291 providing that the court of appeals has jurisdiction over a final decision only after the district court sets forth in a signed writing that the case has been terminated.[245] This requirement was intended to help clarify when a decision is a final one for purposes of appeal.[246]

Carrington further suggested that section 1292 be amended so that its subsection (a) would permit an interlocutory appeal of right when "essential to protect substantial rights which cannot be effectively enforced on review after final decision."[247] Subsection (a) would also list those interlocutory orders that would be appealable under subsection (a), specifically orders regarding injunctions, the appointment of receivers, the determination of all issues in civil patent infringement cases that are final except for an accounting, and those interlocutory orders defined as appealable orders by rule of court.[248] This list would

244. Paul D. Carrington, *Toward a Federal Civil Interlocutory Appeals Act*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 165, 167-69.

245. *Id.* at 166-67. Proposed § 1291(b) provides:

> (b) Appellate jurisdiction under this section shall not vest until the final decision of a district court is set forth on a separate document, signed by the district judge or magistrate, manifesting the intent of the district court that proceedings in the case be thereby terminated save for the taxation of costs or enforcement proceedings, and entered on the docket of the district court.

Id. at 167.

246. *Id.*

247. *Id.*

248. *Id.* at 168.

not be exclusive, and thus an order falling outside the list might still be appealable of right if review were necessary to protect substantial rights that could not be protected effectively upon appeal after final judgment.[249] Present section 1292(b), according to Carrington's proposal, would remain essentially the same with only minor changes.[250]

Carrington's proposed section 1292(a) was based on the policy underlying the many judicially and statutorily created exceptions to the final judgment rule, but eliminated the need for those exceptions by simply making appealability of a particular order depend on whether an interlocutory appeal would further the policy of protecting rights that cannot be protected effectively on appeal after final judgment.[251] In addition, by requiring a district court to state in writing that a decision is final the proposal to amend section 1291 has the added benefit of clarifying when a decision is final.[252]

Professor Maurice Rosenberg set forth proposals that were in substantial agreement with Carrington.[253] Rosenberg, however, did not propose making the jurisdiction of the courts of appeals dependent on meeting the appealability requirements.[254] Instead, Rosenberg argued that the appealability requirements should be viewed merely as procedural requirements, a breach of which would result in negative consequences but not in loss of jurisdiction.[255] Rosenberg did endorse Carrington's suggestion that the Supreme Court devise rules defining interlocutory orders appealable of right as "the best of the available alternatives."[256]

249. *See id.* at 167-69.

250. *Id.* at 168-69.

251. *Id.* at 168. Professor Carrington stated that proposed § 1291(a) is

> declaratory of existing practice, if not of existing doctrine. By authorizing interlocutory appeals when essential to protect substantial rights which cannot be effectively enforced on review after final decision, it eliminates the necessity for strained interpretations of finality under section 1291, and the use of extraordinary writs under section 1651 as an alternative to appeal.

Id.

252. *Id.* at 167.

253. Maurice Rosenberg, *Solving the Federal Finality-Appealability Problem*, 47 LAW & CONTEMP. PROBS., Summer 1984, at 171, 177-179.

254. *Id.* at 178. Professor Rosenberg stated, "I strongly favor the end result the act would reach, but would achieve it by scrapping the idea that meeting the appealability requirements is a 'jurisdictional' necessity." *Id.*

255. *Id.* "If the Carrington statute were revised to treat its subject matter as involving serious requirements of procedure, appropriate provisions could be made to deal with lapses and neither the erection nor the dismantling of jurisdictional constructs would be necessary." *Id.*

256. *Id.* at 179. Professor Rosenberg stated that the proposal to define interlocutory orders by rule of court assures

> that continuing experience with this stubborn problem can be converted into rule-prescribed standards that will give both the courts and the bar a basis for knowing which interlocutory orders are immediately appealable. The rulemaking process is better suited to the careful monitoring effort needed here than the ponderous legislative process.

Id.

Professor Cooper took a different approach from Carrington, Rosenberg, and the Restatement. All three advocated legislative reform in the form of better defined rules regarding interlocutory orders of right.[257] Cooper argued that while these rules are currently necessary for the proper functioning of the appellate system, a scheme for discretionary interlocutory review would eventually eliminate the need for the rules.[258] Cooper argued that the factors that must be considered when deciding whether to grant interlocutory review are constantly changing, and thus an order that should be subject to interlocutory review if granted in a case today may not necessarily be subject to interlocutory review if granted in a case five years from now[259]—a point made earlier by Crick, Professor Martin Redish, and several student writers.[260] These ever-changing considerations include the quality of federal district court judges, the scope of appellate review, the trial court's caseload, the mix of different types of cases, the character of the bar, and the substantive and procedural issues decided by the district courts.[261] While Cooper admitted that the present exceptions to the final judgment rule should remain in place for now, he suggested that as

257. See *supra* notes 236-56 and accompanying text for a discussion of these suggested reforms.

258. Cooper, *supra* note 201, at 157. Cooper suggests, "The best answer may be to adopt the framework for discretionary interlocutory appeals without yet abolishing present rules. As the discretionary system becomes more familiar, it should prove possible to discard many of the present rules in a gradual process of attrition." *Id.*

259. *Id.* at 158, 163. To illustrate his point Cooper noted that for several years motions to disqualify opposing counsel were held to be immediately reviewable. *Id.* at 158. Over the years, however, appeals from such orders increased and were used to delay proceedings and harass parties. The rule was eventually discarded. *Id.* Cooper noted that "the question must be whether these matters are so complex and so shifting that they cannot be contained in any set of elaborate rules—whether our institutions have matured to the point at which discretion can be substituted for some part of the rules." *Id.* Cooper further stated that, "[i]f by luck or design federal courts have hit upon the best possible rules for today, they must remain alert to change them as time marches on." *Id.* at 163.

260. Professor Redish's views are discussed *infra* at notes 303-16 and accompanying text.

261. Cooper, *supra* note 201, at 158-63. According to Professor Cooper, "[w]ith a very wise and well accultured appellate bar, rules of discretion might satisfy all needs for interlocutory review." *Id.* at 161. Also, "[t]he better the judges are, the less need there is for frequent interlocutory appeal." *Id.* at 158. Furthermore, "[i]t may be more important to achieve prompt correction of errors as to some matters of substance or procedure than others, and errors may be more likely in some areas than others." *Id.* at 162.

the federal courts mature the rules should be abolished and a purely discretionary standard adopted.[262] Certification by a district court and a court of appeals' acceptance of the appeal should be entirely within each court's discretion.[263] Cooper also noted that unless there is a compelling reason for immediate application to the appellate court, application for certification by the district court should be required in all cases.[264] Once an application for certification is granted or denied by a district court, application for review can be made to a court of appeals.[265]

The foregoing proposals for amending the federal statutes governing appeals can be classified under several headings. The first includes those who have concluded that the best solution is to abolish the right to appeal completely, thus making all appeals, whether from a final judgment or an interlocutory order, subject to the discretion of an appellate court. These proposals can be termed "no right to appeal" and include Crick and Professors Resnick and Dalton. Others, principally Professors Carrington and Rosenberg, an ABA committee and the Restatement, would merely expand the list of interlocutory orders appealable of right. These can be termed "listing" proposals. A third group that includes Judge Frank, Professor Cooper, a student commentator and the ABA can be termed "discretionary interlocutory appeal" advocates because they propose eliminating all interlocutory appeals of right but permitting any interlocutory order to be appealable in the discretion of an appellate court.

2. *Complex Cases*

Complex cases, including both complex litigation and mass tort litigation, are multiparty, multiforum cases[266] that some legal groups

262. *Id.* at 163-64. According to Cooper:

> Inevitably, the time will come for a far simpler structure. Many adjective doctrines have been transformed successfully from rule to discretion. The special rules and complicating doctrines that now litter the landscape of appellate jurisdiction will be discarded when our institutions are ready for a more openly discretionary system of interlocutory appeal.

Id. at 164.

263. *Id.* at 164.

264. *Id.*

265. *Id.*

266. The American Law Institute Complex Litigation Project defined complex litigation as, "multiparty, multiforum litigation; it is characterized by related claims dispersed in several forums and often over long periods of time and presents one of the greatest problems our courts currently confront." A.L.I., COMPLEX LITIGATION PROJECT 11 (Tentative Draft No. 1, 1989). The ABA, for the purposes of its report, defined mass torts as

think are beginning to place an unmanageable burden upon the federal and state court systems.[267] Because the number of complex cases is increasing, many believe that prompt legislative action is necessary to the survival of the court systems.[268] The American Bar Association and the American Law Institute (ALI) have recently conducted studies in the area of complex litigation and have recommended that Congress enact legislation governing many aspects of these types of cases.[269]

Existing legislation provides that the Judicial Panel on Multidistrict Litigation (the "Panel") can combine in one district court all related suits filed in more than one federal district court.[270] The Panel's decision to consolidate and transfer is reviewable by a court of appeals by a writ of mandamus, but an order refusing to transfer is not reviewable.[271] The transferee court issues a series of pretrial orders, all of which are reviewable under section 1292.[272] The transferee court then

> situations arising from a single accident or use of or exposure to the same product or substance which involve tort claims in excess of $50,000 for death, serious personal injury or substantial property damage asserted by at least one hundred persons [including:] (1) single event catastrophes; (2) traditional product liability cases involving serious traumatically-induced personal injury or property damage; and (3) toxic tort cases which sometimes involve illnesses or conditions whose etiology is not fully understood.

ABA, COMMISSION ON MASS TORTS REPORT TO THE HOUSE OF DELEGATES 5-6 (1989) [hereinafter ABA REPORT].

267. As the ALI noted, "[r]epeated relitigation of the common issues in a complex case unduly expends the resources of attorney and client, clogs already over-crowded dockets, delays recompense for those in need, and brings our legal system into general disrepute." COMPLEX LITIGATION PROJECT, *supra* note 266, at 11. The ABA, in its report to the House of Delegates, quoted a judge as saying,

> [S]tate and federal trial judges are being inundated with mass filings of lawsuits by individual plaintiffs, *each* seeking compensation and a share of large punitive damage awards, based on a single catastrophe or the mass production and sale by one defendant of a defective product. The long arms of these 'big cases' . . . have ensnared virtually thousands of courts in this country in costly and repetitive litigation, threatening to last well into the next century. . . . [I]t is not an overly pessimistic prediction that, absent some legislative or judicial solution, our attempt to try these virtually identical lawsuits, one-by-one, will bankrupt both the state and federal court systems.

ABA REPORT, *supra* note 266, at 10 (alterations in original) (quoting Spencer Williams, *Mass Tort Class Actions, Going, Going, Gone?*, 98 F.R.D. 323, 324 (1983)).

268. *See supra* note 267.

269. *See generally* ABA REPORT, *supra* note 266; COMPLEX LITIGATION PROJECT, *supra* note 266.

270. 28 U.S.C. § 1407 (1988).

271. *Id.* § 1047(e).

272. 28 U.S.C. § 1292; *see* Solimine, *supra* note 105, at 1206 (discussing the current procedure for consolidation of complex litigation cases).

remands the suits not otherwise disposed of back to the various transferor courts.[273]

To deal with the unique problems presented by complex litigation, the ALI recommended the establishment of a panel similar to the Judicial Panel on Multidistrict Litigation called the Complex Litigation Panel.[274] The Complex Litigation Panel would be composed of federal judges. Its task would be to decide whether separate cases should be transferred for consolidation and to what district they should be transferred.[275] The transferee court would then prepare a plan for the disposition of the case.[276] Among the decisions to be made by the transferee court would be whether "the entire action or only specified issues shall be determined in the transferee district."[277]

273. 28 U.S.C. § 1407(a). One commentator has noted that, "[i]n practice, however, few such cases are remanded, as almost all cases terminate by way of summary judgment motion, transfers for change of venue, or settlement in the transferee court." Solimine, *supra* note 105, at 1206 (citing *In re* Korean Air Lines Disaster of Sept. 1, 1983, 829 F.2d 1171, 1178 & n.8 (D.C. Cir. 1987) (Ginsburg, J., concurring), *aff'd on other grounds sub nom.* Chan v. Korean Air Lines, 109 S. Ct. 1676 (1989)).

274. COMPLEX LITIGATION PROJECT, *supra* note 266, § 3.02. The ALI prefers that decisions be made by a specialized court, like the Complex Litigation Panel, because the panel would (1) develop the specialized expertise necessary in managing the transfer and consolidation of complex cases, (2) promote the economical resolution of such procedural issues, and (3) foster predictability. *Id.* cmt. a at 83-84.

275. *Id.* § 3.02. Section 3.02 provides:

> A special Complex Litigation Panel of federal judges shall be established and have responsibility for deciding whether separate actions should be transferred for consolidation under the criteria set forth in § 3.01 and, if so, determining to what district court they should be transferred and consolidated in accordance with the standard set forth in § 3.04.

Id.

276. *Id.* § 3.06(b). In formulating such a plan, the transferee court has broad power and discretion. Section 3.06(a) provides:

> (a) Unless the Complex Litigation Panel otherwise provides, transfer and consolidation shall be for all purposes, and the transferee judge shall have the full power to manage and organize the consolidated proceeding so as to promote its just, efficient and fair resolution. Among the things that the transferee court may consider are the organization of the parties into groups with like interests and the structuring of the litigation by separating the issues into those common questions that should be treated on a consolidated basis and those individual questions that should not. The transferee court also may certify classes either encompassing the entire litigation or for particular issues. Discovery and trial preparation on those issues not consolidated by the transferee court may be stayed until the close of the consolidated proceeding.

Id. § 3.06(a).

277. *Id.* § 3.06(b). Section 3.06(b) provides:

> (b) The transferee court shall prepare a preliminary plan for the disposition of the litigation. The plan shall specify whether the entire action or only specified issues shall be determined in the transferee district and also shall provide for the disposition of the issues not to be determined in the transferee court. This plan is conditional and may be altered or amended should it be appropriate to do so.

Id.

Section 3.07 of the ALI's proposal governs the appealability of the decisions made by the Complex Litigation Panel and the transferee court.[278] Decisions of the Complex Litigation Panel regarding transfer and consolidation are not subject to review by any court.[279] Decisions of the transferee court regarding the transfer of individual claims or issues are reviewable by the Complex Litigation Panel upon the request of any party.[280] The Complex Litigation Panel, however, has complete discretion to review the determinations and may affirm or reverse the transferee court's decision.[281] All other decisions made by the transferee court in devising a preliminary plan are reviewable under sections 1291 and 1292.[282] Section 3.07 also provides that when the issue of

278. *Id.* § 3.07.

279. *Id.* § 3.07(a). The ALI notes that "[p]roscribing immediate review seems most appropriate given the preliminary character of the Complex Litigation Panel's determination, and the fact that some opportunity for limited review is provided for the transferee court's later decision regarding which elements of the litigation to retain or retransfer." *Id.* § 307 cmt. c at 174 (citation omitted).

280. *Id.* § 3.07(b). Section 3.07(b) provides:

> (b) Review of the transferee court's plan under § 3.06(b) concerning whether to transfer subsequent stages of the proceedings will be within the exclusive jurisdiction of the Complex Litigation Panel. Any party may petition the Panel to review that determination but the Panel shall have no obligation to do so. If review is undertaken,
>
> (1) it may be by a subpanel or by the full Panel and
>
> (2) the Panel shall have discretion to affirm the transferee court's decision or to reverse it and specify how and in what district or districts the subsequent stages of the litigation will proceed. The Panel shall have discretion to order any disposition on the retransfer question it believes serves the objectives of justice, efficiency, and fairness.

Id. These types of decisions are reviewable because they "most often will be final and because . . . they may have a serious impact on some litigants if, for example, [the litigants] are required to engage in a full damage trial away from the transferor courts." *Id.* § 307 cmt. c at 174. The ALI justified review by the Complex Litigation Panel by noting that it would promote "the development of a uniform body of law" and it would avoid the problem of forcing "additional duties on already busy circuit courts, or on any other tribunal that has no special connection with the group of cases under consideration and no particular experience in complex litigation." *Id.* cmt. e at 182, 184.

281. *Id.* § 3.07(b). The ALI denies review as of right in these cases, reasoning that "[a]lthough the harm suffered by litigants disfavored by a decision whether or not to retransfer can be substantial, it is neither direct nor certain to occur." *Id.* § 307 cmt. c at 175.

282. *Id.* at 177. The ALI stated that

> review of all rulings other than the decision to transfer or retransfer should follow normal routes for appeal under the final judgment rule and its existing statutory exceptions. Thus, for example, should the magnet court deny a requested preliminary injunction, review may be sought under 28 U.S.C. § 1292(a). Similarly, certain class certification orders may be appealable immediately under 28 U.S.C. § 1292(b).

liability has been decided as to all claims and parties, a discretionary appeal may be taken immediately.[283] A court of appeals may hear the appeal if it finds that immediate review would avoid harm to the appellant and would promote efficiency and economy.[284] In addition, a district judge may certify for appeal an interlocutory order determining liability as to fewer than all the claims or parties when the judge concludes that there is no reason for delay.[285]

The ABA has proposed the establishment of a panel similar to the Complex Litigation Panel with similar authority.[286] It has recommended, however, that a panel decision be reviewable by extraordinary writ.[287] In addition, an interlocutory order of the transferee court would be reviewable at the discretion of a court of appeals.[288]

The proposals of the ABA and ALI can be classified as "listing" proposals along with those described in part V.B.1. above. They are, consequently, subject to the same criticism as those listing proposals made in part VI.

Id.

283. *Id.* § 3.07(c). Section 3.07(c) provides:

> (c) When the question of liability has been separately adjudicated and finally determined in the transferee court as to all the claims and parties, review may be sought immediately. The appellate court may grant review if it determines that doing so is likely (i) to avoid harm to the party seeking review and (ii) to promote the efficient and economical resolution of the litigation. When a final determination of liability has been made as to less than all the claims or parties, the district judge may certify that determination for review if it concludes that there is no just reason for delay.

Id.

284. *Id.*

285. *Id.*

286. ABA REPORT, *supra* note 266, at i-ii. The ABA House of Delegates was unable to act upon the ABA proposals because the Commission withdrew the report, stating that it needed "more time to consider the barrage of last minute criticism leveled at the commission's report." Solimine, *supra* note 105, at 1208 n.226 (quoting 58 U.S.L.W. 2477 (Feb. 20, 1990) (statement of Commission chairman, Robert F. Hanley)).

287. ABA REPORT, *supra* note 266, at 71. This provision is similar to existing § 1407 of title 28 of the United States Code. 28 U.S.C. § 1407(c).

288. ABA REPORT, *supra* note 266, at 74. The ABA recognized that "consolidation greatly increases the amount at stake in the litigation and . . . [that] certain determinations made by the court can have a profound affect on the parties" but it was also concerned that "successive interlocutory appeals would impair important values reflected in the final judgment rule." *Id.* at 73-74. To prevent delay the ABA proposed that " 'prosecution of such an appeal shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.' " *Id.* at 74 (quoting proposed § 111 of a Federal Mass Tort Jurisdiction Reform Act).

C. *Proposed Judicial Interpretations of Existing Statutory Provisions*

In addition to the proposals for statutory changes, many commentators have urged the federal courts to interpret the existing statutory provisions either broadly or narrowly, depending upon whether the commentator favors the final judgment rule as good policy.[289] These suggestions include interpreting section 1292(b) as granting broad discretionary power to the district courts and the courts of appeals,[290] narrowly interpreting the judicial and statutory exceptions to the final judgment rule,[291] and a liberal use of mandamus as a means of escaping the hardship that results from strict application of the final judgment rule.[292]

One suggested method of alleviating the harsh consequences that sometimes result from strict application of the final judgment rule that does not require legislative action is the expanded use of a writ of mandamus.[293] A student commentator advocating this approach has noted the ineffectiveness of other possible alternatives.[294] The author objected to a statutory listing of interlocutory orders immediately appealable of

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289. See *infra* notes 293-330 and accompanying text for a discussion of commentaries suggesting how courts should interpret §§ 1291 and 1292 in general. Many other commentators have written articles on how §§ 1291 and 1292 apply to specific orders; however, a discussion of these articles is beyond the scope of this article. *See, e.g.*, Note, *Discretionary Appeals*, *supra* note 192, at 349-59 (discussing how § 1292(b) applies to such orders as those concerning the propriety of the forum, those staying the action, those determining parties, those concerning dismissal and judgment, those regarding discovery and its enforcement, and those relating to masters); Michael D. Green, *From Here to Attorney's Fees: Certainty, Efficiency, and Fairness in the Journey to the Appellate Courts*, 69 CORNELL L. REV. 207 (1984) (discussing the application of §§ 1291 and 1292 in cases in which attorney's fees are sought); Note, *Interlocutory Appeal of Order Granting or Denying Stays of Arbitration*, 80 MICH. L. REV. 153 (1981) (discussing § 1292's application to orders regarding arbitration proceedings); Patrick E. Sweeney, Note, *Interlocutory Appeals of Orders Denying Claims of State Action Antitrust Immunity*, 49 OHIO ST. L.J. 653 (1988) (advocating the immediate appealability of denials of summary judgment regarding state action antitrust immunity); *see also* MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 82, § 4.4 (Patricia A. Davidson Supp. 1992) (summarizing various courts' application of § 1292 to a variety of orders).

290. *See, e.g.*, Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 92 (1975) (advocating a relaxation of the finality rule and a pragmatic approach to appealability); Solimine, *supra* note 105, at 1165 (advocating increased use of interlocutory appeals).

291. *See, e.g.*, Frank, *supra* note 153, at 317-20.

292. *See, e.g.*, *The Writ of Mandamus*, *supra* note 191, at 1112 (noting that "[t]he writ of mandamus . . . stands as a ready-made remedy [to the rigors of the final judgment rule], without violating the letter of the final judgment rule or the policy that justifies it").

293. *See generally id.*

294. *Id.* at 1109-11.

right because a listing would permit review of some orders that can be effectively reviewed after final judgment but prevents immediate appeal of orders that can result in irreparable harm if the appeal is delayed.[295] Furthermore, conditioning an interlocutory appeal on a trial judge certifying an order for appeal is inadequate because the judge may lack sufficient objectivity.[296] Vesting discretion in an appellate court is a better alternative, but instead of basing a decision to grant review on notions of "finality" the court should focus on whether irreparable harm is likely to result should immediate review be denied.[297] Because the writ of mandamus combines the discretion of an appellate court with the proper inquiry of whether the immediate review of the order would be in the interest of justice, the commentator suggested that the writ of mandamus stands as the best solution to the hardship imposed by strict application of the final judgment rule.[298]

Unlike some later commentators, Theodore D. Frank proposed a narrowing of the exceptions to the final judgment rule.[299] Frank's article was written in response to several Supreme Court cases that, according to Frank, expanded the exceptions to the final judgment rule in a manner that frustrated the purpose of the rule.[300] The Supreme Court's emphasis on the importance of the issue, or the lack of effective review if review is delayed until after a final decision has been rendered, strays from the original emphasis on whether the decision is substantially final.[301] Frank concluded that exceptions to the final judgment rule should be limited to those defined by section 1292, Rule 54(b), and the *Cohen* doctrine.[302]

295. *Id.* at 1110. The author noted, "[i]t is possible . . . that appeals from listed interlocutory orders will be held mandatory rather than optional. And, however extensive the statutory listing, there will always remain cases of immediate hardship for which no provision has been made." *Id.* (footnote omitted).

296. *Id.* at 1110-11.

297. *Id.* at 1111.

298. *Id.* at 1112-13. "Already being utilized beyond its traditional functions in order to secure judicial review of administrative action, mandamus may yet provide the most sensible and convenient solution to the continuing conflict between the policy limiting appeals and that demanding justice in the individual case." *Id.* at 1113 (footnote omitted).

299. Frank, *supra* note 153, at 320.

300. *Id.* at 305-13 (discussing such cases as Brown Shoe Co. v. United States, 370 U.S. 294 (1962); Republic Natural Gas Co. v. Oklahoma, 334 U.S. 62 (1948); Mercantile Nat'l Bank v. Langdeau, 371 U.S. 555 (1963); Hudson Distributors, Inc. v. Eli Lilly & Co., 377 U.S. 386 (1964); and Gillespie v. United States Steel Corp., 379 U.S. 148 (1964)).

301. *Id.* at 313-14. Frank stated:

> [T]he requirement of a final judgment before appellate review can be obtained has assumed a meaning quite different from that which it originally possessed. . . . The more recent cases have altered the emphasis of the analysis, and the necessity for 'substantial finality' in terms of the entire case is no longer the dominant requirement. Rather, the opinions have focused on the importance of the issue to the pending case or the lack of effective review should prompt review be denied.

Id. (footnotes omitted).

Professor Martin Redish has argued that courts should relax the finality rule and take a pragmatic approach to appealability.[303] Redish's approach to appealability might be taken in two different ways.[304] First, an appeal could be permitted from an order that as a practical matter is final even though technical finality has not been reached.[305] Second, an appeal could be permitted from an admittedly interlocutory order when the dangers of allowing an interlocutory appeal are outweighed by the advantages of allowing the appeal.[306] By practical finality, Redish meant that once a court concludes that for all practical purposes a decision is final, no weighing of interests need be conducted because section 1291 grants a right to appeal.[307] Under the second type of pragmatic approach, the interests of the parties in a speedy, fair, just, and effective review of their cases should be weighed against the interest in preventing piecemeal appeals.[308] In determining the interests of the parties, Redish stated that courts should consider the time, effort, and money invested in the litigation that could be saved by an immediate appeal as well as the "external" economic consequences to the parties if immediate appeal is prohibited.[309] In addition, Redish asserted that as the likelihood of reversal increases so does the probability that prejudice to the parties outweighs the harm caused by piecemeal appeals.[310]

As support for the need for a pragmatic approach, Redish noted the shortcomings of section 1292(b), the collateral order doctrine, and mandamus.[311] Section 1292(b), according to Redish, is not an effective "safety valve from the rigors of the final judgment rule" because it

302. *Id.* at 320.

303. Redish, *supra* note 290, at 92.

304. *Id.*

305. *Id.*

306. *Id.*

307. *See id.* at 96. Redish asserts that "once it is accepted that the district court's order has in reality ended the action, refusal to hear an appeal because of a balancing of competing interests does just as much violence to the dictates of section 1291 as does denying an appeal from a technically final decision." *Id.*

308. *Id.* at 97-101.

309. *Id.* at 98-99.

310. *See id.* at 100.

311. *Id.* at 108-15.

grants the district court and the court of appeals too much discretion to deny certification and applications for review.[312] The collateral order doctrine is also ineffective because of its limited application to those orders that are "collateral" and for which a delay in review would cause irreparable harm.[313] Furthermore, mandamus provides a weak exception to the final judgment rule because of the limitations placed on its use by the Supreme Court.[314]

In trying to legitimize the use of a pragmatic approach, Redish noted that its use would further the spirit of the statutory provisions governing appeals.[315] The pragmatic approach, he argued, is in line with the policies behind the final judgment rule of promoting judicial economy and eliminating undue delay.[316]

Another student commentator has recognized the need to interpret and apply section 1292(b) in a manner that fulfills the congressional purpose for enacting the section.[317] Asserting that Congress' only purpose in enacting section 1292(b) was to avoid unnecessary litigation and cost at the trial court stage, the author suggested how each of the three requirements for certification under section 1292(b) should be construed so that it promotes this congressional goal.[318] A court should find that the first requirement, that the order concern a controlling question of law, is fulfilled when an immediate review of that question by an appellate court could save substantial litigation time and cost at the trial court level.[319] Second, the trial court should not place much weight on the second requirement that there be a substantial ground for a difference of opinion because the appellate court is in better position to decide whether the law of the circuit should be reconsidered.[320] The third requirement, that immediate review would materially advance the termination of the litigation, must not be read so as to limit section 1292(b)'s application to "exceptional cases."[321] The materially advance requirement should be interpreted as requiring merely that total litigation time and expense be saved should the order be reversed upon appellate review.[322] The author concluded that viewing the three requirements this way would fulfill Congress's goal in enacting section 1292(b)—avoid a waste of the trial and appellate courts' time.[323] In addition to promoting Congress' purpose in enacting section 1292(b), the author asserted that section 1292(b) could be used effectively to alleviate hardship, a policy often advanced by Professor Michael Solimine in support of allowing exceptions to the final judgment rule but which was not the motivation behind the enactment of section 1292(b).[324] The author invited Congress to consider broadening the scope of section 1292(b) to permit appeal when necessary to alleviate hardship.[325]

Professor Solimine, in discussing the role of the judiciary in interpreting and applying section 1292(a) and (b), advocated a more benign attitude toward interlocutory appeals and the liberal application of section 1292(b).[326] Solimine argued that the collateral order doctrine should be construed more expansively, the application of section 1292(b) should not be limited to "big cases," appellate courts should not be permitted to refuse applications for review because of a congested docket, and district courts should provide explanations when deciding to certify an order for immediate review.[327] The arguments advanced by Solimine in support of greater use of interlocutory appeals included a decrease in the caseload of the federal courts resulting from a decrease in litigation time at the trial court level and an increase in settlements, an improvement in the variety of cases that will be heard by the courts of appeals, and an increased certainty in the law.[328] Solimine advanced a more functional approach to appealability similar to that advocated by Redish, under which courts would examine the "importance" of the right effected by the order to determine whether

312. *Id.* at 108-09.
313. *Id.* at 112.
314. *See id.* at 115.
315. *Id.* at 126.
316. *Id.*
317. Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, *supra* note 212, at 609-10.
318. *See id.* at 611, 617-28.
319. *See id.* at 618-24.
320. *Id.* at 624-25.
321. *Id.* at 625-26.
322. *Id.* at 627. This proposal differs from the controlling law requirement in that under this interpretation of the materially advance requirement, immediate review must result in a net savings even after considering the time for appeal. *Id.*
323. *Id.* at 617.
324. *Id.* at 633.
325. *Id.* at 634.
326. Solimine, *supra* note 105, at 1165-68.
327. *See id.* at 1201-03.
328. *See id.* at 1178-83. Professor Solimine noted "that certainty as to the procedural or substantive law will lead to more settlements than not." *Id.* at 1181. In addition, liberal use of interlocutory appeal could "generate precedent on recurring issues" and "provide an appellate court valuable experience with the reality of day-to-day trial court litigation, a perspective they are often accused of lacking." *Id.* at 1183.

immediate review should be granted.[329] Discussing the FCS Committee proposal that greater rulemaking power in this area be granted to the Supreme Court, Solimine noted that section 1292(b), if used liberally, would render the proposal unnecessary.[330]

The suggestions of Professors Redish and Solimine and others that a solution to the problem of the final judgment rule can be found in expanded judicial interpretation of the word final or of section 1292(b) are unsatisfactory for different reasons. Redish's proposal would merely increase litigation over what is final, the opposite of what the FCS Committee was attempting to achieve. Solimine's proposal, on the other hand, would require a distortion of section 1292(b) to accomplish goals beyond those of Congress in the existing section.

VI. Solving the Final Judgment Rule Dilemma

To resolve the dilemma posed by continued adherence to the final judgment rule and the numerous exceptions or proposed exceptions to it by statute, court rule, or judicial decision, an understanding of the three elements of appealability and the relationship between them is necessary. These three elements are the right to appeal, the jurisdiction of the appellate court, and the timing of the appeal.

These three elements are incorporated in the final judgment rule as follows: (1) a person aggrieved by an order or judgment of a trial court has the right to appeal the order or judgment to an appellate court; (2) the appellate court has jurisdiction over and must review the merits of the order or judgment; and (3) the aggrieved person must wait until the trial court has disposed of the entire case before it can take an appeal. Two corollaries of the final judgment rule are that an aggrieved person may not appeal an interlocutory order before the end of the case, and that the appellate court does not have jurisdiction over an interlocutory appeal. The final judgment rule thus exists in a world of absolutes: right or no right to appeal, mandatory or no jurisdiction over an appeal, and appeal only after a final judgment.

When an exception to the final judgment rule is made or proposed, almost invariably (section 1292(b) being the exception to the contrary) the exception is in absolute terms and affects all three elements—extending the right to appeal and thus mandatory jurisdiction

329. *Id.* at 1191 (citing Lauro Lines v. Chasser, 490 U.S. 495, 502-03 (1989) (Scalia, J., concurring)).

330. *See id.* at 1212.

to one or more classes of interlocutory orders before the entry of the final judgment. If there is the right to appeal an interlocutory order, the appeal must be taken and reviewed immediately. Neither the taking of the appeal nor the review of it can be delayed until the final judgment is entered. Further, the extension is absolute in terms of type or class of the order made appealable. Thus, if an interlocutory order falls within the definition of the exception, it is appealable immediately without regard to the effect of the order in the particular case. The harm the particular appellant will suffer if the appeal is delayed until the final judgment is entered is ignored. Similarly ignored is the harm to the appellee from an immediate appeal and the effect on the trial court, the appellate court, and other litigants in both courts. Further, no consideration is given to whether an immediate appeal may expedite or delay the termination of the litigation, or serve some public purpose. The result is that when an exception to the final judgment rule is made, the exception is likely to produce just what the final judgment rule was designed to prevent—multiple appeals in a single case.

The final judgment rule, which had its origins in the practicalities of the English common law courts having only one record in each case, has continued in existence because in most cases it serves the purposes of some or most litigants and prospective litigants, their lawyers, the trial court, the appellate court, and ultimately the public. The general purpose of the rule is to aid in the resolution of disputes as expeditiously and inexpensively as possible. The rule by its terms, however, does not recognize the reality that in some cases the appeal of an interlocutory order will serve some of these same interests better than strict adherence to the final judgment rule. The constant tension between strict adherence to the final judgment rule and the occasional need for an immediate appeal of an interlocutory order has produced the present confused situation in which the final judgment rule is riddled with exceptions. Each exception almost always requires an immediate appeal of an interlocutory order that falls within the exception, and the appellate court has jurisdiction over the interlocutory order only if appealed immediately and not on appeal from the final judgment. In many cases the exceptions are not necessary to avoid unduly harsh effects of the rule, while often the exceptions do not reach all cases in which strict enforcement of the rule is unduly harsh. For example, 28 U.S.C. § 1292(a)(1) by its terms allows the immediate appeal of any order that grants or denies a request for injunctive relief without regard to the harm or lack of harm to the litigants of a delayed appeal. The

result is constant pressure on the courts and legislative bodies to create new exceptions or to enlarge or narrow exceptions previously made.

The two proposals of the FCS Committee, like most other proposals to modify the final judgment rule, continue this flawed approach in that they are concerned only with appeals of right, either from final judgments or interlocutory orders, and thus either confer mandatory jurisdiction or deny jurisdiction in the appellate court. Thus these two proposals will not accomplish the goals stated by the FCS Committee in its report—to reduce litigation on issues of finality and appealability, to avoid dismissal of appeals as premature, and in particular, to avoid instances in which an appeal of an order not truly final but immediately appealable is held to be untimely because the appeal was not taken until after the final judgment was entered.[331] The first proposal to permit a rule to define "final" for purposes of appeal, and enacted into law as section 315 of the 1990 Act,[332] can only *expand* the definition of "final" to include rulings that are not truly final but become final only because the rule says so. This expansion will result because the Court has consistently defined "final" as used in section 1291 to include two types of rulings: one, the traditional final judgment rule, that is a judgment that disposes of the entire matter in litigation leaving only execution to be done, and two, an order that affects a right that will be irretrievably lost absent an immediate appeal. It is highly unlikely that the rulemakers would seek to eliminate either type of order from its definition of "final." If the rulemakers do anything, consequently, they will add to the list. The second proposal, to list interlocutory orders appealable of right, was enacted into law by section 101 of the 1992 act. By its terms the amendment expands rather than contracts appealability because it permits additions but not deletions from section 1292.[333]

Sixty years ago Crick pointed out the misplaced focus of litigation over what type of judicial action is final and thus appealable.[334] The

331. *See* REPORT, *supra* note 1, at 95.

332. 1990 Act, *supra* note 4, at 5115.

333. Contrary to the suggestion of Professor Rowe in his comment on this article, nothing in the report of the FCS Committee, the article of Professor Carrington on which the FCS Committee's recommendations were drawn, or in the legislative history of § 101 of the 1992 Act suggests that the Supreme Court could make interlocutory orders appealable only in the discretion of the courts of appeals rather than of right. In particular, Professor Carrington's proposal makes it clear that only those types of orders presently covered by § 1292(b) would be subject to discretionary review in the courts of appeals.

334. *See* Crick, *supra* note 60, at 558.

FCS Committee and Congress have recognized the same problem and were correct in so doing. The source of the litigation, however, is neither definitional nor whether the definition is found in a statute or a rule. Reducing the litigation, consequently, cannot result from giving the rulemakers authority to define "final" or to list certain classes of interlocutory orders appealable of right. The litigation arises, rather, from efforts to avoid the effect of the final judgment rule in a particular case by making certain types of interlocutory orders appealable of right, either because of perceived harm from delaying the appeal until the final judgment is entered or perceived advantages of an immediate appeal of an interlocutory order.

There are two techniques to permit an interlocutory appeal of right. One is to change the definition of "final" to include the particular type of interlocutory order. The other is to make an exception to the final judgment rule to permit the immediate appeal of the class of orders into which the particular interlocutory order falls. These are, of course, the two recommendations of the FCS Committee incorporated into the 1990 and 1992 acts of Congress that prompted this article. Either technique, however, increases rather than decreases litigation over issues of finality or appealability. A litigant aggrieved by an order clearly interlocutory under the classic definition of "final" but potentially falling within the expanded definition of "final" or within the definition of the immediately appealable interlocutory order will take an immediate appeal of the order for one of two reasons. One is because the litigant wants an early review of the order. The second is the litigant's fear that the order will be classified on appeal of the true final judgment as having been appealable immediately when entered but not on appeal from the final judgment, thus losing the right to appellate review of the order.

The collateral order doctrine is a classic example of what happens when a court attempts to loosen the definition of "final." The Supreme Court in *Cohen* gave a clear, three point test for a collateral order,[335] and this test was subsequently restated but not substantively redefined in *Coopers & Lybrand*.[336] These well stated criteria, however, did not reduce litigation. Instead, the criteria have increased litigation because each order that an aggrieved party claims or fears meets the criteria and is thus immediately appealable must be tested by a court of ap-

335. *See supra* notes 146-48 and accompanying text.

336. *See supra* note 157 and accompanying text.

peals against each of the three criteria, thus multiplying rather than reducing litigation. The same process will occur if the Supreme Court attempts to exercise its new authority to define by rule "final" for purposes of appeal, thus defeating rather than achieving the stated goals of the FCS Committee. Similarly, each statute or rule designating a class of interlocutory orders as immediately appealable has produced litigation over whether a particular order falls within the class.

The Carrington proposal that was the basis for a bill introduced and the subject of a congressional hearing in 1987 is even more problematic than expanding the definition of "final" or the collateral order rule. The proposal combined general language on protecting substantial rights that cannot be effectively enforced on an appeal from a final judgment with the right to an immediate appeal, but it did not provide a basis for predicting in advance whether a court of appeals would find an immediate appeal was necessary. The result can only compound the problems created by the final judgment rule and the present exceptions to it.

An additional problem created by the listing power is the potential for an ever expanding list. The English rules committee has a similar power, stated in terms of classifying orders as final or interlocutory.[337] Orders classified as final are appealable of right and those classified as interlocutory are appealable only in the discretion of the Court of Appeal. The FCS Committee has classified in its rule a total of eight specific types of interlocutory orders as final and thus appealable of right. The FCS Committee also has a broader definition of final that includes orders clearly interlocutory.[338] The Restatement of Interlocutory Appeals in *Law and Contemporary Problems* devotes thirty sections and 152 pages to listing various types of orders that have been held to be final or interlocutory, with many falling into the latter category.[339] It is highly unlikely that the federal rulemakers would be substantially less restrictive. The best evidence of their tendencies are the amendments to Federal Rules of Appellate Procedure 3 and 4 made since 1979. In every instance, the rulemakers have relaxed rather than tightened the procedural requirements for taking an appeal.

An even more fundamental objection to an appealable interlocutory list has been made by Crick, Cooper, Redish, and several student

337. Supreme Court Act 1981, § 54(b) (Eng.).

338. Order 59, r. 1A, Rules of the Supreme Court (Eng. 1991). See Appendix A for the text of the English rule regarding appeals.

339. *Interlocutory Restatement*, *supra* note 236, at 96-248.

authors. These commentators have pointed out that it is virtually impossible to identify in advance classes or types of interlocutory orders that should be appealable immediately.[340] The type of order that should be appealable immediately will vary from period to period and from case to case, depending upon all of the variables that make one case different from another. It is impossible to predict when in a particular case the relative interests of the parties, the prospects for early termination of the case, or the public significance of the case will dictate the advisability of an earlier rather than later review of an interlocutory order. Thus, attempting to classify interlocutory orders for appeal purposes whether by statute, rule, or judicial decision, can be nothing other than an exercise in futility.

The principal reason advanced by Professor Rowe for authorizing the rulemakers to define "final" and to list certain interlocutory orders as immediately appealable is that the rulemaking process is more responsive to the needs of the courts and those who use them than Congress and the legislative process. Recent criticisms of the rulemaking process at the federal level suggest that while the process may have been responsive once, it is no longer.[341] The process has become more public and thus more political and more time consuming. It is unlikely, consequently, that the rulemaking process will be better able than legislative process to deal with issues of finality and appealability to accomplish the goals stated by the FCS Committee.

As previously discussed, the approach proposed by Crick, Resnick, Dalton, and several judges is at the opposite end of the spectrum—to eliminate completely the right to appeal, and to make all judgments and orders, both final and interlocutory, appealable only in the discretion of the court of appeals.[342] This proposal, of course, would eliminate the confusion over what a final judgment is as well as what classes of interlocutory orders should be appealable immediately. The drawbacks,

340. *See supra* notes 204-325 and accompanying text. Recent articles advocating the immediate appealability of certain types of orders include Sloan, *supra* note 185; Margaret L. Anderson, Note, *The Immediate Appealability of Rule 11 Sanctions*, 59 GEO. WASH. L. REV. 683 (1991); Nicole E. Paoline, Comment, *The Cohen Collateral Order Doctrine: The Proper Vehicle for Interlocutory Appeal of Discovery Orders*, 64 TUL. L. REV. 215 (1989); Sweeney, *supra* note 289; Note, *Motions for Appointment of Counsel and the Collateral Order Doctrine*, 83 MICH. L. REV. 1547 (1985).

341. Criticisms of the current federal rulemaking process are contained in Paul Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161 (1991) and Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C. L. REV. 795, 802 (1991).

342. *See, e.g.*, Crick, *supra* note 60, at 564.

however, far outweigh the advantages. First and foremost, the proposal would eliminate the right to appeal a final judgment. This right has been a basic part of the American judicial process since colonial times and has been part of the federal judicial system since it was established in 1789.[343] As Judge Frank Coffin has said, the "[opportunity] to take one's case to 'a higher court' as a matter of right is one of the foundation stones of both our state and federal court systems."[344] To do away with this right other than for the most compelling reasons cannot be justified. Eliminating confusion over the final judgment rule and its exceptions is certainly a desirable goal, but it does not call for eliminating the right of appeal if there is a less drastic solution available. Also inappropriate are the suggestions that the courts use their statutory construction powers to expand the meaning of "final" by adopting a "practical" rather than technical definition, use the supervisory writ of mandamus or prohibition to review interlocutory orders not otherwise immediately appealable, or expand the definition of "controlling questions of law" as used in section 1292(b). The final judgment rule is, after all, a policy adopted by Congress to govern the right to appeal. When Congress has felt the need to relax the rule, it has done so. Perhaps it has not acted often enough to satisfy some, and certainly not in such a way as to permit the courts to avoid demonstrable irreparable harm in particular cases. The remedy, however, should be to persuade Congress to allow the courts to prevent irreparable harm or to protect some other important interest, but at the same time to protect both the right to appeal and the final judgment rule. Persuading Congress to allow the rulemakers to accomplish the same objectives merely converts a one step process into a two step process.

Only one proposal satisfies all of these objectives—that contained in section 3.12 of the ABA *Standards Relating to Appellate Courts*[345] and as advocated by Judge Frank, Professor Cooper and a student author.[346] Under the proposal, the right to appeal and the final judgment rule remain intact—there is a right to appeal in every case, but only when the entire case is concluded.[347] At the same time, however, a party aggrieved by an interlocutory order who believes that delaying

343. *See* Judiciary Act of 1789, ch. 20, 1 Stat. 73 (1789).

344. FRANK M. COFFIN, THE WAYS OF A JUDGE 16 (1980).

345. ABA STANDARDS RELATING TO APPELLATE COURTS, *supra* note 219, § 3.12. The text of § 3.12 is set out *supra* in note 220.

346. *See supra* notes 212-18 and 258-65.

347. *See* ABA STANDARDS RELATING TO APPELLATE COURTS, *supra* note 219, § 3.12.

review of the order until the final judgment would prevent the review from being effective can seek immediate review.[348] A court of appeals would have the discretion to refuse to hear the appeal if it finds that irreparable harm will not occur or that some important interest will not be served if the appeal is not heard immediately.[349] The discretionary appeal thus provides the relief valve in those cases in which strict adherence to the final judgment rule would not serve the best interests of the parties or the public, but with an individualized balancing of interests made on a case by case basis. Just as important, jurisdiction of the appellate court is never an issue, because the court has discretionary jurisdiction over any interlocutory order. No interlocutory appeal will ever be dismissed as premature, and no interlocutory order will ever be unreviewable on appeal from the final judgment because there was an earlier appeal of right.

Several objections can be raised to this proposal. One is that, notwithstanding the opportunity for discretionary review, the courts would still create judicial exceptions to the final judgment rule by defining final in a "practical" manner so as to allow appeals of right from certain types of interlocutory orders. Another is that the courts of appeals would be inundated with applications for leave to appeal interlocutory orders, thus increasing rather than decreasing their workloads. The U.S. Judicial Conference in 1952 made a similar objection in rejecting Judge Frank's proposal. The Conference stated that giving the courts discretion to hear an immediate appeal from any interlocutory order would encourage "fragmentary and frivolous appeals" and lead to delay.[350] A third objection is that the courts of appeals, so burdened with appeals from final judgments, would refuse to hear any interlocutory appeal, no matter how clear a case of irreparable harm was made.

Fortunately, the validity of these objections does not have to be judged on the basis of sheer speculation. Wisconsin adopted the ABA proposal almost word for word in 1978 and thus has had more than thirteen years experience under it.[351] An examination of that experi-

348. *See id.*

349. *See id.*

350. *1952 Judicial Conference Special Session Report*, *supra* note 214, at 203; *see supra* notes 213-15 and accompanying text.

351. WIS STAT. ANN. § 808.03 (West Supp. 1992). The statute provides for appeals to the court of appeals:

> (1) **Appeals as of right.** A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order entered in accordance with s.

ence can demonstrate how the proposal actually works, and whether any of the potential objections to it are valid.

Before the adoption of the ABA proposal in 1978, Wisconsin's law on finality and appealability was similar to current federal law—there was a right to appeal a final judgment, but by virtue of statutory and judicial exceptions, many interlocutory orders could also be appealed of right.[352] Ascertaining what types of interlocutory orders could be appealed, however, was not always easy. To remedy this problem, and as part of the establishment of an intermediate appellate court and a general revision of the statutes and rules governing appeals, Wisconsin adopted the ABA proposal.

As might be expected, there was an initial rush of opinions construing the new statute, both by the Wisconsin Supreme Court and the state's new court of appeals. Perhaps the most significant of these early decisions were two that initially were decided one way, and then on reconsideration were decided the opposite way. One case, *State v. Jenich*,[353] involved the appealability of the denial of a motion to dismiss a criminal proceeding on grounds of double jeopardy. The other, *State ex rel. A.E. v. Circuit Court*,[354] was an appeal of a waiver by a juvenile court of jurisdiction over a juvenile so that the juvenile could be tried as an adult for a crime. In each case the Wisconsin Supreme Court initially held that the order in question met Wisconsin's collateral order test, which was the same as that in the federal system, and thus was appealable immediately.[355] Upon reconsideration requested by the state, the supreme court issued a new opinion in each case on the same day, doing a complete reversal in both.[356]

The court's opinion on reconsideration in *Jenich* set out its rationale for its abrupt reversal of position. The opinion first quoted the statute providing that only a judgment or order that "disposes of the entire matter in litigation" is a final judgment appealable of right.[357] The court then observed that the order denying dismissal on double jeopardy grounds continued the litigation rather than ended it.[358] The court cited a text on the new Wisconsin appellate procedure that twice stated that an order denying a motion to dismiss was not final and thus not immediately appealable.[359] The opinion noted that the prior Wisconsin practice followed the federal collateral order rule, but again cited the same text stating that the discretionary appeal of an interlocutory order under the new statute obviated the necessity for a collateral order rule.[360] The court then stated that "any implication contained in our

806.06(1)(b) or 807.11(2) or a disposition recorded in docket entries in *ch. 799 cases or* traffic regulation *or* municipal ordinance violation cases prosecuted in circuit court which disposes of the entire matter in litigation as to one or more of the parties, whether rendered in an action or special proceeding.

(2) Appeals by permission. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

(a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;

(b) Protect the petitioner from substantial or irreparable injury; or

(c) Clarify an issue of general importance in the administration of justice.

Id.

Section 808.03 differs in three respects from the ABA proposal. One is that the section defines "final." The second is that a judgment is final and appealable if it is final as to less than all the parties. The third is that the harm to a party in subsection (2)(b) need be substantial *or* irreparable, rather than substantial *and* irreparable.

This author, who was then serving as executive officer of the Wisconsin Supreme Court, was also reporter for a committee of the Wisconsin Judicial Council that was given the task of revising the Wisconsin statutes and rules governing appeals in anticipation of the approval of a constitutional amendment that would reorganize the state courts, including establishing for the first time an intermediate appellate court. For a description of that reform process, see Robert J. Martineau, *Judicial Reform in Wisconsin: Some More Lessons for Reformers*, *in* ABA, COURT REFORM IN SEVEN STATES 87-103 (Lee Powell ed., 1980).

352. WIS. STAT. ANN. §§ 817.09, 817.33 (West 1977) (replaced by § 808.03). The text of §§ 817.09 and 817.33 is provided in Appendix B.

353. 288 N.W.2d 114 (Wis.), *modified on reconsideration per curiam*, 292 N.W.2d 348 (Wis. 1980).

354. 288 N.W.2d 125 (Wis.), *modified on reconsideration per curiam*, 292 N.W.2d 114 (Wis. 1980).

355. *Jenich*, 288 N.W.2d at 116-18; *State ex rel. A.E.*, 288 N.W.2d at 127-28. In *Jenich*, the plurality originally held that a pretrial order denying a motion to dismiss based on double jeopardy finally and completely determines a claim of right; is separate from and collateral to the principal issue of guilt or innocence of the underlying crime; and involves too important to be denied review because if the accused were forced to face a second trial he would lose the full protection of his constitutional rights. *Jenich*, 288 N.W.2d at 116-17. In *State ex rel. A.E.*, the court held an order waiving juvenile court jurisdiction meets the collateral order test because the order disposes of the question of juvenile disposition; the issue of waiver is separable from the main issue of the guilt of the accused; and the confidentiality associated with juvenile proceedings would be "irreparably lost" if review of the waiver must wait review of the final judgment. *State ex rel. A.E.*, 288 N.W.2d at 127.

356. State v. Jenich, 292 N.W.2d 348 (Wis. 1980); State *ex rel.* A.E. v. Circuit Court, 292 N.W.2d 114 (Wis. 1980).

357. State v. Jenich, 292 N.W.2d 348, 349 (Wis. 1980) (quoting WIS. STAT. ANN. § 808.03).

358. *Id.*

359. *Id.* (citing ROBERT J. MARTINEAU & RICHARD R. MALMGREN, WISCONSIN APPELLATE PRACTICE § 402 (1978)).

360. *Id.*

initial opinion that the finality of orders should be tested under the three federal criteria is expressly withdrawn."[361]

Perhaps just as important, the court in *Jenich* reaffirmed one of its earlier decisions that held that the refusal of the court of appeals to grant a petition to review an interlocutory order was not reviewable by the supreme court.[362] Nonetheless, the supreme court urged the court of appeals to be careful in considering petitions challenging denial of double jeopardy claims, stating that immediate review of the denials would almost always be necessary to prevent the substantial or irreparable injury, one of the principal reasons for the discretionary appeal procedure.[363] The court in *State ex rel. A.E.*, the companion juvenile waiver case, held that the waiver order did not dispose of the entire matter in litigation and thus was not final and not appealable of right.[364]

Once the Wisconsin Supreme Court established the principle of strict adherence to both the letter and spirit of the final judgment rule as incorporated into the Wisconsin statute, both the supreme court and the court of appeals have been faithful to the principle. The Wisconsin courts have held that orders denying motions seeking relief at the pretrial or trial stage were not final and thus not appealable of right. These include motions seeking dismissal for lack of subject matter or personal jurisdiction,[365] summary judgment,[366] change of venue,[367] joinder of an additional defendant,[368] or consolidation.[369] Similarly, a judg-

361. *Id.* at 349-50.

362. *Id.* at 350 ("The right to seek review does not exist . . . where the court of appeals, in the exercise of its discretion, declines to entertain a permissive appeal from an order the parties concede to be nonfinal." (citing State v. Whitty, 272 N.W.2d 842 (Wis. 1978))). It also rejected the view of one justice that the court should use its constitutional superintending and administrative authority to direct the court of appeals to hear permissive appeals from orders denying double jeopardy claims. *Id.* (Abrahamson, J., concurring).

363. *Id.* at 349.

364. State *ex rel.* A.E. v. Circuit Court, 292 N.W.2d 114, 114-15 (Wis. 1980).

365. *See, e.g.*, Heaton v. Independent Mortuary Corp., 294 N.W.2d 15, 16 (Wis. 1980) (holding order denying motion to dismiss for lack of personal jurisdiction not final, not appealable as of right); Grulkowski v. State, 294 N.W.2d 43, 44 (Wis. Ct. App. 1980) (holding order denying motion to dismiss based on subject matter jurisdiction not final, not appealable as of right).

366. Corning v. Carriers Ins. Co., 276 N.W.2d 310 (Wis. Ct. App. 1979).

367. Aparacor, Inc. v. Department of Indus., Labor and Human Relations, 293 N.W.2d 545 (Wis. 1980).

368. Rice v. Fiern, 322 N.W.2d 481 (Wis. Ct. App. 1982) (order denying motion to join party not final because it does not dispose of entire matter in litigation as to any party).

369. State v. Rabe, 291 N.W.2d 809 (Wis. 1980) (order consolidating four counts into one not final).

ment on the original claim when a counterclaim remains pending,[370] an order for a new trial whether or not conditioned upon a remittitur,[371] and a denial of a motion for reconsideration not raising a new issue[372] are not final and thus not appealable of right. The Wisconsin courts, on the other hand, have found that the following judgments or orders meet the strict definition of final: setting aside an administrative agency's order and remanding the matter to the agency,[373] denial of a motion for reconsideration raising a new issue,[374] an order of commitment following a trifurcated trial with previous findings on guilt and mental disease,[375] a judgment of foreclosure,[376] an order confirming a sale following a foreclosure judgment,[377] an award of an attorney fee after judgment on merits,[378] a denial of a petition to intervene,[379] and an injunction that although labeled temporary was actually final.[380]

The opinions of the Wisconsin Supreme Court and Court of Appeals in these cases indicate a keen awareness of the narrow definition of finality set forth in the statute and the philosophy behind the definition.[381] The opinions have pointed to the fact that the need for a nar-

370. Brownsell v. Klawitter, 306 N.W.2d 41 (Wis. 1981).

371. Earl v. Marcus, 284 N.W.2d 690, 692 (Wis. 1979).

372. Marsh v. City of Milwaukee, 310 N.W.2d 615 (Wis. 1981).

373. Bearns v. Department of Indus., Labor and Human Relations, 306 N.W.2d 22, 26 (Wis. 1981) (order setting aside administrative agency's order is final because court's adjudication disposes of entire matter in "litigation," as "litigation" refers only to proceedings in the court).

374. *See Marsh*, 310 N.W.2d at 617 (citing Ver Hagen v. Gibbons, 197 N.W.2d 752 (1972)).

375. State v. Smith, 335 N.W.2d 376, 381 (Wis. 1983) (finding that commitment order is final order because it is final disposition of state's criminal prosecution of defendant).

376. Shuput v. Lauer, 325 N.W.2d 321, 326 (Wis. 1982) (judgment of foreclosure is final judgment because it determines the rights of parties and disposes of entire matter in litigation).

377. Anchor Sav. & Loan Ass'n v. Coyle, 435 N.W.2d 727, 730 (Wis. 1989) (order confirming sale and ordering deficiency judgment in foreclosure action is final order as it was final to both stages of foreclosure action and contemplated no further document).

378. ACLU v. Thompson, 455 N.W.2d 268, 270 (Wis. Ct. App. 1990) (judgment final even if attorney fees pending because merits of underlying action have been completely adjudicated).

379. Becker v. Becker, 225 N.W.2d 884, 886 (Wis. 1975) (order denying petition to intervene is final and appealable as of right because it terminates a special proceeding).

380. *In re* Town of Fitchburg v. City of Madison, 299 N.W.2d 199 (Wis. 1980). In *Fitchburg*, the circuit court had issued an injunction, which it labeled "temporary," to enjoin the town of Fitchburg from incorporating by means of a referendum other than one ordered by the court. *Id.* at 203. In determining the appealability of the injunction, the supreme court stated it must look beyond the form and label of the document, and in doing so found that the lower court's actions extinguished the rights of the citizens to incorporate by a referendum of their own initiative. *Id.* at 205. Therefore, the supreme court determined that the "temporary" injunction finally determined the issue, and was appealable as of right. *Id.* at 205-06.

381. *See, e.g.*, State v. Alles, 316 N.W.2d 378 (Wis. 1982). In *Alles*, the Wisconsin Supreme Court noted:

row definition of final judgment was first proposed in Wisconsin in a report on the Wisconsin appellate process by the National Center for State Courts.[382] These opinions further have pointed to the fact that the Wisconsin statute was taken almost word for word from the ABA *Standards*.[383] Perhaps most important, the opinions have recognized that the availability of the discretionary appeal on any interlocutory order eliminated the necessity of exceptions to the final judgment rule to prevent irreparable harm in individual cases.[384]

Just as important to an evaluation of the ABA-Wisconsin approach is how the discretionary appeal works in practice. Only two types of data exist to make this evaluation—statistics on (1) the number of petitions to appeal filed and the number granted; and (2) the number of published opinions in cases in which a discretionary appeal has been allowed. There is no published information on the types of interlocutory orders for which discretionary appeals have been denied because the Wisconsin Court of Appeals does not write opinions on the denials, and the denials are not reviewed by the Wisconsin Supreme Court.

Statistical data developed by the clerk of the Wisconsin Court of Appeals for 1990 show that compared to 2,281 appeals of right, there were 241 petitions to appeal, 80 or 33% of which were granted.[385] The ratio between appeals of right and petitions to appeal is 9.4 to 1 (2,281 to 241), and between appeals of right and discretionary appeals granted 28.5 to 1 (2,281 to 80).[386] In 1989 the comparable statistics

> [A]ppellate review should ordinarily be available only following the entry of a final judgment. The ABA standards [upon which the Wisconsin statute is based] make it clear that the purpose of the final-judgment rule is to avoid piecemeal appeals which delay and interfere with trial court proceedings and destroy the integrity of trial court judgments.
>
> *Id.* at 390.

382. State v. Rabe, 291 N.W.2d 809, 813 (Wis. 1980). The court acknowledged that the National Center for State Courts recommended that interlocutory decisions be reviewable only on a discretionary basis to avoid "unnecessary interruptions and delay in trial court proceedings caused by multiple appeals and to reduce the burden on the court of appeals of dealing with unnecessary appeals." *Id.* (quoting WIS. STAT. ANN. § 808.03 legislative council note).

383. Wick v. Mueller, 313 N.W.2d 799, 803 (Wis. 1982) ("The American Bar Association study committee's proposal . . . has been incorporated almost verbatim in sec. 808.03 of the present Wisconsin Statutes.").

384. *See, e.g.*, State v. Jenich, 292 N.W.2d 348, 349 (Wis. 1980) ("Since, sec. 808.03(2) now provides a flexible procedure for seeking review of all nonfinal judgments and orders by permissive appeal, there is no need to adopt the three-pronged 'collateral order' rule which enables federal appellate courts to review various intermediate orders.").

385. 1990 District Profiles for Wisconsin Appellate Courts (copy on file with author).

386. *See id.*

were 1,953 appeals of right and 191 petitions to appeal, 68 or 35% of which were granted.[387] The appeals of right-petition to appeal ratio was 10.2 to 1 (1,953 to 191), and between appeals of right and discretionary appeals granted, 28.7 to 1 (1,953 to 68).[388] In 1988 there were, coincidentally, 1,988 appeals of right and 228 petitions to appeal, 50 or 21.9% of which were granted.[389] The ratio of appeals of right to petitions to appeal was 8.7 to 1 (1,988 to 228) and between appeals of right to discretionary appeals granted was 39.8 to 1 (1,988 to 50).[390]

Cases in which a petition to appeal has been granted have involved issues such as double jeopardy,[391] appointment of counsel in a civil contempt action,[392] jurisdiction over a minor by a juvenile court,[393] a claim that a delinquency petition was untimely,[394] subject matter jurisdiction in an insurance dispute,[395] choice of law,[396] refusal to submit to a blood test as civil contempt,[397] an order compelling testimony of a minor in a child abuse prosecution,[398] constitutionality of judicial substitution statutes,[399] postponement of hearing on a petition to vacate a street,[400] statutory construction,[401] disqualification of a party's attorney,[402] change of

387. 1989 District Profiles for Wisconsin Appellate Courts (copy on file with author).

388. *See id.*

389. 1988 District Profiles for Wisconsin Appellate Courts (copy on file with author).

390. *See id.*

391. State v. Fischer, No. 90-2855-CR, 1991 Wisc. App. LEXIS 220 (Wis. Ct. App. Mar. 12, 1991).

392. Brotzman v. Brotzman, 283 N.W.2d 600 (Wis. Ct. App. 1979).

393. G.B.K. v. State, 376 N.W.2d 385 (Wis. Ct. App. 1985) (minor accused of murder).

394. C.A.K. v. State, 433 N.W.2d 298 (Wis. Ct. App. 1988), *aff'd*, 453 N.W.2d 897 (Wis. 1990).

395. Sipl v. Sentry Indem. Co., 431 N.W.2d 685 (Wis. Ct. App. 1988).

396. Gavers v. Federal Life Ins. Co., 345 N.W.2d 900 (Wis. Ct. App. 1984).

397. State v. A.W.O., 344 N.W.2d 200 (Wis. Ct. App. 1983).

398. State v. Gilbert, 326 N.W.2d 744 (Wis. 1982).

399. State v. Holmes, 315 N.W.2d 703 (Wis. 1982) (court of appeals granted petition to appeal and in turn certified case to supreme court).

400. Selk v. Township of Minocqua, 422 N.W.2d 889 (Wis. Ct. App. 1988).

401. *See, e.g.*, American Family Mut. Ins. Co. v. Zimmerman, 467 N.W.2d 209 (Wis. Ct. App. 1991) (appeal from nonfinal order which declared that insurance limits are governed by the policy and not by statutory limits under financial responsibility law); Kruschke v. City of New Richmond, 458 N.W.2d 832 (Wis. Ct. App. 1990) (appeal from denial of summary judgment to decide whether swinging in a city park is a "recreational activity" as defined by statute so as to immunize city from liability for injuries to plaintiff who fell from swing); State v. Sammons, 417 N.W.2d 190 (Wis. Ct. App. 1987) (appeal from denial of motion to dismiss to decide whether defendant juror met statutory definition of public employee, and could be charged with accepting a bribe as a public employee).

402. State v. Miller, 467 N.W.2d 118 (Wis. 1991).

venue,[403] discovery,[404] a party's obligation under an installment contract,[405] and the right to bail.[406]

The statistics show several things. One, as compared to appeals of right, the petitions for leave to appeal are a relatively small number, averaging about one petition to appeal for every nine appeals of right. By the same token, the Wisconsin Court of Appeals grants approximately one-third of the petitions, indicating neither an unduly strict nor unduly generous attitude toward interlocutory appeals. The same conclusion can be drawn from the wide range of interlocutory orders that have been reviewed on the merits.

The frivolous appeals that were a concern of the 1952 U.S. Judicial Conference do not appear to be a problem in Wisconsin. In addition, federal courts of appeals have express statutory and rule power as well as inherent power to deal with frivolous appeals, and increasingly have been willing to use that power.[407] Delay also does not appear to be a problem in Wisconsin. Under Wisconsin procedure, a request for an interlocutory appeal must be filed within ten days of entry of the order,[408] and while the request is pending it has no effect on the proceedings in the trial court.[409] Unlike the situation in 1952, federal courts of appeals now utilize motion and administrative panels assisted by staff attorneys to rule on petitions to appeal and various motions. These panels usually act on a petition or motion after review and recommendation by a staff attorney.[410] With this type of process, the additional

403. Irby v. Young, 407 N.W.2d 314 (Wis. Ct. App. 1987).

404. Vincent & Vincent, Inc. v. Spacek, 306 N.W.2d 85 (Wis. Ct. App. 1981) (appeal from order denying a protective order and directing party to answer series of written interrogatories).

405. Flambeau Prods., Corp. v. Honeywell Info. Sys., Inc., 330 N.W.2d 228 (Wis. Ct. App. 1983), *rev'd on other grounds*, 341 N.W.2d 655 (Wis. 1984).

406. State v. Smith, 302 N.W.2d 54 (Wis. Ct. App. 1981).

407. Authority to the federal courts of appeals to impose sanctions for frivolous appeals is reviewed in Robert J. Martineau, *Frivolous Appeals: The Uncertain Federal Response*, 1984 DUKE L.J. 845. The willingness of each circuit to use that authority is set out in Robert J. Martineau & Patricia A. Davidson, *Frivolous Appeals in the Federal Courts: The Ways of the Circuits*, 34 AM. U. L. REV. 603 (1985). More recent cases showing a greater willingness to impose sanctions are Mars Steel Corp. v. Continental Bank N.A., 880 F.2d 928 (7th Cir. 1989) and Braley v. Campbell, 832 F.2d 1504 (10th Cir. 1987).

408. WIS. STAT. ANN. § 809.50 (West Supp. 1992). The 10-day time limit on a request to permit an interlocutory appeal, however, should not be jurisdictional so that a court of appeals could grant a request filed after the 10-day period for good cause shown.

409. DAVID L. WATTLER ET AL., APPELLATE PRACTICE AND PROCEDURE IN WISCONSIN § 9.4 (1986). Section 809.52 of the Wisconsin statute provides a procedure for a petitioner under § 809.50 to seek temporary relief pending action on the petition. WIS. STAT. ANN. § 809.52 (West Supp. 1992).

410. *See* Steven Flanders & Jerry Goldman, *Screening Practices and the Use of Para-Judicial Personnel in the U.S. Courts of Appeals: A Study in the Fourth Circuit*, *in* MANAGING APPEALS IN FEDERAL COURTS 641 (Federal Judicial Center 1988); JOE S CECIL & DONNA STIENSTRA, FEDERAL JUDICIAL CENTER, DECIDING CASES WITHOUT ARGUMENT: AN EXAMINATION OF FOUR COURTS OF APPEALS 35-132 (1987).

workload on the judges of the courts of appeals should be marginal, and would be more than offset by the reduction in time spent on questions of finality and appealability. It is significant that the Judicial Conference took its position only three years after the collateral order doctrine had been established in *Cohen* and before the courts of appeals began using the doctrine as an easy way to avoid the final judgment rule. Further, the courts of appeals had not yet had experience with discretionary appeals under section 1292(b), which was not enacted until 1958.

The Administrative Office of the U.S. Courts does not publish statistical data on appeals to the U.S. courts of appeals that distinguish between appeals from judgments that are truly final and those appeals under the various exceptions to the final judgment rule, whether created by statute, court rule, or judicial decision. Similarly, the office does not publish statistics on the number of cases in which appeals are dismissed because a final judgment had not been entered or because the order was appealable immediately under an exception to the final judgment rule but the appeal was not taken until the final judgment was entered, and thus was too late. The FCS Committee did not develop statistical data to support its recommendations, and none was developed by Congress in support of its enactment of the FCS Committee's recommendation on defining "final." Of the many proposals discussed above made for relaxation of the final judgment rule either by statute or judicial decision, only one—discretionary appeals under section 1292(b)—was supported by statistical data.[411]

It may be argued that in the absence of statistical data clearly showing that the courts of appeals and the Supreme Court spend an undue amount of time on issues of finality and appealability and that litigants are not well served by the existing system of exceptions to the final judgment rule, no change in the present law as construed by the courts is necessary. The time has passed for this argument. The FCS Committee has recommended two major changes.[412] Congress has now enacted both of them.[413] The Advisory Committee on the Federal

411. *See* Solimine, *supra* note 105, at 1196-1201.

412. See *supra* notes 129-59 and accompanying text, for a discussion of the recommendations of the FCS Committee.

413. See *supra* notes 1-8 and accompanying text, for a discussion of congressional action

Rules of Appellate Procedure is now considering whether to propose a rule defining "final decision" and will soon consider whether to list certain interlocutory orders as immediately appealable. In the past decade, the Supreme Court had to decide a substantial number of cases involving the final judgment rule and its exceptions.[414] The rule and its exceptions are a constant source of proposals from scholars and bar groups for tightening or relaxing enforcement of the rule or construing its exceptions. Even a casual reading of opinions of the courts of appeals shows a constant struggle to balance the purposes behind the final judgment rule and the need to avoid irreparable harm to individual litigants.[415] For these reasons empirical data to support a change in the rule and its exceptions do not appear necessary. By the same token, empirical studies are not necessary to demonstrate that the principal difficulty with the final judgment rule—the tension between the validity of its general purposes and the necessity for making exceptions to it to avoid irreparable harm in individual cases—will not be solved by authorizing the rulemakers to extend the right to appeal to certain classes of interlocutory orders, either by the technique of defining "final" or designating classes of interlocutory orders as appealable of right. All that these measures do, as a practical matter, is expand the authority of the rulemakers to make exceptions to the final judgment rule. These measures will not decrease, and will almost inevitably increase, litigation over what is appealable of right, whether final or interlocutory. Each exception will breed its own subset of doctrinal analysis, with narrow or broad interpretations involving the same considerations that have made the current final judgment rule and its exceptions so unsatisfactory both in theory and in practice.

The ABA-Wisconsin approach, on the other hand, recognizes what Judge Frank and commentators such as Crick, Redish, and Cooper as well as student commentators have long recognized—that it is impossible to predict in advance those classes of cases in which an appeal before final judgment should be permitted.[416] Crick pointed out that the nature of the harm and its immediacy will vary from case to

regarding the recommendations of the FCS Committee.

414. *See supra* notes 154-70 and accompanying text.

415. For examples, see MARTINEAU, MODERN APPELLATE PRACTICE, *supra* note 82, § 4.6 (1983 Patricia A. Davidson, Supp. 1992).

416. *See* Crick, *supra* note 60, at 561-65. Crick notes that "to allow or disallow appeals upon the basis of whether or not the final judgment has been rendered is to ignore wholly the needs created by the particular situation." *Id.* at 561.

case.[417] He further decried the time and effort devoted to determining whether a particular order met the definition of "final."[418] His solution to eliminate the right to appeal and to make all appeals discretionary with the appellate court,[419] however, is overly drastic and unnecessary. The ABA-Wisconsin approach is far superior because it maintains both the right to appeal and the final judgment rule, but allows a court of appeals the flexibility to weigh the relative benefits and harm to the opposing parties and the public interests of allowing an immediate appeal of an interlocutory order versus delaying the appeal until the final judgment is entered.

In addition to allowing a discretionary appeal to avoid irreparable harm, the ABA-Wisconsin approach has two additional criteria, either of which will authorize a discretionary appeal. One criterion permits a discretionary appeal if it will materially advance termination of the litigation or clarify further proceedings.[420] The other criterion permits an early appeal to clarify an issue of general importance in the administration of justice.[421] Essentially the first criterion is, like the irreparable harm test, focused on the parties to the litigation. The criterion also encompasses the interests of the trial court and the other litigants in the court. Advancing the termination of one case not only benefits the parties to that case but also parties to other cases then pending or which may be filed in the same court, because the speed with which one case is terminated determines when the trial court can devote its time to other cases. The primary focus of the second criterion, on the other hand, is not the parties to the lawsuit or litigants generally, but some broader public interest. The case could involve a bond issue, an election dispute, separation of powers, the environment, a procedural or evidentiary rule, national defense, or the like. The ABA-Wisconsin system thus allows significant flexibility while strictly adhering to the final judgment rule.

VII. CONCLUSION

The final judgment rule, which prevents an appeal of right until the entire matter in litigation has been terminated by the entry of a

417. *Id.* at 564.

418. *Id.* at 567-60.

419. *Id.* at 564.

420. *See* ABA STANDARDS RELATING TO APPELLATE COURTS, *supra* note 219, § 3.12(a)(1). The full text of § 3.12 is set out *supra* note 220.

421. *Id.* § 3.12(a)(3).

judgment or order, has been a central feature of the federal appellate system since its inception in 1789. Because in some cases an immediate appeal of an interlocutory order would prevent irreparable harm to a party, advance the termination of the litigation, or serve some broader public interest, there have been constant efforts to make exceptions to the finality requirement to allow early appeals in some cases. In 1990, the FCS Committee recommended authorizing the Supreme Court by rule of procedure to define "final" as used in 28 U.S.C. § 1291 and to designate classes of interlocutory orders that would be appealable of right.[422] The first recommendation was enacted into law by section 315 of the Judicial Improvements Act of 1990[423] and the second by section 101 of the Federal Courts Administration Act of 1992.[424]

Neither of these measures will solve the difficulties that flow from the final judgment rule or the exceptions to it. The basic flaw in the measures is that they both would result in only exceptions to the final judgment rule that would create an appeal of right for any interlocutory order that would meet an expanded definition of "final" or be classified as appealable of right, without regard to whether in a particular case an immediate appeal would be necessary to prevent irreparable harm, materially advance the litigation, or serve some other important purpose. Both recommendations would likely increase rather than decrease litigation over what orders would be appealable of right immediately and would create more rather than less uncertainty over problems of finality and appealability. Thus both recommendations would defeat the very goals they were designed to achieve.

The only proposal that both serves the purposes of the final judgment rule and gives the necessary flexibility to permit an immediate appeal of an interlocutory order in appropriate cases was made in 1977 by the ABA *Standards Relating to Appellate Courts* and adopted in 1978 in Wisconsin. Under this approach, only a final judgment that meets the classic *Catlin* definition is appealable of right, but a court of appeals may hear on a discretionary basis an appeal of any interlocutory order that meets one of three criteria.

Sixty years ago (and coincidentally in the same year that Crick published his seminal piece on the final judgment rule) Justice Brandeis wisely noted that "[i]t is one of the happy incidents of the federal system that a single courageous State may . . . serve as a laboratory;

422. REPORT, *supra* note 1, at 95.
423. 1990 Act, *supra* note 4.
424. 1992 Act, *supra* note 6.

and try novel . . . experiments without risk to the rest of the country."[425] In enacting the ABA proposal, Wisconsin has served as the laboratory for both the federal courts and other states. The experience in Wisconsin indicates that the proposal works well in practice and has minimized litigation over what is a final judgment or what should be an exception to it. This approach is far more likely to achieve the goals of the FCS Committee than its own recommendations that continue down the failed path of defining finality and making some interlocutory orders appealable of right. Congress should now reap the benefit from the Wisconsin experience by enacting the ABA proposal and repeal its enactments of the recommendations of the FCS Committee. In the interim, the Advisory Committee on Appellate Rules should not recommend the adoption of a rule that would define "final decision" in section 1291 beyond the classic definition of final judgment, that is, one that terminates the litigation, leaving only execution to be done, or by listing interlocutory orders immediately appealable of right. Only by taking these steps can a real solution to the problem of the final judgment rule be achieved.

425. New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

APPENDIX A

The English rule provides:

(1) For all purposes connected with appeals to the Court of Appeal, a judgment or order shall be treated as final or interlocutory in accordance with the following provisions of this rule.

(2) In this rule, unless the context otherwise requires—

(a) "order" includes a judgment, decree, decision or direction;

(b) references to an order giving specified directions or granting a specified form of remedy or relief shall include an order—

(i) refusing to give such directions or grant such remedy or relief;

(ii) giving such directions or granting such remedy or relief on terms;

(iii) varying, suspending or revoking such an order, and

(iv) determining an appeal from such an order.

(3) A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it.

(4) For the purposes of paragraph (3), where the final hearing or the trial of a cause or matter is divided into parts, a judgment or order made at the end of any part shall be treated as if made at the end of the complete hearing or trial.

(5) Notwithstanding anything in paragraph (3), the following orders shall be treated as final—

(a) an order for discovery of documents made in an action for discovery only;

(b) an order granting any relief made at the hearing of an application for judicial review;

(c) an order made on an originating summons under Order 85, rule 2(2)(b) or (c);

(d) an order for the winding up of a company;

(e) a decree absolute of divorce or nullity of marriage;

(f) an order absolute for foreclosure;

(g) an order as to costs made as part of a final judgment or order;

(h) an order of committal.

(6) Notwithstanding anything in paragraph (3), but without prejudice to paragraph (5), the following judgments and orders shall be treated as interlocutory—

(a) an order extending or abridging the period for the doing of any act;

(b) an order for or relating to the transfer or consolidation of proceedings;

(c) an order for or relating to the validity, service (including service out of the jurisdiction) or renewal of a writ or other originating process;

(d) an order granting leave under section 139 of the Mental Health Act 1983 to bring proceedings against a person;

(e) an order for or relating to the amendment of an acknowledgement of service;

(f) any judgment in default or any "unless" order;

(g) an order for or relating to the joinder of causes or action;

(h) an order for or relating to the addition, substitution or striking out of parties;

(i) subject to Order 58, rule 7, an order granting relief by way of interpleader;

(j) an order for or relating to the service or amendment of any pleading;

(k) an order striking out an action or other proceedings or any pleading under Order 18, rule 19 or under the inherent jurisdiction of the court;

(l) an order dismissing or striking out an action or other proceedings for want of prosecution;

(m) an order staying proceedings or execution;

(n) an order for or relating to a payment into or out of court;

(o) an order for or relating to security for the costs of an action or other proceedings;

(p) subject to paragraph (5)(a), an order for or relating to the discovery or inspection of documents, including an order under Order 24, rule 7A(1) for the disclosure of documents before the commencement of proceedings;

(q) an order for or relating to the service of or answer to interrogatories;

(r) a judgment or order on admissions under Order 27, rule 3;

(s) an order granting an interlocutory injunction or for the appointment of a receiver;

(t) an order for or relating to an interim payment under Order 29;

(u) an order made under or relating to a summons for directions;

(v) an order directing a trial with a jury;

(w) an order for or relating to the fixing or adjournment of trial dates;

(x) an order directing a new trial or a re-hearing;

(y) an order relating to access to, or the custody, care, education or welfare of a minor whether in matrimonial, wardship, guardianship, custodianship or any other proceedings, or a certificate under section 41 of the Matrimonial Causes Act 1973;

(z) an order for or relating to ancillary relief in matrimonial proceedings, including a property adjustment order, an order for the payment of a lump sum and any other order making or relating to financial provision whether of a capital or income nature;

(aa) subject to section 18(2)(a) of the Act, a judgment or order under Order 14 or Order 86 or under Order 9, rule 14 of the County Court Rules 1981;

(bb) an order setting aside or refusing to set aside another judgment or order (whether such other judgment or order is final or interlocutory);

(cc) an order made for or relating to the enforcement of an earlier order (whether such earlier order is final or interlocutory) or giving further directions as to such an order and (without prejudice to the generality of the foregoing)—

(i) a garnishee order nisi or a garnishee order absolute;

(ii) a charging order nisi or a charging order absolute;

(iii) an order for the sale of any property by way of enforcement of an earlier order (whether such earlier order is final or interlocutory) or an order giving directions regarding any such sale, or an order designed to regulate or facilitate any such sale;

(dd) an order for or relating to the taxation of costs or the delivery, withdrawal or amendment of bills of costs;

(ee) without prejudice to paragraph (5)(d), an order made in the course of or by way of regulation of a liquidation and any other order ancillary to or consequential on a winding up order;

(ff) an order directing or otherwise determining an issue as to limitation of

actions other than as part of a final judgment or order within the meaning of paragraph (3);
(gg) an order made on an originating summons under Order 85, rule 2, other than such an order as is mentioned in paragraph (5)(c).

(7) Notwithstanding anything in paragraph (3)—
(a) orders made on an appeal to the High Court under section 1(2) of the Arbitration Act 1979 shall be treated as final orders;
(b) all other orders made in connection with or arising out of an arbitration or arbitral award shall be treated as interlocutory orders; without prejudice to the generality of the foregoing, such orders shall include—
(i) orders made in connection with the appointment or removal of an arbitrator or umpire;
(ii) orders made on or in connection with applications for an extension of time or commencing arbitration proceedings;
(iii) orders setting aside an arbitral award or remitting the matter to an arbitrator or umpire (other than orders setting aside the award or remitting the matter made on an appeal in pursuance of the said section 1(2)); and
(iv) orders made on or in connection with applications for leave to enforce an award.

Order 59, r. 1A, Rules of the Supreme Court (Eng. 1991).

APPENDIX B

Section 817.09 of the Wisconsin statute provided for appeals to the supreme court:

(1) Appeals to the supreme court may be taken from the circuit courts unless expressly denied and also from the county courts except where express provision is made for an appeal to the circuit court and from any court or record having civil jurisdiction when no other court of appeal is provided. Appeals may be taken from interlocutory judgments.
(2) Said right of appeal applies to final orders and judgments rendered upon appeals from or reviews of the proceedings of tribunals, boards and commissions, and to final judgments and orders whether rendered in actions or in special proceedings without regard to whether the action or proceeding involves new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statute which creates the right, remedy or proceeding.

WIS. STAT. ANN. § 817.09 (West 1977) (replaced by § 808.03). Section 817.33 defined appealable orders:

The following orders when made by the court may be appealed to the supreme court:
(1) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken.
(2) A final order affecting a substantial right:
(a) Made in special proceedings, without regard to whether the proceedings involve new or old rights, remedies or proceedings and whether or not the right to appeal is given by the statutes which created the right, remedy or proceedings, or
(b) Made upon a summary application in an action after judgment.
(3) When an order:
(a) Grants, refuses, continues or modifies a provisional remedy;
(b) Grants, refuses, modifies or dissolves an injunction;
(c) Sets aside or dismisses a writ of attachment;
(d) Grants a new trial;
(e) Grants or overrules a motion to dismiss under s. 802.06(2) or a motion for judgment on the pleadings based on total insufficiency of pleaded defenses under s. 802.06(3) or a motion to strike based on the insufficiency of one or more pleaded defenses under s. 802.06(6);
(f) Decides a question of jurisdiction;
(g) Grants or denies a motion for stay of proceeding under s. 801.63; or
(h) Denies a motion for summary judgment.
(3m) A party on whose motion a new trial has been ordered may nevertheless appeal from such order for the purpose of reviewing a denial of his motion after verdict for judgment notwithstanding the verdict or to change answers in the verdict.
(4) Orders made by the court vacating or refusing to set aside orders made at chambers, where an appeal might have been taken in case the order so made at chambers had been made by the court in the first instance. For the purpose of

appealing from an order either party may require the order to be entered by the clerk of record.

Id. § 817.33.

DEFINING FINALITY AND APPEALABILITY BY COURT RULE: A COMMENT ON MARTINEAU'S "RIGHT PROBLEM, WRONG SOLUTION"

*Thomas D. Rowe, Jr.**

By his extensive scholarship and law reform work, Professor Robert Martineau has earned the compliment that he has probably forgotten more about appellate practice and procedure than most lawyers will ever know. His article in this journal faults a proposal of the Federal Courts Study Committee (FCSC),[1] now enacted into law,[2] to delegate considerable authority over federal definitions of finality and appealable interlocutory orders to the federal rules process. Professor Martineau's main point is that the FCSC and Congress should have used the ABA-Wisconsin discretionary approach for review of non-final trial court judgments and orders[3] instead of giving the rulemakers somewhat of a blank check. He also foresees other problems with what the rulemakers might do in exercising their new authority.

I am in the happy position of registering disagreement that amounts to reassurance. This comment will briefly argue that the new rulemaking authority largely allows the Supreme Court to adopt the ABA-Wisconsin model if the rulemakers find the arguments in favor of this approach persuasive. Further, the new authority is unlikely to produce the problems that Professor Martineau fears. In short, don't worry, Bob; you should make the case for the approach you favor to the federal Advisory Committee on Appellate Rules, in which effort I wish you well.

The FCSC recommendation was concise:

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1. *See infra* text accompanying note 4.
2. *See infra* text accompanying notes 7-9.
3. *See* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT L. REV. 717, 776-87 (1993) (describing proposal of AMERICAN BAR ASSOCIATION, COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO APPELLATE COURTS § 3.12 (1977), and its implementation in Wisconsin); *see also* text accompanying note 10 *infra* (text of Wisconsin statute).

> To deal with difficulties arising from definitions of an appealable order, Congress should consider delegating to the Supreme Court the authority under the Rules Enabling Act to define what constitutes a final decision for purposes of 28 U.S.C. § 1291, and to define circumstances in which orders and actions of district courts not otherwise subject to appeal under acts of Congress may be appealed to the courts of appeals.[4]

Congress has now accepted that recommendation in full. In an act implementing several FCSC proposals in 1990,[5] Congress added a new subsection (c) to the Rules Enabling Act, whose subsection (a) authorizes the Supreme Court "to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . . and courts of appeals"[6]:

> (c) Such rules may define when a ruling of a district court is final for the purposes of appeal under section 1291 of [title 28 of the United States Code].[7]

Just recently, Congress passed more implementing legislation[8] that included a new subsection for 28 U.S.C. § 1292 on appealable interlocutory decisions:

> (e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).[9]

The ABA-Wisconsin approach that Professor Martineau favors, as it exists in statutory form in Wisconsin, provides:

> (1) APPEALS AS OF RIGHT. A final judgment or a final order of a circuit [trial] court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law. A final judgment or final order is a judgment or order . . . which disposes of the entire matter in litigation as to one or more of the parties . . . .
>
> (2) APPEALS BY PERMISSION. A judgment or order not appealable as a matter of right under sub. (1) may be appealed to the court of appeals in advance of a final judgment or order upon leave granted by the court if it determines that an appeal will:

4. FEDERAL COURTS STUDY COMM, REPORT OF THE FEDERAL COURTS STUDY COMM. 95 (1990).
5. Judicial Improvements Act of 1990, Pub. L. No. 101-650, § 315, 104 Stat. 5115 (1990).
6. 28 U.S.C. § 2072(a) (1988).
7. 28 U.S.C. § 2072(c) (Supp. II 1991).
8. Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 101, 106 Stat. 4506 (1992).
9. 28 U.S.C.A. § 1292(e) (West Supp. 1993).

> (a) Materially advance the termination of the litigation or clarify further proceedings in the litigation;
>
> (b) Protect the petitioner from substantial or irreparable injury; or
>
> (c) Clarify an issue of general importance in the administration of justice.[10]

The present federal appealability statutes include in section 1291 substantially the same final decision requirement that appears in subsection (1) of the Wisconsin law.[11] Thus, the main difference between the federal and ABA-Wisconsin approaches lies with federal section 1292, which lists several categories of appealable interlocutory decisions,[12] and Wisconsin's subsection (2), which grants discretion to the court of appeals to allow an interlocutory appeal when the court determines that the appeal would serve any of three broad functional goals.

Especially after the 1992 amendment authorizing the creation of additional categories of appealable interlocutory decisions by rule, it is clear that the United States Supreme Court could promulgate Wisconsin's subsection (2) in whole or in part if it saw fit. Some overlap with existing statutory provisions for interlocutory review could result. For instance, if the Supreme Court adopted Wisconsin's subsection (2) by rule, a court of appeals might hear an interlocutory appeal of a particular order either pursuant to the new rule or under section 1292(b) upon certification by the trial judge.[13] To keep such overlaps from getting too messy, federal rulemakers persuaded of the general wisdom of the ABA-Wisconsin approach might be well advised to fine tune new categories of interlocutory appeals. They might also do well to use their power to define finality under section 1291 to move some present categories of "final" decisions such as collateral orders[14] from section 1291 to new rule categories of appealable interlocutory orders.

The Supreme Court, then, can now do by rule most or all of what Professor Martineau would have Congress do by statute. It is understandable that he might have preferred the legislative energy that went

10. WIS. STAT. ANN. § 808.03 (West Supp. 1992).
11. *Compare* 28 U.S.C. § 1291 (1988) ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . .") *with* WIS. STAT. ANN. § 808.03(1) (West Supp. 1992) ("A final judgment or a final order of a circuit court may be appealed as a matter of right to the court of appeals unless otherwise expressly provided by law.").
12. *See* 28 U.S.C. § 1292(a)-(d) (1988) (defining categories of permitted interlocutory appeals, including appeals from many interlocutory orders concerning injunctions, receiverships, etc., and discretionary appeals in limited circumstances).
13. *See* quoted passage *infra* note 18.
14. *See* Martineau, *supra* note 3, at 739-43 (discussing collateral order doctrine).

into conferring the new rulemaking authority on the Court to have gone instead into adopting his solution. Mustering enough support for his single approach out of the many that reformers have advocated,[15] however, would likely have been far more difficult and uncertain of success than getting through the new delegation of rulemaking authority. The bodies involved in the rules process, busy groups but less distracted than Congress, can focus on choosing the best system. Professor Martineau's chances, if anything, are likely to be better in the rules process than in the halls of Congress.

The Supreme Court's ability to implement the approach advocated by Professor Martineau obviates his major objection to the FCSC recommendation and Congress' recent actions. Nothing in the new authority, particularly with the 1992 expansion concerning interlocutory appeals, limits it solely to defining or creating "appeals of right," having either to "confer mandatory jurisdiction or [to] deny jurisdiction in the appellate court."[16] The Supreme Court may by rule "provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for . . . ."[17] New interlocutory appeal rules could readily include discretionary conditions like those found in existing section 1292(b),[18] rather than only conferring or denying mandatory appellate jurisdiction.

Professor Martineau continues with several other objections to the FCSC proposal and the new authority. They will not, he says, "accomplish the goals stated by the FCS Committee in its report—to reduce litigation on issues of finality and appealability, to avoid dismissal of appeals as premature, and in particular, to avoid instances in which an appeal of an order not truly final but immediately appealable is held to

15. *See id.* at 749-60 (discussing several proposals for changes in existing statutory provisions on finality rule and its exceptions).

16. *Id.* at 772.

17. 28 U.S.C.A. § 1292(e) (West Supp. 1993).

18. 28 U.S.C. § 1292(b) (1988):

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order.

See also id. § 1292(d)(1)-(2) (parallel provisions for discretionary appeals by certification from Court of International Trade and United States Claims Court to United States Court of Appeals for the Federal Circuit).

be untimely because the appeal was not taken until after the final judgment was entered."[19] He sees the authority to define finality by rule as usable only to "expand the definition of 'final' to include rulings that are not truly final but become final only because the rule says so."[20] He further fears the creation of an "ever expanding list"[21] of categories of appealable orders, as may have happened in England.[22] He also questions whether the rules process, with its recent increase in publicity and politicization, is still "more responsive to the needs of the courts and those who use them than Congress and the legislative process."[23]

These concerns raise fair questions, but Professor Martineau seems too pessimistic in his view of the nature and likely use of the new authority. To begin with, the ABA-Wisconsin approach he favors includes a finality requirement for most appeals, as does federal law before and after the recent amendments.[24] Under either approach, therefore, litigation over finality would continue. If federal rulemakers believe they can reduce difficulties by adopting definitional rules, such litigation should decline because of increased clarity in the definitions. Similarly, a clearer definition of finality should reduce losses of appeal rights through failure to take timely appeals from "final" decisions. If the Advisory Committee concludes that efforts to define finality by rule might worsen the situation by triggering too much litigation over the new definitions, it presumably will follow the familiar doctor's maxim that it should first do no harm.

Much of Professor Martineau's concern seems to flow from his view that the authority to define "final" for purposes of appeal can be used only to expand the category. He states that the Supreme Court has interpreted "final" to include, first, judgments that effectively dispose of the litigation, and second, orders affecting rights that will be lost without an immediate appeal.[25] Professor Martineau then suggests that a new definition of "final" probably would not exclude either type of ruling.[26] His reading of the new rulemaking authority, I believe, is too grudging. The second type of ruling to which he refers involves obvious, if defensible, fudging that yields qualifications of the finality

19. Martineau, *supra* note 3, at 772 (footnote omitted).

20. *Id.*

21. *Id.* at 774.

22. *See id.*

23. *Id.* at 775.

24. *See supra* note 11 and accompanying text.

25. Martineau, *supra* note 3, at 772.

26. *Id.*

requirement, such as the much litigated collateral order rule. The congressionally delegated authority to "define when a ruling of a district court is final"[27] gives the rulemakers some authority that Congress itself might have exercised, which must include authority to adopt rules pruning back the growths that have sprung up in the borderland of finality.[28] The rulemakers might plausibly exercise the two aspects of their new authority in tandem, for example, to eliminate the collateral order doctrine but to treat the area as subject to discretionary interlocutory appeal as under the ABA-Wisconsin approach.

Another concern of Professor Martineau's, that the new authority will do nothing to avoid loss of appeal rights for failure to take a timely appeal from a ruling later held final, appears related to his belief that the definitional power can only expand the category of final decisions. If I am correct that the authority allows pruning as well as planting new shoots, eliminating categories in the gray area at the fringe of "finality" will reduce the already small number of situations in which parties face the threat of losing a right to appeal. If necessary, the rulemakers could explicitly indicate that interlocutory appeals pursuant to rule were optional with no loss of later appeal rights, and could perhaps include such a statement in definitions of retained borderline categories of "final" orders.[29] Further, if an effort at definition succeeds in

27. 28 U.S.C. § 2072(c) (Supp. II 1990).

28. The Federal Courts Study Committee was fully explicit on this point: "The rulemaking authority under this proposal would include authority . . . to change (by broadening, *narrowing*, or systematizing) decisional results under the finality rule of 28 U.S.C. § 1291 . . . ." REPORT OF THE FEDERAL COURTS STUDY COMMITTEE, *supra* note 4, at 96 (emphasis added). As for the limited legislative history in Congress, it is far from definitive; but it gives no support to Professor Martineau's view that the new authority permits only expansion of the category of "final" decisions. The 1990 House Report on the bill conferring this rulemaking authority refers to "uncertainty . . . as to the scope of a final decision . . . . that could be reduced, if not eliminated, by the promulgation of clarifying rules." H.R. REP. No. 734, 101st Cong., 2d Sess. 18 (1990). If the problem is "uncertainty" about "scope" that can be reduced by "clarifying rules," it is hard to see why narrowing and expansion are not equally legitimate. The Report goes on to quote the standard limit on Supreme Court rulemaking authority, that the rules prescribed "shall not abridge, enlarge or modify any substantive right," *id.* (quoting 28 U.S.C. § 2072(a) (1988)), but it should be difficult for reasonable redefinitions affecting only the *time* for appeal to run afoul of that constraint.

29. Sensible judicial construction has already reached this result, refusing to require immediate appeal from collateral orders. "A 'final' final order must be appealed forthwith; a 'collateral' final order need not be appealed but merges with the final judgment and may be appealed at the end of the case." *In re Kilgus*, 811 F.2d 1112, 1116 (7th Cir. 1987). Similarly,

> [O]nly final judgments need be appealed. Until a judgment is rendered "final" by entry of a separate document under Fed. R. Civ. P. 58, no one need appeal. An appeal from an interlocutory order is not one from a final judgment, even if by virtue of *Cohen* [*v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949),] it is from a final decision. Interlocutory orders therefore may be stored up and raised at the end of the case. Other interlocutory decisions, even those producing interlocutory "judgments" (such as the denial of a preliminary injunction) receive the same treatment.

Kurowski v. Krajewski, 848 F.2d 767, 772 (7th Cir.) (citations omitted), *cert. denied*, 488 U.S. 926 (1988).

30. An advantage of the federal scheme for interlocutory appeals created by the recent amendments is that it *combines* having a *few* definite statutory categories, those of section 1292, with the new power to authorize interlocutory appeals in additional cases. Some definiteness, as for appealability of interlocutory trial court actions on injunctions under § 1292(a)(1), can be preferable to *always* having to argue appealability under general functional criteria like those of the ABA-Wisconsin approach. The functional criteria can then allow interlocutory appeals in some other cases without creating an "ever expanding list" of categories.

31. Martineau, *supra* note 3, at 775.

32. *Id.*

33. *See, e.g.*, Henry J. Reske, *Tinkering with Procedure*, A.B.A. J., Sept. 1992, at 14.

improving clarity, parties will have better notice of when they do and do not need to take an immediate appeal, which should also help reduce the number of appeals dismissed as premature.

As for the proliferation of long lists of categories of orders defined as final or interlocutory but appealable, Professor Martineau's fears might be warranted. At least as likely, though, expressions of concern like his could persuade the rulemakers that such a course would be a mistake.[30] In any event, the danger of possible misuses of the authority hardly seems great enough to halt efforts at seeing if it can be used well. If the rulemakers give this potentially good idea a bad name by implementing it poorly, Congress can always take back what it has recently given.

Professor Martineau is, finally, skeptical about whether "the rulemaking process is more responsive to the needs of the courts and those who use them than Congress and the legislative process."[31] He cites recent criticism of the rules process and suggests that it has "become more public and thus more political and more time consuming."[32] It is true that the regular rules process necessarily takes years with drafting, comment, approval from tiers of bodies up to the Supreme Court, and months on the table after submission to Congress before a new rule or amendment can take effect; and it is sometimes—but far from always—possible to get judiciary legislation through Congress quickly. Politicization and delay in the rules process, however, have tended to come in connection with legal hot buttons like Rule 11 and discovery reform,[33] while rafts of more technical, lawyers'-law changes have gone through with useful comment and refinement but no great flutter. Fi-

nality definitions and appealability expansions seem unlikely to become lightning rods.

The possibility that the rules process *would* respond well to the needs of courts and litigants links to a key virtue of the new authority: It gives much of the job of defining finality and appealability to bodies with considerable specialized expertise and commitment to the workings of the appellate process. Before the FCSC proposal and the recent grants of rulemaking authority, definitions of finality and appealable interlocutory actions took place on two levels: in legislation, and in adjudication interpreting the appellate jurisdiction statutes. Congress has tinkered from time to time with those statutes but has left their most important features largely intact for many years, despite the difficulties that have led to numerous calls for reform such as Professor Martineau's. The courts when deciding cases necessarily labor under an obligation to interpret what Congress has laid down. Judges' ideas of what would constitute a desirable regime must take second place to divining legislative intent, or can enter only via the fudging that has complicated much of the federal law on appealability.

The federal rules process, by contrast, is in a useful intermediate position, neither bound as are the federal courts just to interpret what Congress has done nor subject to the multifarious distractions pressing upon a generalist Congress. The rulemakers, in particular the Advisory Committee on Appellate Rules, can think about policy and what may be the best ways to define finality and the circumstances in which interlocutory appeals shall be allowed, and then draft rules to achieve those ends. They may decide that Professor Martineau is right about the kind of rules they should propose, or they might get a better idea. They could even conclude that they are unlikely to be able to improve upon the present situation within the confines of their new authority, in which case nothing obligates them to use it.

What the Federal Courts Study Committee recommended and Congress enacted may not be ideal. It nonetheless creates an opportunity to gauge the success of defining finality and interlocutory appeal categories by rule. Professor Martineau has made his criticisms of the FCSC proposal and the new authority, but the authority is on the books. I hope he will now turn to helping the rulemakers make the best of this new opportunity, rather than letting his idea of the best become the enemy of the good. The rulemaking power that Congress has recently conferred could itself be a halfway house on the way to full delegation of power over definitions of appealability to the rules process. That further step would clearly enable the rulemakers to adopt Professor Martineau's proposal without the encumbrance of present statutory language.

The "happy warrior" sees opportunities where others see problems. The new authority creates opportunities both to use it well as it stands, and to show by wise use that it should be broadened further. Professor Martineau is among those best qualified to help the rulemakers seize and make the most of these opportunities; I trust they can count on his help.

ITEM NO. 91-17

D. Unpublished Opinions

A representative ad hoc committee under the auspices of the Judicial Conference should review policy on unpublished court opinions in light of increasing ease and decreasing cost of database access.

The policy in courts of appeals of not publishing certain opinions, and concomitantly restricting their citation, has always been a concession to perceived necessity. Sheer bulk prohibits universal publication in traditional hard-copy volumes, and many opinions are indeed easy applications of established law to fact.

Still, non-publication policies and non-citation rules present many problems. Some argue that non-publication policies are inconsistently administered and partially circumvented when regular litigants often circulate such opinions internally and then use arguments from them in other cases. One purpose of restrictions on citing unpublished opinions, after all, is to keep those with better access to them from having an unfair advantage. There are also doctrinal reasons for questioning the non-publication rules: litigants should be able to argue that they are indeed situated similarly to a party in a previous case, even if the court thought it not significant enough to warrant publication.

Universal publication has enough problems of its own that we cannot recommend it now; but inexpensive database access and computerized search technologies may justify revisiting the issue, because these developments may now or soon will provide wide and inexpensive access to all opinions.

from: Federal Courts Study Committee Report, pp. 130-31

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

ROBERT E. KEETON
CHAIRMAN

JAMES E. MACKLIN, JR.
SECRETARY

CHAIRMEN OF ADVISORY COMMITTEES
KENNETH F. RIPPLE
APPELLATE RULES
SAM C. POINTER, JR.
CIVIL RULES
WILLIAM TERRELL HODGES
CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

March 13, 1991

The Honorable Robert E. Keeton
United States District Judge
Room 210, U.S. Courthouse
46 E. Ohio Street
Indianapolis, Indiana 46204

Re: Unpublished Opinions

Dear Bob:

The Federal Courts Study Committee recommended that:

> A representative ad hoc committee under the auspices of the Judicial Conference should review policy on unpublished court opinions in light of increasing ease and decreasing cost of database access.

Jon Newman identified this recommendation as an area that the FRAP Committee might explore and, at our last meeting, there was some sentiment among our members that the topic was an appropriate matter subject for the rulemaking process.

Before undertaking the project, I thought it best to check with you. I do not want to interfere if the Judicial Conference has other plans.

Warm regards,

Kenneth F. Ripple

KFR:tw

cc: Professor Carol Mooney
Mr. James E. Macklin, Jr.

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OF THE
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CRIMINAL RULES
EDWARD LEAVY
BANKRUPTCY RULES

March 18, 1991

The Honorable Robert E. Keeton
United States District Judge
Room 306, John W. McCormack
Post Office & Courthouse
Boston, MA 02109

Re: Unpublished Opinions

Dear Bob:

Reference is made to my letter of March 13.

Jim Macklin informs me that the Judicial Conference has disapproved explicitly of this FCSC recommendation. This action obviously makes it less imperative that we address it. I shall leave it to the Committee as to whether, despite the Conference lack of interest, it wishes to pursue the matter.

The best,

Kenneth F. Ripple

KFR:tw

cc: Professor Carol Mooney
Mr. James E. Macklin, Jr. (with thanks!)

91-17

TO: The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States

FROM: The Advisory Committee on Appellate Rules

DATE: January 8, 1992

SUBJECT: Local Rules Project

At its February 4, 1991, meeting the Committee on Rules of Practice and Procedure approved the circulation of the report from the Local Rules Project on the local rules of appellate practice. The Advisory Committee on Appellate Rules was given the tasks of assisting the courts of appeals in evaluating the report and in assessing both its impact and the need for further action.

The Advisory Committee circulated the Local Rules Project Report to the Chief Judges of all the courts of appeals in April. The committee asked the circuits to examine their rules along with the project report and to submit a preliminary report to the Advisory Committee by November 1, 1991. Ten circuits responded by early November. At its December meeting the Advisory Committee discussed the circuits' reports. The Advisory Committee now transmits to the Standing Committee preliminary reactions to the Project Report and to the circuits' responses.

I. Background

Congress has expressed concern about the proliferation of local rules at every court level. Congressional hearings since at least 1983 have raised the issue. Local rules had been criticized because: they could be promulgated without notice or opportunity for public comment; they were numerous and had no adequate reporting system; they conflicted with the letter and spirit of the national rules and federal law. See H.R. Rep. No. 422, 99th Cong. 1st Sess. 15 (1985).

In 1984, in response to these criticisms, the Judicial Conference of the United States authorized its Standing Committee on Rules of Practice and Procedure to study and confront the problems caused by the proliferation of local rules. In 1985, Dean Daniel R. Coquillette of Boston College Law School was named Reporter to the Standing Committee and was instructed to design a project that would study local rules and propose solutions to the problems, if any, which they present. Also in 1985, the civil and criminal rules were amended to require notice and opportunity for comment before district court rules could be promulgated.[1] Although these steps were responsive to some of the criticisms, they did not regulate the rulemaking process in the courts of appeals, and they did not provide a permanent structure for review of local rules for

[1] Fed. R. Civ. P. 83; Fed. R. Crim. P. 57.

the procedures often seem to reflect such factors as location of prisons, operating procedures in the state courts, and even circuit geography. Allowing the circuits to handle their particular situations may be the only practical solution. However, the committee will study the issue more carefully to determine if there is a need for national death penalty procedures.

c. Publication of Opinions. The Local Rules Project recommended that the Advisory Committee consider amending Rule 36 or adding another rule to include a uniform plan for publication of opinions. The committee was aware that the Federal Courts Study Committee recommended formation of an ad hoc committee under the auspices of the Judicial Conference to review the policy on unpublished opinions in light of the increasing ease and decreasing cost of electronic database access to opinions. The Advisory Committee was also aware that the Judicial Conference decided not to pursue the recommendation. However, some members of the committee believed that the change in technology has changed circumstances to such an extent that a new look at the policy would be timely. Others expressed caution in addressing a matter so recently considered by the Judicial Conference.

91-17

3. Low Priority

A third set of topics was considered low priority:

a. Additional information in petitions for leave to appeal from district court decisions reviewing magistrate's judgments. Fed. R. App. P. 5.1 governs petitions for leave to appeal from district court decisions reviewing magistrates' judgments. Rule 5.1(b) outlines the content of such petitions. Two circuits have local rules requiring inclusion of additional materials in such petitions. The Local Rules Project asked the Advisory Committee to consider amending Rule 5.1 so that it either requires additional information or authorizes courts of appeals to require additional information by rule or order. It was the consensus of the committee that such cases are sufficiently rare that this topic should be considered low priority.

b. Docketing statements. Eight circuits have local rules requiring that docketing statements be provided at some time after the notice of appeal is filed. The Local Rules Report recommended that the Advisory Committee consider a uniform format and filing time for docketing statements. The committee consensus was that this was a case management issue that might be better left to the individual circuits.

c. Corporate disclosure statements. Fed. R. App. P. 26.1 requires corporate parties to file a disclosure statement identifying affiliated entities. Ten circuits have rules that expand upon the requirements in Rule 26.1. The Local Rules Project recommended that the committee consider expanding the requirements of Rule 26.1 and establish a uniform time for filing the statements or that the committee consider limiting the circuit courts' rulemaking authority in this area. Given the history of the development of the current rule and the difficulties encountered in attempting to fashion

ITEM NO. 92-11

AGENDA IV-E
Item 92-11
April 20-21, 1993

TO: Honorable Kenneth F. Ripple, Chair
Members of the Advisory Committee on Appellate Rules and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 9, 1993

SUBJECT: Item 92-11, consideration of local rules that do not exempt government attorneys from joining a court bar or from paying admission fees.

Last November, former Attorney General Barr wrote to the Chief Justice about the fact that a number of federal courts require attorneys who practice before them to join the local court bar and, in many instances, an admission fee is charged. Some courts exempt government attorneys from joining the bar or paying the admission fee; others do not. The Attorney General states that requiring an attorney representing the United States to join a federal court bar and to pay a fee is inconsistent with federal law. A copy of his letter is attached.

I asked my student assistant to review the local rules in all of the circuits. His research shows that seven circuits (D.C., 2nd, 3rd, 5th, 8th, 9th, and 10th) require admission to the court bar and do not have an exemption for government attorneys. Five circuits (1st, 6th, 7th, 11th, and Fed.) require admission but exempt government attorneys. A copy of his memorandum is attached.

This item will be discussed at the April 20 and 21 meeting.

Office of the Attorney General
Washington, D. C. 20530

November 24, 1992

The Honorable William H. Rehnquist
Chief Justice
Supreme Court of the United States
1 First St., N.E.
Washington, D.C. 20543

Dear Chief Justice Rehnquist:

I am writing to you in your capacity as the presiding officer of the Judicial Conference of the United States. I would like to call to your attention a problem caused by the local rules of a number of federal courts for attorneys representing the interests of the United States under the direction of the Attorney General. These rules are promulgated under the authority of 28 U.S.C. 2071(a). By statute, the Judicial Conference of the United States has the power to modify or abrogate rules of the federal courts of appeals if they are inconsistent with federal law. See 28 U.S.C. 331 and 2071(c)(2). Thus, the Judicial Conference is well-positioned to resolve our problem.

A number of federal courts require attorneys who practice before them to join their local bars, and many of these courts require the payment of admission fees. See, for example, D.C. Circuit Rule 6, Second Circuit Rule 46, Ninth Circuit Rule 46.1, and Tenth Circuit Rule 46.2. These rules do not, as far as we are aware, include any exception for government attorneys. Certain other circuits, however, exempt government attorneys from the requirement of paying the admission fee or joining the bar of the court. See First Circuit Rule 46.1, and Federal Circuit Rule 46(d).

We believe that those court rules that require attorneys appearing at the direction of the Attorney General solely in order to represent the interests of the United States to join federal court bars and to pay a fee to do so are not consistent with federal law. Several sections of Title 28 set out the authority of the Attorney General to assign attorneys to appear in court to represent the interests of the United States. Section 515(a) provides that "[t]he Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when

Thank you for your attention to this matter. If you or members of the Judicial Conference would like to discuss it with me or my staff, please contact me.

Sincerely,

WILLIAM P. BARR
Attorney General

To: Professor Mooney
From: Bill Snyder
Date: February 11, 1993
Re: Circuit Court rules regarding admission to local bars, admission fees and exceptions for government employees.

1. D.C. Circuit: Rule 6 requires that each applicant for admission to the Bar of this Court file an application for admission and shall tender a fee for admission (which shall be set periodically by the Court) with the application.

2. First Circuit: Rule 46.1-Upon being admitted to practice, an attorney other than government counsel or court appointed counsel, shall pay a fee of $10.00 to the clerk. . . . Attorneys may be admitted in open court on motion or otherwise as the court shall determine.

3. Second Circuit: Rule 46(c)-Each applicant upon admission shall pay to the Clerk a fee which shall be set by the Court ($20.00). . . . (d) Counsel of record for all parties must be admitted to practice before this court. (For the requirements of admission, see sections (a) and (b)).

4. Third Circuit: Rule 9(1)(a)-Admission to the bar of this Court shall be governed by the provisions of F.R.A.P. 46, and such other requirements as the court may adopt from time to time. . . . The fee for admission shall be determined by order of the court and shall be payable to the Clerk as Trustee.

5. Fourth Circuit: No rule.

6. Fifth Circuit: Rule 46.1-Only attorneys admitted to the Bar of this Court may practice before the Court. Admission to the Bar of this Court is governed by FRAP 46. Each attorney shall pay to the Clerk an admission fee as may be fixed from time to time by Court order. . . .

7. Sixth Circuit: Rule 6

(a) Applicants for admission to the Bar of the Sixth Circuit shall pay a fee of $25.00. . . . An attorney who is appointed by the court to represent a party in forma pauperis and is qualified for admission, shall be admitted to practice in this court without payment for the admission of fees.

(b) In order to file pleadings or briefs on behalf of a party or participate in oral argument, attorney's must be admitted to the Bar of this court and file an appearance form. . . . Any attorney representing the United States or any officer or agency thereof in an appeal will be permitted to participate in that case without the necessity of being admitted to the Bar of this court.

Circuit Rule. An attorney seeking admission shall file an application with the clerk on a form supplied by the clerk with an admission fee of $20.00. . . .

The following attorneys shall be admitted for the particular proceeding in which they are appearing without the necessity of formal application or payment of the admission fee: an attorney appearing on behalf of the United States, a federal public defender, an attorney appointed by a federal court under the Criminal Justice Act (CJA) or appointed to represent a party in forma pauperis. Attorneys in these categories who desire to receive an admission certificate from the Eleventh Circuit must pay the admission fee.

13. Federal Circuit: Rule 46

(c)-The prescribed fee for admission $25 payable to the clerk, for which the applicant shall receive a certificate of admission. . . .

(d) Attorneys for any Federal, State or local government office or agency may appear before this court in connection with their official duties without formal admission to the bar of the court.

92-11

U. S. Department of Justice

Office of the Solicitor General

The Solicitor General *Washington, D.C. 20530*

February 6, 1997

Honorable James K. Logan
United States Circuit Judge
100 East Park, Suite 204
P.O. Box 790
Olathe, Kansas 66061

Re: Appellate Rules Committee Item 93-2

Dear Judge Logan:

Item 93-2 on the Advisory Committee's docket, entitled "[c]onsideration of local rules that do not exempt government attorneys from being required to join court bar or from paying admission fees," was submitted by the Department of Justice. Former Solicitor General Days requested the Committee to suspend consideration of this proposal while the matter was examined further by the Department of Justice. The Department has now determined that it will not, at this time, pursue this matter further before the Advisory Committee. Accordingly, we suggest that the item be removed from the Committee's docket.

Sincerely,

Walter Dellinger
Acting Solicitor General

cc: Professor Carol Ann Mooney
University of Notre Dame Law School
Notre Dame, Indiana 46556

ITEM NO. 95-1

95-1

RECEIVED 4/18/95

PUBLIC CITIZEN LITIGATION GROUP
SUITE 700
2000 P STREET N.W
WASHINGTON, D C 20036
(202) 833-3000

94-CV-J

94-AP-E

April 10, 1995

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Proposal for Rule Change

Dear Mr. McCabe:

This office has been involved in numerous class actions, sometimes on behalf of the class plaintiffs and other times on behalf of objecting absent class members. I am writing to address a procedural problem affecting objecting class members that should, in our view, be addressed by the Committee on Rules. As discussed below, we believe an amendment to Rule 23(e) of the Civil Rules would be appropriate. However, because our suggestion concerns standing to appeal in certain class actions, a conforming amendment to the Rules of Appellate Procedure may also be appropriate. Therefore, we ask that copies of this letter be sent to the Chairs and Reporters of the Advisory Committees for both the Civil and Appellate Rules.

There is a split in authority over whether an absent class member, who appears before the district court in opposition to a proposed class action settlement, must formally intervene pursuant to Rule 24 (or at least have sought intervention) in order to have "standing" to appeal a judgment approving the settlement under Rule 23(e). Some courts have held that intervention is a prerequisite

for appeal,[1] while others have held that intervention is not necessary.[2] Despite the deep split, the Supreme Court has declined to review the issue, including just last year.[3]

In our view, there are several reasons why intervention should not be required. First, intervention is designed to permit non-parties to be able to litigate the underlying case. Thus, potential intervenors file "complaints in intervention," setting out the claims that they wish to litigate against the defendant which they believe are not being adequately advanced by the named plaintiffs. In the settlement context about which we are concerned, however, the absent class member does not generally want (or have the resources) to litigate the case, and merely seeks to challenge a proposed settlement or some aspect thereof, such as the fees awarded class counsel. Requiring intervention does nothing to

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[1] See, e.g., Gottlieb v. Wiles, 11 F.3d 1004, 1007-12 (10th Cir. 1993); Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 679 (8th Cir. 1992); Walker v. City of Mesquite, 858 F.2d 1071, 1074 (5th Cir. 1988).

[2] See, e.g., Carlough v. Amchem, 5 F.3d 707, 713-14 (3d Cir. 1993)(reaffirming ruling in Ace Heating & Plumbing Co., Inc. v. Crane Co., 453 F.2d 30, 33 (1971)); Armstrong v. Bd. of School Directors, 616 F.2d 305, 327-28 (7th Cir. 1980); see In re Cement Antitrust Litig., 688 F.2d 1297, 1309 (9th Cir. 1982), aff'd, 459 U.S. 1191 (1993); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1176 (9th CIr. 1977).

[3] Bowling v. Pfizer, 143 F.R.D. 141 (S.D. Ohio 1993), appeal dismissed, 1993 WL 533489 (6th Cir. Dec. 21, 1993), cert. denied sub nom., Ridgeway v. Pfizer, 115 S. Ct. 294 (1994); see generally Timothy A. Duffy, "The Appealability of Class Action Settlements by Unnamed Parties," 60 U. Chi. L. Rev. 933, 934-40 (1993)(discussing circuit split). Another petition for a writ of certiorari on this issue is pending. Braman v. Barnett Banks, Inc., 38 F.3d 572 (11th Cir. 1994)(Table), cert. pending sub nom., Wagshal v. Bramon, No. 94-1506 (U.S. filed Mar. 13, 1995).

└ cert. denied, 514 U.S. 1096 (1995)

protect the interests of the courts or the settling parties. Assuming that absent class members are aware of the intervention requirement, they will file papers explaining the obvious fact that their interests are adverse to the settling parties and that they desire intervention status solely to protect their appellate standing. The district judge will be hard pressed not to grant intervention in such circumstances, since to do otherwise might be tantamount to denying the objectors' rights to appeal. In sum, requiring intervention is more work for both litigants and judges, with no countervailing benefit.

Second, if absent class members are required to intervene, the courts will become enmeshed in questions about whether that intervention gives the absent class members full party status typically accorded to "regular" intervenors. Thus, for instance, are intervenors unilaterally allowed to reject the settlement and litigate the case? Are their discovery rights the same as those of the named parties? These are important questions (for instance, we believe that objecting class members should have significant rights to discovery, but only relating to the settlement), but they should not turn on whether the absent class member is an intervenor. To be sure, the courts could grant "limited" intervention to absent class members to assure that they can appeal if necessary, but, if that is the only purpose, why require intervention in the first place?

Finally, the notion that intervention should be required to give an absent class member standing to appeal is contrary to the spirit of the rules governing civil litigation generally. Absent

class members are "parties to the suit."[4] Their claims, just like the claims of the named plaintiffs represented by the designated class counsel, must meet the requisite jurisdictional amount in diversity cases.[5] The typicality requirement of Rule 23(a)(3) is meant to assure that the class representatives' claims are similar, in every material respect, to those of the absent class members.

Thus, if absent class members appear in the district court and present arguments and evidence as to why the settlement should not be approved, as the Rules and the Manual for Complex Litigation allow,[6] there is no reason why the absent class members should be required to do anything more to appeal approval of the settlement. Since it is clear that the district court must entertain absent class members' objections without intervention, requiring intervention solely for appellate purposes is at odds with 28 U.S.C. § 1291's appeal as of right in civil cases. In the class action context, where pro se claimants are encouraged to participate in the objections process through the notice provisions of Rules 23(c)(2) and (e), there is all the more reason not to require adherence to formal legal requirements in order to preserve one's appellate rights.

A few examples of intervention problems in recent class action

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[4] American Pipe and Construction Co. v. Utah, 414 U.S. 538, 551 (1974).

[5] Zahn v. International Paper Co., 414 U.S. 291 (1973).

[6] Fed. R. Civ. P. 23(c)(2)(C); Advisory Committee Note to Fed. R. Civ. P. (d)(2); Manual for Complex Litigation 2d § 30.44 & n.99 (2d ed. 1985).

settlements should suffice to demonstrate that a rule change is necessary. In Bowling v. Pfizer[7] -- a case arising in the Southern District of Ohio -- absent class members filed objections to a proposed worldwide settlement concerning present and future relief for 50,000 individuals implanted with a defective heart valve. The class notice never apprised class members that intervention would be necessary to preserve their appellate rights, and none of the many objectors sought intervention. Indeed, at the time the case was filed, at least one of the leading commentators and other courts were of the belief that the Sixth Circuit was among the circuits where intervention was not a prerequisite to appeal.[8]

After the settlement was approved, one group of objectors that had fully participated in the district court filed a notice of appeal. Shortly thereafter, counsel for these objectors was informed that case law in other circuits required intervention. Counsel sought to intervene. The district court declined to rule on the motion on the ground that the appeal had divested it of jurisdiction. On appeal, the Sixth Circuit affirmed the district court's decision not to rule on the intervention request, and dismissed the merits appeal in an unreported order, holding that non-intervening absent class members had no standing to appeal a

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[7] 143 F.R.D. 141 (S.D. Ohio 1993).

[8] See 3B Moore's Federal Practice ¶ 23.80[5] & n.1, p. 23-496 (2d ed. 1995)(citing Cohen v. Young, 127 F.2d 721 (6th Cir. 1942)); Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1308 (3d Cir. 1993). Since that time, the Sixth Circuit has distinguished its prior precedents and required that, in most cases, absent class members be intervenors to have standing to appeal. Shults v. Champion International Corp., 35 F.3d 1056 (6th Cir. 1994).

class settlement approval. Thus, the result was that one of the most widely-reported, significant class action settlements in recent years underwent no appellate review whatsoever, despite vigorous opposition and preservation of numerous issues for appeal.

In the recent airline antitrust settlement,[9] clients of ours moved for intervention solely to preserve their appellate rights. In it order approving the settlement, the district court considered our motion for intervention as if it were a request for full party status under Rule 24, and denied intervention on the ground that "[t]he goals of Rule 23 would be defeated if the Court permitted every individual or entity that objected to discrete aspects of the settlement to intervene."[10] The problem is that we only wanted an opportunity to appeal any settlement approval, not to participate in the actual litigation of the case. If we had sought appellate review, we would have had to appeal both the denial of intervention and the settlement approval, and, presumably, we would have had to prevail on the first question in order to have "standing" to raise the merits before the Eleventh Circuit.[11]

Finally, this office sought intervention in In re Ford Motor Co. Bronco II Products Liab. Litig.[12] on behalf of absent class members who opposed a settlement. The motion for intervention,

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[9] In Re Domestic Air Transportation Antitrust Litig., 148 F.R.D. 297 (N.D. Ga. 1993).

[10] Id. at 337.

[11] See Guthrie v. Evans, 815 F.2d 626 (11th Cir. 1987).

[12] MDL No. 991 (E.D. La.).

which was filed along with our clients' timely filed objections, made clear that we were seeking to preserve appellate rights in light of Fifth Circuit case law requiring intervention.[13] The district court, in a lengthy order devoted solely to the intervention question, addressed the particular requirements of Rule 24, the question whether the request for intervention was timely, and other issues that would be relevant to a typical request for intervention in a litigated case, but which had very little to do with our clients' needs for intervention. The court granted intervention.[14] However, most of the objectors -- represented by lawyers unfamiliar with class action practice and the Fifth Circuit rule on intervention -- did not seek intervention and, presumably, would have been unable to appeal had the court not rejected the settlement.[15] Once again, the notice advised class members that they could object to the settlement by a certain date, but did not tell them of the consequences if they did not seek to intervene.

For these reasons, we believe that the Rule 23(e) should be amended to make clear that intervention is not essential to appeal the approval of a class action settlement. If necessary, the Appellate Rules should be amended to conform to the Rule 23(e)

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[13] Loran v. Furr's/Bishop's Inc., 988 F.2d 554, 554 (5th Cir. 1993); Walker v. City of Mesquite, 858 F.2d 1071, 1074-75 (5th Cir. 1988).

[14] In re Ford Motor Co. Bronco II Products Liab. Litig., MDL No. 991 (E.D. La., Memorandum and Order entered Jan. 13, 1995).

[15] See In re Ford Motor Co. Bronco II Products Liab. Litig., 1995 U.S. Dist. Lexis 3507 (E.D. La. Mar. 21, 1995).

change. If, however, the Committee disagrees with our views, and believes that intervention is necessary, the Civil Rules should expressly require intervention in order to preserve appellate rights. While we think that such a requirement would be unnecessary and unfair, especially to pro se objectors, at least objectors could read the rule and know what to do. We assume that, if such a rule were adopted, the Manual for Complex Litigation would be revised to state that all class settlement notices under Rule 23(e) should explain the intervention requirement. At present, the combined Rule 23(c)(2) and (e) notice contained in the Manual states only that intervention may be sought, and does not state that intervention is necessary to preserve appellate rights. Indeed, in the section of the model notice explaining the manner in which class members may make objections and preserve their rights to appear at the fairness hearing, there is no mention of intervention at all.[16]

[16] See Manual for Complex Litigation 2d § 41.43 (2d ed. 1985).

In summary, we believe that the current requirement in some circuits that objectors to class settlements be intervenors in order to have standing to appeal is unfair, unworkable, and unnecessary. I hope the suggestions in this letter are of some use to you. I look forward to hearing your response, as this office stands ready to assist you in making any necessary changes.

Sincerely,

Brian Wolfman

Brian Wolfman

ITEM NO. 95-2

95-2

TO: JUDICIAL CONFERENCE OR COMMITTEE
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE
Washington, DC 20544

94-AP-F

FROM: William Lynn Johnson, Sr.
Reg. No. 11784-076
F.C.I. Memphis - P.O. Box 34550 (Beale Unit)
Memphis, Tennessee 38184-0550

DATED: March 28, 1995

RE: CLARIFICATION OR CHANGE OF RULES 3 AND 24 OF THE FEDERAL RULES OF APPELLATE PROCEDURES TO INCLUDE A PROVISION "PROHIBITING" A DISTRICT COURT FROM INCORPORATING THE "DENIAL" OF IN FORMA PAUPERIS STATUS "WITHIN" IT'S ORDER WITHOUT A STATEMENT OF THE ISSUES OR ADVISING THE APPELLANT/PRISONER LITIGANT OF THE 30 DAYS LIMITATION FOR FILING A MOTION TO PROCEED ON APPEAL IN FORMA PAUPERIS. 28 U.S.C. §§ 2071-2074.

DEAR COMMITTEE MEMBERS:

This may not seem important to you, but it is important to Pro Se litigants' in the Western District of Tennessee, Memphis.

The purpose for this communication is to bring to your attention that the "judicial officers" in the Western District of Tennessee, Memphis have "enacted" a policy, custom or practice of (1) incorporating the denial of In Forma Pauperis status in their Orders Denying Relief in civil proceedings, without any statements of the issues or advising the adverse litigant (prisoner's) of the 30 days requirements of filing a Motion For Leave To Proceed on Appeal In Forma Pauperis, Federal Rules of Appellate Procedure 24(a), and (2) delaying the Notice of Appeal process beyond the 30 days required by Rule 24(a), Fed. R. App. P., to impede, impair or obstruct the First Amendment to the United States Constitution guarantee of the right to free access to the courts for indigent prisoners. 28 U.S.C. §§ 753(f) and 1915.

Because of this policy, custom or practice, I feel that some clarifications or changes "should be" made because Rule 4 of the Federal Rules of Appellate Procedure "requires" a Notice of Appeal to be filed within 30 days of the judgment or order denying relief in civil cases, to be accompanied by Form 4 [Application or Affidavit To Proceed In Forma Pauperis, Statement of Issues, and Verification of Poverty], to give jurisdiction to the appellate courts'.

By denying In Forma Pauperis status "before" any appeal issues are presented under Rule 24(a), Fed. R. App. P., the indigent prisoner is "unduly" burdened by seeking funds [$105.00 filing fees] from relatives or friends, whom are already in financial burdens with the cost of living and providing for their families, to have the appeal docketed for review. Is it lawful for a Motion to be filed in the appellate courts seeking leave to appeal before a Notice of Appeal, Statement of Issues and Verification of Poverty are filed in the district court ? This needs clarification.

There are several problems with the district court's policy, custom or practice. The district court clerk's office "are not" timely processing the Notice of Appeals promptly to allow the appellate court clerk's office an opportunity to inform a pro se litigant of the Rule 24(a), Fed. R. App. P. requirements. Once the 30 days has elapsed from the denial of In Forma Pauperis status, the time "can not" be extended for good or valid cause, such as waiting on a ruling on a Motion For Reconsideration or Motion To Alter or Amend Judgment under Rules 59 or 60 of the Federal Rules of Civil Procedure or the clerk's office "did not" have time to process the appeal notice promptly within the 30

days.

The adverse "affect" of delaying an appeal notice is that prisoners' are unable to purchase trial or hearing transcripts and their appeals are dismissed because the needed records - to support their claims or grounds for relief "cannot" be prepared for lack of funds, thereby, infringing or impeding upon the First Amendment to the United States Constitution right to free access to the courts by prisoners.

Pursuant to the finality of a judgment or order, the filing of a Motion For Reconsideration or Motion To Alter or Amend Judgment "tolls" the time for filing an appeal or restarts the time limitation. If the district court judge "incorporates" the denial of In Forma Pauperis status in it's Order or Judgment "before" a statement of the issues or grounds for appeal are presented, "does" the filing of a Notice of Appeal, Statement of Issues, and Verification of Poverty "requires" the district court judge to rule anew on the issues or grounds presented, in view of it's previous ruling denying In Forma Pauperis status ? This needs clarification.

The district and appellate courts in the Sixth Circuit "holds" that it "does not" have to "consider" issues or grounds for appeal after a ruling is made that an appeal "is not taken in good faith" before a Notice of Appeal, Statement of Issues, and Verification of Poverty are presented. This also needs clarification. [See Attachments].

For these reasons, I request that this committee clarify or change the Rules mentioned to address the "infringements" upon the First Amendment to the United States Constituion for corrective actions.

Respectfully submitted.

William L. Johnson, Sr.
COMPLAINTANT

cc: file

Sworn to before me this _____ day of

_____, 19_____.

AUTHORIZED BY THE ACT OF
JULY 7, 1955 TO ADMINISTER
OATHS (18 U.S.C. 4004)

3-28-95
CASE MANAGER

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

LEONARD GREEN
CLERK

538 U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

TELEPHONE
(513) 684-2953
FTS 684-2953

January 6, 1993

William Lynn Johnson Sr.
Federal Correctional Institute
Beale Unit
#11784-076
P.O. Box 34550
Memphis, TN 38134-0550

RE: Case No. 93-5018
Johnson vs. Epps
District Court No. 81-02023

We have today docketed the above-styled case and assigned it case number 93-5018 .

On 11/20/92 the district court denied your request for pauper status. Therefore, pursuant to Rule 24 of the Federal Rules of Appellate Procedure, you must now pay the filing fee of $105.00 to the Clerk of the District Court no later than 1/20/93 .

After service of the district court's denial of leave to proceed on appeal in forma pauperis or certification that an appeal could not be taken in good faith, you had thirty (30) days in which to renew, in the Court of Appeals, the motion for in forma pauperis.

Since the rules do not provide for extensions of time to properly execute a request for pauper status and the thirty days having expired, you must now pay the filing fee or the appeal will be dismissed for want of prosecution.

This court will not entertain any future motions to proceed in forma pauperis.

Yvonne Henderson
Case Supervisor

Enclosures: Rule 24, FRAP

cc:
Mr. Peter M. Brown

UNIT) STATES COURT OF APPE ,S
SIXTH CIRCUIT

LEONARD GREEN
CLERK

538 U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

TELEPHONE
(513) 684-2953
FTS 684-2953

March 19, 1993

William Lynn Johnson Sr.
Federal Correctional Institute
Beale Unit
#11784-076
P.O. Box 34550
Memphis, TN 38134-0550

RE: Case No. 93-5367
Johnson vs. Epps
District Court No. 81-02023

We have today docketed the above-styled case and assigned it case number 93-5367 .

On 11/20/92 the district court denied your request for pauper status. Therefore, pursuant to Rule 24 of the Federal Rules of Appellate Procedure, you must now pay the filing fee of $105.00 to the Clerk of the District Court no later than 4/2/93 .

After service of the district court's denial of leave to proceed on appeal in forma pauperis or certification that an appeal could not be taken in good faith, you had thirty (30) days in which to renew, in the Court of Appeals, the motion for in forma pauperis.

Since the rules do not provide for extensions of time to properly execute a request for pauper status and the thirty days having expired, you must now pay the filing fee or the appeal will be dismissed for want of prosecution.

This court will not entertain any future motions to proceed in forma pauperis.

Yvonne Henderson
Case Supervisor

Enclosures: Rule 24, FRAP

cc:
Mr. Peter M. Brown

Rule 24. Proceedings in Forma Pauperis

(a) Leave to Proceed on Appeal in Forma Pauperis from District Court to Court of Appeals. A party to an action in a district court who desires to proceed on appeal in forma pauperis shall file in the district court a motion for leave so to proceed, together with an affidavit, showing, in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay fees and costs or to give security therefor, the party's belief that that party is entitled to redress, and a statement of the issues which that party intends to present on appeal. If the motion is granted, the party may proceed without further application to the court of appeals and without prepayment of fees or costs in either court or the giving of security therefor. If the motion is denied, the district court shall state in writing the reasons for the denial.

Notwithstanding the provisions of the preceding paragraph, a party who has been permitted to proceed in an action in the district court in forma pauperis, or who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization unless, before or after the notice of appeal is filed, the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled so to proceed, in which event the district court shall state in writing the reasons for such certification or finding.

If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court, or by the affidavit prescribed by the first paragraph of this subdivision if no affidavit has been filed in the district court, and by a copy of the statement of reasons given by the district court for its action.

(b) Leave to Proceed on Appeal or Review in Forma Pauperis in Administrative Agency Proceedings. A party to a proceeding before an administrative agency, board, commission or officer (including, for the purpose of this rule, the United States Tax Court) who desires to proceed on appeal or review in a court of appeals in forma pauperis, when such appeal or review may be had directly in a court of appeals, shall file in the court of appeals a motion for leave so to proceed, together with the affidavit prescribed by the first paragraph of (a) of this Rule 24.

(c) Form of Briefs, Appendices and Other Papers. Parties allowed to proceed in forma pauperis may file briefs, appendices and other papers in typewritten form, and may request that the appeal be heard on the original record without the necessity of reproducing parts thereof in any form.

(As amended Apr.30, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986)

CROSS REFERENCE: 6thCR 12

'TED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
100 EAST FIFTH STREET, ROOM 538
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

LEONARD GREEN
CLERK

TELEPHONE
(513)684-2953

FILED BY ____ D.C.

94 AUG 22 AM 9:24

ROBERT R. DI TROLIO
CLERK, U.S. DIST. CT.
W.D. OF TN, MEMPHIS

August 17, 1994

Peter M. Brown
Law Offices of Peter M. Brown
79 Washington Street
Newton, MA 02158

William Lynn Johnson Sr.
Federal Correctional Institute
Beale Unit
#11784-076
P.O. Box 34550
Memphis, TN 38184-0550

RE: 93-5018: 93-5367
Johnson vs. Epps
District Court No. 81-02023

Enclosed is a copy of an order which was entered today in the above-styled case.

Very truly yours,
Leonard Green, Clerk

Yvonne Henderson
Case Supervisor

Enclosure

cc:
Mr. Robert R. Di Trolio

1 cc

NOS. 93-5018/5367

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIAM LYNN JOHNSON, SR., Plaintiff-Appellant

v.

JOHN EPPS, Defendant-Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE

BEFORE: KEITH, NORRIS, and BATCHELDER, Circuit Judges.

PER CURIAM. Plaintiff William Lynn Johnson, Sr., a prisoner, appeals the district court's dismissal of this § 1983 suit against the jailer who confiscated Johnson's legal papers and typewriter. Johnson also appeals the district court's denial of his requests for pauper status on appeal and transcripts at government expense. We affirm.

I

In November, 1980, Johnson was transferred from the Tennessee State Penitentiary to the Shelby County Jail in Nashville for a hearing on his state postconviction petition. The defendant/appellee, John Epps, confiscated Johnson's typewriter and legal papers upon Johnson's arrival at the jail. After three months in the custody of Johnson's family, the

papers and typewriter were returned to Johnson in his cell. Johnson soon realized that a Proof of Facts article on ineffective assistance of counsel was missing.

In 1981, Johnson, proceeding *pro se*, filed this action under 42 U.S.C. § 1983 for injury caused by the confiscation. After a long series of continuances, trial was held on August 27, 1992. The next day, the district court issued an order dismissing the case "[f]or the reasons stated in open court." Judgment was entered on September 14, 1992.

On September 30, 1992, Johnson filed a notice of appeal from the district court decision, which appeal became no. 93-5018. On November 20, 1992, the district court denied Johnson's request for pauper status on appeal.

On February 19, 1993, the clerk of the court received Johnson's motion to alter or amend the judgment. On February 22, Johnson moved for pretrial and trial transcripts at government expense. On February 23, the district court denied Johnson's motion to alter or amend because the motion did not "present any facts or legal arguments that have not already been considered and rejected by previous order of this Court." In a separate order of the same day, the district court denied Johnson's motion for transcripts because Johnson was ineligible for appeal in forma pauperis.

On March 3, 1993, Johnson filed a notice of appeal of the orders denying free transcripts and amendment or alteration of the judgment. This appeal became no. 93-5387.

In the March 3 notice, Johnson renewed with this Court his request for pauper status on appeal, but filed no affidavit of financial condition or statement of issues on appeal. To avoid dismissal of her son's appeals, Johnson's mother paid the filing fee.

II

As a threshold matter, we note that we do not have jurisdiction over appeal no. 93-5018. Federal Rule of Appellate Procedure 4(a)(1) requires the appealing party to file a notice of appeal within thirty days after the entry of judgment or order appealed from. Generally, a timely notice of appeal divests the district court of jurisdiction and confers jurisdiction on the court of appeals. *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). A timely motion to alter or amend, however, tolls the time for noticing an appeal. Fed. R. App. P. 4(a)(4). A notice of appeal filed before or during the pendency of a timely motion to alter or amend is ineffective. Fed. R. App. P. 4(a)(4). Unless another notice of appeal is filed within thirty days after the disposition of the motion to alter or amend, this Court lacks jurisdiction over the appeal. Fed. R. App. P. 4(a)(4).[1]

The relevant events for the jurisdictional analysis are these:

Date	*Action*
9/14/92	Judgment of dismissal entered.
9/30/92	Johnson files notice of appeal of 9/14/92 judgment (no. 93-5018).
2/19/93	Johnson's motion to alter or amend received by clerk of court.
2/23/93	District court denies motion to alter or amend.
3/3/93	Johnson files notice of appeal from order denying motion to alter or amend (no. 93-5367).

A motion to alter or amend the judgment must be filed within ten days of judgment. Fed. R. Civ. P. 59(e). According to the date stamped on the motion to alter or amend, the Rule 59(e) motion was not filed until February 19, 1993--more than five months after judgment. Using February 19, 1993, as the filing date would compel the conclusion that the motion to

[1]Congress amended Rule 4(a)(4) in 1993 to mitigate the harsh results sometimes occasioned by the rule. Those amendments are inapplicable to this case because all relevant motions were filed before the amendments' effective date of December 1, 1993. *See* Fed. R. App. P. 4(a)(4) (1993 amendments).

alter or amend was not a time-tolling motion under Rule 4(a)(4); therefore, the timely notice of appeal from the judgment of dismissal would have divested the district court of jurisdiction and conferred jurisdiction over appeal no. 93-5018 in this Court. Under this analysis, this Court would not have jurisdiction over appeal no. 93-5367.

We have determined, however, that February 19, 1993, is not the proper date to use for the jurisdictional analysis. Federal Rule of Civil Procedure 5(e) provides that filing may be made with the clerk of the court or, if the judge permits, with the judge. *Torras Herreria y Construcciones v. M/V Timur Star*, 803 F.2d 215, 216 (6th Cir. 1986). In ruling on Johnson's motion to alter or amend, the district court wrote,

> The above-styled case went to trial on August 27, 1992, and by order dated August 28, 1992, this case was dismissed with prejudice. Subsequently, plaintiff served on counsel for the defendants a motion to alter or amend judgment and mailed a copy of the same to this Court's chambers. Although this motion was not filed with the Clerk of Court due to inadvertence, the motion was timely filed and this Court will treat the motion as if filed within the ten (10) days allowed under the Federal Rules of Civil Procedure.

Because Johnson timely filed his Rule 59(e) motion with the district judge,[2] the motion tolled the time for appeal and rendered ineffective Johnson's notice of appeal from the September 14 judgment of dismissal. Accordingly, we dismiss appeal no. 93-5018 as prematurely filed.

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[2]This case pointedly highlights the problems which may arise when pleadings are accepted for filing in chambers. Civil Procedure Rule 5(e) requires the judge to note the date on all papers filed in chambers and transmit the papers to the office of the clerk of court. In this case, the district judge neglected to make such notation on Johnson's motion to alter or amend and delayed approximately five months in transmitting the motion to the clerk of court. Failure to record the filing date and promptly deliver the filing to the clerk of court creates ambiguity in the docket and confusion on the part of the litigating parties.

After disposition of the Rule 59(e) motion, Johnson timely appealed. An appeal from the denial of a motion to alter or amend is sufficient to confer jurisdiction over the underlying judgment. *See* Fed. R. App. P. 4(a)(1) and (4). Therefore, we have jurisdiction over appeal no. 93-5367, including the merits of the underlying case.

We also have jurisdiction over the issue of Johnson's entitlement to pauper status and free transcripts. The governing statutory provisions specifically authorize this Court to entertain petitions for pauper status and free transcripts. 28 U.S.C. §§ 753(f) and 1915(a); *see also* Fed. R. App. P. 24(a) (Advisory Committee Notes to 1967 Adoption).

III

Where an appellant claims that a finding or conclusion in the decision below is unsupported by or contrary to the evidence, the appellant must submit to this Court a record of all evidence relevant to such finding or conclusion. *See* Fed. R. App. P. 10(b)(2). On the merits, Johnson argues that the district court's judgment in Epps's favor was contrary to the evidence. Therefore, it is Johnson's responsibility to provide this Court with a sufficient record for review. Johnson has not done so. Instead, he requests pauper status and the production of transcripts at government expense.

As to his eligibility for pauper status, Johnson has waived the issue on appeal. Federal Rule of Appellate Procedure 24(a) provides in part,

> If a motion for leave to proceed on appeal in forma pauperis is denied by the district court, or if the district court shall certify that the appeal is not taken in good faith or shall find that the party is otherwise not entitled to proceed in forma pauperis, the clerk shall forthwith serve notice of such action. A motion for leave so to proceed may be filed in the court of appeals within 30 days after service of notice of the action of the district court. The motion shall be accompanied by [an affidavit of

financial condition and issues on appeal] . . . and by a copy of the statement of reasons given by the district court for its action.

Fed. R. App. P. 24(a). Johnson failed to file a motion and affidavit within thirty days of the district court's denial of pauper status. Therefore, Johnson is precluded from claiming eligibility to proceed in forma pauperis on appeal.

Title 28, § 753(f) provides, in relevant part,

> Fees for transcripts furnished in other proceedings[3] to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question).

28 U.S.C. § 753(f). As the language of the statute makes clear, pauper status is a prerequisite to a grant of free transcripts. *See Maloney v. E. I. DuPont de Nemours & Co.*, 396 F.2d 939, 940 (D.C. Cir. 1967) ("Before a free transcript can be furnished, then, the appeal must be permitted *in forma pauperis*."), *cert. denied*, 396 U.S. 1030 (1970). For the reason discussed, Johnson will not be permitted to proceed in forma pauperis. Therefore, Johnson is not entitled to free transcripts under § 753(f).

Johnson was required to provide this court with the portions of the record necessary to prosecute the appeal. He has failed to do so, and has further wholly failed to do that which the Rules clearly require in order to permit him to obtain those portions of the record without cost to himself. Accordingly, we hold that appeal no. 93-5367 should be dismissed.

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[3]The preceding sentences provide for free transcripts in direct criminal appeals and habeas corpus proceedings. *See* 28 U.S.C. § 753(f).

III

Based on the foregoing, we DISMISS appeal no. 93-5018 for lack of jurisdiction; we DENY Johnson's motions for pauper status and free transcripts; and we DISMISS appeal no. 93-5367 for failure to provide the record on appeal as required by Fed. R. App. P. 10(b)(2). *See* Fed. R. App. P. 3(a).

ITEM NO. 95-3

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

STEPHEN F. WILLIAMS
UNITED STATES CIRCUIT JUDGE

(202) 273-0638
FAX (202) 273-0976

April 21, 1995

Honorable James K. Logan
U.S. Court of Appeals for the
Tenth Circuit
P.O. Box 790
Olathe, Kansas 66051-0790

Dear Jim,

I have recently focused on an issue that may warrant our committee's attention. There is a striking difference (at least in some circuits) between the treatment of (1) notices of appeal that are premature because of post-trial motions pending before the district court and (2) petitions for review of agency action that are premature because of petitions for reconsideration, rehearing, or reopening pending before the agency. As you recall, in 1993 we addressed the district court situation, amending Rule 4(a)(4) to undo the trap for the unwary that had been inadvertently created by the 1979 amendment, under which appeals were lost irretrievably when filed after initial judgment but before the disposition of certain post-trial motions. See Griggs v. Providence Consumer Discount Co., 459 U.S. 56 (1982) (per curiam). Under our reform, a prematurely filed notice of appeal is deemed "ineffective" so long as potentially mooting post-trial motions are outstanding, but it becomes effective on the date that the last outstanding motion is decided.

Petitions for review of agency action (at least in some circuits, including my own), however, are still subject to the trap that applied to notices of appeal before 1993. The consensus after ICC v. Brotherhood of Locomotive Engineers, 482 U.S. 270 (1988), is that courts lack jurisdiction to review agency actions while petitions for reconsideration, etc., are still pending before the agency. See, e.g., United Transp. Union v. ICC, 871 F.2d 1114, 1118 (D.C. Cir. 1989); West Penn Power Co. v. EPA, 860 F.2d 581, 585-87 (3d Cir. 1988); Winter v. ICC, 851 F.2d 1056, 1062 (10th Cir. 1988). The question then becomes what to do with a petition for judicial review that is filed while an administrative petition for reconsideration is pending. The circuits that have considered the question have taken a tack very much like the pre-1993 Rule 4(a)(4) approach: they have held that the prematurity of these review petitions is "incurable," so that they do not "ripen" into validity when the petitions for

reconsideration, etc., are denied. See TeleSTAR, Inc. v. FCC, 888 F.2d 132 (D.C. Cir. 1989) (per curiam); Chu v. INS, 875 F.2d 777 (9th Cir. 1989). Like the pre-1993 litigant who failed to file a second notice of appeal, the party aggrieved by agency action risks being shut out of court forever if it fails to file a second petition for review before the deadline for doing so.

A solution similar to our post-1993 Rule 4(a)(4) might be appropriate here. Instead of dismissing prematurely filed petitions for judicial review, they could simply be held in abeyance until the resolution of the potentially mooting administrative motions for reconsideration, rehearing, or reopening.

One distinction between the two situations is that very commonly the party that finds its petition for judicial review barred may have other avenues open in the future to challenge the validity of the agency action. For example, in the absence of a specific statute to the contrary, our circuit allows litigants a second bite at the apple when an agency seeks to enforce rules against them for which statutory authorization is lacking, see Functional Music, Inc. v. FCC, 274 F.2d 543 (D.C. Cir. 1958), and we often allow what are effectively belated challenges to old rules when litigants re-petition agencies to amend those rules and the petitions are denied, see Gage v. AEC, 479 F.2d 1214 (D.C. Cir. 1973). See generally NLRB Union v. FLRA, 834 F.2d 191, 195-97 (D.C. Cir. 1987). But these second chances are by no means universal, and the various deadlines for petitioning for review cannot be circumvented in the large run of cases. See, e.g., Adamo Wrecking Co. v. U.S., 434 U.S. 275 (1978) (holding Clean Air Act's specific 30-day time limit for challenging emissions standards to preclude challenge in later enforcement proceeding); Natural Resources Defense Council v. NRC, 666 F.2d 595, 602-03 (D.C. Cir. 1981) (holding that APA time limit for seeking review of procedural defects in agency action is jurisdictional and may not be extended). Furthermore, even where a second chance does become available, the scope of review at the later date may be more limited than it would have been on the first occasion. See NLRB Union, 834 F.2d at 196. I would therefore be reluctant to refrain from reform on the basis of this distinction.

My recollection is that when we were considering the Rule 4(a)(4) amendment we sought reaction from clerks of the various circuits (I think our clerk committee member spearheaded the inquiry), and found that, although some clerks felt that holding appeals in abeyance would create some administrative confusion, none foresaw any very grievious problem. Perhaps it might be useful to launch a similar inquiry, asking whether the Rule 4(a)(4) amendment in fact has created major hassles and whether the clerks foresee any

reason why a similar solution for petitions for review of agency action would not work as well.

Sincerely,

Stephen F. Williams

cc: Carol Mooney

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
WASHINGTON, DC 20001

STEPHEN F. WILLIAMS
UNITED STATES CIRCUIT JUDGE

(202) 273-0638
FAX (202) 273-0976

July 26, 1995

Honorable James K. Logan
U.S. Circuit Judge
U.S. Court of Appeals for
the Tenth Circuit
P.O. Box 790
Olathe, KS 66051-0790

Dear Jim:

Enclosed is a draft rule designed to address the procedural trap currently attending premature petitions for review of agency action--a trap analogous to the one corrected by our recent revision of rule 4(a)(4). The trickiest aspect of drafting the rule is defining the class of agency rehearing/reopening/etc. procedures that will trigger the rule's operation, as these vary from agency to agency according to their particular governing statutes and regulations, rather deriving from a set of uniform Rules of Civil Procedure. As you'll see, the formula adopted is a functional one framed in terms of finality, which may be slippery but is at least one that courts commonly must apply. Further, it seems to make substantive sense.

One subject might be added to the proposed Advisory Committee's notes. It may be worthwhile to note that the courts owe deference to an agency's interpretation of the effect of its own procedures (including those procedures' finality within the agency), but not to its views on whether its actions are final for purposes of judicial review, even though the internal effects of agency procedures may be critical in resolving the issue of finality for purposes of reviewability. See Consolidated Rail Corp. v. ICC, 43 F.3d 1528, 1531-32 (D.C. Cir. 1995). The Committee might want at least to flag the issue, which has come up several times this year in my circuit.

Sincerely,

Stephen F. Williams

Stephen F. Williams

CC: Professor Carol Mooney

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

. . .

(f) Effect of Petitions for Rehearing, Reopening, or Reconsideration. If any party petitions an agency to rehear, reopen, or reconsider an order, the time for seeking judicial review of that order runs from the entry of the agency's disposition of the last such petition outstanding. This provision applies to any agency procedure that reopens or continues an otherwise final and reviewable proceeding.

A petition for review filed after announcement or entry of an agency's order but before its disposition of any petitions for rehearing, reopening, or reconsideration is ineffective until the entry of the agency's order disposing of the last such petition outstanding. A party seeking to challenge the agency's disposition of these administrative petitions must file a separate petition for review.

. . .

[ADVISORY COMMITTEE NOTES]

Subdivision (f). This rule is modeled on Rule 4(a)(4) and operates in a similar manner. It aligns the treatment of premature petitions for review of agency orders with that of premature notices of appeal. The consensus after ICC v. Brotherhood of Locomotive Eng'rs, 482 U.S. 270 (1988), is that courts lack jurisdiction to review agency actions while administrative petitions for rehearing, reopening, or reconsideration are pending. See, e.g., United Transp. Union v. ICC, 871 F.2d 1114, 1118 (D.C. Cir. 1989); West Penn Power Co. v. EPA, 860 F.2d 581, 585-87 (3d Cir. 1988). Some circuits have held that petitions for review filed while these administrative petitions are pending are incurably premature, meaning that they do not ripen or become valid once the agency finally denies the pending petitions for rehearing or reopening. See, e.g., TeleSTAR, Inc. v. FCC, 888 F.2d 132 (D.C. Cir. 1989) (per curiam); Chu v. INS, 875 F.2d 777 (9th Cir. 1989). In these circuits, a party aggrieved by agency action must file a second timely petition for review or risk being shut out of court. The amended rule seeks to alleviate this procedural trap by allowing premature petitions for review to be held in abeyance until the agency resolves the potentially mooting administrative petitions.

Unlike for Rule 4(a)(4), the wide variety of procedures applicable in different agencies makes it impossible to list the specific administrative petitions that will trigger

suspension of a petition for review; the class can only be defined functionally. Suspension of a review petition is appropriate only where administrative motions have been filed that could reopen or continue an existing agency proceeding and potentially moot the petition for court review. Suspension is not appropriate for motions that petition the agency to begin a new rulemaking or other proceeding, even where the administrative petition seeks to amend the previous order or deal with the same subject matter.

ITEM NO. 95-4

95-4

94-AP - H

RECEIVED 7/28/95

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July 21, 1995

Mr. Peter G. McCabe
Section on the Committee
on Rules, Practice and Procedure
Thurgood Marshall Federal
Judicial Building
Washington DC 20455

RE: Committee of Appellate Rules
meeting October 19 - 21, 1995

Dear Mr. McCabe:

There is a conflict between the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure on the computation of time in appeals allowed pursuant to 28 U.S.C. 1292(b), which I believe leads to confusion, and has not been fully resolved by any appellate court facing the issue. A simple resolution to this problem, which I encountered recently in a very significant case, could be made by amending the Federal Rules of Appellate Procedure to conform to the computation of time requirement of FRCP Rule 6(a), at least with reference to appeals which are allowed pursuant to district court order.

Before this case, I believed that a 1292(b) certification, which specifically provides that its procedure does not divest the trial court of jurisdiction, was continuously governed by FRCP until such time as the Court of Appeals acted on the application. But the FRAP, specifically Rule 4, is to the contrary. As a consequence, the seven-day threshhold for computation of time as opposed to the eleven-day threshhold contained in FRCP 6(a) comes into play. In my case, the certification order was signed just prior to the Good Friday and Easter holidays. Relying on the federal

rules of civil procedure, I filed by petition in the Court of Appeals on the last day allowable, using the expanded the ten-day calculation in the cited rule. The defendant opposed the application as being untimely based on the seven-day threshhold contained in FRAP 4. Rather than litigate the issue, I applied to the district court for a recertification, which was granted, and the matter is now pending on a secondary application. The first application has been mooted without decision.

I can see no good reason for a different method of computation of time between the appellate rules and the district court rules, particularly when appeals under 1292(b) are to be favored.

I am enclosing appropriate briefings filed in the Fifth Circuit Court of Appeals on this point. If you wish to have further discussions regarding this matter, please feel free to give me a call.

With kindest regards, I am

Very truly yours,

JAMES B. DOYLE

JBD:ks
Enclosure

ITEM NO. 95-5

95-5

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

FRANK H. EASTERBROOK
CIRCUIT JUDGE

July 24, 1995

Hon. James K. Logan
United States Court of Appeals for the Tenth Circuit
P.O. Box 790
Olathe, Kansas 66051-0790

Dear Jim:

The decision of the Standing Committee to recommit the draft of Rule 32 offers an opportunity to revisit the question what we are trying to achieve by revising the national rule. I think that there are three principal objectives:

1. Making briefs more readable. Appellate judges spend more time reading briefs than on any other task. Better typography and form would do more to facilitate our work than anything short of better substance—which no rule can ensure. Readability requires better typography, making briefs prepared in house more like briefs prepared by a commercial printer. Achieving that objective entails two steps: First, we have to free counsel from the constraints of some local rules that hamper good typography. (The Seventh Circuit, for example, forbids the use of proportional type; yet printers use *only* proportional type, and monospaced type does not appear in any professionally prepared book or magazine.) Second, we have to protect the court from typographical tyros. Freed to use good devices, such as proportionally spaced faces, lawyers may trip over their shoelaces. They went to law school, not a trade school for printers. Software has given them options they do not know how to use wisely. One therefore cannot have liberty (step one) without responsibility (step two).

2. Creating a level playing field. The rule should give every lawyer an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions. Footnotes, the use of tight tracking, even the selection of a face with a small x-height, can squeeze more words into 50 pages. This objective is in part for the benefit of the bench, but it is even more for the benefit of the bar, a message that should be prominent in the Committee Note.

3. Facilitating a national practice. A brief prepared according to the national rule should be acceptable in every court. The Committee Note to the current draft expresses this as a hope, but as a hope it is forlorn. Comments to the many drafts show that judges and courts have different ideas about what is acceptable, so local rules are bound to break out. But a national rule can and should say that the local rules may move in one direction only: they may authorize additional devices and forms but may not remove any from the national rule. The way to achieve this is with language in the text rather than language in the Committee Note.

Judges who prefer or need larger type can use a computer disk to generate it (see below for a proposed new Rule 31(c)). But if the national rule is to guarantee universal acceptability, I suppose it should use the 14-point minimum for text (though not for footnotes).

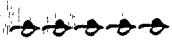
Type styles: A lowest common denominator rule should ensure roman type, limit the use of italics and boldface, and all but forbid all-caps text (which lawyers are wont to use in argument headings, although I find it unreadable). Some courts may be more liberal, but I doubt it.

Length: To placate No-Tie Brown, I have drafted a safe harbor for all briefs, with a counting rule equally applicable across the board. The certificate can use word or character counts (the numbers are roughly equivalent), and the No-Tie crowd, which uses typewriters, also can use a line count that comes out to approximately 50 pages. Even No-Tie Brown can have a secretary count lines! The 1,300 lines is 50 pages at 26 lines per page. With lines 6½ inches wide, and 10½ characters per inch, there would be 68.25 characters per line, and 1,300 such lines would contain 88,725 characters. So the word, character, and line counts all come to roughly the same thing. A level playing field—and level at approximately the current 50-page limit. Rule 32(a)(7)(B)(iii) contains a more comprehensive list of excluded matter. The certificate of compliance has been simplified from the Advisory Committee's current draft.

The rest is straightforward, I hope. Rule 32(b)(2) states loudly that the appendix may not contain faxes or photo-reductions, two banes of judicial existence. Rule 32(d) sets limits on the scope of local rules that are absolutely essential if this project is to succeed.

As I said at the Standing Committee meeting, one more matter deserves attention. The single most-talked-about subject in the corridors of the appellate judges' meeting in San Diego was how to use modern technology to be able to search text in briefs and records—and, for judges with visual problems, how to enlarge that text, or have the computer read it aloud. Dealing with the record is a large problem, because only some of it is available on computer. But most briefs are now available in electronic form, and we can require them to be filed that way. I propose the following as a new Rule 31(c). The current subsection (c) in Rule 31 would be redesignated as (d).

Digital Media. One copy of each brief must be filed on digital media. The disk must contain nothing more than the text of the brief, and the label of the disk must include the case name and docket number. One copy of the disk must be served on each party separately represented. Filing and service under this subsection are not required if counsel certifies that the text of the brief is not available on digital media.



The Committee Note should include three points: (1) A 3½ inch disk is preferred but not required. (2) It is not necessary to use any particular operating

system or word processing program. Modern computers can read both IBM and Macintosh disks, and translators enable one program to read at least the text (if not all the formatting) generated by other programs. But counsel should be encouraged to include two versions of the text: one in the word processor's "native" format and the other in plain ASCII text. (3) The rule is not designed to require the use of word processing equipment.

One copy should suffice; the court can create more if they are required. Judge Stotler has expressed a concern about viruses, but I do not think this troubling. Viruses infect only executable files; word processing documents are not executable. Anyway, most computers today are equipped with virus-detection and disinfection programs.

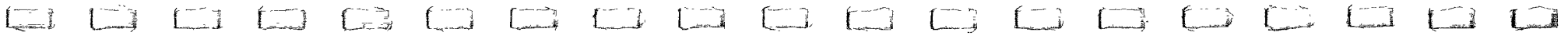
I look forward to joining you at the next Advisory Committee meeting.

Sincerely,

Frank H. Easterbrook

cc: Hon. Alicemarie H. Stotler
John K. Rabiej
Peter B. McCabe
Carol Ann Mooney
Bryan Garner

ITEM NO. 95-7



95-7

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November 15, 1995

Luther T. Munford
Partner
Resident in Mississippi
(601) 360-9364

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, IN 46556

Re: Fed. R. App. P. 4(a)(5)

Dear Carol:

At the last committee meeting we discussed the conflict between the plain language of this rule and the manner in which courts have applied it. On its face, the rule appears to allow an extension for either "good cause" or "excusable neglect" even after the original 30-day period has run.

As discussed in the enclosed article, the courts of appeals have generally taken the position that a "good cause" extension is not available after 30 days. If that is going to be the law, then it seems to me that the rule ought to be amended to say so expressly. I would appreciate your thoughts as to whether or not this should be made an agenda item. In the alternative, should the style revision "clarify" this?

Very truly yours,

Luther T. Munford

LTM:szr
Enclosure

109852.1

1367). There is little doubt, however, that the result would not have been any different had the statute applied. Under §1367(a), district courts have supplemental jurisdiction over all claims that are so related to claims over which they have original jurisdiction as to be part of the same case or controversy under Article III. Because there was no close factual connection between the RICO and fraud claims in the underlying action and possible future claims against the subpoenaed parties, there would be no basis for exercising supplemental jurisdiction.

Research Leads

7B *Moore's Federal Practice* §1367

13 Wright, Miller, & Cooper, *Federal Practice & Procedure* §3523

1 Givens, *Manual of Federal Practice, 4th* §§1.109 - 1.112 (Shepard's)

APPEALS

Notice of Appeal—Extension of Time to File—Excusable Neglect F.R.C.P. 77(d) F.R.A.P. 4(a)(1), 4(a)(5), 4(a)(6)

Virella-Nieves v. Briggs & Stratton Corp.
53 F.3d 451 (1st Cir. 1995)

Case at a Glance

When the failure to file a timely notice of appeal results from neglect in determining when the judgment or order was entered on the docket, thereby triggering the appeal period, the time to appeal can be extended under F.R.A.P. 4(a)(5) only on the basis of excusable neglect, not good cause.

Summary of Decision

Following a jury verdict for plaintiffs in a products liability action, both sides filed post-trial motions. The motions were denied on July 12, 1993. The clerk received and filed the orders denying the motions on the same day. The following day, the clerk entered the orders on the docket. On July 14, the clerk's office mailed copies of the orders to defendants. The orders showed they had been signed by the judge and had been received and filed by the clerk's office on July 12. Defendants received the copies.

Under F.R.A.P. 4(a)(1), notice of appeal must be filed within 30 days after entry of the judgment or order being appealed. Defendants knew the post-trial motions had been denied on July 12. They also knew the clerk's office had received and filed the orders the same day, and all that remained for the clock to begin running on the period for taking an appeal was for the clerk's office to enter a notation on the docket that the motions had been denied. Despite knowing this, defendants did nothing. The reason, they submitted, was that the copies of the orders they received from the clerk did not indicate entry on the docket.

On August 9, defendants' counsel attempted for the first time to find out if the orders had been entered on the docket. A secretary for defendants' attorneys claimed that beginning on August 9, she made a number of telephone calls to the clerk's office to determine the status of the orders. Each time, someone in the clerk's office reportedly informed her that the office's computer system was not functioning. On August 16, she discovered that the orders had in fact been docketed. Upon learning that the orders had been entered, defense counsel assumed he would receive written notice from the clerk's office advising him of the date of their entry. It was only during a chance telephone conversation with plaintiff's attorney later on August 16 that counsel discovered the orders had been docketed on July 13. The period for filing notice of appeal had expired.

On August 18, defense counsel filed a motion under F.R.A.P. 4(a)(5) requesting an extension of time to file an appeal "on the grounds of excusable neglect or good cause." District court found that defendants had good cause for failing to file notice of appeal within the 30-day period, and accordingly granted the motion. The First Circuit vacated the district court's order.

The clerk is required to mail notice of entry of court orders and judgments to all nondefaulted parties. *See* F.R.C.P. 77(d). The clerk's failure to do so does not, however, affect the time to appeal, or relieve or authorize the court to relieve a party for failing to take a timely appeal, except as permitted by Rule 4(a). *See* Rule 77(d). Upon a showing of excusable neglect or good cause, Rule 4(a)(5) authorizes district courts to extend the time for filing a notice of appeal if the party seeking an extension moves for an

extension within 30 days of the time the original appeal period expires.

According to the First Circuit, a showing of good cause can justify an extension even if the motion requesting an extension is made after the original appeal period has expired. However, good cause provides a basis for extending the time to appeal only in circumstances that are unsuited to excusable neglect analysis. In the First Circuit's view, that was not the case here. Defendants were put on notice that the post-trial orders had been signed by the judge and received by the clerk's office on July 12. Nevertheless, they waited almost the full 30 days—until August 9—before even attempting to learn when the orders had been docketed. When their telephone inquiries were unsuccessful, they took no other steps, but simply allowed the appeal period to expire. They offered no reason for their failure to determine when the clerk had entered the orders on the docket. Thus, the First Circuit said, only excusable neglect, not good cause, could justify granting them an extension.

In giving defendants additional time to appeal, district court made no determination whether their neglect had been excusable. It based its decision solely on a finding of good cause. The First Circuit held, therefore, that it was necessary to vacate the extension order and remand for a determination whether an extension was warranted on excusable neglect grounds.

Litigation Tips

It would have made more sense for defendants to move under F.R.A.P. 4(a)(6) to reopen the time to appeal. Rule 4(a)(6) permits reopening if notice of entry of the judgment or order was not received within 21 days, and reopening will not prejudice any party. A motion to reopen must be made within 180 days of entry of the judgment or order sought to be appealed, or within seven days of receipt of notice of entry, whichever is earlier. If reopening is ordered, notice of appeal must be filed within 14 days of entry of the order. Rule 4(a)(6). Since the reason defendants did not file a timely notice of appeal was their failure to receive notice of entry of the orders denying the parties' post-trial motions, Rule 4(a)(6) would have applied. Reopening the time to appeal under Rule 4(a)(6) has been held not to require a showing of excusable neglect. *See Nunley v. City of Los Angeles*, 52 F.3d 792 (9th Cir. 1995), 95 Fed Lit 184; *Avolio v. County of Suffolk*, 29 F.3d 50 (2d Cir. 1994), 94 Fed Lit 323 (Jan. 1995).

□ The position taken by the First Circuit—that good cause provides a basis for extension of the time to appeal under Rule 4(a)(5) even if the extension motion is made after expiration of the original 30-day appeal period—is in contrast to the view of the majority of circuits. They distinguish between Rule 4(a)(5)'s two grounds for extending the appeal period: good cause applies when the extension motion is made prior to expiration of the 30-day period; excusable neglect is the basis for extension when the motion is made after the period has run. *See Allied Steel v. City of Abilene*, 909 F.2d 139 (5th Cir. 1990); *Vogelsang v. Patterson Dental Co.*, 904 F.2d 427 (8th Cir. 1990), 90 Fed Lit 282; *Borio v. Coastal Marine Construction Co.*, 881 F.2d 1053 (11th Cir. 1989); *Marsh v. Richardson*, 873 F.2d 129 (6th Cir. 1989); *Parke-Chapley Construction Co. v. Cherrington*, 865 F.2d 907 (7th Cir. 1989); *650 Park Avenue Corp. v. McRae*, 836 F.2d 764 (2d Cir. 1988); *State of Oregon v. Champion International Corp.*, 680 F.2d 1300 (9th Cir. 1982).

Research Leads

9 *Moore's Federal Practice* ¶204.13

16 Wright, Miller, Cooper, & Gressman, *Federal Practice & Procedure* §3950

Tigar, *Federal Appeals: Jurisdiction & Practice, 2d* §6.03 (Shepard's)

ITEM NO. 96-2

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

96-Z

March 4, 1996

Honorable Richard A. Posner, Chief Judge
U.S. Court of Appeals Seventh Circuit
Everett McKinley Dirksen Building
219 South Dearborn Street
Chicago, Illinois 60604

Dear Dick,

Your letter and Marbley opinion were forwarded to me to my home in Florida, where I am preparing to sit on a week of cases with the Eleventh Circuit next week. I have also just returned from two weeks vacation in Southeast Asia.

I think you have made an important point. I do not have with me in Florida my committee's full style revision of Rule 4. But I think I recall that we added "or good cause" to excusable neglect as a basis to grant a limited extension of the time to file an appeal. Of course, that would not save your case. What you propose would be a substantive change. I will put the matter on the study agenda of our FRAP committee, and will send a copy of the Marbley opinion to our reporter to distribute in connection with the study. I fully appreciate your concern and thank you for the suggestion.

With kind personal regards, I remain

Sincerely yours,

James K. Logan
sa
James K. Logan

JKL:sa

cc: Mr. John K. Rabiej w/enc.
Professor Carol Ann Mooney w/enc.

805 F.2d at 621. *See also Pierce,* 40 F.3d at 804, 29 C.F.R. § 1604.11(d). Here, the sexual conduct at issue occurred during a two-week period in August of 1992. The company reprimanded defendant Hatmaker in September of 1992, and, by plaintiff's own admission, the sexual conduct stopped. Even if the conduct alleged up to that time could support a claim under Title VII, the company's action was sufficient to stop it and to relieve itself of liability. The conduct alleged after that time does not state a set of facts that would establish sex discrimination under Title VII whether the employer knew about it or not. For these reasons, we AFFIRM the District Court's dismissal of the Title VII claim and the remand of the state claims to state court.

UNITED STATES of America,
Plaintiff–Appellee,

v.

Odell MARBLEY, Defendant–Appellant.

No. 94–2658.

United States Court of Appeals,
Seventh Circuit.

Argued Jan. 23, 1996.

Decided Feb. 9, 1996.

Defendant was convicted in the United States District Court for the Southern District of Indiana, Larry J. McKinney, J., of being felon in possession of firearm. Defendant appealed. The Court of Appeals, Posner, Chief Judge, held that Court of Appeals did not have jurisdiction to hear appeal of defendant's conviction for being felon in possession of firearm due to untimely filing of appeal 20 days late without showing that untimeliness was excusable.

Dismissed.

1. Criminal Law ⇐1081(5, 6)

Court of Appeals did not have jurisdiction to hear appeal of defendant's conviction for being felon in possession of firearm due to untimely filing of notice of appeal 20 days late without showing that untimeliness was excusable; although counsel requested and was granted additional 30 days to extend time for filing as part of appeal, no explanation of excuse for untimeliness was proffered. F.R.A.P.Rule 4(b), 28 U.S.C.A.

2. Criminal Law ⇐1081(6)

If counsel seeking forgiveness for late filing of notice of appeal fails to offer any excuse but merely cites that he has excuse, judge cannot determine whether late filing was result of excusable neglect. F.R.A.P.Rule 4(b), 28 U.S.C.A.

3. Criminal Law ⇐1081(6)

Inadvertence with out more is not excusable reason for late filing of notice of appeal. F.R.A.P.Rule 4(b), 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division. No. 94 CR 12—Larry J. McKinney, Judge.

Timothy M. Morrison (argued), Office of the United States Attorney, Indianapolis, IN, for Plaintiff–Appellee.

F. Allen Tew, Jr. (argued), Indianapolis, IN, for Defendant–Appellant.

Before POSNER, Chief Judge, and BAUER and EVANS, Circuit Judges.

POSNER, Chief Judge.

The defendant was convicted by a jury of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), and was sentenced to 108 months in prison. The only ground of the appeal is that no reasonable jury could have found the defendant guilty beyond a reasonable doubt of the offense with which he was charged. Appeals on this ground rarely succeed and there is no reason to suppose this case an exception. The gun was found in the back of a car driven by the

defendant (he fled when the police stopped him) and the girlfriend's explanation for the presence of the gun—that the car was hers and the gun had been given her as payment for a "trick," though her standard price is $50 and the gun and ammunition found with it were worth more than $500—was not credible.

Yet although we are given no reason to doubt that a rational jury could have disbelieved the girlfriend, Rule 4(b) of the Federal Rules of Appellate Procedure prevents us from reaching the merits of the appeal and dispatching this case once and for all. The rule fixes a ten-day limit for appeals in a criminal case unless the defendant shows excusable neglect. The judgment in this case was entered on June 10, 1994, and the notice of appeal was not filed until July 8, almost thirty days later. In the notice of appeal appears the statement that "counsel for defendant, through inadvertence and excusable neglect failed to file the notice of appeal within the required ten (10) days and requests the District Court, pursuant to FRAP 4(b) to extend the time for filing an additional thirty (30) days." Counsel vouchsafed no fuller or further explanation of why the neglect could be thought excusable. Yet the government did not oppose the motion, and the district judge granted it without a statement (written or, so far as appears, oral—there is no indication of any hearing on the matter) of reasons. The government does not contest our jurisdiction. Asked at argument why not, its lawyer told us that he believes that judges prefer to decide cases on their merits.

There was neglect in missing the ten-day deadline, and no indication the neglect was excusable. The defendant's current lawyer speculates that the lawyer who filed the notice of appeal was busy with other matters. The government's lawyer could offer no better explanation than that the defendant's lawyer "blew the time."

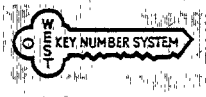
[1–3] If Rule 4(b) gave the district judge carte blanche to allow untimely appeals, our jurisdiction would be secure. The rule does not do this. It requires that the neglect resulting in the failure to comply with the ten-day deadline be "excusable." If counsel seeking forgiveness for a late filing fails to offer any excuse but merely recites that he *has* an excuse, the judge cannot determine whether the late filing was the result of excusable neglect and we cannot determine whether the judge's finding of excusable neglect has a rational basis. It is true that the belated notice of appeal in this case cited "inadvertence" as well as "excusable neglect" in extenuation of the untimely filing. But "inadvertence," without more, is not an excuse. It is merely a synonym for "neglect," and our court and the other courts of appeals have made clear that not every instance of neglect to file on time is excusable. *Prizevoits v. Indiana Bell Tel. Co.*, 76 F.3d 132 (7th Cir.1996); *United States v. Clark*, 51 F.3d 42, 44 (5th Cir.1995); *United States v. Hooper*, 43 F.3d 26, 29 (2d Cir.1994). Since we have been given no reason to believe that the neglect here was excusable and suspect that it was not, we are compelled to dismiss the appeal for want of jurisdiction.

We are not happy with this result, which we reach only under compulsion of the rule. The fact that the notice of appeal was filed on July 8 rather than June 20 has no positive, and probably a negative, significance for the policy of expediting criminal proceedings. The lost time could easily be made up at a later stage in the appellate process by requiring the appellant to file his brief earlier than he would otherwise have to do (as we are empowered to require by Fed.R.App.P. 31(a) and 7th Cir.R. 31(a)), while our action in dismissing the appeal will, paradoxically, delay the final resolution of the criminal proceeding. For consider what comes next. Either the defendant's new counsel will make a compelling showing of excusable neglect by the old, leading to a well-grounded finding by the district judge of excusable neglect and so to reinstatement of the appeal, or counsel will file a motion under 28 U.S.C. § 2255 to vacate the conviction on the ground that by failing to perfect the appeal the defendant's original counsel caused the defendant to lose the right to effective counsel that the Sixth Amendment confers on him. If the motion was granted, as it would have to be since there is no suggestion that the defendant bore any responsibility for his lawyer's fail-

ure to file a timely appeal, *United States v. Nagib*, 56 F.3d 798, 800–801 (7th Cir.1995); *Castellanos v. United States*, 26 F.3d 717, 719 (7th Cir.1994); *United States v. Stearns*, 68 F.3d 328, 330–31 (9th Cir.1995), the appeal would again be reinstated.

It might be better to permit untimely appeals in any criminal case in which the district judge and the court of appeals agreed that the appeal should be heard. Although criminal judgments used not even to be appealable, today the right of a criminal defendant to appeal is considered so fundamental that the usual consequence of an inexcusable failure to perfect the appeal is merely to have the appeal heard later through the Sixth Amendment route described above. See, e.g., *Stutson v. United States*, — U.S. —, 116 S.Ct. 600, 133 L.Ed.2d 571 (1996) (per curiam). This oblique approach serves no one's interest that we can see and introduces real delay into the system of criminal justice. But although we think Rule 4(b) is ripe for reexamination we are bound by it and the appeal must therefore be

DISMISSED.



PRINCIPAL MUTUAL LIFE INSURANCE COMPANY, Plaintiff–Appellee,

v.

CHARTER BARCLAY HOSPITAL, INCORPORATED, Defendant–Appellant.

No. 95–2786.

United States Court of Appeals, Seventh Circuit.

Argued Jan. 19, 1996.

Decided April 3, 1996.

Group health insurer brought suit seeking declaration that it had no liability for hospital bill of purported employee participant in ERISA plan. The United States District Court for the Northern District of Illinois, Ruben Castillo, J., 889 F.Supp. 1067, denied hospital's motion to amend answer to assert counterclaim against insurer and entered summary judgment in favor of insurer with respect to hospital. Hospital appealed. The Court of Appeals, Posner, Chief Judge, held that: (1) psychiatric patient was not participant employee entitled to coverage under ERISA group health policy, and (2) district court did not abuse its discretion in refusing to allow hospital to assert counterclaims after discovery deadline had passed.

Affirmed.

1. Pensions ⇐135

Any entitlement that medical provider might have to notice from ERISA plan or insurer of its denial of participant's claim depends upon provider's having received assignment and insurer or plan administrator having notice of it. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.; 29 C.F.R. § 2560.503–1(e, f).

2. Pensions ⇐141

Hospital which sought direct payment of psychiatric patient's bill from group health insurer under ERISA plan had burden of providing coverage. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

3. Pensions ⇐141

Psychiatric patient was not participant employee entitled to coverage under ERISA group health policy, notwithstanding undated, unsigned and incomplete "individual payroll record" submitted by his father's corporation which listed him as employee, where strong inference arose from patient's medical records that he was not employee and no other paperwork was submitted showing employee status. Employee Retirement Income Security Act of 1974, § 2 et seq., 29 U.S.C.A. § 1001 et seq.

ITEM NO. 96-3

MINUTES OF THE TELEPHONE CONFERENCE OF THE ADVISORY COMMITTEE ON APPELLATE RULES MAY 1, 1996

Judge James K Logan began the telephone conference at 4:00 EDT on May 1, 1996. In addition to Judge Logan the following Advisory Committee members participated in the conference: Chief Justice Pascal Calogero, Judge Will L. Garwood, Judge Alex Kozinski, Mr. Michael Meehan, Mr. Luther Munford, Mr. John Charles Thomas, and Judge Stephen Williams. Mr. Robert Kopp represented Solicitor General Days. Judge Frank Easterbrook, the liaison member from the Standing Committee, participated as did Mr. Patrick Fisher, representing the circuit clerks. Professor Carol Ann Mooney, the reporter, and Mr. John Rabiej from the Administrative Office also participated.

Proposed Rule 5

As requested at the April meeting the reporter had prepared and circulated a draft Rule 5 that would replace both existing Rules 5 and 5.1. That draft was circulated on April 19. Committee members then submitted suggestions for improvement in the draft and a new draft was circulated on April 29. The draft under discussion was that later draft. A copy of that draft is attached to these minutes.

The Committee members expressed general satisfaction with the basic approach.

It was noted that the caption to the rule was titled "Appeal by Leave" but subdivision (a) was titled "Petition for Permission to Appeal." The consensus was that the rule should consistently use either "leave" or "permission" but not both. By a vote of 5 to 3 it was decided to use "permission."

Discussion then turned to lines 3 through 5. To eliminate the word "may" at the end of line 4 the sentence was rewritten, with unanimous approval, to read as follows:

> "To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. "

One member questioned the need for paragraph (a)(3). Paragraph (a)(3) was added to the second draft to deal with the possibility that a problem that existed before the 1967 adoption of Rule 5 might resurface. The problem concerns a district court's amendment of an order to include the § 1292(b) statement when the order originally entered did not include such a statement. The problem was whether the 10-day period for filing an interlocutory appeal should be measured from entry of the original order or from entry of the

amended order. A split in the circuits arose until the 1967 adoption of Rule 5.

Since 1967 Rule 5 has said that if a district court amends an order to contain the statement prescribed by § 1292(b), the petition must be filed within 10 days after entry of the amended order. The April 19 draft did not include that provision on the assumption that with the passage of time and the habits developed under Rule 5 the problem would not resurface. Two members agreed with that approach believing that the chance of the problem returning was remote. Others thought that the addition of (a)(3), while not absolutely necessary, provided helpful clarification and removed a litigable issue. Judge Logan called for a vote on retention of paragraph (a)(3); all members voted in favor of retaining it.

Lines 40 through 43 were amended, with unanimous approval, to improve the flow of the language. As amended they provide that a petition must include a copy of the order complained of and any related opinion or memorandum, "including any stating the district court's permission or finding of any necessary conditions to appeal, if required."

Line 45 of the draft says that a response or a cross-petition must be filed within 7 days after the petition is served. One member suggested that the response time should be 14 days. Another suggested 10 days. Another noted that the respondent has not only 7 days but also all the time the petitioner has. Since most petitions are denied, it was suggested that expanding the response time beyond 7 days would cause unnecessary delay. The consensus was to retain the 7-day response time.

Lines 47 through 49 state that oral argument occurs only if the court orders it. It was suggested that there should be a provision in the rules, perhaps in Rule 34, that oral argument is heard as to the substance of an appeal, but as to all other matters the presumption is that there will be no oral argument. The reporter was asked to add that suggestion to the table of agenda items.

96-3

The second draft added language at lines 64-67. Existing Rule 5 says that if permission to appeal is granted no notice of appeal is necessary. The new language says that "the date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under these rules." Mr. Fisher confirmed that the new language simply clarifies existing practice. The Committee approved the change unanimously and requested the reporter to amend the Committee Note to state that its purpose is simply to clarify existing practice.

Judge Logan had spoken with Judge Stotler that morning. She asked what the Committee would want to do with the proposed Rule 5 if the amendments to

ITEM NO. 97-1

96-AP-26

97-1

LOS ANGELES COUNTY BAR ASSOCIATION

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WRITER'S DIRECT LINE

December 31, 1996

VIA FACSIMILE & FEDERAL EXPRESS

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: ***Federal Rules of Appellate Procedure***

Dear Mr. McCabe:

The Appellate Courts Committee of the Los Angeles County Bar Association has reviewed and discussed the proposed changes to the Federal Rules of Appellate Procedure. The Committee offers the following comments. As with the proposed rules themselves, some of the comments are substantive and others are only stylistic.

Rule 3.

The proposed rule is confusing because it fails to make a distinction between a joint appeal, which is authorized when two or more persons appeal from a single judgment or order, and a consolidated appeal, which involves appeals from separate judgments or orders. The committee suggests that proposed subdivision (b)(2) be modified as follows: After the word "joined" add "(if from a single judgment or order)"; and after the word "consolidated" add "(if from separate judgments or orders)".

Rule 4.

The Comment to this rule notes the different methods for computing time under the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The use of different methods for computing time makes little sense, and is a trap for the unwary. The committee recommends that rule 26(a) of the Federal Rules of Appellate Procedure be amended to conform with the method for computing time found in rule 6(a) of the Federal Rules of Civil Procedure or, in the alternative, that proposed subdivision (a)(4)(vi) be modified as follows: After "10 days" add "(as computed under rule 6 of the Federal Rules of the Civil Procedure)".

97-1

ITEM NO. 97-2

97-2

DRAFT

MINUTES OF THE
ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 3 & 4, 1997

Judge James K. Logan, Chair of the Advisory Committee, called the meeting to order at 8:40 in the conference room of the Thurgood Marshall Federal Judiciary Building. The following Advisory Committee members were present: Judge Will Garwood, Judge Alex Kozinski, Judge Diana Gribbon Motz, Mr. Michael Meehan, Mr. Luther Munford, and Mr. John Charles Thomas. Mr. Robert Kopp was present representing the Solicitor General. Judge Stephen Williams, whose term on the Advisory Committee had recently expired, was in attendance. Judge Alicemarie Stotler who chairs the Standing Committee, Judge Frank Easterbrook who is the liaison from the Standing Committee, Judge James Parker who chairs the Standing Committee's Subcommittee on Style, and Professor Daniel Coquillette who is the Reporter for the Standing Committee were all present, as was Mr. Joseph Spaniol who is a consultant to the Standing Committee. Mr. Patrick Fisher, who represents the clerks, was present. Ms. Judy McKenna, from the Federal Judicial Center, and Mr. John Rabiej, of the Administrative Office, were also present. Mr. Bryan Garner was present for portions of the meeting via speaker phone connection.

Judge Logan introduced Judge Motz and welcomed her to the Advisory Committee.

Approval of Minutes

The minutes of the April 1996 meeting, and of the May 1, 1996, telephonic meeting, were approved without any additions or corrections.

Restylization of the Rules

The primary item on the Committee's agenda for the meeting was consideration of the packet of restyled rules published for comment during 1996. Each member of the Committee received copies of all comments submitted during the publication period. Prior to the meeting the Reporter summarized the comments and made recommendations concerning their implementation.

The reaction to the undertaking was strongly positive. Of the eighteen commentators who offered general observations on the value of the project, all but one was very favorable. The consensus was that substantial improvements had been made in both the language of the rules and in their structure, that the rules are easier to comprehend, and, that they are, as a result, fairer.

the style project.

In addition to the topics enumerated during the Advisory Committee's discussion, the suggestions listed below were raised by various commentators. Each suggestion is followed by the Advisory Committee's recommendation as to whether the suggestion should receive further study by the Committee.

1. Rule 4 should clarify whether a cross-appeal is necessary to preserve an issue not addressed by the appellant.

   A complex jurisprudence treating this question has developed. The Advisory Committee concluded that the issue is substantive and not susceptible to solution by rule and therefore did not recommend placing the issue on the agenda.

2. The time computation problem addressed in Rule 4(a)(4)(vi) should be addressed by amending Fed. R. App. P. 26(a) so that it is consistent with Fed. R. Civ. P. 6(a).

   The Advisory Committee decided to place this suggestion on its table of agenda items.

3. Rule 4(a)(5) should not grant an extension of time for filing a notice of appeal upon a motion filed *ex parte*.

   The Advisory Committee decided not to place this suggestion on its agenda.

4. Rule 4(a)(5) should be amended to clarify that the standard for granting an extension during the first 30 days is different (i.e. more lenient) than during the second 30 days. (This suggestion was put forth by a committee member rather than one of the commentators.)

   The Advisory Committee decided to place this suggestion on its table of agenda items.

97-2

5. Rule 6 should require the appellant to serve the statement of issues on other parties, not just on the appellee.

   The Advisory Committee decided to place this suggestion on its table of agenda items.

ITEM NO. 97-3

97-3

BINGHAM, DANA & GOULD LLP
150 FEDERAL STREET
BOSTON, MASSACHUSETTS 02110-1726
TEL: 617.951.8000
FAX: 617.951.8736

May 10, 1996

Honorable Alicemarie H. Stotler
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

I appreciate the opportunity to review the restyling efforts of the Advisory Committee on Appellate Rules. I think the new wording and captioning are a big improvement. The new rules are easier to read than the old rules and I expect they should be well received.

I did not study each of the rules but I did read them over and where I had a question or a comment I made a note. I pass them along for what they are worth. I truly cringe at the nit-picking content of my comments, but to some extent nit-picking is what the exercise is all about. Anyway, here are some comments.

Should the heading of new Rule 4(a)(3) read "Multiple Appeals" rather than referring to cross-appeals? The text is not limited to cross-appeals but seems to encompass successive notices of appeal without regard to whether there is hostility between the previous appellant and the new appellant.

New Rule 4(a)(4)(A)(ii) substitutes "factual findings under Rule 52(b)" for "findings of fact under Rule 52(b)." I prefer the phrase "findings of fact" which has an ancient and honorable tradition. I think a requirement for a judge to sit down and make "findings of fact" conveys a more serious mission than conveyed by a requirement that findings be made which may have some factual content. Present Rule 52(b) of the Civil Rules presently refers to findings of fact and when the Civil Rules Advisory Committee comes to consider changing the wording, I will vote against the change.

I do not understand the last paragraph of old Rule 4(a)(4), which appears on p. 10 of the Request for Comment. Similarly, I do not understand new Rule 4(a)(4)(B). I especially do not know what the phrase "in whole or in part" does in (B)(i). The prematurely filed notice of appeal will be effective to save the appeal, in whole or in part, once a pending motion has been decided. But then (B)(ii) goes on to require another notice of appeal where the particular motion has amended something. One would suppose that the amended something would thus be part of the judgment or order that has already been appealed "in whole or in part" by (B)(i).

I feel that if I had a little more time to think about this, I would understand it better. I do not and therefore I remain confused.

Both old Rule 4(a)(5) and new 4(a)(5) allow motions to extend the time for filing a notice of appeal to be made "ex parte." I never noticed that rule before. I think it is extraordinary that I could win a case and not even know that the other side has filed a motion to extend the time within which to appeal. When I am an appellee, I like to know what a prospective appellant is up to. The new rule does not seem to accomplish any substantive change but, in this instance, I wonder why.

I have a question about Rule 6. New Rule 6(b)(2)(B)(i) requires appellant, under certain circumstances, to serve a statement of issues "on the appellee." Should not the statement of issues be served on all other parties? The same question would apply to the appellee's duty under (B)(ii). There may be good reason for these distinctions. I take no position on it. It is not a "restyling" comment anyway.

97-3

It seems to me that the first sentence in new Rule 11(c) is not good English. Should not the word "that" appear after "order," and before "the" in the second line of the sentence? If so, "to" should go out of the next line. Anyway, I do not think that the sentence "The parties may stipulate the district clerk to retain" is proper phrasing.

New Rule 15(a)(2)(A) (appearing at p. 46) does not seem to be phrased properly. Should there not be a period after the word "petition" in the third line of (A)? Then should not the next word ("using") be capitalized? Or maybe the comma should be replaced by a semicolon.

ITEM NO. 97-4

National Association of
NAB
BROADCASTERS

97-4

RECEIVED 8/20/96

Jack N. Goodman

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August 14, 1996

96-AP-011

Peter G. McCabe, Esquire
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Mr. McCabe:

I submit these comments on the proposed revisions of the Federal Rules of Appellate Procedure. I believe that the proposed revisions as a whole are splendid. They will help clarify the rules for practitioners as well as bring uniformity to appellate practice. I offer the following few comments and suggestions:

Rule 15(c)(1) The proposed rule carries over from the current rule the requirement that a copy of the petition be served on all parties "admitted to participate in the agency proceedings." Because many appeals from agencies arise out of informal rulemaking proceedings, it may not be entirely clear who was a party before the agency. Would the filing of formal comments qualify an entity as a party? Some agencies — like the Federal Communications Commission — also authorize the filing of informal comments, and it is not clear whether persons filing those type of comments would be deemed parties. In many cases, there may not be a complete list of all of the commenters and, even if there were, service on hundreds or thousands of entities would be extremely burdensome. The D.C. Circuit addressed this problem in D.C. Cir. R. 15(a), which provides that "in cases involving informal rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute." In order to avoid confusion, it might be desirable to incorporate such a provision into the federal rule.

97-4

Rule 28(a)(3) The proposed rule continues the present requirement of a table of authorities with reference to the pages where the authorities are cited. Would it be appropriate (either in the rule or in the advisory committee notes) to authorize the almost universal practice of using *passim* in the table where an authority is cited throughout the brief?

Rule 28(j) The proposed rule would maintain the rule that a letter citing supplemental authorities may not include argument, but instead must simply reference arguments in the brief or that were made orally to which the new authority is pertinent. In practice, the relevance of a new authority to a particular argument may not be immediately obvious. Not infrequently, therefore,

counsel feel compelled to add some explanation to their letters, despite the contrary admonition in the rule. It seems to me that both counsel and the courts would be better served if the rule permitted a *brief* explanation of the new authority and its significance to be included in the letter.

Rule 31(a) The proposed rule requires that appellants' briefs be filed 40 days after the record is filed, but permits courts of appeals to "shorten" the time for filing by rule or order. Under the D.C. Circuit's case management plan, the court sets a briefing schedule tied to the date set for oral argument. This may not result in shortening the time for filing, but instead only in shifting the entire briefing schedule from that which the federal rule establishes. To avoid any confusion about the drafters' intent, should Rule 31(a)(2) be amended to make clear that a court of appeals may "modify," rather than "shorten," the time for briefs to be filed?

Rule 35(f) The proposed rule refers to two sets of judges to whom a petition for rehearing might be sent — all of the judges in regular active service or the members of the original panel. The reference in the last sentence of the rule to "those judges" seems to me to be ambiguous and could be construed to refer to only the judges on the panel, rather than any of the judges who received the petition.

Rule 40 In *Missouri v. Jenkins*, 495 U.S. 33 (1990), the Court grappled with a situation that arose when a party filed a "Petition for Rehearing *En Banc*" that did not explicitly state whether the party sought panel rehearing as well. Since a petition for rehearing tolls the time for seeking certiorari and a suggestion for rehearing *en banc* does not, the poorly styled petition left open the question of whether certiorari had been timely filed. The Court suggested (*id.* at 49) that it would be "desirable to have published rules of procedure giving parties fair warning of the treatment afforded petitions for rehearing and suggestions for rehearing *en banc*." Responding to that suggestion, the D.C. Circuit adopted a rule stating that any "pleading requesting rehearing *in banc*, no matter how styled, shall be deemed to include both a petition for rehearing by the panel that decided the case and a suggestion for rehearing *in banc*." D.C. Cir. R. 35(e). It may be that the reference to both requests for rehearing and for rehearing *en banc* as "petitions" in the proposed rules is intended to deal with this trap for the unwary. Even so, inexperienced counsel may style their pleadings in such a way as to leave their intentions in doubt. Since it would seem to be the better practice to allow panels to consider requests for rehearing to avoid needlessly burdening the remaining judges on the court, I believe that incorporating a provision similar to the D.C. Circuit's would avoid possible confusion.

Respectfully submitted,

Jack N. Goodman

97-4

DRAFT

MINUTES OF THE
ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 3 & 4, 1997

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and the need to clearly indicate that subdivision (a) applies to all phases preceding sentencing and that subdivision (b) applies to all phases after sentencing, the Committee decided not to amend the captions.

Rule 10

Only minor word changes were made in Rule 10.

Rule 11

Only minor word changes were made in Rule 11.

Rules 12, 13, and 14

No changes were made in Rules 12, 13, or 14.

Rule 15

Several punctuation changes and minor word changes were made in Rule 15. Paragraph 15(c)(1) was amended so that it more closely follows the current Rule. Existing Rule 15(c)(1) requires service "at or before the time of filing a petition for review." The published rule said that a petitioner must already have served a copy on other parties at the time of filing and one commentator objected to that change. Because no substantive change was intended, the Committee amended the rule to state that service must occur at or before the time of filing.

The rule requires the clerk to serve the petition for review on the respondent; the petitioner is required to serve each party admitted to participate in the agency proceedings other than the respondents. The Committee had previously discussed the uncertainty concerning the service obligations in proceedings involving informal agency rulemaking. The Committee reiterated its interest in pursuing the question and using the D.C. Circuit's local rule as a possible starting place.

97-4

Rules 15.1, 16, 17, 18, 19, and 20

No changes were made in Rules 15.1, 16, 17, 19 or 20. In Rule 18 a plural was changed to singular in 18(a)(2)(A)(ii).

Rule 21

Minor language changes were made in Rule 21. In 21(b)(4), the phrase indicating that a trial-court judge may "respond" only if invited to do so by the court of appeals was changed because it might cause confusion by implying that the trial judge

6. Rule 6 should state which exhibits are too bulky or heavy for routine transmission to the court of appeals, and at what time arrangements must be made for sending such exhibits to the courts of appeals.

The Advisory Committee decided not to place this suggestion on its agenda.

7. Rule 8 should require a party appealing from a Bankruptcy Appeal Panel (B.A.P.) to first seek a stay from the B.A.P.

The Advisory Committee decided not to place this suggestion on its agenda. There are many places in the rules where references could be made to the B.A.P. but they have not been added.

8. A reference to the B.A.P. should be added to Rule 8(a)(2).

The Advisory Committee decided not to place this suggestion on its agenda.

9. Many appeals from agencies arise out of informal rulemaking proceedings. In such instances, it is not clear who is a party to the agency proceeding for purposes of the 15(c)(1) requirement to serve the petition on all parties "admitted to participate in the agency proceedings." One commentator suggests amending Rule 15 to incorporate the solution adopted by D.C. Cir. R. 15(a) which provides that "in cases involving informal rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute."

97-4

The Advisory Committee decided to place this suggestion on its table of agenda items.

10. Rule 24(a)(2) says that if the district court grants a motion to proceed IFP, "the party may proceed on appeal without prepaying or giving security for fees and costs." This may need to be amended in light of the Prisoner Litigation Reform Act. Prisoners must pay the filing fee, but need not prepay the full amount if they do not have it; partial payments will be collected by the court over time.

The Advisory Committee decided to place this suggestion on its table of agenda items.

11. Rule 25 should be amended to extend the "mailbox rule" to petitions for rehearing.

The Advisory Committee decided not to place this suggestion on its agenda.

TITLE IV. REVIEW AND ENFORCEMENT OF ORDERS OF ADMINISTRATIVE AGENCIES, BOARDS, COMMISSIONS AND OFFICERS

FRAP 15. Review or Enforcement of an Agency Order; How Obtained; Intervention

(For text of rule, see Federal Rules of Appellate Procedure.)

Circuit Rule 15. Petition to Review or Appeal From Agency Action; Docketing Statement

(a) **Service of Petition for Review.** In carrying out the service obligations of FRAP 15(c), in cases involving informal agency rulemaking such as, for example, those conducted pursuant to 5 U.S.C. § 553, a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute (see, e.g., 28 U.S.C. § 2344).

(b) **Intervention.** For purposes of FRAP 15(d), a motion to intervene in a case before this court regarding review of agency action must be served on all parties to the case before the court. A motion to intervene in a case before this court concerning direct review of an agency action shall be deemed to be a motion to intervene in all cases before this court involving the same agency action or order, including later filed cases, unless the moving party specifically states otherwise, and an order granting such motion shall have the effect of granting intervention in all such cases.

(c) **Docketing Statement.** (1) *Timing.* As directed by the court, appellant or petitioner shall file an original and one copy of a docketing statement and shall serve a copy on all parties (including intervenors) and amici curiae appearing before this court at that time.
(2) *Docketing Statement Form.* The docketing statement shall be on a form furnished by the clerk's office and shall contain such information as the form prescribes. Absent good cause for an exception, incomplete docketing statements will be rejected.
(3) *Provisional Certificate.* Attached to the docketing statement shall be a provisional certificate prepared by appellant or petitioner setting forth the information required by Circuit Rule 28(a)(1).
(4) *Knowledge and Information.* The docketing statement and the provisional certificate shall be prepared on the basis of the knowledge and information reasonably available to appellant or petitioner at the time of filing.
(5) *Errors in Docketing Statement.* Any party or amicus shall bring any errors in the docketing statement or provisional certificate to the attention of the clerk by letter served on all parties and amici within 7 days of service of the docketing statement.
(6) *Statement by Respondent, Appellee, or Intervenor.* Within 7 days of service of the docketing statement or the granting of an intervention motion, a respondent, appellee, or intervenor shall file with the court any statement required by Circuit Rule 26.1.

ITEM NO. 97-5

97-5

DRAFT

MINUTES OF THE
ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 3 & 4, 1997

Judge James K. Logan, Chair of the Advisory Committee, called the meeting to order at 8:40 in the conference room of the Thurgood Marshall Federal Judiciary Building. The following Advisory Committee members were present: Judge Will Garwood, Judge Alex Kozinski, Judge Diana Gribbon Motz, Mr. Michael Meehan, Mr. Luther Munford, and Mr. John Charles Thomas. Mr. Robert Kopp was present representing the Solicitor General. Judge Stephen Williams, whose term on the Advisory Committee had recently expired, was in attendance. Judge Alicemarie Stotler who chairs the Standing Committee, Judge Frank Easterbrook who is the liaison from the Standing Committee, Judge James Parker who chairs the Standing Committee's Subcommittee on Style, and Professor Daniel Coquillette who is the Reporter for the Standing Committee were all present, as was Mr. Joseph Spaniol who is a consultant to the Standing Committee. Mr. Patrick Fisher, who represents the clerks, was present. Ms. Judy McKenna, from the Federal Judicial Center, and Mr. John Rabiej, of the Administrative Office, were also present. Mr. Bryan Garner was present for portions of the meeting via speaker phone connection.

Judge Logan introduced Judge Motz and welcomed her to the Advisory Committee.

Approval of Minutes

The minutes of the April 1996 meeting, and of the May 1, 1996, telephonic meeting, were approved without any additions or corrections.

Restylization of the Rules

The primary item on the Committee's agenda for the meeting was consideration of the packet of restyled rules published for comment during 1996. Each member of the Committee received copies of all comments submitted during the publication period. Prior to the meeting the Reporter summarized the comments and made recommendations concerning their implementation.

The reaction to the undertaking was strongly positive. Of the eighteen commentators who offered general observations on the value of the project, all but one was very favorable. The consensus was that substantial improvements had been made in both the language of the rules and in their structure, that the rules are easier to comprehend, and, that they are, as a result, fairer.

6. Rule 6 should state which exhibits are too bulky or heavy for routine transmission to the court of appeals, and at what time arrangements must be made for sending such exhibits to the courts of appeals.

The Advisory Committee decided not to place this suggestion on its agenda.

7. Rule 8 should require a party appealing from a Bankruptcy Appeal Panel (B.A.P.) to first seek a stay from the B.A.P.

The Advisory Committee decided not to place this suggestion on its agenda. There are many places in the rules where references could be made to the B.A.P. but they have not been added.

8. A reference to the B.A.P. should be added to Rule 8(a)(2).

The Advisory Committee decided not to place this suggestion on its agenda.

9. Many appeals from agencies arise out of informal rulemaking proceedings. In such instances, it is not clear who is a party to the agency proceeding for purposes of the 15(c)(1) requirement to serve the petition on all parties "admitted to participate in the agency proceedings." One commentator suggests amending Rule 15 to incorporate the solution adopted by D.C. Cir. R. 15(a) which provides that "in cases involving informal rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute."

The Advisory Committee decided to place this suggestion on its table of agenda items.

10. Rule 24(a)(2) says that if the district court grants a motion to proceed IFP, "the party may proceed on appeal without prepaying or giving security for fees and costs." This may need to be amended in light of the Prisoner Litigation Reform Act. Prisoners must pay the filing fee, but need not prepay the full amount if they do not have it; partial payments will be collected by the court over time. 97-5

The Advisory Committee decided to place this suggestion on its table of agenda items.

11. Rule 25 should be amended to extend the "mailbox rule" to petitions for rehearing.

The Advisory Committee decided not to place this suggestion on its agenda.

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(12) The court may charge and collect fees, commensurate with the cost of printing, for copies of the local rules of court. The court may also distribute copies of the local rules without charge.

(13) The clerk shall assess a charge for the handling of registry funds deposited with the court, to be assessed from interest earnings and in accordance with the detailed fee schedule issued by the Director of the Administrative Office of the United States Courts.

(14) For usage of electronic access to court data, 60 cents per minute of usage [provided the court may, for good cause, exempt persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information]. All such fees collected shall be deposited to the Judiciary Automation Fund. This fee shall apply to the United States. (The Judicial Conference has approved an advisory note clarifying the judiciary's policy with respect to exemptions from this fee. The advisory note is attached to this Fee Schedule as Appendix II.)

APPENDIX I

ee Guidelines for District Courts

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ten response. Because of the time and resources which must be expended in order to respond to a written request, such a request shall be considered a search which is subject to the fee, even if the request is for basic information which may be obtained from an automated database or from the docket sheet. The combination of the search and the written response justify the imposition of the fee. The exception to this policy applies only to courts which require *all* search requests to be in writing; in such courts, no search fee should be charged for requests for retrievals of "basic" information, as defined in Guideline No. 1, above.

The search fee should be included with the request, and the court should not process a written request until the search fee has been received (subject to the limited exception set forth above.)

Guideline No. 3

A search fee should be charged for any request which requires a physical search of the court's records.

A request for information which is not easily accessible from an automated database or the face of a docket sheet (i.e., anything other than "basic" information) and which therefore requires a *physical* search of the court's records will be considered a "search" which is properly chargeable under the Judicial Conference Schedule of Fees.

Chargeable services include, but are certainly not limited to, requests for information whether a certain person has ever been a plaintiff or defendant in any case, or whether a certain person has a criminal record. In this situation, where the search will take considerable time, the fee should be charged even if the requestor does not ask for a certificate of the search.

Guideline No. 4

In automated courts, a computer terminal with suitable data protection should be made available for use by the public.

Those offices with computer terminals located in a public access area may adopt the policy set forth in Guideline No. 4 for in-person requests for basic information, i.e., a court may require an in-person requestor to utilize the public computer terminal rather than having a court employee retrieve the information.

Guideline No. 5

The clerk has general authority to refuse to conduct searches which are unreasonable or unduly burdensome.

The office of the clerk of court has the responsibility of being responsive to parties in interest to cases pending in the court. However, this does not mean that either the public or government agencies has an unfettered right to make unreasonable or unduly burdensome demands upon the resources and personnel of a clerk's office. The clerk may (and should) refuse to conduct searches which would require a disproportionate expenditure of time and/or resources, and should encourage entities making such requests to conduct their own search of court records.

This procedure applies to federal agencies as well. Although search and copying fees are waived for federal agencies, the clerk is not required to accommodate search requests from such agencies which are unduly burdensome or time-consuming. Because of the volume of requests that often comes from federal agencies, a court may invite or encourage federal agencies (or a local representative), to come into the court to conduct their own searches and should allow them to use court copy facilities.

APPENDIX II

The Judicial Conference has prescribed a fee for electronic access to court data, as set forth above in the Miscellaneous Fee Schedule. The schedule provides that the court may exempt persons or classes of persons from the fees, in order to avoid unreasonable burdens and to promote public access to such information. Exemptions should be granted as the exception, not the rule. The exemption language is intended to accommodate those users who might otherwise not have access to the information in this electronic form. It is not intended to provide a means by which a court would exempt all users. Examples of persons and classes of persons who may be exempted from electronic public access fees include, but are not limited to: indigents; bankruptcy case trustees; not-for-profit organizations; and voluntary ADR neutrals.

CROSS REFERENCES

Additional trustee compensation and fees, see 11 USCA § 330.

Exemption of United States from payment of fees, see 28 USCA § 2412.

§ 1915. Proceedings in forma pauperis

(a)(1) Subject to subsection (b), any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.

(2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

(3) An appeal may not be taken in forma pauperis if the trial court certifies in writing that it is not taken in good faith.

(b)(1) Notwithstanding subsection (a), if a prisoner brings a civil action or files an appeal in forma pauperis, the prisoner shall be required to pay the full amount of a filing fee. The court shall assess and, when funds exist, collect, as a partial payment of any court fees required by law, an initial partial filing fee of 20 percent of the greater of—

(A) the average monthly deposits to the prisoner's account; or

(B) the average monthly balance in the prisoner's account for the 6-month period immediately preceding the filing of the complaint or notice of appeal.

(2) After payment of the initial partial filing fee, the prisoner shall be required to make monthly payments of 20 percent of the preceding month's income credited to the prisoner's account. The agency having custody of the prisoner shall forward payments from the prisoner's account to the clerk of the court each time the amount in the account exceeds $10 until the filing fees are paid.

(3) In no event shall the filing fee collected exceed the amount of fees permitted by statute for the commencement of a civil action or an appeal of a civil action or criminal judgment.

(4) In no event shall a prisoner be prohibited from bringing a civil action or appealing a civil or criminal judgment for the reason that the prisoner has no assets and no means by which to pay the initial partial filing fee.

(c) Upon the filing of an affidavit in accordance with subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b), the court may direct payment by the United States of the expenses of (1) printing the record on appeal in any civil or criminal case, if such printing is required by the appellate court; (2) preparing a transcript of proceedings before a United States magistrate in any civil or criminal case, if such transcript is required by the district court, in the case of proceedings conducted under section 636(b) of this title or under section 3401(b) of title 18, United States Code; and (3) printing the record on appeal if such printing is required by the appellate court, in the case of proceedings conducted pursuant to section 636(c) of this title. Such expenses shall be paid when authorized by the Director of the Administrative Office of the United States Courts.

(d) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in other cases, and the same remedies shall be available as are provided for by law in other cases.

(e)(1) The court may request an attorney to represent any person unable to afford counsel.

(2) Notwithstanding any filing fee, or any portion thereof, that may have been paid, the court shall dismiss the case at any time if the court determines that—

(A) the allegation of poverty is untrue; or

(B) the action or appeal—

(i) is frivolous or malicious;

(ii) fails to state a claim on which relief may be granted; or

(iii) seeks monetary relief against a defendant who is immune from such relief.

(f)(1) Judgment may be rendered for costs at the conclusion of the suit or action as in other proceedings, but the United States shall not be liable for any of the costs thus incurred. If the United States has paid the cost of a stenographic transcript or printed record for the prevailing party, the same shall be taxed in favor of the United States.

(2)(A) If the judgment against a prisoner includes the payment of costs under this subsection, the prisoner shall be required to pay the full amount of the costs ordered.

(B) The prisoner shall be required to make payments for costs under this subsection in the same manner as is provided for filing fees under subsection (a)(2).

(C) In no event shall the costs collected exceed the amount of the costs ordered by the court.

(g) In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury.

(h) As used in this section, the term 'prisoner' means any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.

(As amended Apr. 26, 1996, Pub.L. 104–134, Title I, § 101[(a)][Title VIII, § 804(a), (c) to (e)], 110 Stat. 1321–73, 1321–74; renumbered Title I May 2, 1996, Pub.L. 104–140, § 1(a), 110 Stat. 1327.)

HISTORICAL AND STATUTORY NOTES

Amendments

1996 Amendments. Subsec. (a). Pub.L. 104–134, § 101[(a)][§ 804(a)(1)], designated existing text as pars. (1) and (3), in par. (1) as so designated, in addition to making provisions gender neutral, added reference to subsec. (b), substituted references to fees and such fees for references to fees and costs and such costs,

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ITEM NO. 97-6

96-AP-26

97-4

LOS ANGELES COUNTY BAR ASSOCIATION

STREET ADDRESS: 617 SOUTH OLIVE STREET, LOS ANGELES, CA 90014-1605
MAILING ADDRESS: PO BOX 55020, LOS ANGELES, CA 90055-2020

TELEPHONE: (213) 627-2727
TELECOPIER: (213) 896-6500
WRITER'S DIRECT LINE

December 31, 1996

VIA FACSIMILE & FEDERAL EXPRESS

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: ***Federal Rules of Appellate Procedure***

Dear Mr. McCabe:

The Appellate Courts Committee of the Los Angeles County Bar Association has reviewed and discussed the proposed changes to the Federal Rules of Appellate Procedure. The Committee offers the following comments. As with the proposed rules themselves, some of the comments are substantive and others are only stylistic.

Rule 3.

The proposed rule is confusing because it fails to make a distinction between a joint appeal, which is authorized when two or more persons appeal from a single judgment or order, and a consolidated appeal, which involves appeals from separate judgments or orders. The committee suggests that proposed subdivision (b)(2) be modified as follows: After the word "joined" add "(if from a single judgment or order)"; and after the word "consolidated" add "(if from separate judgments or orders)".

Rule 4.

The Comment to this rule notes the different methods for computing time under the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The use of different methods for computing time makes little sense, and is a trap for the unwary. The committee recommends that rule 26(a) of the Federal Rules of Appellate Procedure be amended to conform with the method for computing time found in rule 6(a) of the Federal Rules of Civil Procedure or, in the alternative, that proposed subdivision (a)(4)(vi) be modified as follows: After "10 days" add "(as computed under rule 6 of the Federal Rules of the Civil Procedure)".

Rule 26.

As with rule 4, the committee recommends establishing consistency between the Federal Rules of Appellate Procedure and the Federal Rules of Civil Procedure concerning the computation of time.

Rule 27.

There are certain circumstances where a party may need to get a motion on file (say for a stay) but may not yet have all the necessary papers (maybe the court has not yet signed the order, or it has not been made available by the clerk's office). Room might be allowed for such exigent circumstances, e.g., by including subdivision (a)(2)(B)(iv): "In exigent circumstances the court may allow any necessary affidavit, supporting paper, or copy of trial court order or agency decision to be served and filed after the motion provided that any necessary missing document is supplied forthwith as soon as it is available."

Proposed subdivision (a)(3) confusingly uses one time limit (10 days) that does includes weekends and holidays and another (5 days) that does not. This might be remedied by making the time computation rule, rule 26(a), comport with FRCP 6. Alternately, the time for a reply might be made 7 days, in which event both time periods would include weekends and holidays; under the present rule 26(a), the current 5-day deadline is never less than 7 days and may be more if a holiday intervenes.

In subdivision (b), in addition to allowing the court to authorize its clerk to act in its stead, the Committee may also want to reference appellate commissioners as the Ninth Circuit routinely employs an appellate commissioner to rule on procedural motions. 97-6

In subdivision (d)(2), length of the brief is defined as a page limit, yet elsewhere (rule 32) the rules relegate page limits to a safe-harbor and instead impose word- or character-count limits. Should not motions have similar limits? The motion and opposition could have 2/3 the limits imposed on principal briefs under rule 32; any reply could have 1/3 those limits.

Rule 29.

Proposed new subdivision (d) would limit the length of amicus briefs to one-half the length of a party's principal brief. While it is true that an amicus brief may omit certain sections necessary in a party's brief, and while it is also true that an amicus brief is supplemental in that it need not address all issues in a given appeal, these reasons fail to justify the arbitrary proposed limitation.

ITEM NO. 97-7

National Association of
NAB
BROADCASTERS

RECEIVED 8/20/96 97-7

Jack N. Goodman
Vice President/Policy Counsel
Legal Department
1771 N Street, N.W.
Washington, DC 20036-2891
(202) 429-5459
Fax: (202) 775-3526
Internet: jgoodman@nab.org

August 14, 1996

96-AP-011

Peter G. McCabe, Esquire
Secretary of the Committee on Rules
of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Mr. McCabe:

I submit these comments on the proposed revisions of the Federal Rules of Appellate Procedure. I believe that the proposed revisions as a whole are splendid. They will help clarify the rules for practitioners as well as bring uniformity to appellate practice. I offer the following few comments and suggestions:

Rule 15(c)(1) The proposed rule carries over from the current rule the requirement that a copy of the petition be served on all parties "admitted to participate in the agency proceedings." Because many appeals from agencies arise out of informal rulemaking proceedings, it may not be entirely clear who was a party before the agency. Would the filing of formal comments qualify an entity as a party? Some agencies — like the Federal Communications Commission — also authorize the filing of informal comments, and it is not clear whether persons filing those type of comments would be deemed parties. In many cases, there may not be a complete list of all of the commenters and, even if there were, service on hundreds or thousands of entities would be extremely burdensome. The D.C. Circuit addressed this problem in D.C. Cir. R. 15(a), which provides that "in cases involving informal rulemaking . . . a petitioner or appellant need serve copies only on the respondent agency, and on the United States if required by statute." In order to avoid confusion, it might be desirable to incorporate such a provision into the federal rule.

Rule 28(a)(3) The proposed rule continues the present requirement of a table of authorities with reference to the pages where the authorities are cited. Would it be appropriate (either in the rule or in the advisory committee notes) to authorize the almost universal practice of using *passim* in the table where an authority is cited throughout the brief?

Rule 28(j) The proposed rule would maintain the rule that a letter citing supplemental authorities may not include argument, but instead must simply reference arguments in the brief or that were made orally to which the new authority is pertinent. In practice, the relevance of a new authority to a particular argument may not be immediately obvious. Not infrequently, therefore,

97-7

counsel feel compelled to add some explanation to their letters, despite the contrary admonition in the rule. It seems to me that both counsel and the courts would be better served if the rule permitted a *brief* explanation of the new authority and its significance to be included in the letter. 97-7

Rule 31(a) The proposed rule requires that appellants' briefs be filed 40 days after the record is filed, but permits courts of appeals to "shorten" the time for filing by rule or order. Under the D.C. Circuit's case management plan, the court sets a briefing schedule tied to the date set for oral argument. This may not result in shortening the time for filing, but instead only in shifting the entire briefing schedule from that which the federal rule establishes. To avoid any confusion about the drafters' intent, should Rule 31(a)(2) be amended to make clear that a court of appeals may "modify," rather than "shorten," the time for briefs to be filed?

Rule 35(f) The proposed rule refers to two sets of judges to whom a petition for rehearing might be sent — all of the judges in regular active service or the members of the original panel. The reference in the last sentence of the rule to "those judges" seems to me to be ambiguous and could be construed to refer to only the judges on the panel, rather than any of the judges who received the petition.

Rule 40 In *Missouri v. Jenkins*, 495 U.S. 33 (1990), the Court grappled with a situation that arose when a party filed a "Petition for Rehearing *En Banc*" that did not explicitly state whether the party sought panel rehearing as well. Since a petition for rehearing tolls the time for seeking certiorari and a suggestion for rehearing *en banc* does not, the poorly styled petition left open the question of whether certiorari had been timely filed. The Court suggested (*id.* at 49) that it would be "desirable to have published rules of procedure giving parties fair warning of the treatment afforded petitions for rehearing and suggestions for rehearing *en banc*." Responding to that suggestion, the D.C. Circuit adopted a rule stating that any "pleading requesting rehearing *in banc*, no matter how styled, shall be deemed to include both a petition for rehearing by the panel that decided the case and a suggestion for rehearing *in banc*." D.C. Cir. R. 35(e). It may be that the reference to both requests for rehearing and for rehearing *en banc* as "petitions"in the proposed rules is intended to deal with this trap for the unwary. Even so, inexperienced counsel may style their pleadings in such a way as to leave their intentions in doubt. Since it would seem to be the better practice to allow panels to consider requests for rehearing to avoid needlessly burdening the remaining judges on the court, I believe that incorporating a provision similar to the D.C. Circuit's would avoid possible confusion.

Respectfully submitted,

Jack N. Goodman

ITEM NO. 97-8

97-8

Office of the Clerk
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
121 Spear Street
Post Office Box 193939
San Francisco, California 94119-3939

Cathy A. Catterson
Clerk of Court

(415) 744-9800

RECEIVED 1/14/97

96-AP-029 addendum

January 9, 1997

Secretary of the Committee on Rules of Practice and Procedures
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: Comment on Appellate Rules

Dear Committee:

This letter serves as an addendum to my letter of December 31, 1996. Enclosed is a letter from Brian Sun, Esq., dated June 19, 1996; and a memorandum from Cole Benson, dated November 6, 1996.

If you have any questions, please do not hesitate to contact me at (415) 556-9811. Thank you for your consideration.

Very truly yours,

Cathy A. Catterson

Cathy A. Catterson

Enclosures (2)

cc: Peter W. Davis, Chair (w/o enclosures)
Ninth Circuit Rules Committee (w/o enclosures)

DATE: November 6, 1996

TO: Cathy Catterson

FROM: Cole Benson

RE: Amendments to Federal Rules of Appellate Procedure 29-31 and 38-44

Per your request, I examined the above revised rules in an effort to discover any substantive changes. The bulk of the modifications are stylistic. I have two concerns that may be worth raising:

(1) Rule 29 provides that the United States, a federal agency or a federal officer may file an amicus curiae brief without obtaining leave to do so. The language governing a state's brief does not replicate the language governing federal entities, since it does not provide a state agency or officer a similar right to file a brief. If the rule is being examined, this may be an appropriate time to raise that issue, as the question is not academic. State attorney generals have noted this inconsistency, and no rationale to support the distinction comes to mind.

97-8

(2) The revisions to Rule 31 state that an unrepresented pauper status litigant is only obligated to file an original and three copies of his/her briefs; under the circuit's rule, such litigants are responsible for filing an original and seven copies of the brief. After the federal rule is adopted, our rule might be considered an impermissible variation from the federal standard. However, I imagine we can cross that bridge when we come to it.

ITEM NO. 97-9

97-9

PUBLIC CITIZEN LITIGATION GROUP
1600 20TH STREET, N.W.
WASHINGTON, D.C. 20009-1001

(202) 588-1000

96-AP-018

December 11, 1996

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

Please find enclosed the comments of Public Citizen Litigation Group on the Preliminary Draft of Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules and Preliminary Draft of Proposed Amendments of Appellate Rules 27, 28, and 32, issued in April 1996.

Sincerely yours,

Paul Alan Levy

14 point Garamond Halbfett, it would look like this: **typeface**).

Proposed Rule 32(a)(2)

There should be a uniform national rule establishing the color of a petition for rehearing (or rehearing en banc) and of the response if one is ordered. In some circuits, each party is directed to use the color required for its opening brief on appeal; in others, the petition or suggestion is white and the opposition is yellow. Similarly, a color should be specified for supplemental briefs that are sometimes filed when recent precedent or legislation is particularly important and thus merits more elaborate treatment than allowed by a citation of supplemental authority under Rule 28(j), or when an issue develops at oral argument that requires further briefing.

Proposed Rule 32(a)(7)(B)(i)

We are grateful that the former proposal, which would have limited opening briefs to 12,500 words, has been somewhat relaxed. However, the new proposal does not make clear how the limitations on character counts and word counts interact. If a brief is 14,000 words long, but 90,001 characters long, does it comply with the Rule or not? We urge that the Rule bc clarified to provide that counsel have the option of complying with either the word or the character limitation. In that regard, our word-processing program does not count characters, and so we would hard pressed to certify compliance with such a limitation.

Proposed Rule 32(a)(7)(B)(iii)

The currently proposed Rules do not contain any requirement of

ITEM NO. 97-10

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RECEIVED
10/7/96

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October 3, 1996

96-AP-014

PHILIP ALLEN LACOVARA
212-506-2585

Peter G. McCabe, Esquire
Secretary
Committee on Rules of
Practice and Procedure
Judicial Conference of the
United States
Administrative Office of the
United States Courts
Washington, DC 20544

Re: Proposed Revision of the Federal Rules of Appellate Procedure

Dear Mr. McCabe:

I am pleased to submit the following comments on the April 1996 draft of *Proposed Revision of the Federal Rules of Appellate Procedure*.

Relevant Qualifications

I co-chair of the Supreme Court and Appellate Practice Group at my law firm. I served a Deputy Solicitor General of the United States and have regularly appeared in cases before the United States courts of appeals as well as state appellate courts. In addition, I helped organize and co-chair the American Bar Association's annual National Institutes on Appellate Advocacy.

My firm's appellate practice group is, I believe, the largest cadre of lawyers specializing in appellate litigation in any single private law firm in the country. Among the dozen partners in this Group are many alumni of the Office of the Solicitor General, including five of us who at one time or another served as Deputy Solicitor General.

We have collectively argued more than 260 cases in the Supreme Court of the United States. In addition to Supreme Court matters, our practice also includes briefing and arguing cases in virtually all of the federal circuits plus many state appellate courts. Collectively we have filed literally thousands of briefs in appellate courts.

The proposed new Rules contemplate that a party may "petition for rehearing en banc" without also seeking rehearing before the panel. See proposed Rule 35(c). As proposed Rule 41(d) declares and as the Committee Notes recognized in connection with the original proposal, such a "petition" would suspend the finality of the court's judgment for various purposes, including commencement of the time for seeking Supreme Court review. Moreover, under proposed Rule 41(b), the mandate will not issue until seven days after "entry of an order denying a timely petition for . . . rehearing en banc . . ."

Thus, Rule 35(f) cannot simply leave in limbo a "petition for rehearing en banc." Since the filing and pendency of this newly authorized form of petition would have important collateral consequences, such a petition must come to some kind of formal closure.

If the Committee concludes that it may not be practical to require routine votes on all petitions for rehearing en banc, one alternative would be to specify that the petition will be "deemed denied" (or "ordered denied") on the date of the denial of panel rehearing (or some short time thereafter), if panel rehearing had been sought, unless a judge has called for a vote on en banc rehearing. If no panel rehearing is sought, the Rule could specify that the clerk will enter an order denying the petition at the end of a defined period (such as 21 days), unless a judge has called for a vote.

Disposition by Opinion — Rule 36.

The Committee proposes no substantive changes in Rule 36, which describes the process for entering judgment when the case is disposed of by opinion or without an opinion. This Rule is the appropriate place to address two important aspects of appellate practice that the Rules currently do not address: the growing practice of disposing of appeals heard on the merits without issuing any explanatory opinion, no matter how brief, and the other growing practice of issuing opinions that are "not for publication."

95-10

First, the Committee should seriously consider proposing to amend Rule 36 to provide that the courts of appeals will issue opinions (or at least brief explanatory memoranda) in every case, unless the panel concludes that the

appeal was frivolous. This kind of Rule could parallel the presumption in favor of oral argument contained in Rule 34(a).

The Eleventh Circuit in particular has taken to disposing of a significant percentage of its cases with a one-line order of affirmance. See 11th Cir. R. 36-1 (setting out wide range of circumstances in which court will affirm without opinion). Our firm has been on both ends of these affirmances. Whether our client prevailed or lost, it is our distinct impression that the practice of routinely utilizing one-line affirmances is unfair to the litigants and creates unnecessary doubts about how the court reached and justified its ultimate decision.

If an argument is not frivolous, the appellate court should, at a minimum, give a short explanation for rejecting that argument. This is particularly important when the opposing side has offered several potential grounds for rejecting the argument. For example the court should explain whether it rejected an argument on the merits, simply deferred to the trial court's discretion, or relied on some procedural default to bypass the point.

95-10

Not only does the one-line affirmance denigrate the efforts of the parties, it also effectively — and unfairly — insulates the appellate court's judgment from a rehearing petition and from a petition for certiorari. Put simply, if the court's reasoning is not set forth, there is no way to know whether there are grounds to challenge the decision in accordance with the procedures otherwise provided by law.

Second, as the Committee knows, "no publication" rules and practices have proliferated in the circuits. If I hade to choose between a one-line order and a "not for publication" opinion, I would opt for the latter practice. This is a false choice, however. In any event, this is a sufficiently important subject that it deserves full treatment on a uniform, nationwide basis in the Federal Rules of Appellate Procedure. It makes no sense to have the circuits going off in different direction in determining when their decisions are precedential and when they are essentially private communications with the parties.

Admission to the Bar of Individual Circuits — Rule 46.

The Proposed Revision would recast Rule 46 governing admission of attorneys to the bar of a court of appeals but make no substantive change. We

FEB 24 1997

97-10

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K. RABIEJ
Chief
Rules Committee Support Office

WASHINGTON, D.C. 20544

February 18, 1997

MEMORANDUM TO JUDGE JAMES K. LOGAN AND PROFESSOR CAROL ANN MOONEY

SUBJECT: *Appellate Rule 36, Entry of Judgment*

John asked me to research the history of Appellate Rule 36, Entry of Judgment. Specifically he wanted to know why and under what circumstances the rule contemplates entry of a judgment without an opinion.

I have reviewed the committee materials relating to the 1967 adoption of the rule, including the minutes of several meetings, all comments received on the proposed rule, and agenda materials from several meetings. I have also reviewed Moore's Federal Practice and Wright, Miller, and Cooper, Federal Practice and Procedure.

With one exception, the committee materials I reviewed are silent on the issue of entering judgments without opinions. The discussion of the rule governing entry of judgments focused solely on the timing of entry of judgment.

The one exception is a comment from Charles A. Meeker suggesting that the Court of Appeals be required to write a reasoned opinion in any case in which the court below, or the administrative agency whose judgment or order is on appeal, did not accompany its judgment or order with a reasoned opinion. The microfiche collection of rules documents does not contain any reference to discussion of Mr. Meeker's suggestion.

The treatises on appellate rules that I reviewed were equally silent on the history of entering judgment without an opinion. Moore's did cite a case holding that "disposition of a case by judgment order has withstood due process attack." Moore's also cites a recommendation of the Commission on Revision of Federal Court Appellate System (the Commission) that "in all cases there should be 'some record, however brief, and whatever form, of the reasoning which impelled the decision.'" *Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (Final Report)(1975)50.* The microfiche collection does not contain any documents relating to the Commission or its recommendations on this topic.

Mark D. Shapiro

ITEM NO. 97-11

96-AP-26

97-11

LOS ANGELES COUNTY BAR ASSOCIATION

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December 31, 1996

VIA FACSIMILE & FEDERAL EXPRESS

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Re: ***Federal Rules of Appellate Procedure***

Dear Mr. McCabe:

The Appellate Courts Committee of the Los Angeles County Bar Association has reviewed and discussed the proposed changes to the Federal Rules of Appellate Procedure. The Committee offers the following comments. As with the proposed rules themselves, some of the comments are substantive and others are only stylistic.

Rule 3.

The proposed rule is confusing because it fails to make a distinction between a joint appeal, which is authorized when two or more persons appeal from a single judgment or order, and a consolidated appeal, which involves appeals from separate judgments or orders. The committee suggests that proposed subdivision (b)(2) be modified as follows: After the word "joined" add "(if from a single judgment or order)"; and after the word "consolidated" add "(if from separate judgments or orders)".

Rule 4.

The Comment to this rule notes the different methods for computing time under the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure. The use of different methods for computing time makes little sense, and is a trap for the unwary. The committee recommends that rule 26(a) of the Federal Rules of Appellate Procedure be amended to conform with the method for computing time found in rule 6(a) of the Federal Rules of Civil Procedure or, in the alternative, that proposed subdivision (a)(4)(vi) be modified as follows: After "10 days" add "(as computed under rule 6 of the Federal Rules of the Civil Procedure)".

allowing, *after* such notice has been given, the parties to request that oral argument nonetheless be permitted. The committee thus suggests that the following language be added to subdivision (a) or (b):

"When a case has been classified by the court for submission without oral argument, the Circuit Clerk must give the parties written notice of such action. The parties may within 10 days from the date of the Circuit Clerk's letter file a statement explaining why oral argument should be permitted."

The committee is also concerned that the deletion of the word "recently" from subdivision (a), subsection (2), although not intended as a substantive change, would allow the court to forego oral argument whenever the issue at hand has previously been decided — no matter how many years ago.

These comments are made for the purposes of affirming the importance of oral argument in the majority of cases and of specifically detailing how parties are to be informed that oral argument is not to be permitted and the timing and procedure by which a party should seek relief from that decision. Also, the committee feels that its proposed revision to rule 34, unlike the proposed revision of the commission, does not encourage parties or their attorneys to affirmatively request oral argument in every case for fear that failure to do so will result in a waiver.

Rule 37.

The last line in subdivision (a) is ambiguous if there have been multiple appeals and district court judgments. Inserting "affirmed" between "district court's" and "judgment was" eliminates the ambiguity, making clear that interest automatically runs only to the most recent district court judgment.

In subdivision (b), "affirms in part, reverses in part" should be inserted between "modifies" and "or reverses a judgment" to be consistent with the terminology used in rule 39 regarding costs.

Rule 39.

In subdivision (a)(4), "modified" should be inserted on the second line between "reversed in part," and "or vacated" to be consistent with the terminology used in rule 37 regarding interest.

97-11

Should the rule address whether it is the court of appeals or the district court that determines any attorney's fees awarded as an element of costs on appeal and the procedure for determining such fees? The Ninth Circuit, for example, requires a *separate* request for attorney's fees and requires that a party intending to request attorney's fees state that intent in its first brief.

We appreciate the opportunity to comment on the proposed revision of the Federal Rules of Appellate Procedure.

Sincerely,

GINA M. CALVELLI
THOMAS PAINE DUNLAP
DAVID P. LAMPKIN
JAMES S. LINK
ROBERT A. OLSON
CHERYL A. ORR
DAVID S. ETTINGER

By David S. Ettinger
David S. Ettinger

Chair, Appellate Courts Committee

ITEM NO. 97-12

97-12

RECEIVED 5/16/96

95-AP-1

#1101

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
CORNELIA G. KENNEDY
CIRCUIT JUDGE

SENT VIA E-MAIL

PHONE: (313) 234-5240
FAX: (313) 234-5380

May 10, 1996

Secretary of the Committee on
Rules of Practice and Procedure
Administrative Office of the U.S. Courts
Washington, D.C. 20544

Dear Sir:

In response to your request for comments on the Proposed Revision of the Appellate Rules, I would first like to commend the Committee for the extraordinary improvement in clarity it has achieved. Indeed, it seems a little presumptuous to raise some of the minor items that I believe could be further improved; however, I do so at your invitation.

Rule 21, Writs of Mandamus, etc., is still confusing. I recognize that this rule was recently amended, but it is still unclear whether the District Court, in the person of the District Judge, can be a respondent. Probably not since the rule defines respondents as all parties in the trial court other than the petitioner. Thus, where there are no parties other than petitioner (as, for example when the District Court has failed for a year to rule on a petition to proceed in forma pauperis, etc.), there is no respondent. Paragraph (1) of the rule would not be applicable under those circumstances. (The "if any" language indicates there will be such circumstances.) I think the confusion arises from applying the verb "respond" in (b) to the trial court judge who is not a "respondent." It seems counterintuitive that "respondents" "answer," in (b)(1) and (b)(3), while the non-respondent trial court judge "responds" but the drafters appear to want to avoid the phrases " . . . it must order the respondent, if any, to respond . . .," (b)(1), and "respondents may respond . . . .," (b)(3). Perhaps, in (b)(4), instead of "The court of appeals may invite or order the trial court judge to respond . . .," the word "respond" could be emended to "reply" or "address the petition." The synonym, "answer," would seem inappropriate as it is applied to respondents and using the same verb might blur what appears to be an intentional distinction.

Rule 27(c), Motions. In transposing the last sentence of (c) from "[t]he action of a single judge may be reviewed by the Court" to the proposed language "[t]he Court may review the

action of a single judge," it seems to me that the emphasis is now placed on the Court's power rather than the non-finality of a single judge's action and the party's right to have the ruling reviewed by a panel of the court.

Rule 44, Case Involving a Constitutional Question When the United States is not a Party. I wonder whether any thought has been given to add constitutional challenges to federal regulations. I had a recent case in which such a constitutional challenge was made in a case in which the United States was not a party. A declaration that the regulation was unconstitutional could have had much the same effect -- albeit to a lesser degree -- as a similar declaration that a statute was unconstitutional. This may not be the forum in which to raise this issue; however, perhaps the committee might wish to consider the matter at some future time. 97-12

Once again, congratulations for a job well done.

Very truly yours,

Cornelia G. Kennedy

CGK/kp

ITEM NO. 97-13

97-13

DRAFT

MINUTES OF THE
ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 3 & 4, 1997

Judge James K. Logan, Chair of the Advisory Committee, called the meeting to order at 8:40 in the conference room of the Thurgood Marshall Federal Judiciary Building. The following Advisory Committee members were present: Judge Will Garwood, Judge Alex Kozinski, Judge Diana Gribbon Motz, Mr. Michael Meehan, Mr. Luther Munford, and Mr. John Charles Thomas. Mr. Robert Kopp was present representing the Solicitor General. Judge Stephen Williams, whose term on the Advisory Committee had recently expired, was in attendance. Judge Alicemarie Stotler who chairs the Standing Committee, Judge Frank Easterbrook who is the liaison from the Standing Committee, Judge James Parker who chairs the Standing Committee's Subcommittee on Style, and Professor Daniel Coquillette who is the Reporter for the Standing Committee were all present, as was Mr. Joseph Spaniol who is a consultant to the Standing Committee. Mr. Patrick Fisher, who represents the clerks, was present. Ms. Judy McKenna, from the Federal Judicial Center, and Mr. John Rabiej, of the Administrative Office, were also present. Mr. Bryan Garner was present for portions of the meeting via speaker phone connection.

Judge Logan introduced Judge Motz and welcomed her to the Advisory Committee.

Approval of Minutes

The minutes of the April 1996 meeting, and of the May 1, 1996, telephonic meeting, were approved without any additions or corrections.

Restylization of the Rules

The primary item on the Committee's agenda for the meeting was consideration of the packet of restyled rules published for comment during 1996. Each member of the Committee received copies of all comments submitted during the publication period. Prior to the meeting the Reporter summarized the comments and made recommendations concerning their implementation.

The reaction to the undertaking was strongly positive. Of the eighteen commentators who offered general observations on the value of the project, all but one was very favorable. The consensus was that substantial improvements had been made in both the language of the rules and in their structure, that the rules are easier to comprehend, and, that they are, as a result, fairer.

18. Delete the third exception in Rule 34 (a court may dispense with oral argument if "the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument").

The Advisory Committee decided not to place this suggestion on its agenda.

19. Amend Rule 36 to address the disposition of appeals without any explanatory opinion.

The Advisory Committee decided to place this suggestion on its table of agenda items.

20. Rule 36 should address the practice of issuing opinions that are not for publication.

This topic is already on the table of agenda items.

21. Amend Rule 39 to state whether the court of appeals or the district court determines the attorney's fees awarded as costs on appeal and the procedure (including time for filing) for determining those fees.

The Advisory Committee decided to place this suggestion on its table of agenda items.

22. Amend Rule 44 to apply to constitutional challenges to federal regulations.

The Advisory Committee decided to place this suggestion on its table of agenda items.

23. Amend Rule 46 so that once a person becomes a member of the bar of a court of appeals for any circuit, that person may appear as counsel in any other circuit without the need for admission to the bar of that court.

The Advisory Committee decided not to place this suggestion on its agenda.

In addition to those topics added to the table of agenda items as a result of the commentators' suggestions, the Advisory Committee decided to add consideration of the Effective Death Penalty Act. The Committee should determine whether additions or amendments are necessary to implement the new act.

97-13

ITEM NO. 97-14

DRAFT 97-14

MINUTES OF THE
ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 3 & 4, 1997

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before the court acts, the language of Rule 27(a)(3)(4) was altered. The language was changed from "[t]he moving party may reply to a response within 7 days . . ." to "[a]ny reply to a response must be filed within 7 days . . ." The Committee Note was amended in a minor way also to remove any implication that there is an absolute right to file a reply. Since a court has general authority to shorten or extend the time, the Advisory Committee omitted that language from 27(a)(4).

The Committee Note was also amended to say that spiral binding and stapling satisfy the binding requirement.

The discussion of the restyled rules was briefly suspended to give Professor Daniel Coquillette, the Reporter for the Standing Rules Committee, the opportunity to discuss his work on the question of local rules governing attorney conduct.

Local Rules Governing Attorney Conduct

For the past two years the Standing Committee has been examining the local rules governing attorney conduct. In the district courts there is a wide disparity in the approaches taken by the district courts. The Standing Committee is likely to take some action this summer regarding district court rules governing attorney conduct. The Standing Committee may recommend a model local rule, or it may recommend a rather basic national rule. With regard to the rules in the courts of appeals, Dan began by stating that his examination of the local rules in the courts of appeals revealed the following:

97-14

- 4 circuits have no local rule,
- 2 circuits cover the topic in internal operating procedures,
- 5 circuits have rules similar to the model local rule being considered for the district courts, (the rules give some specificity to the term "conduct unbecoming a member of the bar") and
- 1 circuit has its own code.

On the face of it there is a great deal of diversity among the circuits. As a practical matter, Dan reported that there is not much of a problem. Over the past five years, in the courts of appeals, there were only 46 reported cases involving Rule 46 sanctions.

If the Standing Committee makes a recommendation for a model local rule for use in the district courts, Dan asked the Advisory Committee whether the recommendation should include the courts of appeals. Judge Logan asked whether the model local rule developed for the district courts could be used for the courts of appeals. Professor Coquillette responded that it could. The model local rule is likely to be one that adopts state standards in the absence of conflicting federal law and four of the circuits already have similar rules. The experts that participated in the special conferences sponsored by the Standing Committee concluded that it would be unwise to attempt to develop an entire body of federal rules on attorney conduct.

Dan indicated that the Advisory Committee need not make a decision on the issue at this time. Once the Standing Committee makes a recommendation at its June meeting, Dan suggested that it would be appropriate for the Advisory Committee to take up that specific recommendation at its next meeting. Dan's purpose in discussing the issue with the Advisory Committee at this time was simply to advise the Committee that the issue would be coming before the Standing Committee and the Advisory Committee will need to respond.

97-14

Restylization (continued)

Rule 28

No changes were recommended in Rule 28.

There was discussion about whether the Rule 28 list should include the statement regarding oral argument now authorized by Rule 34. (Rule 32(a)(7)(B)(iii) says that any statement with respect to oral argument does not count toward the length limitations for a brief.) Although Rule 34 permits a party to file a statement explaining why oral argument should, or should not, be permitted, no rule explains where the statement should be placed in the brief. One member opposed any mention of a statement concerning oral argument in Rule 28 because it would encourage such statements and he believes that they generally are not helpful. Discussion revealed that there are differences in the circuits concerning the use of such a statement and its placement. It was decided not to include in Rule 28 any reference to a statement regarding oral argument.

There was also discussion about the fact that the Rule 28 list does not include the certificate of service. In fact, it is not uncommon for a certificate of service to be filed separately from a brief. The Rule 28 list includes only items that must be included in a brief and, therefore, it would not be appropriate to include the certificate of service in that list.

Rule 29

Although several changes are recommended, most of them are the result of comments submitted following the September 1995 publication of Rule 29. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, were tentatively approved by the Standing Committee in July 1996.

After publication of the style packet only one substantive change was recommended. That change requires an amicus brief to state the source of its authority to file, i.e., whether it is by leave of court or with consent of all other parties. In

97-14

STUDY OF RECENT FEDERAL CASES (1990-1997) INVOLVING FEDERAL RULE OF APPELLATE PROCEDURE 46

TO: Committee on Rules of Practice and Procedure, Judicial Conference of the United States

FROM: Daniel R. Coquillette, Reporter

DATE: May 10, 1997

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APPENDICES

I. CHART I — Breakdown of Recent Federal Appellate Cases Citing Federal Rule of Appellate Procedure 46 (1990-1997)

II. Example Model Local Rule Governing Attorney Conduct For Federal Courts of Appeals

III. Example Revised Federal Rule of Appellate Procedure 46

IV. In re Snyder, 472 U.S. 634 (1985)

V. Jeffrey A. Parness "Enforcing Professional Norms For Federal Litigation Conduct: Achieving Reciprocal Cooperation," 60 Albany Law Review 303 (1996)

VI. Example of Uniform Federal Rules Of Attorney Conduct and Revised Federal Rule of Civil Procedure 83

VII. CHART III — From The Report On Local Rules Regulating Attorney Conduct In The Federal Courts, July 5, 1995: "Rules of Professional Conduct In The Federal Circuit Courts"

I. INTRODUCTION

This Committee is currently considering two options for changing local rules governing attorney conduct in the federal courts. "Option One" is the adoption of a model local rule similar to Model Rule IV of the Federal Rules of Disciplinary Enforcement as recommended by the Committee on Court Administration and Case Management ("CACM") in 1978. "Option Two" is the adoption of uniform rules of attorney conduct applying to specific "core" areas of federal concern, with the provision that all other areas of attorney conduct are governed by state standards. See Report on Local Rules Regulating Attorney Conduct, July 5, 1995; Study of Recent Federal Cases Involving Rules of Attorney Conduct, January 9, 1996; and Supplement to Study of Recent Federal Cases Involving Rules of Attorney Conduct (1995-1996), May 14, 1996. At the request of the Committee, I have researched cases dealing with Federal Rule of Appellate Procedure 46 to determine what effect, if any, the proposed changes will have on this rule and on the practice of Courts of Appeals.

I am again deeply indebted to my two most talented and industrious research assistants, James J.G. Dimas and Thomas J. Murphy, whose hard work and intelligence are evident on every page of this study. In addition, I have benefited greatly from discussion with members of the Advisory Committee on Appellate Rules, including the Honorable James K. Logan, Chairman, and the Committee's Reporter, Professor Carol Ann Mooney, Vice President and Associate Provost of Notre Dame. Any Recommendations are, however, my own. In addition, any revision to Rule 46 itself, or any model rules designed for Courts of Appeals, should be considered by the Advisory Committee on Appellate Rules before action is taken.

II. DISCUSSION

Rule 46 is the uniform federal rule governing attorney conduct in the courts of appeals. Fed. R. App. P. 46.[1] It is similar to Rule 8 of the Supreme Courts Rules,[2]

---

[1] Federal Rule of Appellate Procedure 46 provides:

Rule 46. Attorneys

(a) **Admission to the Bar of a Court of Appeals; Eligibility; Procedure for Admission.** An attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or by a United States district court (including the district courts for the Canal Zone, Guam, and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

I, _____, do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and accordingly to law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) **Suspension or Disbarment.** When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of the bar of the court, the member will be subject to suspension or disbarment by the court. The member shall be afforded the opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(c) **Disciplinary Power of the Court Over Attorneys.** A court of appeals may, after reasonable notice and the opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member the bar or for failure to comply with these rules or any rule of the court.

[2] Supreme Court Rule 8 provides:

Rule 8. Disbarment and Disciplinary Action.

1. Whenever a member of the Bar of this Court has been disbarred or suspended from practice in any court of record, or has engaged in conduct unbecoming a member of the Bar of this Court, the Court will enter an order suspending that member from practice before this Court and affording the member an opportunity to show cause, within 40 days, why a disbarment order should not be entered. Upon response, or if no response is timely filed, the Court will enter an appropriate order.

2. After reasonable notice and an opportunity to show cause why disciplinary action should not be taken, and after a hearing if material facts are in dispute, the Court may take any appropriate disciplinary action against any attorney who is admitted to practice before it for conduct unbecoming a member of the Bar or for failure to comply with these Rules or any Rule or order of the Court.

which governs attorney conduct in the Supreme Court of the United States. Rule 46(b) states that a member of the bar will be subject to supervision or disbarment from the court when it is shown: (1) that the attorney has been suspended or disbarred from any other court of record or (2) has been guilty of "conduct unbecoming a member of the bar." Fed. R. App. P. 46(b). Rule 46(b) also provides an opportunity for the attorney to show good cause why suspension or disbarment would be unjustified. Rule 46(c) states that a member of the bar practicing before the court will be subject to disciplinary action for (1) "conduct unbecoming a member of the bar" or (2) "for failure to comply with these rules or any rules of the court." Rule 46(c) also requires the court to provide "reasonable notice and an opportunity to show good cause to the contrary" before taking any disciplinary action against the attorney.

A. The In re Snyder Standard. See Appendix IV.

The Supreme Court has defined the phrase "conduct unbecoming a member of the bar." See In re Snyder, 472 U.S. 634, 645, 105 S. Ct. 2874 (1985), attached as Appendix IV, infra. In the Snyder case, the Supreme Court interpreted this phrase to require "conduct contrary to professional standards that show unfitness to discharge the continuing obligations to clients or the courts, or conduct inimical to the administration of justice." Id. at 645. The Supreme Court further stated that "case law, applicable court rules and 'the lore of the profession', as embodied in codes of professional conduct" provide guidance in determining the scope of these affirmative obligations. Id. at 645. See also Matter of Hendrix, 986 F.2d 195, 201 (7th Cir. 1993) (Fed. R. Civ. P. 11 and ABA Model Rules provide guidance as to conduct sanctionable under Rule 46); In re Bithony, 486 F.2d 319, 324 (1st Cir. 1973) (complex code of behavior embodied in the ABA Code helps define "conduct unbecoming a member of the bar").

B. Local Rules Interpreting Rule 46. See Appendices V, VII.

The Rule 46 "conduct unbecoming" standard has been consistently read to include reference to "professional standards" and "codes of professional conduct", including

federal local rules governing attorney conduct. Seven courts of appeals have adopted such local rules. See Report on Local Rules Regulating Attorney Conduct in the Federal Courts (July 5, 1995), 8. Four courts of appeal have adopted local rules that have a "dynamic conformity" to the rules of attorney conduct adopted by the highest court of the state in which a particular attorney is admitted to practice. See id. Chart III, set out as Appendix VII, infra. The 11th Circuit has also adopted such a standard, but only to the extent that the state rules "are not inconsistent with the ABA Model Rules, in which case the ABA model rules govern." See Chart III, Appendix VII, infra. Furthermore, both the 11th Circuit and the Court of Appeals for the District of Columbia have local rules that show signs of influence from CACM Model Local Rule IV. See Report on Local Rules Regulating Attorney Conduct in the Federal Courts, Appendix V (July 5, 1995) (containing Model Local Rule IV). Two other courts of appeals have local rules that refer directly to ABA models. The 2nd Circuit's local rule refers to the ABA Code, which is still in effect in the state of New York, and the 6th Circuit's local rule refers to the ABA Model Rules and the Canons of Ethics. See Chart III, Appendix VII, infra.

Six courts of appeals have no local rules to supplement Rule 46.[3] The 8th Circuit has an Internal Operating Procedure which refers to the state standard in which the attorney is admitted to practice. The Clerk's Office of the 5th Circuit states that "it is long-standing practice to look to and follow the ethical rules adopted by the highest court in the state of the attorney's domicile, while always being mindful of the ABA Model Rules." See Chart III, Appendix VII, infra. The 7th Circuit has "Standards for Professional Conduct Within the Seventh Federal Judicial Circuit" which are neither based on an ABA model nor a state standard, but do provide additional guidance. See Jeffrey A. Parness "Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation," 60 Albany Law Review 303 (1996), attached as Appendix V, infra.

[3] The United States Court of Appeals for the Federal Circuit is one of six courts of appeals which do not have local rules supplementing Rule 46.

C. Court of Appeals Cases on Rule 46. See Appendix I.

Our research shows that, since 1990, 37 decisions of the federal courts of appeals, have cited Rule 46, or a local rule which supplements it.[4] See Appendix I, infra, Chart I, Breakdown of Recent Federal Appellate Cases Citing Federal Rule of Appellate Procedure 46 (1990-1997). Most of the decisions involve misrepresentations of law or fact to a tribunal, maintaining frivolous appeals, failure to prosecute criminal appeals with due diligence, or failure to follow court rules. See Hendrix, supra, 986 F.2d at 200-01 (Court sanctioned attorney under Rule 46 for failure to cite contrary authority in appellate brief); U.S. v. Williams, 952 F.2d 418, 421, cert. denied 506 U.S. 850 (1992) (court publicly censured attorney for misstatements of record in appellate brief thus violating ABA Model Rule 3.3); U.S. v. Song, 902 F.2d 609, 610 (7th Cir. 1990) (Court sanctioned attorney under Rule 46 for lack of due diligence in filing criminal appeal); In re Solerwitz, 848 F.2d 1573, 1580-81 (Fed. Cir. 1988), cert. denied, 488 U.S. 1004 (1989) (Court sanctioned attorney under Rule 46 for filing over 100 frivolous appeals). The rest of the decisions involve other types of attorney misconduct, including misappropriation of a client's funds, conduct by an attorney intended to disrupt a tribunal, and false accusations concerning a judge's qualifications and integrity. See Appendix I, infra Chart I, Breakdown of Recent Federal Appellate Cases Citing Federal Rule of Appellate Procedure 46 (1990-1997). See also Nordberg, Inc. v. Telsmith, Inc., 82 F.3d 394, 398-99 (Fed.Cir. 1996) (Court stated that lawyer who verbally attacked opposing counsel during oral argument can be sanctioned under Rule 46); Tyson v. Jones & Laughlin Steel, 958 F.2d 756, 763 (7th Cir. 1993) (Court warned attorney through written opinion that he can be sanctioned for making unsupported charges against a judge in his appellate brief).

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[4] The exact search in the CTA database was:

> "Federal Rule of Appellate Procedure 46" "F.R.A.P. 46" "Fed. R. App. P. 46" "Fed. R. App. P. 46" (Rule /5 46 /P (Suspen! Disbar! Sanct! "Conduct Unbecoming")) & DA(AFT 1/1/1990)

A typical example is in Matter of Mix, 901 F.2d 1431 (7th Cir. 1990). There the 7th Circuit sanctioned an attorney for failure to prosecute a criminal appeal with due diligence. Id. at 1432. The attorney had let deadlines pass without filing motions for extensions, presented a poor quality brief, and failed to be available for oral argument. Id. at 1431-1432. The court publicly censured the attorney as a message to other members of the 7th Circuit bar that "lackadaisical work is not acceptable." Id. at 1432-33. Another good example is in Matter of Hendrix, supra, 986 F.2d 195 (7th Cir. 1993). There the court sanctioned counsel for filing an appellate brief without citing contrary authority. Id.at 200. (The attorney had failed to cite a reported decision within the circuit which the court would have had to overrule for the attorney's client to succeed on appeal.) The court directed counsel to submit a statement why he should not be sanctioned under Rule 46(c). The charges were 1) violating Fed. R. Civ. P. 11 by failing to make a reasonable inquiry as to whether a position is warranted by existing law and, 2) possibly violating ABA Model Rule 3.3 for intentionally concealing dispositive authority. Id. at 201.

In U.S. v. Williams, supra, 952 F.2d 418 the Court of Appeals for the District of Columbia publicly censured a government attorney for violating ABA Model Rule 3.3 by making material misstatements of the public record in an appellate brief. Id.at 421. The court publicly reprimanded the attorney. It also warned that any further similar conduct by the government would invoke the full extent of the court's sanctioning power under Rule 46. Id. at 422. In Guentchev v. I.N.S., 77 F.3d 1036, 1039 (7th Cir. 1996), the court ordered a show cause hearing why an attorney should not be suspended from practice for failure to follow court rules. There, an attorney submitted a brief without attaching the immigration judge's opinion as required by Fed. R. App. P. 30. Id. at 1038. The court ordered a show cause hearing to have the lawyer account for his failure to competently represent his client. Id. at 1039.

As these examples demonstrate, Rule 46 cases do occur, and they frequently require reference to the ABA Model Rules and the ABA Code, or other standards. While

such cases are not numerous, there appears to be no intrinsic reason for the great disparity between circuit court local rules — or lack therefore — interpreting Rule 46. Professor Gregory C. Sisk has recently completed a major study of the proliferation of disparate local rules among courts of appeals. See Gregory C. Sisk, "The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits," 68 Colorado L. Rev. 1 (1997). (Copies have already been distributed to members of the Standing Committee). Professor Sisk has written to the Committee that:

> "Ideally, the vague standard of Federal Rule of Appellate Procedure 46 should be deleted and replaced by a new standard through the Rules Enabling Act. However, although FRAP 46 does contain a uniform national ethical standard, a model local rules approach could still be applied in this context, in the nature of a clarifying or specifying local rule giving meaningful context to the 'conduct unbecoming a lawyer' standard."

(Letter, June 26, 1996)

While local rules governing attorney conduct are not, in Sisk's view, the worst examples of appellate rule "balkanization," nothing in the reported cases indicates any reason why a simpler, more uniform approach would present difficulties.

III. CONCLUSION

This Committee is currently considering two options for changing local rules governing attorney conduct in the federal courts. "Option One" would be the adoption of a model local rule by the Judicial Conference similar to Rule IV of the Federal Rules of Disciplinary Enforcement, first recommended by the Committee on Court Administration and Case Management in 1978. "Option Two" would be the adoption of uniform rules of attorney conduct, pursuant to the Rules Enabling Act, applying to specific "core" areas of federal concern, with the provision that all other areas of attorney conduct are to be governed by state standards. See the reports cited at Section I, supra. The adoption of either option in the federal courts of appeals would provide concrete, meaningful standards governing attorney conduct, instead of the vague "conduct unbecoming" standard of Rule 46. Either option would also follow the trend of the majority of circuit courts, which have adopted local rules, internal operating procedures or other standards to clarify

Rule 46. Finally, either option would be consistent with the Supreme Court's decision in Snyder, supra, holding that supplemental rules are often necessary in determining the scope of the "conduct unbecoming" standard. See In re Synder, supra, 472 U.S. 634, at 645, set out at Appendix IV, infra.

A. "Option One." Model Local Rule. See Appendix II.

"Option One" would be a model local rule recommended by the Judicial Conference and adopted by individual courts pursuant to 28 U.S.C. § 2071. Similar local rules are already in existence in the five courts of appeals. These look to "dynamic conformity" to the rules provided by the highest court in the state in which the attorney is admitted to practice. See Rules Governing Attorney Discipline in the U.S. Court of Appeals for the Eleventh Circuit, (effective October, 1992, amended January, 1996) and Report on Local Rules Regulating Attorney Conduct in the Federal Courts (July 5, 1995) page 8 and Chart III, Appendix VII, infra. But most of these existing rules have no choice of law standard for attorneys licensed to practice in more than one state. See Chart III, infra. Furthermore, these rules do not give standards of attorney conduct for cases arise in district courts and are appealed to the circuit courts. See id. Presumably, the lower court's standards of attorney conduct should be applied in these types of cases. See e.g. U.S. v. Balter, 91 F.3d 427, 435 (3rd Cir. 1996) (applying district court's local rules of attorney conduct on appeal as to whether U.S. Attorney had violated anti-contact rule).

Thus, the Standing Committee should consider proposing an improved, new model local rule for the courts of appeals. Such a rule should provide a standard of attorney conduct for cases appealed from a district court and a choice of law standard for attorneys who practice in multiple states. For the benefit of the Committee, I have included an example of such a model local rule in Appendix II, infra.[5] This model local rule closely

[5]The Standing Committee requested that I not submit specific proposed rules until this study was completed, and further studies done in relation to Bankruptcy Courts and to actual District Court practice (now being completed by the Federal Judicial Center). Thus the rules set out here are for example only, and have not been reviewed by either the Advisory Committee or Appellate Rules on the Style Subcommittee. The Advisory Committee has, however, been advised of the general approaches under consideration, and has

follows Model Rule IV of the Federal Rules of Disciplinary Enforcement as recommended by the Committee on Court Administration and Case Management in 1978.[6] In particular, part A(2) of the proposed model local rule traces CACM Model Rule IV by imposing a "dynamic conformity" state standard of attorney discipline for issues of misconduct before the courts of appeals. In addition, part A(2) implements a choice of law standard similar to ABA Model Rule 8.5(b)(2) for situations where the attorney is admitted to practice in more than one state. Such a provision provides that an attorney is governed by the state standard of the state in which the attorney principally practices unless the conduct has its predominant effect on another state where licensed to practice. In that case, the rules of the other state govern. Finally, part B of the model local rule provides clarification regarding the range of sanctions a court of appeals may impose on an attorney, while not limiting the court's ability to provide alternative sanctions. This section was modeled after similar language in the Rules Governing Attorney Discipline in the U.S. Court of Appeals for the Eleventh Circuit, supra.

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expressed general concurrence, subject to future review. The two other requested studies should be completed by the next Committee meeting on June 18-20, 1997.

[6]Twenty five federal courts currently have local rules that reflect in some way the wording of Model Rule IV, as proposed in 1978. These courts consist of 23 district courts and two courts of appeals, the 11th Circuit and the Court of Appeals for the District of Columbia. Twelve of these courts refer to the appropriate State Supreme Court's version of the ABA Model Rules of Professional Conduct. Eight refer to the appropriate State Supreme Court's version of the ABA Code of Professional Responsibility. Five adopt the language, but not the spirit of Rule IV. Of these five, two use very similar language to Rule IV, but refer to the ABA Model Rules and not the appropriate State Rules. The other three refer to a combination of the Federal Rules of Disciplinary Enforcement, the State Supreme Court's standard and either the ABA Model Code or ABA Model Rules as their standard of attorney conduct. The following chart lists the 25 courts by their actual standard of attorney conduct:

State Rules Based on ABA Model Rules	State Rules Based on the ABA Codes	ABA Model Rules Directly	Combination of State Rules and Other Standards
E.D.AR	D.C. Appeals	D.PR	11th Cir.
W.D.AR	D.MA	D.DE	N.D.W.VA
S.D.IL	D.ME		S.D.W.VA
E.D.MI	D.NE		
D.MN	S.D.OH		
D.NH	E.D.VA		
D.NJ	W.D.VA		
M.D.NC	D.VT		

B. "Option Two:" Uniform Federal Rules of Attorney Conduct. See Appendices III, VI

"Option Two" achieves a similar result by a different means — directly amending Fed. R. App. 46. Of course, this would require the full process of the Rules Enabling Act, 28 U.S.C. § 2072-2074. While a model local rule could be directly promulgated by the Judicial Conference, a change in Fed. R. App. 46 would require at least two and one half years, and must be submitted to Congressional examination pursuant to 28 U.S.C. § 2074.

Nevertheless, direct amendment to Fed. R. App. 46 may be desirable, particularly if it is decided to adopt a uniform Federal Rules of Attorney Conduct for the district courts. Such a change would probably be achieved in the district courts by amending Fed. R. Civ. P. 83, and adding an Appendix "A", containing the new Federal Rules of Attorney Conduct. (An example of how this could be done, provided for discussion only, is provided in Appendix VI, infra.)

For the benefit of the Standing Committee, an example of such a revised Rule 46 has been drafted to reflect this option. See Appendix III, infra. It includes an appropriate standard for cases involving attorney conduct adjudicated in the district courts and appealed to the circuit courts, and a choice of law standard to determine the relevant state standard for attorneys licensed to practice in more than one state. The "revised" example of Rule 46 is almost identical to the original Rule 46 in sections (a), (b) and (c). But there is one major change. The old "conduct unbecoming" standard is removed, and replaced by references to "the courts standards for attorney conduct." These "standards" are supplied by a new section (d), "Standards for Attorney Conduct."

The new Rule 46(d)(1) in Appendix III would require a court of appeals to apply the district court standards of attorney conduct to any case appealed to the circuit court. This section was modeled after ABA Model Rule 8.5(b)(1). The new Rule 46(d)(2) would also provide that in all other cases the relevant state standard of attorney conduct applies, except as specifically provided in any new Federal Rules of Attorney Conduct. The new

Rule 46(d)(2) would also provide a choice of law standard similar to ABA Model Rule 8.5(b)(2) for those attorneys licensed to practice in more than one state. Thus, an attorney would be governed by the state standard where that attorney principally practices unless the attorney's conduct has its predominant effect in another state where the attorney is also licensed to practice. If so, the rules of the other state govern.

Attorney conduct is primarily a problem for district courts, where there are many more reported cases. There are relatively few cases in the courts of appeals. Given that both the model local rule option and the uniform rule option are reasonable solutions for the courts of appeals, the circuits should probably follow whatever option is eventually adopted for the district courts. Either a new model local rule or a new uniform federal rule will provide better guidance for attorneys practicing before the courts of appeals than the existing Rule 46 jurisprudence. The first could be done through a model local rule which supplements Rule 46, pursuant to In re Snyder, supra, while the second could only be done by directly amending Rule 46. Again, the option ultimately recommended for courts of appeals should depend primarily on the Committee's judgment about what is best for the district courts.

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Appendix I, Chart I

Breakdown of Recent Federal Appellate Cases Citing Federal Rule of Appellate Procedure 46 (1990-1997)

BREAKDOWN OF RECENT FEDERAL APPELLATE CASES CITING FEDERAL RULE OF APPELLATE PROCEDURE 46 (1990-97)[1]

Type of Attorney Misconduct	Corresponding Model Rule[2]	Number of Cases
Misrepresentation of Law or Fact to the Court	Rule 3.3	8
Failure to Prosecute Criminal Appeals with Due Dilligence	Rule 1.3	5
Misappropriation of Clients' Funds	Rule 1.15	3
Failure to Pay Court Fines	Rule 3.4	3
Failure to Follow Court Rules	Fed.R.App.P. 46(c)	7
Filing of Frivolous Appeals	Rule 3.1	7
Unauthorized Practice of Law	Rule 5.5	1
False Statements Concerning a Judge	Rule 8.2	1
Disruptive Conduct in a Courtroom	Rule 3.5	1
Confidentiality	Rule 1.6	1
TOTAL CASES		37

[1]The 37 cases cite Federal Rule of Appellate Procedure 46 or a local rule which supplements it.

[2]This category was created to show the comparable Model Rule of Professional Conduct for the types of attorney misconduct sanctioned under Rule 46.

Appendix II

Proposed Model Local Rule Governing Attorney Conduct for Federal Courts of Appeals

PROPOSED MODEL LOCAL RULE GOVERNING ATTORNEY CONDUCT FOR THE FEDERAL COURTS OF APPEALS[1]

A. STANDARDS FOR ATTORNEY CONDUCT. The Court's standards for attorney conduct are as follows:

(1) *Proceedings Before District Court.* For any act or omission by an attorney in a proceeding in a district court before which the attorney has been admitted to practice, the rules of attorney conduct of that district court must apply unless the district court's rules provide otherwise; and

(2) *All Other Acts or Omissions by Attorney.* For any other act or omission by an attorney admitted to practice before the Court, the standards for attorney conduct are:

(a) if the attorney is licensed to practice only in one state, the rules of that state as currently adopted by its highest court, or

(b) if the attorney is licensed to practice in more than one state, the rules of the state in which the attorney principally practices as currently adopted by its highest court; provided, however, that if particular conduct clearly has its predominant effect in another state in which the attorney is licensed to practice, then the rules of that state as currently adopted by its highest court.

B. SANCTIONS. Discipline for acts or omissions by an attorney which violate the Court's standards for attorney conduct may consist of disbarment, suspension, reprimand, monetary sanctions (including payment of the costs of the disciplinary proceedings), disqualification, removal from district court Criminal Justice Act panels, removal from the Court's roster of attorneys eligible for practice before the Court and for appointment under the Criminal Justice Act, or any other sanctions the Court may deem appropriate.

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[1]This proposed rule is for example only, and has not been reviewed by the Subcommittee on Style.

NOTE

Part A(1) provides that courts of appeals will apply the district courts' standards of attorney discipline for any misconduct which occurs in a proceeding before the lower court. This section closely follows the language of Model Rule 8.5(b)(1) of the American Bar Association's Model Rules of Professional Conduct and Model Rule IV of the Federal Rules of Disciplinary Enforcement as recommended by the Committee on Court Administration and Case Management. Part A(2) traces Model Local Rule IV by imposing the state standard of attorney discipline to be applied in the federal courts of appeals for all other attorney misconduct. The state standard would be ""dynamic," i.e. the rules currently adopted by the state's highest court. Additionally, Part A(2) also implements a choice of law standard similar to ABA Model Rule 8.5(b)(2) for situations where the attorney is admitted to practice law in more than one state.

Part B provides clarification regarding the range of sanctions a court may impose on an attorney, while not limiting the court's ability to provide alternative sanctions. This language closely follows the Standards of Attorney Conduct of the Court of Appeals for the Eleventh Circuit.

Some courts of appeals may wish to supplement this model rule by a local rule permitting temporary suspension of attorneys. A good example is Interim Local Rule 46.6 of the First Circuit, which is now being considered for permanent adoption. It reads as follows:

> Interim Rule 46.6 - Temporary Suspension of Attorneys. When it is shown to the Court of Appeals that any member of its bar has been suspended or disbarred from practice by a final decision issued by any other court of record, or has been found guilty of conduct unbecoming of a member of the bar of the court, the member may be temporarily suspended from representing parties before this court pending the completion of proceedings initiated under Fed. R. App. P. 46 and the Rules of Disciplinary Enforcement of the Court of Appeals for the First Circuit.

Appendix III

Proposed Federal Rule of Appellate Procedure 46

PROPOSED AMENDED FEDERAL RULE OF APPELLATE PROCEDURE 46[1]

(a) ADMISSION TO THE BAR OF COURT OF APPEALS; ELIGIBILITY; PROCEDURE FOR ADMISSION. An attorney admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court (including the district court for the Canal Zone, Guam and the Virgin Islands), and who is of good moral and professional character, is eligible for admission to the bar of a court of appeals.

An applicant shall file with the clerk of the court of appeals, on a form approved by the court and furnished by the clerk, an application for admission containing the applicant's personal statement showing eligibility for membership. At the foot of the application the applicant shall take and subscribe to the following oath or affirmation:

> I, ..., do solemnly swear (or affirm) that I will demean myself as an attorney and counselor of this court, uprightly and according to the law; and that I will support the Constitution of the United States.

Thereafter, upon written or oral motion of a member of the bar of the court, the court will act upon the application. An applicant may be admitted by oral motion in open court, but it is not necessary that the applicant appear before the court for the purpose of being admitted, unless the court shall otherwise order. An applicant shall upon admission pay to the clerk the fee prescribed by rule or order of the court.

(b) SUSPENSION OR DISBARMENT. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, *or has violated the court's standards of attorney conduct*, the member will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why the member should not be suspended or disbarred. Upon the member's response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order.

(c) DISCIPLINARY POWER OF THE COURT OVER ATTORNEYS. A court of appeals may, after reasonable notice and an opportunity to show cause to the contrary, and after hearing, if requested, take any appropriate disciplinary action against any member of the bar who practices before it *and violates the court's standards of attorney conduct or fails* to comply with these rules or any rule of the court.

(d) STANDARDS FOR ATTORNEY CONDUCT. The court's standards for attorney conduct are as follows:

> *(1) Proceedings Before District Court. For any act or omission of an attorney before a district court of this circuit which the attorney has been admitted to practice, the rules of attorney conduct of that district court must apply unless the rules of that district court rules otherwise provide; and*

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[1] New language is in italics. This proposed rule is for example only, and has not been reviewed by the Advisory Committee on Appellate Rules or the Subcommittee on Style. The reference to the "Federal Rules of Attorney Conduct" in Appendix A of Rule 83 of the Federal Rules of Civil Procedure is, of course, purely hypothetical, and assumes that the Rules Committees decide to adopt uniform rules of attorney conduct for the district courts. See Appendix VI, supra, for an example "Federal Rules of Attorney Conduct."

(2) All Other Acts and Omissions by Attorney. For any other act or omission of an attorney admitted to practice before the court, except as otherwise provided by specific rule of the Federal Rules of Attorney Conduct located in Rule 83, Appendix A, Federal Rules of Civil Procedure, the standards for attorney conduct are:

(A) if the attorney is licensed to practice only in one state, the rules of that state as currently adopted by its highest court, or

(B) if the attorney is licensed to practice in more than one state, the rules of the state in which the attorney principally practices as currently adopted by its highest court apply; provided, however, that if particular conduct clearly has its predominant effect in another state in which the attorney is licensed to practice, then the rules of that state as currently adopted by its highest court.

NOTES

All italicized language are proposed amendments to Federal Rule of Appellate Procedure 46.

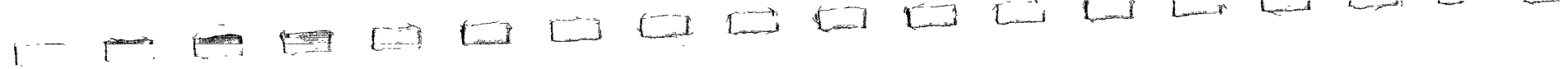
Rule 46(d)(1) follows closely Section (A)(1) of the *Proposed Model Local Rule Governing Attorney Conduct in the Federal Courts of Appeals*. See Appendix II, infra. It provides that the courts of appeals will apply the district courts' standards of attorney discipline for any misconduct which occurs in the lower court. This section is also modeled after Rule 8.5(b)(1), American Bar Association Model Rules of Professional Conduct and Model Local Rule IV of the Federal Rules of Disciplinary Enforcement, as recommended in 1978 by the Committee in Court Administration and Case Management.

Rule 46(d)(2) is also similar to Section A(2) of the *Proposed Model Local Rule Governing Attorney Conduct in the Federal Courts of Appeals*. See Appendix II, infra. It does, however, make specific provision for adopting uniform *Federal Rules of Attorney Conduct*. See Appendix VI, supra. The relevant state standard would govern all other attorney misconduct. The relevant state standard is determined by a choice of law provision similar to American Bar Association Model Rule 8.5(b)(2).

Appendix IV

In re Snyder

472 U.S. 634 (1985)



IN RE SNYDER

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 84-310. Argued April 16, 1985—Decided June 24, 1985

Petitioner, who was appointed by the Federal District Court for the District of North Dakota to represent a defendant under the Criminal Justice Act (Act), was awarded almost $1,800 by the court for services and expenses in handling the assignment. As required by the Act with regard to expenditures for compensation in excess of $1,000, the Chief Judge of the Court of Appeals for the Eighth Circuit reviewed the claim, found it to be insufficiently documented, and returned it with a request for additional documentation. Because of computer problems, petitioner could not readily provide the information in the requested form, but filed a supplemental application. The Chief Judge's secretary again returned the application, stating that petitioner's documentation was unacceptable; petitioner then discussed the matter with the District Judge's secretary, who suggested that he write a letter expressing his views. In October 1983, petitioner wrote a letter to the District Judge's secretary in which (in an admittedly "harsh" tone) he declined to submit further documentation, refused to accept further assignments under the Act, and criticized the administration of the Act. Viewing the letter as seeking changes in the process for providing fees, the District Judge discussed those concerns with petitioner and then forwarded the letter to the Chief Judge. In subsequent correspondence with the District Judge, the Chief Judge of the Circuit stated, *inter alia*, that he considered petitioner's October letter to be "totally disrespectful to the federal courts and to the judicial system," and that unless petitioner apologized an order would be issued directing petitioner to show cause why he should not be suspended from practice in the Circuit. After petitioner declined to apologize, an order was issued directing petitioner to show cause why he should not be suspended for his "refusal to carry out his obligations as a practicing lawyer and officer of [the] court" because of his refusal to accept assignments under the Act; however, at the subsequent hearing the Court of Appeals focused on whether petitioner's October letter was disrespectful, and petitioner again refused to apologize for the letter. Ultimately, the Court of Appeals suspended petitioner from the practice of law in the federal courts in the Circuit for six months, indicating that its action was based on petitioner's "refusal to show continuing respect for the court," and specifically finding that petitioner's "disrespectful statements" in his October letter as to the court's

administration of the Act constituted "contumacious conduct" rendering him "not presently fit to practice law in the federal courts."

Held: Petitioner's conduct and expressions did not warrant his suspension from practice. Pp. 642–647.

(a) Under Federal Rule of Appellate Procedure 46, which sets forth the standard for disciplining attorneys practicing before the courts of appeals, an attorney may be suspended or disbarred if found guilty of "conduct unbecoming a member of the bar of the court." The quoted phrase must be read in light of the complex code of behavior to which attorneys are subject, reflecting the burdens inherent in the attorney's dual obligations to clients and to the system of justice. In this light, "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. Pp. 642–645.

(b) Petitioner's refusal to submit further documentation in support of his fee request could afford a basis for declining to award a fee, but the record does not support the Court of Appeals' action suspending petitioner from practice; the submission of adequate documentation was only a prerequisite to the collection of his fee, not an affirmative obligation required by his duties to a client or the court. Nor, as the Court of Appeals ultimately concluded, was petitioner legally obligated under the terms of the local plan to accept cases under the Act. A lawyer's criticism of the administration of the Act or of inequities in assignments under the Act does not constitute cause for suspension; as officers of the court, members of the bar may appropriately express criticism on such matters. Even assuming that petitioner's October letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy—in the context here—does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is not presently fit to practice law in the federal courts; nor does it rise to the level of "conduct unbecoming a member of the bar" warranting suspension from practice. Pp. 645–647.

734 F. 2d 334, reversed.

BURGER, C. J., delivered the opinion of the Court, in which all other Members joined except BLACKMUN, J., who took no part in the decision of the case.

David L. Peterson argued the cause for petitioner. With him on the briefs were *Robert P. Bennett*, *John C. Kapsner*, *Charles L. Chapman*, and *Irvin B. Nodland*.

John J. Greer argued the cause for respondent United States Court of Appeals for the Eighth Circuit. With him on the brief was *Ross H. Sidney*.*

CHIEF JUSTICE BURGER delivered the opinion of the Court.

We granted certiorari to review the judgment of the Court of Appeals suspending petitioner from practice in all courts of the Eighth Circuit for six months.

I

In March 1983, petitioner Robert Snyder was appointed by the Federal District Court for the District of North Dakota to represent a defendant under the Criminal Justice Act. After petitioner completed the assignment, he submitted a claim for $1,898.55 for services and expenses. The claim was reduced by the District Court to $1,796.05.

Under the Criminal Justice Act, the Chief Judge of the Court of Appeals was required to review and approve expenditures for compensation in excess of $1,000.[1] 18 U. S. C. § 3006A(d)(3). Chief Judge Lay found the claim insufficiently documented, and he returned it with a request for additional information. Because of technical problems with his computer software, petitioner could not readily provide the information in the form requested by the Chief Judge. He did, however, file a supplemental application.

The secretary of the Chief Judge of the Circuit again returned the application, stating that the proffered documentation was unacceptable. Petitioner then discussed the matter with Helen Monteith, the District Court Judge's secretary, who suggested he write a letter expressing his view. Petitioner then wrote the letter that led to this case. The letter, addressed to Ms. Monteith, read in part:

"In the first place, I am appalled by the amount of money which the federal court pays for indigent criminal defense work. The reason that so few attorneys in Bismarck accept this work is for that exact reason. We have, up to this point, still accepted the indigent appointments, because of a duty to our profession, and the fact that nobody else will do it.

"Now, however, not only are we paid an amount of money which does not even cover our overhead, but we have to go through extreme gymnastics even to receive the puny amounts which the federal courts authorize for this work. We have sent you everything we have concerning our representation, and I am not sending you anything else. You can take it or leave it.

"Further, I am extremely disgusted by the treatment of us by the Eighth Circuit in this case, and you are instructed to remove my name from the list of attorneys who will accept criminal indigent defense work. I have simply had it.

"Thank you for your time and attention." App. 14–15.

The District Court Judge viewed this letter as one seeking changes in the process for providing fees, and discussed these concerns with petitioner. The District Court Judge then forwarded the letter to the Chief Judge of the Circuit. The Chief Judge in turn wrote to the District Judge, stating that he considered petitioner's letter

"totally disrespectful to the federal courts and to the judicial system. It demonstrates a total lack of respect for the legal process and the courts." *Id.*, at 16.

The Chief Judge expressed concern both about petitioner's failure to "follow the guidelines and [refusal] to cooperate with the court," and questioned whether, "in view of the let-

*Charles S. Sims filed a brief for the American Civil Liberties Union as *amicus curiae* urging reversal.

Frank E. Bazler and *Albert L. Bell* filed a brief for the Ohio State Bar Association as *amicus curiae*.

[1] The statutory limit has since been raised to $2,000. 18 U. S. C. § 3006A(d)(2) (1982 ed., Supp. III).

ter" petitioner was "worthy of practicing law in the federal courts on any matter." He stated his intention to issue an order to show cause why petitioner should not be suspended from practicing in any federal court in the Circuit for a period of one year. *Id.*, at 17–18. Subsequently, the Chief Judge wrote to the District Court again, stating that if petitioner apologized the matter would be dropped. At this time, the Chief Judge approved a reduced fee for petitioner's work of $1,000 plus expenses of $23.25.

After talking with petitioner, the District Court Judge responded to the Chief Judge as follows:

> "He [petitioner] sees his letter as an expression of an honest opinion, and an exercise of his right of freedom of speech. I, of course, see it as a youthful and exuberant expression of annoyance which has now risen to the level of a cause. . . .
>
> "He has decided not to apologize, although he assured me he did not intend the letter as you interpreted it." *Id.*, at 20.

The Chief Judge then issued an order for petitioner to show cause why he should not be suspended for his "refusal to carry out his obligations as a practicing lawyer and officer of [the] court" because of his refusal to accept assignments under the Criminal Justice Act. *Id.*, at 22. Nowhere in the order was there any reference to any disrespect in petitioner's letter of October 6, 1983.

Petitioner requested a hearing on the show cause order. In his response to the order, petitioner focused exclusively on whether he was required to represent indigents under the Criminal Justice Act. He contended that the Act did not compel lawyers to represent indigents, and he noted that many of the lawyers in his District had declined to serve.[2]

[2] A resolution presented by the Burleigh County Bar Association to the Court of Appeals on petitioner's behalf stated that of the 276 practitioners eligible to serve on the Criminal Justice Act panel in the Southwestern Division of the District of North Dakota, only 87 were on the panel. App. 85.

He also informed the court that prior to his withdrawal from the Criminal Justice Act panel, he and his two partners had taken 15 percent of all the Criminal Justice Act cases in their district.

At the hearing, the Court of Appeals focused on whether petitioner's letter of October 6, 1983, was disrespectful, an issue not mentioned in the show cause order. At one point, Judge Arnold asked: "I am asking you, sir, if you are prepared to apologize to the court for the tone of your letter?" *Id.*, at 40. Petitioner answered: "That is not the basis that I am being brought forth before the court today." *Ibid.* When the issue again arose, petitioner protested: "But, it seems to me we're getting far afield here. The question is, can I be suspended from this court for my request to be removed from the panel of attorneys." *Id.*, at 42.

Petitioner was again offered an opportunity to apologize for his letter, but he declined. At the conclusion of the hearing, the Chief Judge stated:

> "I want to make it clear to Mr. Snyder what it is the court is allowing you ten days lapse here, a period for you to consider. One is, that, assuming there is a general requirement for all competent lawyers to do pro bono work that you stand willing and ready to perform such work and will comply with the guidelines of the statute. And secondly, to reconsider your position as Judge Arnold has requested, concerning the tone of your letter of October 6." *Id.*, at 50.

Following the hearing, petitioner wrote a letter to the court, agreeing to "enthusiastically obey [the] mandates" of any new plan for the implementation of the Criminal Justice Act in North Dakota, and to "make every good faith effort possible" to comply with the court's guidelines regarding com-

pensation under the Act. Petitioner's letter, however, made no mention of the October 6, 1983, letter. *Id.*, at 51–52.

The Chief Judge then wrote to Snyder, stating among other things:

> "The court expressed its opinion at the time of the oral hearing *that interrelated with our concern* and the issuance of the order to show cause *was the disrespect that you displayed* to the court by way of your letter addressed to Helen Montieth *[sic]*, Judge Van Sickle's secretary, of October 6, 1983. The court expressly asked if you would be willing to apologize for the tone of the letter and the disrespect displayed. You serve as an officer of the court and, as such, the Canons of Ethics require every lawyer to maintain a respect for the court as an institution.
>
> "Before circulating your letter of February 23, I would appreciate your response to Judge Arnold's specific request, and the court's request, for you to apologize for the letter that you wrote.
>
> "Please let me hear from you by return mail. I am confident that if such a letter is forthcoming that the court will dissolve the order." *Id.*, at 52–53. (Emphasis added.)

Petitioner responded to the Chief Judge:

> "I cannot, and will never, in justice to my conscience, apologize for what I consider to be telling the truth, albeit in harsh terms. . . .
>
> "It is unfortunate that the respective positions in the proceeding have so hardened. However, I consider this to be a matter of principle, and if one stands on a principle, one must be willing to accept the consequences." *Id.*, at 54.

After receipt of this letter, petitioner was suspended from the practice of law in the federal courts in the Eighth Circuit for six months. 734 F. 2d 334 (1984). The opinion stated

that petitioner "contumaciously refused to retract his previous remarks or apologize to the court." *Id.*, at 336. It continued:

> "[Petitioner's] refusal to show continuing respect for the court *and his refusal to demonstrate a sincere retraction of his admittedly 'harsh' statements* are sufficient to demonstrate to this court *that he is not presently fit to practice law in the federal courts.* All courts depend on the highest level of integrity and respect not only from the judiciary but from the lawyers who serve in the court as well. Without public display of respect for the judicial branch of government as an institution by lawyers, the law cannot survive. . . . Without hesitation *we find Snyder's disrespectful statements* as to this court's administration of CJA *contumacious conduct.* We deem this unfortunate.
>
> "We find that Robert Snyder shall be suspended from the practice of law in the federal courts of the Eighth Circuit for a period of six months; thereafter, Snyder should make application to both this court and the federal district court of North Dakota to be readmitted." *Id.*, at 337. (Emphasis added.)

The opinion specifically stated that petitioner's offer to serve in Criminal Justice Act cases in the future if the panel was equitably structured had "considerable merit." *Id.*, at 339.

Petitioner moved for rehearing en banc. In support of his motion, he presented an affidavit from the District Judge's secretary—the addressee of the October 6 letter—stating that she had encouraged him to send the letter. He also submitted an affidavit from the District Judge, which read in part:

> "*I did not view the letter as one of disrespect for the Court,* but rather one of a somewhat frustrated lawyer hoping that his comments might be viewed as a basis for some changes in the process.

". . . Mr. Snyder has appeared before me on a number of occasions and has always competently represented his client, and has shown the highest respect to the court system and to me." App. 83–84. (Emphasis added.)

The petition for rehearing en banc was denied.[3] An opinion for the en banc court stated:

"The gravamen of the situation is that Snyder in his letter [of October 6, 1983] became harsh and disrespectful to the Court. It is one thing for a lawyer to complain factually to the Court, it is another for counsel to be disrespectful in doing so.

. . . . .

". . . Snyder states that his letter is not disrespectful. We disagree. In our view, the letter speaks for itself." 734 F. 2d, at 343. (Emphasis added.)

The en banc court opinion stayed the order of suspension for 10 days, but provided that the stay would be lifted if petitioner failed to apologize. He did not apologize, and the order of suspension took effect.

We granted certiorari, 469 U. S. 1156 (1985). We reverse.

II

A

Petitioner challenges his suspension from practice on the grounds (a) that his October 6, 1983, letter to the District Judge's secretary was protected by the First Amendment, (b) that he was denied due process with respect to the notice of the charge on which he was suspended, and (c) that his challenged letter was not disrespectful or contemptuous. We avoid constitutional issues when resolution of such issues is not necessary for disposition of a case. Accordingly, we consider first whether petitioner's conduct and expressions

[3] 734 F. 2d, at 341. Circuit Judges Bright and McMillian voted to grant the petition for rehearing en banc.

warranted his suspension from practice; if they did not, there is no occasion to reach petitioner's constitutional claims.

Courts have long recognized an inherent authority to suspend or disbar lawyers. *Ex parte Garland*, 4 Wall. 333, 378–379 (1867); *Ex parte Burr*, 9 Wheat. 529, 531 (1824). This inherent power derives from the lawyer's role as an officer of the court which granted admission. *Theard* v. *United States*, 354 U. S. 278, 281 (1957). The standard for disciplining attorneys practicing before the courts of appeals[4] is set forth in Federal Rule of Appellate Procedure 46:[5]

"(b) Suspension or Disbarment. When it is shown to the court that any member of its bar has been suspended or disbarred from practice in any other court of record, or has been guilty of conduct unbecoming a member of

[4] The panel opinion made explicit that Snyder was suspended from the District Court as well as the Court of Appeals by stating: "[T]hereafter Snyder should make application to both this court and the federal district court of North Dakota to be readmitted." 734 F. 2d, at 337.

Federal Rule of Appellate Procedure 46 does not appear to give authority to the Court of Appeals to suspend attorneys from practicing in the District Court. As the panel opinion itself indicates, the admission of attorneys to practice before the District Court is placed, as an initial matter, before the District Court itself. The applicable Rule of the District Court indicates that a suspension from practice before the Court of Appeals creates only a rebuttable presumption that suspension from the District Court is in order. The Rule appears to entitle the attorney to a show cause hearing before the District Court. Rule 2(e)(2), United States District Court for the District of North Dakota, reprinted in Federal Local Rules for Civil and Admiralty Proceedings (1984). A District Court decision would be subject to review by the Court of Appeals.

[5] The Court of Appeals relied on Federal Rule of Appellate Procedure 46(c) for its action. While the language of Rule 46(c) is not without some ambiguity, the accompanying note of the Advisory Committee on Appellate Rules, 28 U. S. C. App., p. 496, states that this provision "is to make explicit the power of a court of appeals to impose sanctions less serious than suspension or disbarment for the breach of rules." The appropriate provision under which to consider the sanction of suspension would have been Federal Rule of Appellate Procedure 46(b), which by its terms deals with "suspension or disbarment."

the bar of the court, he will be subject to suspension or disbarment by the court. The member shall be afforded an opportunity to show good cause, within such time as the court shall prescribe, why he should not be suspended or disbarred. Upon his response to the rule to show cause, and after hearing, if requested, or upon expiration of the time prescribed for a response if no response is made, the court shall enter an appropriate order." (Emphasis added.)

The phrase "conduct unbecoming a member of the bar" must be read in light of the "complex code of behavior" to which attorneys are subject. *In re Bithoney*, 486 F. 2d 319, 324 (CA1 1973). Essentially, this reflects the burdens inherent in the attorney's dual obligations to clients and to the system of justice. Justice Cardozo once observed:

> "'Membership in the bar is a privilege burdened with conditions.' [An attorney is] received into that ancient fellowship for something more than private gain. He [becomes] an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *People ex rel. Karlin* v. *Culkin*, 248 N. Y. 465, 470–471, 162 N. E. 487, 489 (1928) (citation omitted).

As an officer of the court, a member of the bar enjoys singular powers that others do not possess; by virtue of admission, members of the bar share a kind of monopoly granted only to lawyers. Admission creates a license not only to advise and counsel clients but also to appear in court and try cases; as an officer of the court, a lawyer can cause persons to drop their private affairs and be called as witnesses in court, and for depositions and other pretrial processes that, while subject to the ultimate control of the court, may be conducted outside courtrooms. The license granted by the court requires members of the bar to conduct themselves in a manner

compatible with the role of courts in the administration of justice.

Read in light of the traditional duties imposed on an attorney, it is clear that "conduct unbecoming a member of the bar" is conduct contrary to professional standards that shows an unfitness to discharge continuing obligations to clients or the courts, or conduct inimical to the administration of justice. More specific guidance is provided by case law, applicable court rules, and "the lore of the profession," as embodied in codes of professional conduct.[6]

B

Apparently relying on an attorney's obligation to avoid conduct that is "prejudicial to the administration of justice,"[7] the Court of Appeals held that the letter of October 6, 1983,

[6] The Court of Appeals stated that the standard of professional conduct expected of an attorney is defined by the ethical code adopted by the licensing authority of an attorney's home state, 734 F. 2d, at 336, n. 4, and cited the North Dakota Code of Professional Responsibility as the controlling expression of the conduct expected of petitioner. The state code of professional responsibility does not by its own terms apply to sanctions in the federal courts. Federal courts admit and suspend attorneys as an exercise of their inherent power; the standards imposed are a matter of federal law. *Hertz* v. *United States*, 18 F. 2d 52, 54–55 (CA8 1927).

The Court of Appeals was entitled, however, to charge petitioner with the knowledge of and the duty to conform to the state code of professional responsibility. The uniform first step for admission to any federal court is admission to a state court. The federal court is entitled to rely on the attorney's knowledge of the state code of professional conduct applicable in that state court; the provision that suspension in any other court of record creates a basis for a show cause hearing indicates that Rule 46 anticipates continued compliance with the state code of conduct.

[7] 734 F. 2d, at 336–337. This duty is almost universally recognized in American jurisdictions. See, *e. g.*, Disciplinary Rule 1–102(A)(5), North Dakota Code of Professional Responsibility; Rule 8.4(d), American Bar Association, Model Rules of Professional Conduct (1983); Disciplinary Rule 1–102(A)(5), American Bar Association, Model Code of Professional Responsibility (1980).

and an unspecified "refusal to show continuing respect for the court" demonstrated that petitioner was "not presently fit to practice law in the federal courts." 734 F. 2d, at 337. Its holding was predicated on a specific finding that petitioner's "disrespectful statements [in his letter of October 6, 1983] as to this court's administration of the CJA [constituted] contumacious conduct." *Ibid.*

We must examine the record in light of Rule 46 to determine whether the Court of Appeals' action is supported by the evidence. In the letter, petitioner declined to submit further documentation in support of his fee request, refused to accept further assignments under the Criminal Justice Act, and criticized the administration of the Act. Petitioner's refusal to submit further documentation in support of his fee request could afford a basis for declining to award a fee; however, the submission of adequate documentation was only a prerequisite to the collection of his fee, not an affirmative obligation required by his duties to a client or the court. Nor, as the Court of Appeals ultimately concluded, was petitioner legally obligated under the terms of the local plan to accept Criminal Justice Act cases.

We do not consider a lawyer's criticism of the administration of the Act or criticism of inequities in assignments under the Act as cause for discipline or suspension. The letter was addressed to a court employee charged with administrative responsibilities, and concerned a practical matter in the administration of the Act. The Court of Appeals acknowledged that petitioner brought to light concerns about the administration of the plan that had "merit," 734 F. 2d, at 339, and the court instituted a study of the administration of the Criminal Justice Act as a result of petitioner's complaint. Officers of the court may appropriately express criticism on such matters.

The record indicates the Court of Appeals was concerned about the tone of the letter; petitioner concedes that the tone of his letter was "harsh," and, indeed it can be read as ill-

mannered. All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is "not presently fit to practice law in the federal courts." Nor does it rise to the level of "conduct unbecoming a member of the bar" warranting suspension from practice.

Accordingly, the judgment of the Court of Appeals is

Reversed.

JUSTICE BLACKMUN took no part in the decision of this case.

Appendix V

Jeffrey A. Parness, "Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation," 60 Albany Law Review 303 (1966)

Albany Law Review

Enforcing Professional Norms for Federal Litigation Conduct: Achieving Reciprocal Cooperation

Jeffrey A. Parness

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ENFORCING PROFESSIONAL NORMS FOR FEDERAL LITIGATION CONDUCT: ACHIEVING RECIPROCAL COOPERATION

Jeffrey A. Parness[*]

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I. INTRODUCTION

In the United States today, lawyers are subject to "multiple centers of professional control."[1] Professional norms for American lawyers spring from a variety of sources and are enforced in a variety of systems.[2] Occasionally, those responsible for establishing norms differ from those operating norm-enforcement systems.[3] Further, the same lawyer misconduct can violate norms emanating from several different sources and can attract the attention of several norm enforcers.[4] This "multi-door" approach[5] has been generally accepted because no single scheme "is likely to address all categories of lawyer misconduct efficiently."[6]

The varied norms and norm-enforcement systems for controlling lawyer conduct have generated much confusion. Even the terminology is puzzling. Consider the phrase "disciplinary action." For many, it means an independent proceeding concerning lawyer misconduct outside the scope of any traditional civil or criminal case. The consequences of such disciplinary action might be the loss of a law license, or some lesser public interest sanction such as a reprimand. Such disciplinary action usually is conducted before a state's high court lawyer disciplinary agency.[7] Yet for others, "disciplinary

[1] David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 804 (1992).

[2] *See, e.g., id.* at 805-09 (identifying four basic enforcement models: disciplinary, liability, institutional, and legislative controls, and discussing each model's source of authority).

[3] *See id.* at 805 (stating that the reference point for the disciplinary control "model is the current disciplinary system, in which independent agencies . . . investigate and prosecute violations of the rules of professional conduct" while the rules are adopted by the state's highest court). In Illinois, a Hearing Board comprised of lawyer and non-lawyer appointees may reprimand an attorney, or recommend disciplinary action by the court, *see* ILL. SUP. CT. R. 753(c), but the rules are adopted by the Illinois Supreme Court, *see* ILLINOIS RULES OF PROFESSIONAL CONDUCT, *reprinted in* ILLINOIS CODE OF CIVIL PROCEDURE AND RULES OF COURT: STATE AND FEDERAL 396 (West 1996) [hereinafter ILL. RPC].

[4] *See, e.g.*, Wilkins, *supra* note 1, at 805-09 (explaining that state disciplinary bodies, legislative or executive agencies, courts, clients, and third parties are all potential norm enforcers).

[5] *Id.* at 851 n.228 (borrowing the phrase from Frank E.A. Sander, *Alternative Methods of Dispute Resolution: An Overview*, 37 FLA. L. REV. 1, 12 (1985)).

[6] *Id.* at 804. *But see* Linda S. Mullenix, *Multiforum Federal Practice: Ethics and* Erie, 9 GEO. J. LEGAL ETHICS 89, 129-31 (1995) (concluding that federal practitioners need only one uniform code of professional ethics and that standards should not vary from district to district or circuit to circuit).

[7] *See* Wilkins, *supra* note 1, at 805; *see also* MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT Rule 2 (1989) (establishing "one permanent statewide agency to administer the lawyer discipline and disability system").

action" might also connote a proceeding on lawyer misconduct within a traditional civil or criminal case. The proceeding might lead not only to a public interest sanction, but also to a private interest sanction such as an award of attorney's fees.[8]

The differing standards and forums which address lawyer misconduct during federal litigation illustrate the multiple centers of professional control. Applicable norms spring chiefly from federal procedural rules,[9] statutes[10] and inherent power cases,[11] as well as from state lawyer conduct codes[12] and state malpractice cases.[13] Available enforcement systems exist at both the federal and state levels. These enforcement systems include: a lawyer disciplinary proceeding before an agency of the state high court which licensed

[8] Compare the pre-1983 version of Rule 11 of the Federal Rules of Civil Procedure, and several contemporary state civil procedure laws, e.g., COLO. R. CIV. P. 11, ILL. SUP. CT. R. 137, and MASS. R. CIV. P. 11, with Rule 8 of the Rules of the Supreme Court of the United States, and several contemporary state high court rules, e.g., N.J. R. CT. 1:20-15(f)(3), TENN. R. SUP. CT. 9, § 5.5, and TX. R. CT. 3. The former allow "appropriate disciplinary action" during a civil case for a willful violation of the rule on signing pleadings, while the latter allow "appropriate disciplinary action" in a separate proceeding for conduct unbecoming a member of the bar. *See generally* 2 RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 10.13, at 708 n.3 (4th ed. 1996) (listing all state equivalents to FED. R. CIV. P. 11).

[9] *See, e.g.*, FED. R. CIV. P. 11 (imposing sanctions for improper signing of pleadings); *id.* R. 37 (imposing sanctions for failing to make disclosures or cooperate in discovery). Also, local federal district court rules usually set additional norms, typically relying upon a state high court or American Bar Association standards. *See infra* notes 12-13.

[10] *See, e.g.*, 28 U.S.C. § 1927 (1994) (providing that attorneys may be liable for excess costs and expenses incurred because of unreasonable and vexatious multiplication of proceedings).

[11] *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 765 (1980) ("[I]n narrowly defined circumstances federal courts have inherent power to assess attorney's fees against counsel").

[12] *See, e.g.*, ILL. RPC 3.2, *supra* note 3 (requiring an attorney to "make reasonable efforts to expedite litigation"). This rule is made applicable in some Illinois federal litigation. *See* S.D. ILL. R. 29(d)(2) (stating that "[t]he Rules of Professional Conduct adopted by this Court are the Rules of Professional Conduct adopted by the Supreme Court of Illinois"). Compare the Rules of Professional Conduct of the U.S. District Court for the Northern District of Illinois 3.2, a distinct set of rules which adopts ILL. RPC 3.2, *supra* note 3.

[13] When clients sue their attorney for acts of malpractice which occur during federal litigation, their primary focus is on conduct normally governed by state lawyer conduct codes. Thus, state tort or contract law should apply. Of course, not every violation of a state lawyer conduct code gives rise to malpractice liability. *See, e.g.*, MALLEN & SMITH, *supra* note 8, § 18.7, at 577-80 (explaining that a violation of the Model Rules or Model Code does not automatically result in civil liability); Charles W. Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 319 (1979) (noting the lack of enhanced enforcement of lawyer conduct codes through malpractice suits). When adversaries of their clients sue lawyers for acts of malpractice (e.g., malicious prosecution, abuse of process, etc.) during federal litigation, state law usually applies as well. *See* MALLEN & SMITH, *supra* note 8, § 10.13, at 708-20 (noting that state sanction power is available to federal courts in the absence of a federal provision). *But see* Jeffrey A. Parness, *Groundless Pleadings and Certifying Attorneys in the Federal Courts*, 1985 UTAH L. REV. 325, 342-52 (urging application of federal common law principles where federal provisions are lacking).

the lawyer ("disciplinary control"); a lawyer malpractice proceeding typically commenced by an injured client before a state or federal trial court ("liability control"); and a lawyer sanction proceeding before the federal court hearing the case in which the lawyer's misconduct occurred ("institutional control").[14]

The "multi-door" approach can present significant difficulties for state-licensed lawyers interested in following the appropriate rules during federal litigation.

> For example, a securities lawyer might be placed in the uncomfortable position of having to decide whether to follow a series of SEC precedents that appear to require him to resign from representing a client whom he strongly suspects is involved in a fraudulent scheme, or a line of judicial precedents that suggests that resigning under these circumstances constitutes malpractice.[15]

Consider also an Assistant U.S. Attorney facing conflicting federal and state norms on *ex parte* communications during criminal investigations. He or she must work through the conflict between the Department of Justice's guidance permitting *ex parte* communications with adverse, represented parties, and state prohibitions on *ex parte* communications based on Model Rule 4.2 or Model Code DR 7-104.[16] The notion that a distinct set of professional norms under

[14] *See* Wilkins, *supra* note 1, at 805-08. Professor Wilkins also notes that there are possible "legislative controls," wherein executive or legislative branch agencies investigate and prosecute lawyer misconduct. *See id.* at 808-09. To date, at best there are only a few such agencies. According to Professor Wilkins, one example is the California State Bar Court, established by the State Bar Board of Governors to undertake attorney disciplinary proceedings leading to public or private reproval or to recommendations to the state high court for disbarment or suspension. *See id.* at 808 n.31. The Bar Court provides "a complete alternative and cumulative method of hearing and determining accusations against members of the State Bar," however, the high court's "inherent power" to discipline attorneys remains intact. CAL. BUS. & PROF. CODE §§ 6075, 6100 (Deering 1993).

[15] Wilkins, *supra* note 1, at 851 n.230.

[16] *See* Elizabeth A. Allen, *Federalizing the No-Contact Rule: The Authority of the Attorney General*, 33 Am. Crim. L. Rev. 189, 190-91 (1995) (describing the conflict and the Department of Justice's attempt to address the ethical problem by distinguishing a disinterested "party" from a disinterested "person"); *see also* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 611 (1986) ("Although the matter is not entirely clear under the Code, probably DR 7-104(A)(1) and, clearly, MR 4.2 prohibit contact with *any* represented person . . . ."). Model Rule 4.2 reads, in relevant part, "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer . . . ." MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.2 (1995). DR 7-104(A)(1) states, "During the course of his representation of a client a lawyer shall not: (1) Communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer . . . ." MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-104(A)(1) (1995).

federal law should govern state-licensed lawyers litigating in federal courts is currently under serious debate before the Standing Committee on Rules of Practice and Procedure of the United States Judicial Conference.[17] Some argue these norms should be comprehensive and displace any otherwise relevant state law,[18] while others urge there is a need for only particularized federal law, with the remaining norms derived from state law.[19]

The "multi-door" approach also can present significant difficulties for those operating norm-enforcement systems covering lawyer conduct during federal litigation.[20] Problems include the potential for under or over-enforcement,[21] as well as confusion over when particular systems apply.[22]

While there is much current debate about professional norms for federal litigators, there is relatively little talk of norm-enforcement

[17] *See* Memorandum from Daniel R. Coquillette, Committee on Rules of Practice and Procedure of the U.S., *Local Rules Regulating Attorney Conduct in the Federal Courts* (July 5, 1995) at 38-41 (hereinafter *Judicial Conference Report*) (*available in* Westlaw, Q247 ALI-ABA 311, 370-74) (further citations will be to the Westlaw cite).

[18] *See id.* at 370-71 (describing how such norms might be adopted). Strongly advocating such norms is Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules Be Created?*, 64 GEO. WASH. L. REV. 460 (1996), who urges the development of an independent set of detailed rules of conduct for lawyers practicing in federal court via federal judicial rulemaking procedures. *See generally* Fred C. Zacharias, *Federalizing Legal Ethics*, 73 TEX. L. REV. 335 (1994) (making the case for uniform legal ethics rules governing conduct in both federal and state courts via Congressional action). Of course, the need for comprehensive or limited federal court norms, or for national norms for all courts, presents differing questions than simply who should be making any such norms. *See, e.g.*, Linda S. Mullenix, *Judicial Power and the Rules Enabling Act*, 46 MERCER L. REV. 733, 733 (1995) (arguing that "congressional intrusion into federal procedural rulemaking is the most significant contemporary issue of judicial independence").

[19] *See* Memorandum from Daniel R. Coquillette, Committee on Rules of Practice and Procedure of the U.S., *Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct* (Dec. 1, 1995) at 5-7. The Committee on Professional Responsibility of the New York City Bar split almost evenly when it considered comprehensive versus narrow and particularized federal ethics norms. *See* Committee on Professional Responsibility, *Uniform Ethics Rules in Federal Court: Jurisdictional Issues in Professional Regulation*, 50 REC. ASS'N B. CITY N.Y. 842, 842 (1995).

[20] *See Judicial Conference Report*, *supra* note 17, at 333 (stating that the "balkanization" of local rules contributes to problems for norm enforcers).

[21] *See* Wilkins, *supra* note 1, at 851 (expressing concern that "involving multiple actors in the enforcement process might cumulatively result in significant overenforcement"). Concerns about under-enforcement in state disciplinary boards of professional norms regarding conflicts of interest led one federal court to a more relaxed standard for motions to disqualify opposing counsel. *See In re* American Airlines, Inc., 972 F.2d 605, 610-11 (5th Cir. 1992).

[22] *See* Wilkins, *supra* note 1, at 851 (noting that "spreading enforcement authority . . . will inevitably produce substantive and jurisdictional conflicts" and that "a lawyer might still find herself confronting two control systems that express conflicting interpretations of the same professional norm").

systems. Some who urge the establishment of a new and comprehensive set of federal norms summarily conclude that their enforcement must be undertaken in a new, unitary federal "disciplinary control" system (i.e., not in a "disciplinary control" system established independently at the district or circuit court level).[23] Others favoring federal norms wonder whether enforcement could be undertaken in existing state high court "disciplinary control" systems.[24] To date, the U.S. Judicial Conference inquiry has focused little attention on appropriate norm enforcers or on the costs and benefits of employing multiple enforcement systems.[25]

Recently, the U.S. Court of Appeals for the Seventh Circuit had occasion to reflect on norm-enforcement systems for lawyer misconduct during federal litigation.[26] During its own disciplinary proceeding involving attorney Rufus Cook's conduct before a federal district judge, it said that earlier federal and state norm-enforcement efforts aimed at the Illinois-licensed lawyer should have been pursued in the spirit of reciprocal cooperation.[27] Yet the desired coordination was found lacking in the enforcement systems used for the actual and alleged misconduct of Mr. Cook.[28] While indicating

[23] *See, e.g.*, Mullenix, *supra* note 6, at 131 (arguing that a uniform federal code of ethics "will eliminate all problems relating to interdistrict and intercircuit conflicts"); *see also* Burton C. Agata, *Admissions and Discipline of Attorneys in Federal District Courts: A Study and Proposed Rules*, 3 HOFSTRA L. REV. 249, 285 (1975) (urging the adoption of a disciplinary structure in "the federal courts, as well as the states[,]" that "provide[s] more centralization, greater power and swifter action"); Stephen B. Burbank, *State Ethical Codes and Federal Practice: Emerging Conflicts and Suggestions for Reform*, 19 FORDHAM URB. L.J. 969, 977-78 (1992) (arguing that one of the benefits of a uniform federal enforcement mechanism would be the "demise of provisions like [Federal] Rule 11 that obliquely and recklessly regulate litigation conduct") (footnote omitted).

[24] *See, e.g.*, Allen, *supra* note 16, at 223 (discussing the benefits of state disciplinary board enforcement of federal Justice Department norms on prosecutorial contact with represented persons). *See also* 28 C.F.R. § 77.12 (1996) (providing that when U.S. Attorney General finds a "willful violation" of certain Justice Department rules governing its lawyers, sanctions "may be applied, if warranted, by the appropriate state disciplinary authority"). For a review of the criticisms of the Justice Department rule, see generally, Jocelyn Lupert, Comment, *The Department of Justice Rule Governing Communications with Represented Persons: Has the Department Defied Ethics?*, 46 SYRACUSE L. REV. 1119 (1996).

[25] *See Judicial Conference Report*, *supra* note 17, at 333-34 (outlining the problems that have arisen due to the Committee's "do-nothing" approach in recent years).

[26] *See In re* Cook, 49 F.3d 263 (7th Cir. 1995).

[27] *See id.* at 265 (explaining that reciprocal cooperation is one of three reasons for state courts to enforce discipline for misconduct in federal court).

[28] The court was most displeased with the manner in which the Illinois Attorney Registration and Disciplinary Commission (ARDC) responded to its referral of Cook for "[c]ircumventing and ignoring district court orders." *Id.* at 265 (quoting Alexander v. Chicago Park Dist., 927 F.2d 1014, 1025 (7th Cir. 1991)). It also criticized "the surprising fact that the district court, where the misconduct occurred, has never opened its own disciplinary proceeding." *Id.* at 267.

its disappointment in the lack of coordination, however, the Seventh Circuit said little about how to achieve better coordination.[29]

Techniques for coordinating enforcement efforts when state-licensed lawyers misbehave in federal court are important. Thus, implementing a change need not await full debate and reform on applicable professional norms for federal court litigators. Of course, norms are not independent of norm-enforcement systems.[30] There is no guarantee that new professional conduct standards for federal litigation will be enforceable through existing enforcement schemes. However, the *Cook* case, among others, demonstrates that existing norms governing lawyer conduct during federal litigation are poorly enforced, in part because of the lack of reciprocal cooperation between available norm enforcers. Part II of this Article will review briefly the norms and norm-enforcement systems utilized and available in *Cook*. Part III will offer suggestions on achieving better coordination among the differing norm enforcers interested in the federal litigation misconduct of lawyers.

II. THE *COOK* CASE

A. *What the Seventh Circuit Said*

Rufus Cook, a member of the bars of Illinois, the U.S. District Court for the Northern District of Illinois (Northern District), and the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit), represented a plaintiff class in a civil action in the Northern District against the City of Chicago.[31] "Cook entered into a settlement on behalf of one subclass, with 19 members, and abandoned efforts to obtain relief for the remaining [class members]. Chicago agreed to pay $500,000, a sum that included all costs and attorneys' fees, in exchange for a release."[32] The class action rule required approval of the settlement by the district judge, Ilana Rovner.[33]

[29] *See id.* at 265-66 (criticizing the ARDC for failing to proceed against Cook unless Judge Rovner appeared as a witness). The ARDC stance was "equivalent to taking the position that it will disregard misconduct in federal court, period. [The ARDC action] cannot be described as a cooperative approach." *Id.* at 266.

[30] *See, e.g.*, David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145, 1154 (1993) (stating that professional regulation and judicial sanctions must "coexist").

[31] *See Cook*, 49 F.3d at 264.

[32] *Id.*

[33] *See id.*, *see also* FED. R. CIV. P. 23(e).

> Cook waived any claim for attorneys' fees but sought to recover $350,000 in expenses, which would have left just $150,000 for distribution to the class. Judge Rovner disapproved this allocation of the proceeds, observing that the expenses were inflated—and suspect as well, because much of the work for which reimbursement was claimed had been done by firms in which Cook or his former wife had an ownership interest. Judge Rovner concluded that the combination of unusually high expenses and self-dealing was intolerable and curtailed the award accordingly.[34]

Both sides appealed, but before any decision on appeal was made, another settlement was reached.[35]

> [The settlement] called for both sides to dismiss their appeals, for the district court to vacate its opinion (which had been highly critical of Cook's ethics and performance), and for the district court to approve the original settlement. The agreement, which the district court entered as a judgment, provided: "Plaintiffs' counsel is hereby awarded statutory costs of $128,705.68", the same amount Judge Rovner originally had approved.
>
> Chicago then disbursed the funds. Cook remitted $150,000 to the class members, keeping $350,000 for himself. When she found out what Cook had done, Judge Rovner was appalled. She ordered Cook to pay the residue, and when he did not pay she held him in contempt of court.[36]

The Seventh Circuit affirmed the decision, rejecting Cook's procedural and substantive defenses.[37] Cook's procedural defense was that Judge Rovner had not afforded him a proper hearing.[38] "Cook's substantive defense was that he kept the $350,000 not under the court's order but under contingent-fee contracts with the plaintiffs, contracts that entitled him to full reimbursement for costs."[39] Responding to these arguments, the Seventh Circuit reached the conclusion "that Judge Rovner was entitled to find that she had never been notified of these agreements."[40] Both Judge Rovner and

[34] *Cook*, 49 F.3d at 264.
[35] *See id.*
[36] *Id.* (quoting Alexander v. Chicago Park Dist., 927 F.2d 1014, 1021 (7th Cir. 1991)).
[37] *See Alexander*, 927 F.2d at 1025.
[38] *See id.*
[39] *Cook*, 49 F.3d at 264 (referring to Cook's substantive defense in the *Alexander* litigation)
[40] *Id.*

the Seventh Circuit found that when Cook "'disagrees with the Court's rulings, [he] believes [he] has the right to ignore them.'"[41]

At the conclusion of the Seventh Circuit opinion affirming the contempt order, the court said:

> This opinion sets forth in some detail the unprofessional manner in which Cook Partners has prosecuted this litigation. Although many of the issues raised by Cook are frivolous, we see no point in heaping further sanctions on a lawyer and law office facing large contempt fines. However, a copy of this opinion will be submitted to the Illinois Attorney Registration and Disciplinary Commission with a suggestion that it investigate the conduct of Rufus Cook and Cook Partners in this litigation. Circumventing and ignoring district court orders in the manner described above will not be condoned.[42]

The Illinois Attorney Registration and Disciplinary Commission (ARDC)

> opened an investigation and compiled a large record. But it did not reach a decision. Cook objected to any consideration of Judge Rovner's findings, and the ARDC issued a subpoena requiring Judge Rovner to appear and submit to cross-examination about the proceedings in her court and the rationale for her findings. Not surprisingly, she declined, observing that federal judges speak through their opinions, and that their mental processes are not subject to examination. The ARDC's hearing panel then excluded from evidence the district court's findings of fact and conclusions of law, its opinions, and even the transcript of the proceedings in the federal case. Following this decision, the Administrator of the

[41] *See id.* (alterations in original) (quoting *Alexander*, 927 F.2d at 1022).
[42] *Alexander*, 927 F.2d at 1025. The ARDC inquiry sparked by this 1991 referral was not the first time the ARDC investigated Cook's conduct in the class action case before Judge Rovner. In responding to the June, 1994 show cause order leading to his two year suspension, Cook noted: "Even before the Court's 1991 opinion, the ARDC had previously investigated the matters involved in the [*Park District*] litigation and had decided not to issue a complaint with respect to those matters." Respondent's Motion for Clarification (June 23, 1994) at 3, *Cook* (No. D-217).

It was not unreasonable for the Seventh Circuit to suppose the ARDC would demonstrate reciprocal cooperation by deferring to Judge Rovner's findings of misconduct and only independently considering the nature of any sanctions. In addition, Cook's stipulation before the ARDC on the misconduct in the federal district court was reasonably foreseeable to the Seventh Circuit. *See, e.g.*, People v. Primavera, 904 P.2d 883 (Colo. 1995) (accepting hearing board's recommendation that a former district attorney who stipulated to failing to pay court-ordered child support in disciplinary proceeding after marriage dissolution could be publicly censured)

> ARDC withdrew the complaint, and the inquiry [ended]. The failure of the ARDC to complete its investigation led [the Seventh Circuit] to open a disciplinary proceeding of [its] own. [It] received the evidentiary record compiled by the ARDC and [heard] oral argument. Cook was offered an opportunity to make a statement but declined to do so.[43]

In its decision, the Seventh Circuit noted that there were three main reasons it traditionally refers incidents of federal litigation misconduct by lawyers to state bar officials. First, state "disciplinary controls" have better "means to investigate charges of misconduct and resolve factual disputes";[44] second, the state bar has a "superior perspective" on a lawyer's pattern of conduct;[45] and third, the state bar should reciprocate the "principles of cooperative federalism"[46] which lead federal courts to defer to state judgments on lawyer competence. Here, however, the Seventh Circuit found cooperation had not been reciprocated because the ARDC's insistence on Judge Rovner's appearance as a witness was tantamount to its "taking the position that it will disregard misconduct in federal court."[47]

The Seventh Circuit observed that reciprocal cooperation by the ARDC would have entailed giving "close consideration" to the possible binding effect of the federal findings that Cook defrauded a district judge and bilked his clients.[48] It strongly hinted that upon such review, the ARDC should find that it is not free "to decline to respect federal judgments."[49]

In considering its own possible discipline of Rufus Cook in 1995, the Seventh Circuit indicated surprise "that the district court, where the misconduct occurred, [had] never opened its own disciplinary proceeding."[50] The court went on to note that the acts of contempt before the district judge had occurred in 1989 and 1990;[51] Cook had repaid the class members;[52] and that there was "no indication that Cook [had] misbehaved in any state or federal tribunal since 1990."[53] The court also noted that Cook continued to defend his

[43] *Cook*, 49 F.3d at 265 (citations omitted).
[44] *Id.*
[45] *Id.*
[46] *Id.*
[47] *Id.* at 266.
[48] *Id.*
[49] *Id.*
[50] *Id.* at 267.
[51] *See id.*
[52] *See id.*
[53] *Id.*

conduct, though the court opined that "[o]nly theft from a trust fund would be a clearer breach of an attorney's fiduciary duty to his client"[54] than the breach committed by Cook during the case before Judge Rovner. This demonstrated that Cook's "clients remain[ed] in need of judicial protection."[55]

The Seventh Circuit further noted that in the past, it had "suspended from practice lawyers who fell behind in filing briefs or who did not exert themselves in protecting their clients' interests."[56] The court concluded that "[i]t would be incongruous to permit a lawyer who has diverted funds from clients to himself to remain in good standing, while mere lassitude leads to suspension from practice."[57] As a result, the court suspended Cook from membership in the Seventh Circuit bar, although he was permitted to apply for reinstatement after two years if he could then demonstrate that he is "in good standing in all other jurisdictions where he is admitted to practice."[58]

B. What the Seventh Circuit Did Not Say

1. Barriers to Reciprocal Cooperation by the ARDC

While the Seventh Circuit chastised the ARDC for failing to give "close consideration" to the binding effect of Judge Rovner's finding that Cook defrauded a district judge and bilked his clients,[59] the Seventh Circuit itself failed to consider closely the reasons the ARDC paid little attention to preclusion principles. The ARDC's inattention seemingly was prompted by the Illinois Supreme Court Rules which limit the Hearing Board in the "disciplinary control" system to deferring conclusively to only a few types of earlier judicial findings. One rule states that "[i]n any hearing conducted pursuant to this rule, proof of conviction is conclusive of the attorney's guilt of the crime."[60] In cases where an attorney has been convicted of a crime involving fraud or moral turpitude, the rule requires the Administrator to petition the court "praying that the attorney be suspended

[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 267-68.
[58] *Id.* at 268.
[59] *Id.* at 266.
[60] ILL. SUP. CT. R. 761(f).

from the practice of law until further order of the court."[61] The court then issues "a rule to show cause why the attorney should not be suspended . . . until the further order of the court."[62] After the court considers "the petition and the answer to the rule to show cause, the court may enter an order, effective immediately, suspending the attorney from the practice of law until the further order of the court."[63] Another rule states that an Illinois-licensed attorney who is also licensed in another state and who "is disciplined in the foreign State, . . . may be subjected to the same or comparable discipline in [Illinois], upon proof of the order of the foreign State imposing the discipline."[64]

Because Cook was neither convicted of a crime involving fraud or moral turpitude nor disciplined in a foreign state, the Hearing Board in the ARDC proceeding felt it was required to conduct a new hearing on his conduct in federal court.[65] This hearing had to be conducted in accordance with the Illinois Code of Civil Procedure, Illinois Supreme Court Rules, and the rules of the ARDC; at the conclusion, "the standard of proof" would be "clear and convincing evidence."[66] Because the standard of proof in the civil contempt proceeding before Judge Rovner also was clear and convincing evidence,[67] the Hearing Board in the ARDC proceeding should have

[61] *Id.* R. 761(b). For a crime not involving fraud or moral turpitude, upon notice to the Administrator ("the principal executive officer of the registration and disciplinary system," *id* R. 751(e)(1)), the matter is referred to the Inquiry Board, which upon "investigation and consideration" votes "to dismiss the charge, to close an investigation, or to file a complaint with the Hearing Board." *Id.* R. 753(a)(3). Seemingly, should a complaint result from the events leading to a conviction of a crime not involving fraud or moral turpitude, the Hearing Board would consider proof of conviction under the Code of Civil Procedure, the rules of the Illinois Supreme Court, and the rules promulgated by the ARDC. *See id.* R. 753(c)(5)

[62] *Id.* R. 761(b).

[63] *Id.*

[64] *Id.* R. 763.

[65] The ARDC prosecutor argued to the Hearing Board that its office was "not attempting to use a civil judgment to estop Respondent from contesting the disciplinary charges at hearing." Administrator's Response to Respondent's Motion to Dismiss Counts II and III of the Complaint at 4, *in* Volume III of Appendix to Respondent Rufus Cook's Memorandum of Law in Response to the Court's Orders to Show Cause & Request for a Formal Hearing in the Seventh Circuit at C39, *Cook* (No. D-217) [hereinafter Vol. III]. The ARDC prosecutor did urge that papers from the federal court case were admissible evidence in the disciplinary proceeding. *See* Respondents' [sic] Memorandum of Law in Support of His Motion to Exclude Documents Containing Statements Made By the Honorable Ilana Diamond Rovner from Evidence at the Hearing at 3 *in* Vol III, *supra*, at C501.

[66] ILL SUP CT R. 753(c)(5)-(6).

[67] *See, e.g.*, Stotler & Co. v. Able, 870 F.2d 1158, 1163 (7th Cir. 1989) (stating that to find a party in contempt of court, the complaining party must show "by 'clear and convincing' evidence" that the opposing party disobeyed the court's order). This standard in contempt proceedings has long been read to mean that the evidence must indicate that there is no "fair ground of doubt as to the wrongfulness of the defendant's conduct." California Artificial Stone Paving Co. v. Molitor, 113 U.S. 609, 618 (1885) (holding that the defendant should not be held in contempt of a court's order that it cease using the plaintiff's patented paving process, where the judges disagreed as to whether the plaintiff was indeed continuing the infringement); *see* Robin Woods, Inc. v. Woods, 28 F.3d 396, 399 (3d Cir. 1994) (holding that civil contempt "must be proved by clear and convincing evidence," where the defendants were held in contempt for failing to heed the court's order that they refrain from referring to defendant doll designer as defendant corporation's employee); Fox v. Capital Co., 96 F.2d 684, 686 (3d Cir. 1938) (holding that the plaintiff failed to carry the "heavy burden" of showing "by 'clear and convincing evidence'" that the defendant was guilty of civil contempt for failing to testify in a bankruptcy proceeding).

been able to consider her findings if permitted by Illinois statute or rule. In proceeding upon the complaint against Cook, however, the ARDC Hearing Board did not find such consideration was required.[68] Perhaps such deference was deemed foreclosed as it was not included within the Illinois Supreme Court Rules on criminal conviction and foreign state discipline. Or perhaps, even if issue preclusion was available, it was deemed not to fit under Illinois law. As the Seventh Circuit noted, "Illinois does not use offensive nonmutual issue preclusion in attorney disciplinary proceedings."[69] Finally, while the Hearing Board was aware that "state tribunals must give federal judgments the same force that federal courts give them,"[70] it may have determined, as the Seventh Circuit speculated, that "subsidiary issues" in federal judgments need not be respected by state courts and that the findings as to Cook's conduct involved such "subsidiary issues."[71]

A closer look at the Hearing Board's failure to consider the federal judgment on Cook's contempt reveals several major barriers to the types of reciprocal cooperation desired by the Seventh Circuit. Incidentally, reciprocity should occur not only between the ARDC and federal courts, but also between the ARDC and Illinois state courts, between the ARDC and state courts outside of Illinois, and between the ARDC and other disciplinary tribunals, such as administrative agencies. One major barrier to reciprocity in cases like *Cook* is that not all of the available professional norm-enforce-

[68] *See In re* Cook, 49 F.3d 263, 265 (7th Cir. 1995).

[69] *Id.* at 266 (citing *In re* Owens, 532 N.E.2d 248, 252 (Ill. 1988) (holding that "factual findings" based on clear and convincing evidence "in a civil fraud action" may not form the basis for collateral estoppel against attorneys in ARDC proceedings, since "[t]he risk of unfairly imposed discipline is too great, and the economy to be gained too minimal")).

[70] *Id. See* RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982) ("Federal law determines the effects under the rules of res judicata of a judgment of a federal court.").

[71] *Cook*, 49 F.3d at 266. The Seventh Circuit itself noted "there remains some question about the extent to which states must respect federal decisions about subsidiary issues." *Id.*

ment systems for lawyers are to be respected equally by a state's disciplinary body.[72] While the results as well as the underlying findings in foreign state disciplinary control systems regarding the conduct of an Illinois-licensed lawyer generally were respected,[73] the results in either a liability control system or an institutional control system outside of Illinois regarding the conduct of an Illinois-licensed lawyer were not respected.[74] Why is deference accorded to a foreign state's disciplinary action, but not to the judgment of a foreign state or federal court, in a lawyer liability civil action or in a lawyer sanction proceeding? The answer to this question is unclear. Seemingly, Cook has comparable incentives, tools, and hearing opportunities when charged with contempt, legal malpractice, or the violation of a court rule, as when charged by a traditional disciplinary agency with breaching a professional conduct rule—at least in settings where the burden of proof remains clear and convincing evidence.[75] While "courts must be more cautious in allowing collateral estoppel to be used offensively than in allowing

[72] This can be seen in the varying levels of deference the Illinois Supreme Court Rules afford to different professional enforcement systems. For example, if an Illinois attorney is convicted of a crime in Illinois, only "proof" of the conviction is sufficient to justify the attorney being disciplined. *See* ILL. SUP. CT. R. 761(f). And, if an attorney is subject to discipline in another state he also may be subject to discipline by the State of Illinois upon a showing of "proof of the order of the foreign State imposing the discipline," unless the procedures employed violated due process principles. *Id.* R. 763. Yet, the high court rules are silent with regard to deference accorded to other adjudicatory proceedings involving issues of attorney misconduct.

[73] *See id.* R. 763 (stating that an attorney disciplined in a foreign State may be subjected to "the same or comparable discipline" in Illinois).

[74] The situation is different outside of Illinois. *See, e.g.*, GENERAL RULES U.S. DISTRICT COURT, EASTERN AND SOUTHERN DISTRICT OF NEW YORK 4(d) (providing that discipline imposed by another state or federal court may support an order of discipline), *reprinted in* MCKINNEY'S NEW YORK RULES OF COURT: STATE AND FEDERAL 1996 at 789 (West 1996); IOWA SUP CT. R. 118.7 (providing that in state disciplinary proceeding, issue preclusion may be used from a civil judgment where the burden of proof underlying the judgment is greater than preponderance of the evidence); *see also* Bar Counsel v. Board of Bar Overseers, 647 N.E.2d 1182, 1185 (Mass. 1995) (concluding that offensive collateral estoppel is appropriate in some bar discipline proceedings based on earlier civil judgments).

[75] While the burden of proof in legal malpractice or in civil rule violation proceedings usually is not clear and convincing evidence, that standard generally applies in civil contempt proceedings. *See* Shepherd v. American Broad Co., 62 F.3d 1469, 1475-78 (D.C. Cir. 1995) (discussing the punitive nature of inherent power sanctions and the social utility of using a heightened standard of proof). Aside from contempt, other inherent power sanctions, such as awards of attorneys' fees and the imposition of fines, may also require clear and convincing evidence of lawyer misconduct as they too may be fundamentally punitive or penal. *See id.*

it to be used defensively,"[76] many of the pertinent reasons for caution are inapplicable to most ARDC disciplinary proceedings.[77]

A second major barrier to reciprocal cooperation between the ARDC and the federal courts is the lack of evidentiary standards guiding the Hearing Board's consideration of certain earlier norm-enforcement proceedings. For example, where the burden of proof in a lawyer malpractice action or sanction proceeding is preponderance of the evidence, conclusive effect cannot be given their findings by the Hearing Board because it employs a clear and convincing evidence standard.[78] It does not follow, however, that the Hearing Board should not consider any part of the malpractice or sanction case. In the ARDC hearing, when Judge Rovner declined to honor the Hearing Board subpoena, her findings, conclusions, and opinions, as well as the transcript of proceedings were excluded from evidence.[79] The relevant Illinois Code, Supreme Court rules and ARDC rules should provide an avenue for consideration of these federal court materials as evidence, even if they are not conclusive.

2. Barriers to Cooperation Between Federal Disciplinarians

Along with its disappointment in the ARDC hearing, the Seventh Circuit also expressed dismay over the district court's response to Cook's misconduct. Upon finding that Cook defrauded the court and

[76] *In re* Owens, 532 N.E.2d 248, 252 (Ill. 1988).

[77] Illinois likely could not have joined as a party in *Cook* because no other inconsistent determination of the same issue existed, and it was foreseeable that federal litigation misconduct would be referred to, and considered by, the Illinois ARDC. *See* RESTATEMENT (SECOND) OF JUDGMENTS §§ 28-29 (1982). It should be noted that when the ARDC Hearing Board deemed inadmissible Judge Rovner's opinions regarding Cook's contempt, it said that if Cook "had known that Judge Rovner's remarks about him . . . would be presented at a later date in a disciplinary matter, he would have been placed in the awkward position of wanting to cross-examine Judge Rovner about her remarks . . . possibly to the detriment of his clients!" Order Excluding Documents and Testimony at 2-3 *in* Vol. III *supra* note 65, at C509-10 [hereinafter ARDC Order]. The ARDC Order did not explain why the Seventh Circuit's referral to the ARDC in *Alexander* was not foreseeable to Cook or why an apparent conflict of interest between Cook and his clients should not have led Cook to cease representing the clients. In Florida, the high court resists the use of offensive collateral estoppel in bar discipline proceedings where an administrative agency previously has disciplined an attorney because the "primary purpose" of the agency "is not to ensure the qualification, supervision or regulation of lawyers." Florida Bar v. Tepps, 601 So.2d 1174, 1175 (Fla. 1992).

[78] *See* ILL. SUP. CT. R. 753(c)(6).

[79] *See In re* Cook, 49 F.3d 263, 265 (7th Cir. 1995). While the Hearing Board did mention the possibility that certain portions of the documents could be purged while the balance could be admitted into evidence, it strongly hinted that not much would be left in the "'balance'" because all materials "prejudicial in nature" to Cook would be excluded. *See* ARDC Order, *supra* note 77, at C509-10.

bilked his clients, the Seventh Circuit called it "surprising . . . that the district court . . . never opened its own disciplinary proceeding."[80] But what was Judge Rovner or her colleagues to do? What disciplinary proceedings could have been opened? A variety of approaches to Cook's misconduct were available to the district court, but guiding standards were lacking.[81] The Seventh Circuit itself said nothing of such choices, or of the techniques for facilitating cooperation between federal district judges and the courts they serve, or of better coordination between federal trial and appellate courts. Also, the court said nothing about the processes for cooperation in existence in 1989 and 1990, when the contempt before District Judge Rovner occurred, or about the processes in place in 1995, when the Seventh Circuit itself suspended Cook based on the 1989-1990 contempt.[82]

In 1989 and 1990, the U.S. District Court for the Northern District of Illinois had in place a series of local rules entitled "Discipline of Attorneys."[83] One rule recognized that the court's "disciplinary powers" were "vested in its Executive Committee."[84] This committee was then charged with overseeing the investigation, prosecution, and adjudication of lawyer misconduct matters. Such matters included, but were not limited to, acts occurring during litigation before the district court.[85] But the rules also expressly recognized that lawyer misconduct in the district court could prompt other responses, including referrals to an "appropriate state or local disciplinary body"[86] or the exercise of "the traditional powers of each [district] judge to maintain decorum, dignity and integrity in the courtroom and to compel obedience to its orders through the contempt power."[87] The rules did not elaborate on the nature of these "traditional powers" or on the coordination of all the possible responses to lawyer misconduct. These particular rules were also quite comparable to earlier local court rules, including a rule on

[80] *Cook*, 49 F.3d at 267.

[81] *See infra* notes 119-21 and accompanying text (discussing other disciplinary approaches).

[82] *See Cook*, 49 F.3d at 268.

[83] U.S. DIST. CT. N.D. ILL. LOCAL GEN. R. 3.50-3.59, *reprinted in* ILLINOIS CODE OF CIVIL PROCEDURE & RULES OF COURT: STATE AND FEDERAL 602-05 (West 1989) [hereinafter 1989 N.D. GENERAL RULES].

[84] 1989 N.D. GENERAL RULE 3.51(a), *supra* note 83.

[85] *See id.* R. 3.55.

[86] *Id.* R. 3.55(a).

[87] *Id.* R. 3.50.

discipline of attorneys adopted in April of 1974.[88] Thus, Judge Rovner was left on her own to determine what forms of "traditional powers" she might exercise regarding Cook's conduct and in what form, if any, she should forward her concerns and findings about Cook to the court's Executive Committee or to the Illinois ARDC.[89]

At the time of the Seventh Circuit's disciplinary action against Cook in early 1995, the district court's local rules entitled "Discipline of Attorneys"[90] significantly differed from the rules in effect in 1989-1990. In 1991, the Northern District's rules on the disciplinary process were altered when the court's new Rules of Professional Conduct were adopted.[91] New local rules addressed Executive Committee duties regarding disciplinary proceedings against lawyers convicted of crimes, lawyers disciplined by other federal or state courts, and lawyers who engaged in actual or alleged misconduct and who had not been subjected previously to such criminal or disciplinary proceedings.[92] Under the 1991 rules, Cook was a lawyer who apparently engaged in actual misconduct, in that he had been found to have committed acts of contempt before Judge Rovner, but he had not been subjected to earlier related criminal or disciplinary proceedings elsewhere.[93] The 1991 rules did not expressly require Cook or the clerk of the Northern District or anyone else to report the actual misconduct within the contempt finding to the Executive Committee or to the Illinois ARDC.[94] In addition, the rules did not

[88] *See* U.S. DIST. CT. N.D. ILL. LOCAL GEN. R. 8 (repealed 1989) *reprinted in* ILLINOIS PRACTICE ACT & RULES 1976, 433-36 (West 1976).

[89] From 1989 through 1990, attorneys admitted to practice law in the Northern District were obliged to follow "the provisions of the Code of Professional Responsibility of the American Bar Association." 1989 N.D. GENERAL RULE 3.54(b), *supra* note 83. DR 1-103(A) of the Model Code seemingly mandated that lawyers report knowledge of other lawyers' misconduct. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103(A) (1980). But such reporting duties only came to the attention of most Illinois lawyers with the decision in *In re Himmel*, 533 N.E.2d 790 (Ill. 1988), involving a lawyer's misconduct toward a client, rather than a lawyer's violation of a court order.

[90] *See* U.S. DIST. CT. N.D. ILL. LOCAL GEN. R. 3.50-3.59, *reprinted in* ILLINOIS CODE OF CIVIL PROCEDURE & RULES OF COURT: STATE AND FEDERAL 737-41 (West 1996) [hereinafter 1995 N.D. GENERAL RULES].

[91] *See* RULES OF PROFESSIONAL CONDUCT FOR THE NORTHERN DISTRICT OF ILLINOIS, *reprinted in* ILLINOIS CODE OF CIVIL PROCEDURE & RULES OF COURT: STATE & FEDERAL 796-829 (West 1996).

[92] *See* 1995 N.D. GENERAL RULES 3.50-3.51, 3.53, *supra* note 90.

[93] *See id.* R. 3.53(A).

[94] Rufus Cook did have a duty to report to the Northern District the "public discipline" imposed by another court, while the clerk had duties to gather certified copies of criminal convictions and public discipline elsewhere. *See id.* R. 3.51(A), 3.59(A)-(B). Rule 8.3(a) of the Rules of Professional Conduct of the U.S. District Court for Northern District of Illinois man-

require the Executive Committee, upon learning of it, to view Judge Rovner's findings as conclusive of actual misconduct in the same way that earlier criminal convictions and disciplinary proceedings establish facts conclusively.[95] Judge Rovner and others may have chosen to refrain from notifying the district court's Executive Committee (or other norm enforcers, including those in other states and courts where Cook was licensed to practice law) because the contempt proceedings in the Northern District could have been viewed as sufficient vindication of the public interest in regulating Cook's professional conduct. Also, the proceedings could have been viewed, in part, as a form of "vigilante discipline" which had awakened Cook to concerns about his legal practice, and as an "institutional control" response to misconduct which eliminated the need, in a "multi-door" approach, for utilizing any "disciplinary control."

In expressing surprise that Judge Rovner and her colleagues failed to open "disciplinary proceeding[s],"[96] the Seventh Circuit not only failed to articulate relevant techniques and guiding standards, but also failed to explain why it delayed implementing its own Seventh Circuit disciplinary proceeding until 1994, after the termination of the ARDC inquiry triggered by the Seventh Circuit referral in 1991. When the court did refer Cook to the ARDC in 1991, it noted that there was "no point in heaping further sanctions on a lawyer and law office facing large contempt fines[,]"[97] suggesting that the remedies in contempt, together with any ARDC action, would constitute sufficient norm-enforcement. Perhaps its own disciplinary proceeding

dates that lawyers report misconduct involving certain criminal acts or "dishonesty, fraud, deceit or misrepresentation" to authorities "empowered to investigate or act." This responsibility was infrequently assumed in Illinois, even after *In re Himmel*, 533 N.E.2d 790 (Ill. 1988). *See, e.g.*, Jeffrey A. Parness, *Disciplinary Referrals Under New Federal Civil Rule 11*, 61 TENN. L. REV. 37, 52-54 (1993) (noting that surveys in 1992-1993 indicate few Rule 11 violations in federal courts reported to state disciplinary agencies). Compare the more explicit reporting duties in California, where courts since 1990 are required to notify state disciplinarians of "any judicial sanctions against an attorney, except sanctions for failure to make discovery or monetary sanctions of less than one thousand dollars ($1,000)." CAL. BUS. & PROF. CODE § 6086.7(c) (Deering 1993).

[95] *But cf.* 1995 N.D. GENERAL RULE 3.50(C), *supra* note 90 (stating that a "certified copy of a judgment of conviction of any attorney for any crime shall be conclusive evidence of the commission of that crime"); *id.* R. 3.51(E) (stating that in most instances "a final adjudication in another court that an attorney has been guilty of misconduct shall establish conclusively the misconduct"); *id.* R. 3.53(C) (allowing for an "evidentiary hearing" for other allegations of misconduct).

[96] *In re* Cook, 49 F.3d 263, 267 (7th Cir. 1995).

[97] *Id.* at 265 (quoting Alexander v. Chicago Park Dist., 927 F.2d 1014, 1025 (7th Cir. 1991)).

initiated in 1994 was deemed necessary to supplement the district court contempt proceeding, after the ARDC failed to supplement the proceeding and the large contempt fines were removed.[98]

But why refer Cook to the ARDC in 1991, fail to open simultaneous Seventh Circuit disciplinary proceedings against him, and then fail to suggest that the district court act against Cook? The answer cannot be "reciprocal cooperation," because the Seventh Circuit and the Northern District Executive Committee just as easily could have respected Judge Rovner's findings in a 1991 federal disciplinary proceeding, as the Seventh Circuit expected the ARDC to respect her findings upon the 1991 referral. By contrast with such federal disciplinarians, the ARDC likely did have a "superior perspective" on Cook's pattern of conduct and a better "means to investigate" his entire professional record.[99] But why should discipline by the federal courts, limited to federal court misconduct (which had already been determined so that issue preclusion principles probably applied), await Illinois ARDC proceedings? No good reason exists for this state of affairs. As the Seventh Circuit noted in 1995, lawyers who only "fell behind in filing briefs" and otherwise engaged in "mere lassitude" were routinely being suspended from practice in that court.[100]

III. COORDINATING NORM-ENFORCEMENT SYSTEMS FOR LAWYER MISCONDUCT DURING FEDERAL LITIGATION

The benefits of coordinating norm-enforcement systems for lawyer misconduct during federal litigation are self-evident. Yet such coordination was lacking throughout the *Cook* matter, seemingly because the Seventh Circuit failed to articulate techniques and standards for better coordination in the earlier *Alexander* proceeding. Exploration of such techniques is particularly appropriate today, as there are now serious debates and reform efforts aimed at expanding federal professional norms governing the conduct of state-licensed lawyers in the federal courts.[101]

[98] *See id.* (explaining that the ARDC's failure to complete investigations on Cook, and its response to the matter, caused the Seventh Circuit to consider the "continuing vitality of [their] practice[]" of referring disciplinary matters to the ARDC, thus deeming it necessary to open their own disciplinary proceeding).

[99] *Id.*

[100] *Id.* at 267-68

[101] *See* Allen, *supra* note 16, at 201 (detailing the Justice Department's goal of regulating the "No-Contact Rule" which would provide uniform regulations for government attorneys'

New techniques for coordinating norm-enforcement systems for lawyer misconduct during federal litigation can be explored by considering how the responses to Cook's conduct by the ARDC, the district judge, the district court, and the Seventh Circuit could have been coordinated better.

For the Seventh Circuit, cooperation between norm-enforcement systems in *Cook* chiefly entailed the coordination of two systems. One is the "institutional control" system, which the district judge used in sanctioning Cook for contempt. The other is the "disciplinary control" system of the Illinois Supreme Court, the U.S. District Court for the Northern District of Illinois, and the Seventh Circuit Court of Appeals, each of which could examine whether to continue Cook's license to practice law. The Seventh Circuit neither addressed Judge Rovner's choice to proceed against Cook in contempt as the only vehicle for "institutional control," nor did it address other weapons that may have been available in the "institutional control" arsenal of her district court. The court also did not address whether any of these other weapons should have been employed together with, or instead of, contempt. Before exploring the relationships between the contempt proceeding and the possible license-related "disciplinary control" proceedings before the Illinois Supreme Court, the district court, and the Seventh Circuit, other weapons in the district court's "institutional control" arsenal will be examined first, as their effective coordination should facilitate the achievement of enhanced cooperation among norm enforcers.

A. *"Institutional Controls" in the Federal District Court*

"Institutional controls" enforce professional norms for lawyers where the governmental institutions in which the lawyers practice (e.g., courts and agencies), undertake to uncover and sanction internal lawyer misconduct.[102] Because their reach is limited, however, "the substantive jurisdiction of these institutional enforcement officials is likely to be confined to the area in which the institution operates. For example, SEC officials cannot discipline lawyers outside of the securities area."[103] Thus, it seems that an

conduct during criminal and civil investigations, applicable to both state and federal courts), *see generally Judicial Conference Report*, *supra* note 17, at 370 (suggesting options for long-term reform, one of which is establishing a uniform national set of rules governing attorney conduct in federal courts).

[102] *See* Wilkins, *supra* note 1, at 807.

[103] *Id.* at 808.

administrative law judge in a SEC adjudication can be concerned primarily with the misconduct of a lawyer only during the adjudication.[104] Nevertheless, "institutional controls" can address effectively certain lawyer misconduct. The institution can respond quickly and inexpensively because enforcement involves authorities who often are "in a position to observe lawyer misconduct directly."[105] "Institutional controls" allow for flexibility in the scheduling of hearings and in the timing of sanctions, and the institution often contains enforcement officials who "are involved in a continuing relationship" with lawyers.[106] This allows patterns of conduct to be judged firsthand.

In the federal district court where Cook's misconduct initially occurred, there were and are different ways in which "institutional controls" operate to sanction a lawyer for misconduct before the court. To address violations of professional norms involving, for example, violations of pleading or discovery rules, Northern District judges can act in the very cases in which the misconduct occurred. Such norm-enforcement procedures (and often the applicable norms themselves) are defined in the federal rules,[107] statute,[108] common law precedents outside of contempt,[109] and in court orders of contempt in pending cases.[110] Judge Rovner acted on norm-enforcement only through proceedings for contempt of her court order.

As noted earlier, the court's Executive Committee has been and remains responsible for the "discipline of attorneys."[111] Cook's contempt also could have triggered an "institutional control" response by the Executive Committee. In many respects, such an Executive Committee "institutional control" response to a lawyer's misconduct

[104] *See id.* at 807-08 (explaining that some federal administrative agencies may request that sanctions be imposed on lawyers who have not properly advised clients about their duties under certain "regulatory regimes").

[105] *Id.* at 808.

[106] *Id.*

[107] *See, e.g.*, FED. R. CIV. P. 11(c) (pleadings and motions); *id.* R. 37 (discovery). Incidentally, efforts to unify norm-enforcement procedures for all federal civil rule violations have failed. *See id.* R. 11(d) (stating that pleading standards are distinct from discovery standards).

[108] *See, e.g.*, 28 U.S.C. § 1927 (1994) (providing that attorneys may be liable for excess costs and expenses incurred because of unreasonable and vexatious multiplication of civil proceedings).

[109] *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 764-65 (1980) (noting that aside from contempt, there is comparable inherent authority over litigants and attorneys to achieve order and expedition).

[110] *See, e.g.*, *id.* at 764 (stating that the contempt sanction is the "most prominent" exercise of the federal courts' inherent authority).

[111] *See supra* text accompanying notes 83-85.

before a judge of the Northern District parallels the response to the same misconduct by an agency within a "disciplinary control" system, such as the Illinois ARDC.[112] Yet, unlike the Illinois ARDC and other "disciplinary control" agencies, when focusing on lawyer misconduct which occurred before one of its district judges, the Northern District's Executive Committee is not an independent body acting under the supervision of another court.[113] The Executive Committee can act on an earlier criminal conviction or disciplinary order imposed by another court, where its conduct is part of a "disciplinary control" system, and the Executive Committee can discipline a lawyer licensed by the court for violating the court's own general norms in a case pending before a judge of the court.[114] There, such disciplinary action is a part of the Northern District's "institutional control" system. The Northern District's norms in such a disciplinary action have changed significantly since 1989-1990. Misconduct triggering such Executive Committee action prior to 1991 typically involved the enforcement of the norms found in the A.B.A. Code of Professional Responsibility;[115] since 1991, the relevant norms are the court's own independently developed Rules of Professional Conduct.[116] These post-1991 rules, like the A.B.A. Code, are more general in nature than the norms applicable in certain types of cases (e.g., federal civil procedure rules on pleading

[112] For example, both bodies can, and in 1989-1990 could, suspend a lawyer from the practice of law for certain misconduct during litigation in a federal court. *See, e.g.*, 1989 N.D. GENERAL RULES 3.55(a), 3.56(f), *supra* note 83 (providing that Executive Committee disciplinary proceedings can be initiated upon receipt of "a report of professional misconduct" and can lead to disbarment, suspension or censure); 1995 N.D. GENERAL RULE 3.52(A), *supra* note 90 (providing that the Executive Committee receives referrals of attorney misconduct or allegations of misconduct where discipline might be warranted); *see also* ILL. SUP. CT. R. 751(a), 771 (providing that disciplinary proceedings are supervised by the ARDC and may lead to disbarment, suspension or censure where the conduct violates professional responsibility norms, brings the legal profession into disrepute, or tends to defeat the administration of justice).

[113] *See supra* text accompanying notes 83-85 (stating that the Executive Committee is vested with "disciplinary powers" to adjudicate matters of misconduct in the district court system).

[114] *See* 1995 N.D. GENERAL RULES 3.50-3.52, *supra* note 90.

[115] *See* Cannon v. U.S. Acoustics Corp., 398 F. Supp. 209, 214 (N.D. Ill. 1975), *rev'd on other grounds*, 532 F.2d 1118 (7th Cir. 1976); *see also* 1989 N.D. GENERAL RULE 3.54(b), *supra* note 83 (providing that disbarment is the sanction for acts of professional misconduct such as fraud, deceit, malpractice, or failure to abide by the provisions of the A.B.A. Code of Professional Responsibility).

[116] *See* 1995 N.D. GENERAL RULE 3.52(B), *supra* note 90

or discovery) or in a particular case as a result of a court order (e.g., contempt).[117]

When the Seventh Circuit lamented over Judge Rovner's failure to open "disciplinary proceedings,"[118] it may have been concerned with her choice of contempt as the only vehicle employed for "institutional control." Arguably, she also could have proceeded against Cook under a federal rule,[119] her inherent authority,[120] or perhaps even a statute.[121] Also, the Seventh Circuit may have been concerned that she failed to refer Cook either to her own court's Executive Committee or to the ARDC. Yet the local rules of the Northern District give its judges no guidance on these matters.[122] The Seventh Circuit itself failed to instruct district judges on how to blend "institutional" and "disciplinary controls." The following sections discuss how lawyer litigation misconduct in a federal district court can be handled better through the coordination of the district court's "institutional controls," as well as through better reciprocal cooperation between the district court's "institutional controls" and the "disciplinary controls" of other courts, both federal and state.

B. Coordination of the Federal District Court's "Institutional Controls"

In finding good cause to believe Cook made misrepresentations to the court and bilked his clients, and in determining to do something about it, Judge Rovner had available a variety of professional norms and "institutional controls." Available norms appeared in the

[117] *See* RULES OF PROFESSIONAL CONDUCT FOR THE NORTHERN DISTRICT OF ILLINOIS, *reprinted in* ILLINOIS CODE OF CIVIL PROCEDURE & RULES OF COURT: STATE & FEDERAL (West 1996).

[118] *In re* Cook, 49 F.3d 263, 267 (7th Cir. 1995).

[119] Under FED. R. CIV. P. 11 in 1989-1990 and under its present version (effective Dec. 1, 1993), lawyers may be sanctioned for presenting frivolous papers or maintaining papers for improper purposes. A history of changes to Rule 11 both in 1983 and in 1993 can be found in Jeffrey A. Parness, *Fines Under New Federal Civil Rule 11: The New Monetary Sanctions for the "Stop-and-Think-Again" Rule*, 1993 BYU L. REV. 879, 880-90.

[120] *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 767 (1980) (holding that in order to sanction a lawyer by assessing attorney's fees under a federal court's inherent powers, the lawyer's conduct in a case must "constitute[] or [be] tantamount to bad faith"), *see also* Republic of Philippines v. Westinghouse Elec. Corp., 43 F.3d 65, 74 n.11 (3d Cir. 1995) (concluding that the inherent power to sanction attorneys by means other than assessing attorneys' fees does not require a finding of bad faith).

[121] *See, e.g.*, 28 U.S.C. § 1927 (1994) (stating that attorneys may be liable for excess costs and expenses incurred because of unreasonable and vexatious multiplication of proceedings).

[122] *See supra* notes 83-95 and accompanying text.

generally applicable federal rules and statutes,[123] in her own court's local rules,[124] and in her own particular orders directing Cook to undertake certain conduct.[125] Some of the norms seemingly involved duties owed by Cook to his clients and to his clients' adversaries, including both opposing parties and their lawyers. Other norms involved duties owed to Judge Rovner and to the Northern District which had licensed Cook to practice law.[126] "Institutional controls" for norm-enforcement included *sua sponte* proceedings on sanctions for violation of a rule or statute, referral to her court's Executive Committee for possible discipline, and contempt proceedings for violation of a court order.[127] As noted, Judge Rovner had little guidance on how to choose among these norms and controls. Of course, these norms and "institutional controls" could have been used together with a referral to a disciplinary control system of another court, including the Illinois Supreme Court and the Seventh Circuit. Each of these two courts also had licensed Cook to practice law, and their own norms addressed conduct occurring outside their own courts and inside the Northern District.[128] Recall that at the time of Cook's actions in 1989-1990, Judge Rovner was subject to a Northern District local rule which recognized not only the "disciplinary powers" of her court's Executive Committee, but also her own authority to refer lawyer misconduct to state disciplinary bodies and to exercise "traditional powers . . . to maintain decorum, dignity and integrity in the courtroom and to compel obedience to its orders through the contempt power."[129]

Judge Rovner's choice to proceed in civil contempt seems quite sensible. As a result, Cook's clients are more likely to obtain the relief that Judge Rovner ordered earlier. And in the contempt

[123] *See, e.g.*, 28 U.S.C. § 1927; FED. R. CIV. P. 11.

[124] *See supra* notes 83-95 and accompanying text (detailing the local rules for the Northern District of Illinois in effect at the time of Cook's misconduct).

[125] *See In re* Cook, 49 F.3d 263, 264 (7th Cir. 1995) (describing Judge Rovner's order to Cook to pay the residue of settlement funds to plaintiffs and holding him in contempt when he failed to do so).

[126] *See id.* at 264-65 (explaining Judge Rovner's rationale in holding Cook in contempt and whom she sought to protect by her actions).

[127] *See id* (listing the options that Judge Rovner had available).

[128] *See, e.g.*, ILL. RPC 8.5(a), *supra* note 3 ("A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs"); *see also* FED R. APP. P. 46(b) (providing that an attorney is "subject to suspension or disbarment" for "conduct unbecoming a member of the bar"); *id.* R. 46(c) (providing that a court of appeals has the power to take "any appropriate disciplinary action against any attorney who practices before it for conduct unbecoming a member of the bar").

[129] 1989 N.D. GENERAL RULES 3.51(a), 3.55(a), *supra* note 83.

process, Cook is pushed to think about his professional duties as an officer of the court and as an agent of his clients.

While it is wise to recognize broad discretion in the federal district judges to choose among available "institutional controls" when faced with lawyer misconduct in a pending case, such controls could be coordinated better and employed more equitably with some new local rule amendments or with some new uniform national policy expressed in generally applicable rules or statutes. Such law reforms would promote more consistent treatment of comparable professional misconduct in a single court. Uniform national policy is preferable, for "a lawyer who has diverted funds from clients to himself [should not] remain in good standing" while another lawyer who has engaged in "mere lassitude" is suspended or disbarred from legal practice.[130] The differing treatment should not be determined by the unguided choices of federal district judges, often aided by the parties who pursue private interest sanctions (such as an award of attorney's fees) in selecting which norms and norm-enforcement systems to employ.[131] Fortunately, an available avenue presently exists to consider uniform national policy on "institutional controls" within the federal district courts. The U.S. Judicial Conference Committee on Rules of Practice and Procedure is now examining local federal district rules regulating attorney conduct.[132] In refining the "multi-door" approach to controlling lawyer misconduct during federal district court litigation, the Committee should consider not only the substantive norms, but also the available norm-enforcement systems.

In addressing coordination of district court institutional controls, certain premises seem key. First, there are at least two forms of "institutional controls" within every district court; the first is norm-enforcement by a district judge during the case in which the lawyer misconduct occurs. The second form is norm-enforcement outside the setting of a traditional civil or criminal case, usually within a separate disciplinary proceeding before a body of the court's judges with disciplinary authority delegated by local rule.[133] While typically there is only a single form of separate disciplinary proceeding in each district court, there are usually a variety of "institutional

[130] *Cook*, 49 F.3d at 267-68.

[131] Similar criticism of the confusion caused by the differing standards and methods of sanctioning pleading abuses in the federal district courts is found in Parness, *supra* note 13, at 358-60.

[132] *See Judicial Conference Report*, *supra* note 17, at 339 (discussing recent local rule revisions).

[133] *See, e.g.*, 1995 N.D. GENERAL RULES 3.50, 3.51, 3.53, *supra* note 90

controls" available to a judge in a single case. "Institutional controls" include proceedings for contempt, rule violations, or statutory violations.[134] These controls vary, in that they may be spurred by either a party's motion or by the district judge *sua sponte*, or both.

Second, some "institutional controls" within a case permit only private interest sanctions, that is, sanctions which provide remedies for the litigants harmed by lawyer misconduct during litigation.[135] Some permit only public interest sanctions, that is, sanctions which benefit public, rather than private litigant, interests,[136] while others allow judges a choice of either public or private interest sanctions, or both.[137] Consider the differences between lawyer responsibility for "the excess costs, expenses and attorneys' fees" resulting from their unreasonable and vexatious multiplication of case proceedings,[138] for a fine or imprisonment upon a summary criminal contempt proceeding,[139] and, for either "reasonable attorneys' fees and other expenses" of a party or for a penalty payable "into court" for bad pleadings.[140]

Third, in a "multi-door" approach, several "institutional controls" can be employed within a single case simultaneously or consecutively. Parties may call upon a variety of norms and norm enforcers simultaneously for the same or different private interest sanctions due to a single act of lawyer misconduct. Thus, motions regarding rule and statutory violations are regularly joined.[141] With particularly egregious lawyer misconduct, a district judge can order consecutive "institutional control" proceedings. For example, a party's motion for sanctions may be heard immediately if the relevant attorney misconduct effects substantive legal results, while

[134] *See* discussion *supra* Part III.A.

[135] *See, e.g.*, 28 U.S.C. § 1927 (1994) (providing that a court may order an attorney to reimburse the opposing party for excessive costs due to unreasonable and vexatious multiplication of proceedings).

[136] *See* 18 U.S.C. § 401 (1994) (providing that the court has the power to punish contempt by fine or imprisonment).

[137] *See, e.g.*, FED. R. CIV. P. 11(c)(2) (providing that the court may order an attorney who has violated the rule to pay sanctions to either the opposing party or the court).

[138] 28 U.S.C. § 1927.

[139] *See* 18 U.S.C. §§ 401, 402, 3691 (providing that the court has the power to punish contempt by fine or imprisonment and that an attorney may request a jury trial if charged with criminal contempt).

[140] FED. R. CIV. P. 11(c)(2).

[141] *See, e.g.*, Roadway Express, Inc. v. Piper, 447 U.S. 752, 767-68 (1980) (affirming the decision of violation of 28 U.S.C § 1927, but rejecting the claim that "costs" include attorneys' fees, and remanding for determination of violation of FED. R. CIV. P. 37).

other lawyer misconduct may be held over for a separate public interest disciplinary action.[142]

Fourth, while many federal district courts expressly vest the court's "disciplinary" authority by local rule in their Executive Committee or a similar body of judges,[143] this disciplinary authority is not fully exclusive. Thus, individual judges within pending cases can also discipline errant lawyers in what might be called "vigilante discipline."[144] Yet, certain disciplinary sanctions, such as disbarment, i.e., termination of the license to practice law in the court, should be within the sole power of some judicial body or independent agency.[145]

In taking these premises into account, the U.S. Judicial Conference (Conference) would promote better coordination of the district court's "institutional controls" by surveying, and then comparing, both the available norms and the relevant norm-enforcement systems so that all district judges would become better informed of the available alternatives in the "multi-door" approach. By elaborating on the differences in certain norms and their norm-enforcement systems, as well as by urging the elimination of any irrational differences, the Conference would promote a more uniform, or national, approach to similar instances of attorney misconduct where local tradition, circumstances, and the like, do not warrant district to district

[142] *See In re* Tutu Wells Contamination Litig., 162 F.R.D. 46, 81 (D.V.I. 1995) (ordering attorneys to appear at a separate hearing to determine the "nature and extent of sanctions warranted by [the attorneys'] misconduct" where the court found the attorneys had committed discovery violations), *opinion clarified by* 162 F.R.D. 81 (D.V.I. 1995); *see also* Mullenix, *supra* note 6, at 128-29 (urging that federal courts develop a means of separating ethical challenges that affect substantive legal claims and those that are collateral to the underlying legal dispute, with the result that the former type of ethical challenge is heard during the adjudication, while the latter type is referred to an independent federal grievance commission).

[143] *See, e.g.*, *In re* Jacobs, 44 F.3d 84, 87, 91 (2d Cir. 1994) (explaining that in the Eastern District of New York, the chief judge of the district court appoints a "board of judges known as the committee on grievances," as well as an advisory panel of attorneys to assist the grievance committee), *cert. denied*, 116 S. Ct. 73 (1995); *see generally* Agata, *supra* note 23 (noting the great variation among district courts).

[144] Purness, *supra* note 94, at 59-61 (stating that "serious professional misconduct by attorneys during federal civil litigation is best left to traditional state disciplinary agencies, and that less serious misconduct is best handled by the trial judge presiding in the relevant civil case").

[145] *But see* Baldwin Hardware Corp. v. Franksu Enter. Corp., 78 F.3d 550, 561-64 (Fed. Cir. 1996) (affirming district judge's order permanently and prospectively barring an attorney from appearing before him *pro hac vice*), *In re* Maurice, 73 F.3d 124, 126-27 (7th Cir. 1995) (suspending attorney from practice of law in all federal courts within the circuit until certain conditions were met); Kendrick v. Zanides, 609 F.Supp. 1162, 1173 (N.D. Cal. 1985) (ordering attorneys to show cause "why they should not be suspended from practice" after assessing fees and costs under FED. R. CIV. P. 11).

variation. Coordination among a single district court's varying "institutional controls" would be enhanced if:

1. Exclusive authority was delegated expressly to an independent body within the court, such as its Executive Committee, to disbar or suspend a lawyer from practice before the court, or before any judge of the court, because of litigation misconduct during a case;
2. Proceedings before such a body for possible suspension or disbarment were facilitated by requirements that district judges refer certain instances of lawyer conduct (e.g., egregious misconduct) to the body;[146]
3. The use of issue preclusion was facilitated in such license proceedings by requiring district judges employing "institutional controls" in addressing lawyer misconduct to undertake certain processes, including mandates on notice, opportunity to be heard, factual findings, and conclusions of law;
4. The body within the district court responsible for license proceedings also was assigned information-gathering duties regarding all lawyers licensed to practice before the court, aided by new reporting duties or options for district judges, lawyers, witnesses and others knowing of their own or some other lawyer's misconduct of certain types. Standardized reporting forms would make it even easier for the court's license review body to gain "superior perspective" on a lawyer's pattern of conduct; and

[146] Upon receipt of such referrals, the body would determine whether to proceed itself, or delay its own proceeding pending a referral to a state disciplinary agency, or to some other federal court disciplinary agency, which may already have begun a license review hearing. *See* Parness, *supra* note 94, at 59-61 (suggesting that "disciplinary referrals should be guided by the principles that serious professional misconduct by attorneys during federal civil litigation is best left to traditional state disciplinary agencies, and that less serious misconduct is best handled by the trial judge").

5. Limits were placed on a lawyer's ability to eliminate afterward, or avoid beforehand, judicial findings within a case relating to that lawyer's misconduct during the case.[147]

C. Cooperative Federalism Between Federal Courts and State Disciplinary Agencies

The Seventh Circuit determined that it could not condone Cook's actions in "[c]ircumventing and ignoring district court orders."[148] Therefore, in 1991 the court referred Cook to the Illinois ARDC, without opening its own disciplinary proceeding.[149] When the ARDC complaint against Cook was dismissed after Judge Rovner refused to testify, the Seventh Circuit could not employ its rule on reciprocal discipline. The Seventh Circuit lamented that the ARDC action constituted a failure of reciprocal cooperative federalism between Illinois federal courts concerned with a lawyer's misconduct during federal litigation[150] and the lawyer disciplinary agency in Illinois where that lawyer was licensed to practice, especially as the Illinois license allowed the attorney to practice in two additional Illinois federal courts.[151] After the ARDC inaction, the Seventh Circuit began its own disciplinary proceeding against Cook for his misconduct in 1989-1990 before Judge Rovner.[152] This proceeding, which led to Cook's suspension, was held before a Seventh Circuit panel of three judges different from the panel that made the referral.[153] One judge sat on both panels, however, he authored

[147] While an appeal was pending in the Seventh Circuit, a settlement was reached over the litigation expenses awarded to Cook. The agreement directed "the district court to vacate its opinion (which had been highly critical of Cook's ethics and performance)." *In re* Cook, 49 F.3d 263, 264 (7th Cir. 1995). Had the opinion not been vacated, the appeals would have been reinstated. *See* Alexander v. Chicago Park Dist., 927 F.2d 1014, 1020 (7th Cir. 1991).

[148] *Alexander*, 927 F.2d at 1025.

[149] *See id.*

[150] *See Cook*, 49 F.3d at 265-66.

[151] *See* 1995 N.D. GENERAL RULE 3.00(A), *supra* note 90 (stating that "[a]n applicant for admission . . . must be a member in good standing of the bar of the highest court of any state . . . or of the District of Columbia"); FED. R. APP. P. 46(a) (stating that "[a]n attorney who has been admitted to practice before the Supreme Court of the United States, or the highest court of a state, or another United States court of appeals, or a United States district court . . . and who is of good moral and professional character, is eligible for admission").

[152] *See Cook*, 49 F.3d at 263.

[153] *See id.* at 264 (disciplinary proceeding before Circuit Judges Easterbrook, Ripple and Kanne which resulted in the suspension of Cook's membership in the Illinois bar); *Alexander*, 927 F.2d at 1015 (referral ordered by Circuit Judges Posner, Ripple and Manion).

neither the opinion which affirmed the finding of contempt, nor the opinion which suspended Cook from practice.[154]

As noted earlier, Illinois Supreme Court rules were read by the ARDC Hearing Board to require a new hearing to consider the Cook referral by the Seventh Circuit.[155] If the Hearing Board was correct, the rules also prohibited the ARDC from using as evidence the federal court's findings on Cook's conduct.[156] Reciprocal cooperative federalism would be enhanced if conclusive, or at least significant, evidentiary status was accorded to the federal court findings of an Illinois lawyer's misconduct in the federal court.[157] The major rationales offered against such respect seemingly are that "Illinois does not use offensive nonmutual issue preclusion in attorney disciplinary proceedings,"[158] or perhaps that "subsidiary issues" in federal court judgments need not be respected.[159]

As noted by the Seventh Circuit, *In re Owens*[160] is the major Illinois precedent regarding offensive nonmutual issue preclusion.[161] Yet, Illinois ARDC Hearing Boards should conclude that this case does not preclude them from deferring to findings of lawyer misconduct made by a federal court in later ARDC proceedings. In *Owens*, the Illinois high court ruled that "factual findings based on 'clear and convincing evidence'" in an earlier Illinois civil court fraud action, brought by former clients against two lawyers, were not entitled to offensive collateral estoppel effect in a later ARDC proceeding against the two lawyers.[162] Clearly, Illinois supplied the applicable collateral estoppel law.[163] Despite this, the Illinois Supreme Court frowned upon relegating the fact-finding function in a lawyer disciplinary proceeding to mechanisms "outside of formal disciplinary proceedings."[164] When it does so, as when a criminal

[154] *See Cook*, 49 F.3d at 264 (Judge Ripple concurred in Judge Easterbrook's opinion); *Alexander*, 927 F.2d at 1015 (Judge Ripple concurred in Judge Manion's opinion).

[155] *See supra* text accompanying notes 60-65.

[156] *See supra* text accompanying notes 66-69.

[157] *See Cook*, 49 F.3d at 266 (stating that a state "is not free to prefer its internal processes to those of the federal courts and to decline to respect federal judgments").

[158] *Id.*

[159] *Id.* (citing Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 773, 791-97 (1986))

[160] 532 N.E.2d 248 (Ill. 1988).

[161] *See Cook*, 49 F.3d at 266.

[162] *See Owens*, 532 N.E.2d at 252.

[163] *See id.* (holding that in Illinois, courts could go beyond the "threshold requirements" for collateral estoppel in their application of offensive collateral estoppel to ensure fundamental fairness to defendants).

[164] *Id.*

conviction is used in an ARDC proceeding, the high court said that it is more assured that the lawyer "made every reasonable effort to cast doubt on his guilt."[165] Also, it can "more confidently rely" on the earlier findings because the burden of proof is "extremely high, higher than is the burden of proof in a disciplinary proceeding."[166]

Whatever merit there is in the ARDC not according respect to an earlier Illinois civil court's findings on fraud, two reasons exist why the *Owens* court's rationales are inapplicable to many lawyer misconduct findings in earlier federal court proceedings where the burden of proof is comparable. First, it is federal collateral estoppel law which applies, as federal law determines the res judicata effects of a federal court judgment.[167] Second, the Illinois Supreme Court already recognizes that absolute deference must be accorded to earlier findings outside criminal courts, because its reciprocal discipline rule provides that factual findings on lawyer misconduct during foreign state disciplinary proceedings normally should be deemed conclusive by the ARDC.[168] No good reason exists why other states' disciplinary proceedings should be respected, but not a federal court contempt proceeding. While a *per se* rule requiring the ARDC to treat as conclusive all federal court findings of lawyer misconduct, regardless of context, may be overly broad,[169] deference

[165] *Id.*

[166] *Id.* A very different, and more deferential, approach to applying issue preclusion in state disciplinary proceedings to earlier civil fraud findings is found in IOWA SUP. CT. R. 118.7 (stating that issue preclusion may be used where there is a final judgment in a civil case whose burden of proof is greater than preponderance of the evidence). *See* Iowa Supreme Court Bd. of Prof'l Ethics and Conduct v. D.J.I., 545 N.W.2d 866 (Iowa 1996) (affirming use of IOWA SUP. CT. R. 118.7 to invoke issue preclusion); Bar Counsel v. Board of Bar Overseers, 647 N.E.2d 1182, 1184 (Mass. 1995) (holding that the doctrine of collateral estoppel is appropriate in "bar discipline cases to the same extent that it applies to civil cases").

[167] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 87 (1982) (stating that Articles I and III of the U.S. Constitution are the source of the federal courts' authority and that "in the absence of some other provision by Congress, the effects of a federal judgment are a legal implication of those provisions"); *see also* Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 CORNELL L. REV. 773, 776-77 (1986) (stating that "[a]fter a federal court adjudicates matters of federal law," uniform federal law will determine whether strangers can use findings offensively or defensively in later state litigation).

[168] *See* ILL. SUP. CT. R. 763.

[169] For example, the burdens of proof may differ. Many federal institutional controls addressing attorney misconduct, such as FED. R. CIV. P. 11, do not require proof by clear and convincing evidence. Nevertheless, foreign state disciplinary actions founded on less than clear and convincing evidence may still be conclusive in Illinois. *See* ILL. SUP. CT. R. 763; Wolfram, *supra* note 13, at 292 n.47 (demonstrating that a few states use the "'preponderance of the evidence' standard in attorney discipline cases"); *see also In re* Friedman, 609 N.Y.S 2d 578, 586 (App. Div. 1994) (holding that due process was not violated when the fair preponderance

should not be foreclosed altogether for such findings. A new Illinois Supreme Court recognizing guidelines that accord conclusive effect to certain earlier federal court lawyer misconduct findings would promote cooperative federalism.

Cooperative federalism also would be promoted if federal court lawyer misconduct findings would be recognized as admissible evidence, though nonconclusive, in later ARDC proceedings. It is hard to imagine that lawyer misconduct constituting contempt involves "subsidiary" issues lightly decided and undeserving of any recognition.[170] While the Illinois Supreme Court Rules directed the ARDC Hearing Board to consider evidence in the Cook inquiry in accordance with the Illinois Code of Civil Procedure, other Illinois Supreme Court Rules, and ARDC Rules,[171] the Hearing Board deemed Judge Rovner's findings inadmissible upon her refusal to testify.[172] Yet it did not explain why certain exceptions to the hearsay rule were not germane and why her findings were otherwise unreliable.[173] It was concerned that employing the findings would deprive Cook of an opportunity to cross-examine Judge Rovner. But

of the evidence is the standard in an attorney disciplinary proceeding), *appeal dismissed*, 635 N.E.2d 295 (N.Y. 1994), *and cert. denied*, 115 S. Ct. 810 (1994). Incidentally, the standard of proof in disciplinary cases before the Northern District Executive Committee may be only preponderance of the evidence. *See* 1995 N.D. GENERAL RULES 3.50, 3.51, 3.53, *supra* note 90; *see also In re* Palmisano, 70 F.3d 483, 486-87 (7th Cir. 1995) (finding that the clear and convincing evidence standard used by the Illinois court was as demanding as the federal approach, though the federal approach may require only preponderance of the evidence).

[170] *See In re* Cook, 49 F.3d 263, 266 (7th Cir. 1995). The Seventh Circuit urged the ARDC to give close consideration to the "subsidiary issues" point when handling subsequent federal court referrals. *See id.* (citing Burbank, *supra* note 167, at 791-97). On subsidiary issues, see, e.g., RESTATEMENT (SECOND) OF JUDGEMENTS § 27 cmt. j (1982) ("The appropriate question . . . is whether the issue was actually recognized by the parties as important and by the trier [of fact] as necessary . . . . If so, the determination is conclusive between the parties in a subsequent action, unless there is a basis for an exception . . . .").

[171] *See* ILL. SUP. CT. R. 753(c)(5)-(6).

[172] *See* ARDC Order, *supra* note 77, at C510 (excluding Judge Rovner's remarks because they fell "outside the realm of 'readily verifiable facts which are capable of instant and unquestioned demonstration'" and excluding the "'balance' of the documents as evidence . . . [because] the Hearing Panel question[ed] whether or not the 'balance' of the documents ha[d] any evidentiary value" (quoting May Dept. Stores v. Teamster's Union Local No. 743, 355 N.E.2d 7, 9 (Ill. 1976))).

[173] *See id.*; *cf. In re* Friedman, 51 F.3d 20, 22 (2d Cir. 1995) (holding that respondent in disciplinary proceeding who contests earlier finding by another disciplinary agency has no right to an evidentiary hearing, only a right to be heard which should be used to demonstrate by clear and convincing evidence that the earlier agency's procedures were wanting), *cert. denied*, 116 S. Ct. 1040 (1996), *In re* Jacobs, 44 F.3d 84, 89 (2d Cir 1994) (rejecting the claim that "an attorney subject to a state disciplinary proceeding enjoys the full panoply of federal constitutional protections" and that an advisory panel's denial of the attorney's request for an evidentiary hearing did not violate due process), *cert. denied*, 116 S. Ct. 73 (1996)

it failed to explain in any significant way why an adequate opportunity to challenge Judge Rovner had not been available in the federal court contempt proceeding. Further, it articulated neither the factual issues that would necessitate Judge Rovner's testimony, nor the special procedures required to receive her testimony.[174]

Cooperative federalism between Illinois federal courts and the Illinois ARDC also would be promoted if federal court referrals of lawyer misconduct were more standardized. Here again, the U.S. Judicial Conference could help by formulating guidelines. Copies of federal judicial opinions containing findings of lawyer misconduct are not always sufficient to inform state lawyer disciplinary agencies. Recall that in *Cook*, the Seventh Circuit referral constituted an opinion affirming an order finding Rufus Cook in contempt;[175] yet the contempt was not the only actual or possible misconduct by Cook during the federal litigation.[176] The Seventh Circuit could have aided the ARDC by referring other relevant instances of misconduct which were found by the district or appeals court, along with other useful information, such as the burden of proof employed. An opinion sustaining a lower court order serves many different purposes, but it should be separate from an order explaining a referral of lawyer misconduct to a state disciplinary agency.

Guidelines prompted by a U.S. Judicial Conference inquiry would also be helpful in determining: when federal court "institutional controls" alone would be appropriate to address lawyer misconduct in federal litigation; when referrals to state disciplinary agencies alone would suffice; and when both federal "institutional controls"

[174] ARDC order, *supra* note 77, at C511 (declaring that the federal court findings and other documents are inadmissible unless Judge Rovner is available for a deposition and agrees to testify at a trial on the ARDC charges). In indicating Judge Rovner was not then able to testify, the U.S. Attorney objected on grounds of judicial independence and that the information was available from other sources, however, he did recognize her testimony would be forthcoming if "unusual circumstances" were shown. *See* Letter from Michael J. Shepard, U.S. Attorney, to Mary Foster, ARDC Counsel (Oct 12, 1993) *in* Vol. III, *supra* note 65, at C496. *Cf.* Jones v. Clinton, 72 F.3d 1354, 1366 (8th Cir. 1996) (Beam, C.J., concurring specially) (stating that the trial judge can carefully supervise civil litigation involving the testimony of the President, with "maximum consideration" given to the President's constitutional duties), *cert. granted*, 116 S. Ct. 2545 (1996).

[175] *See* Alexander v. Chicago Park Dist., 927 F.2d 1014, 1025 (7th Cir. 1991) (affirming the district court's order and stating that "a copy of this opinion will be submitted to the Illinois Attorney Registration and Disciplinary Commission with a suggestion that it investigate the conduct of Rufus Cook").

[176] *See id.* at 1018-19 (reviewing Judge Rovner's critical assessment of Cook's request for litigation expenses). In fact, prior to the referral, the ARDC had already investigated Cook's conduct in the case before Judge Rovner. *See supra* note 42

and state disciplinary referrals should be undertaken. In the *Cook* litigation, for example, neither the Seventh Circuit opinion referring Cook to the ARDC, nor the later Seventh Circuit order suspending Cook from the practice of law, explained why a federal court disciplinary proceeding had to await ARDC inquiry. To limit *ad hoc* decisionmaking, the U.S. Judicial Conference should consider guidelines that would attempt to standardize federal court disciplinary referrals and "institutional control" practices.

D. Coordination Between Federal District and Appellate Court Disciplinarians

Finally, aside from the need for better coordination of a trial court's "institutional controls" and better cooperation between federal courts and state disciplinary agencies, *Cook* demonstrates the need for better coordination of inquiries into lawyer misconduct by the federal district and appeals courts.

In 1995, the Seventh Circuit suspended Rufus Cook for his 1989-1990 misconduct in the federal district court, and openly questioned why the district court had not "opened its own disciplinary proceeding."[177] The court never explained why it failed to open an appellate court disciplinary proceeding against Cook upon affirming his acts of contempt in 1991, nor did the court explain why it did not refer Cook, in 1991, to the Executive Committee of the Northern District, nor did it consider sanctioning Cook for pursuing a frivolous appeal. Further, the court failed to explain why its own 1994 show cause order on why Cook should not be disciplined[178] included references to the Federal Rules of Appellate Procedure as well as to Seventh Circuit Rule 38. The referenced Federal Rules of Appellate Procedure cover not only "suspension or disbarment"[179] but also "disciplinary action,"[180] while Seventh Circuit Rule 38, which deals with "sanctions on . . . an attorney as otherwise authorized by law,"[181] seemingly draws authority from Federal Rule of Appellate Procedure 38 to "award just damages and single or double costs to the appellee" for frivolous appeals.[182] Evidently, in 1994 the court

[177] *In re* Cook, 49 F.3d 263, 267 (7th Cir. 1995).
[178] *See* Order to Show Cause, In the Matter of Disciplinary Action Against. Attorney Rufus Cook, No. D-217 (June 13, 1994).
[179] FED. R. APP. P. 46(b).
[180] *Id.* R. 46(c)
[181] 7TH CIR. R 38
[182] FED R. APP P. 38.

was willing to consider, after the ARDC proceeding, not only Cook's suspension or disbarment, but also other forms of discipline and sanctions involving monies to be received by private parties who were compelled to defend against a frivolous appeal pursued by Cook a few years earlier. In its 1995 order, the court did not explain why an award of damages and costs was not forthcoming. Further, in 1995, the court did not address the circumstances under which attorney misconduct in the federal courts should be addressed immediately, either via a sanction awarded to a private party or via "vigilante" discipline (such as a reprimand). Moreover, it did not address how federal trial and appellate court efforts should be coordinated better in the future with regard to attorney misconduct. U.S. Judicial Conference study and guidance are needed here.

Certain principles should underlie the coordination of federal district and appeals court efforts regarding lawyer misconduct during federal litigation. First, district judges, via a body such as an Executive Committee, should be responsible primarily for traditional lawyer discipline arising out of lawyer misconduct in federal litigation, whether the conduct occurred before an appellate court, a district court, or before a magistrate or bankruptcy judge. Much of the lawyer misconduct in the Article III courts occurs before district judges, and such judges are accomplished hearing providers and fact finders. Circuit-wide disciplinary bodies have some appeal, but calling in lawyers far from home or far from where their alleged misconduct occurred seems too burdensome. District court disciplinary bodies should focus primarily on issues involving licenses to practice law. "Institutional controls," such as vigilante discipline for pleading or discovery abuse, of course, may still be utilized by individual federal appellate judges and by the federal magistrate, bankruptcy and district judges where a "multi-door" approach is warranted. Once suspension, disbarment, and the like are determined at the district court level, reciprocal discipline can occur in the federal appeals court and in other federal adjudicatory settings (and, presumably, in the state high court).

Second, federal district court disciplinary bodies, such as the Northern District Executive Committee, should operate under guidelines setting forth the means by which federal judges and others can report actual and alleged lawyer misconduct. Such guidelines should be part of a uniform federal policy for all district court disciplinary bodies. Upon receipt of reports, standards are needed on the issue preclusion effects of earlier factual findings made by judges who address lawyer misconduct in "institutional

control" settings. Thus, at least upon the affirmance of Cook's contempt before Judge Rovner, the Northern District Executive Committee should have received a referral of the factual findings underlying the contempt, as well as reports of any other actual or alleged egregious misconduct (e.g., a rule or statutory violation, or conduct unbecoming an attorney).[183]

IV. CONCLUSION

Spurred by a U.S. Judicial Conference inquiry, there is now serious debate over the appropriate professional norms for lawyers litigating in the federal courts. Unfortunately, little attention has yet been focused on appropriate norm-enforcement systems. As a "multi-door" approach to such professional norm-enforcement is likely to continue at both the federal and state levels, serious discussion of the techniques for reciprocal cooperation between all norm enforcers becomes necessary. Such coordination was found wanting by the Seventh Circuit Court of Appeals in the federal and state enforcement proceedings involving Cook's misconduct in a federal district court.[184] But the Seventh Circuit offered little guidance on enhancing reciprocal cooperation between norm enforcers. Better coordination requires examination of each federal district court's "institutional controls" on lawyer conduct, of the appropriate interplay between federal district and appeals courts' "institutional" and "disciplinary controls," and of the relationship between the federal trial and appellate courts' norm enforcers and the relevant state disciplinary controls. The U.S. Judicial Conference Standing Committee on Rules of Practice and Procedure should undertake such examinations as it discusses the breadth and content of appropriate professional norms for state-licensed lawyers practicing in the federal courts.

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[183] The Seventh Circuit, even before its disappointment with the ARDC proceedings against Cook, did not always refer sanctionable attorneys to the state disciplinary agencies, though there were benefits in "cooperative federalism." *See In re* Cook, 49 F.3d 263, 265 (7th Cir. 1995); *see also* Phillips Med. Sys. Int'l B.V. v. Bruetman, 8 F.3d 600, 607 (7th Cir. 1993) (referring case to Executive Committee of Northern District). Arguably, the new rule provisions on federal appellate court practices, effective in December 1995, counsel against ad hoc decisionmaking in favor of more standard practices articulated in local court rules. *See* FED. R. APP. P. 47(a)(1) ("A generally applicable direction to . . . a lawyer regarding practice . . . shall be in a local rule rather than an internal operating procedure or standing order.").

[184] *See Cook*, 49 F.3d at 266 (pointing to the ARDC's failure to take a cooperative approach).

Appendix VI

Examples of Uniform Federal Rules of Attorney Conduct and Possible Revisions to Fed. R. Civ. P. 83.

NOTE

The attached are for example only, and thus have not been reviewed by either the Advisory Committee on Civil Rules or the Style Subcommittee. The "Notes" are for the Standing Committee's assistance, and are not intended to be "Committee Notes."

FEDERAL RULES OF CIVIL PROCEDURE

(Addition of a new Fed. R. Civ. P. 83(c))

RULE 83: RULES BY DISTRICT COURTS

(c) ATTORNEY CONDUCT. In addition to rules adopted under 28 U.S.C. §§ 2072 and 2075, the rules governing attorney conduct in the federal district courts are the Federal Rules of Attorney Conduct.

NOTE

The new part (c) of this rule promotes uniformity in the standards of conduct for all attorneys admitted to practice before federal district courts. In the past, the federal district courts relied upon many different local rules to prescribe standards of attorney conduct. See, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts*, 1-3 (July 5, 1995) (Appendices I and II charted the many different of attorney conduct rules in the 94 districts). These local rules took many forms. Some were ambiguously drafted. Others adopted conflicting standards of conduct. Still others adopted standards so vague they may have violated constitutional due process principles. See Report, supra, at 11-23, Appendix IV (Appendix IV contains Professor Linda Mullinex's article entitled, *Multiforum Federal Practice: Ethics and Erie*, in 9 Geo. J. Legal Ethics 89 (1995)); Eli J. Richardson, *Demystifying the Federal Law of Attorney Ethics*, 29 Geo. L. Rev. 137, 151-58 (1994). Finally, some districts failed to incorporate any standards of conduct in their local rules, leaving attorneys to guess the applicable standards. See Report, supra, at 8-11; Richardson, supra, at 152. This rule, applicable in all districts, seeks to eliminate the confusion. See *Study of Recent Federal Cases (1990-1995) Involving Rules of Attorney Conduct*, Appendix IV (Dec. 1, 1995) (containing: Bruce A. Green, *Whose Rules of Professional Conduct Should Govern Lawyers in Federal Court and How Should the Rules be Created*, 64 Geo. Wash. L. Rev. (1996)); Roger C. Cramton, *Memorandum to Participants of the Special Study Conference*, 3 (Jan. 8, 1996).

FEDERAL RULES OF ATTORNEY CONDUCT

RULE 1. GENERAL RULE

(a) STANDARDS FOR ATTORNEY CONDUCT. Except as provided by specific rule adopted pursuant to 28 U.S.C. §§ 2072 and 2075 or by specific rule of the Federal Rules of Attorney Conduct, the standards for attorney conduct are as follows:

(1) Proceedings Before District Court. For conduct in connection with a proceeding in a district court before which an attorney has been admitted to practice, the rules to be applied must be the standards of attorney conduct currently adopted by the highest court of the state in which the district court sits, and

(2) All Other Acts or Omissions by Attorney. For any other act or omission by an attorney admitted to practice before a district court, the standards for attorney conduct are:

(i) if the attorney is licensed to practice only in one state, the rules of that state as currently adopted by its highest court, or

(ii) if the attorney is licensed to practice in more than one state, the rules of the state in which the attorney principally practices as currently adopted by its highest court; provided, however, that if particular conduct has its predominant effect in another state in which the attorney is licensed to practice, then the rules of that state as currently adopted by its highest court.

(3) Acts or omissions by an attorney admitted to practice before a district court of the United States, individually or in concert with any other person or persons, which violate these rules constitute misconduct and are grounds for discipline, whether or not the act or omission occurred in the course of an attorney-client relationship.

(b) SANCTIONS. For misconduct defined in the Federal Rules of Attorney Conduct, for good cause shown, and after notice and opportunity to be heard, any attorney admitted to practice before a district court may be disbarred, suspended, reprimanded or subjected to such other disciplinary action as the district court deems appropriate. An attorney may also be subject to the disciplinary authority of the state or states where the attorney is admitted to practice for the same misconduct.

NOTE

This rule is based on Model Local Rule IV of the Federal Rules of Disciplinary Enforcement as recommended by the Committee on Court Administration and Case Management in 1978 and ABA Model Rule of Professional Conduct 8.5 governing choice of law for disciplinary authority. See *Report on Local Rules Regulating Attorney Conduct in the Federal Courts*, Appendix V (July 5, 1995) (original version of Rule IV of the Federal Rules of Disciplinary Enforcement).

RULE 2. CONFIDENTIALITY OF INFORMATION

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).

(b) A lawyer may reveal, and to the extent required by Federal Rules of Attorney Conduct 7 and 9(b) must reveal, such information to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another: or

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.6 in its entirety with one significant exception. The rule modifies Rule 1.6 to permit disclosures of confidential information in order to prevent a fraudulent act which would result in substantial injury to the financial interests or property of another. The rule was modified to reflect prevailing state views which permit this type of disclosure. Thirty-six states permit disclosure under these circumstances, and five states mandate disclosure in these circumstances. By permitting disclosure, the federal rule comports with or avoids conflict with forty-one jurisdictions. See Roger C. Cramton, *Memorandum to Participants of the, Special Study Conference, 2* (Jan. 8, 1996). Finally, the rule provides a reference to Federal Rules of Attorney Conduct 7 and 9 which are based on the ABA Model Rules of Professional Conduct 3.3 and 4.1 respectively. This reference emphasizes that Federal Rule of Attorney Conduct 2(b) is not the only provision of these rules which deals with disclosure of information and that in some circumstances disclosure of such information may be required and not merely permitted.

RULE 3. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer shall not represent a client if the representation of that client will be directly adverse to another client, unless:

(1) the lawyer reasonably believes the representation will not adversely affect the relationship with the other client; and

(2) each client consents after consultation.

(b) A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests, unless:

(1) the lawyer reasonably believes the representation will not be adversely affected; and

(2) the client consents after consultation. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.7 in its entirety. Over the last five years, the largest number of federal disputes involving attorney conduct concerned conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct*, 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules).

RULE 4. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client;

(2) the client is given reasonable opportunity to seek the advice of independent counsel in the transaction; and

(3) the client consents in writing thereto.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Federal Rules of Attorney Conduct 2 or 7.

(c) A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client consents after consultation;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to the representation of a client is protected as required by Federal Rule of Attorney Conduct 2.

(g) A lawyer who represents two or more clients shall not participate in making aggregate settlement of claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, unless each client consents after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless permitted by law and the client is independently represented in making the agreement, or settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

(i) A lawyer related to another lawyer as parent, child, sibling or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon the consent by the client after consultation regarding the relationship.

(j) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for client, except that the lawyer may:

(1) acquire a lien granted by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.8 in its entirety except for the cross references to these rules. Again, over the last five years, the largest category of federal disputes involving attorney conduct centered on conflict of interest rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct*, 3 (Dec. 1, 1995) (forty-six percent of reported federal disputes involved conflict of interest rules). DR 4-101(B)(2) and (3), DR 5-103, DR 5-104, DR 5-106, DR 5-107(A) and (B), DR 5-108 and DR 6-102 are the corresponding provisions of the ABA Code of Professional Responsibility.

RULE 5. CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's

interests are materially adverse to the interests of the former client unless the former client consents after consultation.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client,

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Federal Rules of Attorney Conduct 2 and 5(c) that is material to the matter;

unless the former client consents after consultation.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as Federal Rule of Attorney Conduct 2 and 7 would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as Federal Rule of Attorney Conduct 2 or 7 would permit or require with respect to a client.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.9 in its entirety except for the cross references to these rules. DR 4-101(B) and (C) and DR 5-105(C) are the corresponding provisions of the ABA Code of Professional Responsibility.

RULE 6. IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Federal Rules of Attorney Conduct 4, 5(c) or 6.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer, and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Federal Rules of Attorney Conduct 2 and 5(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Federal Rule of Attorney Conduct 3.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 1.10 almost in its entirety except for cross references to these rules. The rule does not include a federal rule similar to ABA Model Rule 2.2, dealing with the lawyer as an intermediary. No recent federal cases have involved ABA Model Rule 2.2, and the matter should be left to state rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct*, 3 (Dec. 1, 1995) (no reported federal disputes involve Model Rule 2.2). DR 5-105(D) is the corresponding provision of the ABA Code of Professional Responsibility.

RULE 7. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Federal Rule of Attorney Conduct 2.

(c) A lawyer may refuse to offer evidence that, the lawyer reasonably believes is false.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.3 in its entirety except for a cross reference to these rules. To preserve the integrity of the court proceedings, candor toward the tribunal is a matter of significant federal interest, and as such, requires a single uniform standard applicable in all federal courts. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference*, 2-3 (Jan. 8, 1996). DR 7-102 and DR 7-106(B) are the corresponding provisions of the ABA Code of Professional Responsibility.

RULE 8. LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:

(1) the testimony relates to an uncontested issue;

(2) the testimony relates to the nature and value of legal services rendered in the case; or

(3) disqualification of the lawyer would work a substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from so doing by Federal Rules of Attorney Conduct 3 or 5.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.7 in its entirety, except for a cross reference to these rules. Over the last five years, ten percent of reported federal disputes involve lawyer as witness rules. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct*, 3 (Dec. 1, 1995). Thus, a federal lawyer as witness rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provisions of the ABA Code of Professional Responsibility are DR 5-101(B) and DR 5-102.

RULE 9. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting in a criminal or fraudulent act by a client, unless disclosure is prohibited by Federal Rule of Attorney Conduct 2.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 4.1 in its entirety except for a cross reference to these rules. The corresponding provision of the ABA Model Code of Professional Responsibility is DR 7-102.

RULE 10. COMMUNICATIONS WITH PERSONS REPRESENTED BY COUNSEL

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 4.2 in its entirety. In fact, the final rule is likely to reflect an agreement between the U.S. Department of Justice and the Conference of Chief Justices, and be somewhat different from ABA Model Rule 4.2. Over the last five years, twelve percent of reported federal cases involve rules governing communications with represented persons. See Daniel R. Coquillette, *Study of Recent Federal Cases (1990-95) Involving Rules of Attorney Conduct,* 3 (Dec. 1, 1995). Thus, a federal rule is needed to create uniform standards of conduct for attorneys practicing in the federal courts. The corresponding provision of the ABA Code of Professional Responsibility is DR 7-104.

Appendix VII

"Chart III" for the
Report on Local Rules & Regulations
Attorney Conduct in the
Federal Courts (July 5, 1995)

CHART THREE

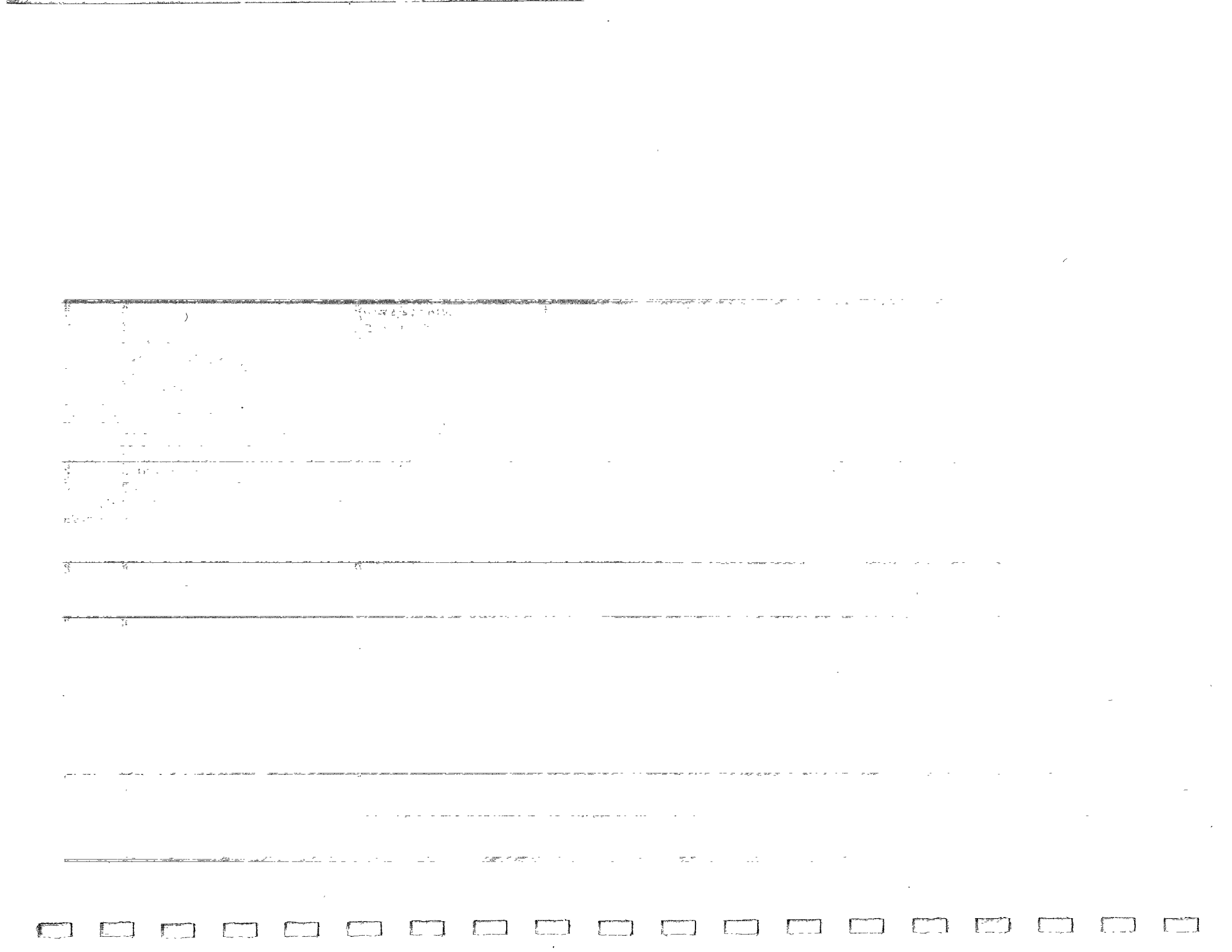
RULES OF PROFESSIONAL CONDUCT IN THE FEDERAL CIRCUIT COURTS

May 24, 1995

Cir.	REFERS TO STATE RULES	REFERS TO A MODEL RULE			No Local Rule	Local Rule: Refers Neither to State Rules nor an ABA Model
		ABA Model Rules	ABA Model Code	Other		
DC App. V, Rule 1	The Code of Prof. Responsibility adopted by the District of Columbia Court of Appeals, as amended fom time to time by that Ct, except as otherwise provided by specific rule of this Ct.					
1st Rule 4(b)	Code of Prof. Responsibility; that code adopted by the highest ct of the state, or commonwealth, as amended from time to time by that ct, except as otherwise provided by specific Rule of this Ct after consideration of comments by rep's of bar associations within the state or commonwealth.					
2nd Rule 46(h)(2)			The ct may refer to the Committee any accusation or evidence of misconduct by way of violation of the disciplinary rules under the Code of Professional Responsibility			
3rd App. D						Adopted the Rules of Disciplinary Enforcement; Rule 2 states that the ct must look to FRAP, the rules and internal operating procedures of the Ct, or other instruction of the ct... or any other conduct unbecoming a member of the court

Cir.	REFERS TO STATE RULES	REFERS TO A MODEL RULE			No Local Rule	Local Rule: Refers Neither to State Rules nor an ABA Model
		ABA Model Rules	ABA Model Code	Other		
4th					Internal Operating Procedure Rule 46.6 (a)(3): Rules of Prof. Conduct or Resp. in effect in the state or other jurisdiction in which the atty maintains his or her principal office, the FRAP, the local rules and internal operating procedures of this Ct, or orders or other instructions of this Ct.	
5th					No Local Rule: "it is longstanding court practice to look to and follow the ethical rules adopted by the highest court in the state of the atty's domicile, while always being mindful of the ABA Model Rules" (clerk's office)	
6th Rule 32(b)		The ct may impose discipline on any member who engages in conduct violating the Canons of Ethics or the Model Rules of Professional Conduct		The ct may impose discipline on any member who engages in conduct violating the Canons of Ethics or the Model Rules of Professional Conduct		
7th App. III						Standards of Prof. Conduct within the 7th Judicial Circuit

Cir.	REFERS TO STATE RULES	REFERS TO A MODEL RULE			No Local Rule	Local Rule: Refers Neither to State Rules nor an ABA Model
		ABA Model Rules	ABA Model Code	Other		
8th					Internal Operating Procedure Rule II D: attys may be disciplined for failure to comply with FRAP or 8th Cir. Rules. Clerk's office stated that issues are sent to a panel of 8th Cir. judges; determinations made on an case-by-case basis.	
9th					No Local Rule: Ct cites to cases that exist (clerk's office)	
10th Add. III Sect. 2.3	Conduct unbecoming a member of the bar which violates the federal laws, federal statutes, FRAP, rules of this ct, orders or other instructions of this ct, or the Code of Prof. Resp. adopted by the highest ct of any state in which the atty is admitted to practice					
11th Add. VIII Rule 1A	FRAP, the ct's local rules, the ABA Model Rules of Prof. Cond., and the rules of prof. cond. adopted by the highest ct of the state(s) in which the atty is admitted to practice to the extent that those state rules are not inconsistent with the ABA Model Rules of Prof. Cond., in which case the model rules shall govern.	FRAP, the ct's local rules, the ABA Model Rules of Prof. Cond., and the rules of prof. cond. adopted by the highest ct of the state(s) in which the atty is admitted to practice to the extent that those state rules are not inconsistent with the ABA Model Rules of Prof. Cond., in which case the model rules shall govern.				



97-14

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Draft Minutes of the Meeting of June 19-20, 1997
Washington, D.C.

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C. on Thursday and Friday, June 19-20, 1997. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Judge Frank H. Easterbrook
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Alan W. Perry, Esquire
Sol Schreiber, Esquire
Judge Morey L. Sear
Chief Justice E. Norman Veasey
Acting Deputy Attorney General Seth P. Waxman
Judge William R. Wilson

Alan C. Sundberg, Esquire was unable to be present. Mr. Waxman was able to attend the meeting only on June 19. Ian H. Gershengorn, Esquire and Roger A. Pauley, Esquire represented the Department of Justice on June 20.

Supporting the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts; Mark D. Shapiro, senior attorney in that office; and Patricia S. Channon, senior attorney in the Bankruptcy Judges Division of the Administrative Office.

Representing the advisory committees at the meeting were:

Advisory Committee on Appellate Rules -
Judge James K. Logan, Chair
Professor Carol Ann Mooney, Reporter
Advisory Committee on Bankruptcy Rules -
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter
Advisory Committee on Civil Rules
Judge Paul V. Niemeyer, Chair
Professor Edward H. Cooper, Reporter

Several members expressed support for the substance of the proposal. One lawyer-member emphasized that it represented a significant improvement over the earlier draft. **The consensus of the committee, however, was that the subdivision should be returned to the advisory committee for redrafting in light of the comments made during the discussion.**

Informational Items

Professor Capra pointed out that the committee notes to several of the Federal Rules of Evidence contained inaccuracies. The notes had been prepared to support and explain the advisory committee's draft of the rules. But the rules ultimately enacted by the Congress differed in several respects from the committee's version.

He reported, for example, that the advisory committee had reviewed the notes recently and had discovered that references in 21 notes to rules that were not in fact approved by the Congress. In some instances the committee notes were directly contrary to the positions eventually taken by the Congress. Accordingly, the committee notes were a potential trap for unwary attorneys.

He stated that the advisory committee was considering preparing a short list of editorial comments pointing out the discrepancies between the notes and the rules and asking law book publishers to include the comments in their publications of the rules. He explained that the proposed comments would consist of short bullets set forth at each troublesome section of the rules. The members were asked for their initial views of this proposed course of action.

A couple of participants suggested that it might be preferable to inform law book publishers that the committee notes are not meaningful and should no longer be included in their publications. Other participants, however, responded that the notes were a part of the legislative history of the rules and should continue to be made available. Some members suggested that any action that would help clarify the matter for users should be encouraged. Professor Coquillette added that the reporters had agreed to discuss the matter at their working luncheon.

97-14

STATUS REPORT ON THE ATTORNEY CONDUCT STUDY

Professor Coquillette reported that he had completed work on the several background studies of attorney conduct that the committee had requested of him. He pointed out that the last two studies—analyzing the case law under FED. R. APP. P. 46 and bankruptcy cases involving attorney conduct rules—were set forth as Agenda Item 7. He thanked the Federal Judicial Center in general, and Marie Leary in particular, for invaluable assistance in conducting the studies, especially the survey of existing district court practices and preferences. He also thanked Judge

Logan and Professor Mooney for their help in compiling the appellate court study and Patricia Channon for her help on the bankruptcy study. He concluded that the committee had now studied attorney conduct in the federal courts in every meaningful way.

Potential Courses of Action

Professor Coquillette suggested that the committee might wish to consider four possible courses of action regarding attorney conduct:

1. Do nothing.

2. Draft a model local rule on attorney conduct that could be adopted voluntarily by the district courts, and possibly by the courts of appeals.

3. Draft a small number of national rules to govern attorney conduct in the areas of primary concern to bench and bar.

4. Draft both a model local rule and uniform national rules.

He stated that the committee had conducted two special conferences on attorney conduct with knowledgeable lawyers, professors, and state bar officials. At the conferences, the participants had expressed a wide range of diverging views on how best to address attorney conduct issues. There was no clear consensus among the participants as to whether conduct matters should be governed by uniform national rules or by local court rules. Nevertheless, the one thing that all the participants agreed upon was that the present system was deficient in several respects and that the rules committees should take some kind of action.

He pointed out that the principal advantage of national rules is that they would set forth a uniform, national standard applicable in all federal courts. National rules, moreover, would have the benefit of public comment and national debate under the Rules Enabling Act process. On the other hand, a model local rule could be adopted more expeditiously and would not have to be submitted to the Congress. He noted that the recent Federal Judicial Center survey had shown that 30% of the courts favored national rules on attorney conduct, while 62% favored a local-rule approach. He added that, to guide the committee's deliberations, he had included in the agenda materials samples of: (1) a model local rule for the courts of appeals; (2) an amended version of FED. R. APP. P. 46; and (3) uniform federal rules of attorney conduct.

The members discussed generally the advantages and disadvantages of each approach. Several members emphasized that all attorneys as a matter of policy should be governed by the conduct rules of the states in which they are licensed to practice. They added, however, that it might be appropriate to carve out a very limited number of exceptions for federal lawyers that would govern areas where there were overriding federal interests.

Concerns of Federal Lawyers

Mr. Waxman pointed out that federal lawyers face uncertainty in their practice and need, as a minimum, a clear federal law to govern conflicts between jurisdictions. He added that federal law was needed in certain limited situations that impacted on the work of federal attorneys. Chief Justice Veasey responded that the Department of Justice's interest in uniformity was understandable. Nevertheless, state bars also want uniformity for all lawyers in the state. There should not be one set of conduct standards in the state courts and a different standard for the federal courts of that state.

Mr. Waxman was asked which conduct issues were of particular concern to the Department of Justice and federal lawyers. He responded that there were no problems with the rules governing attorney conduct within a court setting. Rather, the Department's concern was limited to areas where state ethical rules reach, or purport to reach, conduct by federal prosecutors and other attorneys conducting investigations outside the court. These include such matters as contacts with represented parties, subpoenas directed to attorneys, and the presentation of exculpatory evidence to grand juries.

Concerns in Bankruptcy Cases

Professor Coquillette explained that attorney conduct in the bankruptcy courts raised certain unique problems. The local rules of the bankruptcy courts generally adopt the rules of the district courts. Nevertheless, actual practice in the bankruptcy courts is very different from that in the district courts. Bankruptcy judges usually look for guidance on matters of attorney conduct to the Bankruptcy Code and to the common law of bankruptcy. There are, he said, serious differences among the bankruptcy courts in applying these laws and a lack of clear and specific conduct case law and guidelines. He recommended that further research be conducted on attorney conduct issues and practices in the bankruptcy courts.

Judge Duplantier reported that the Advisory Committee on Bankruptcy Rules had a subcommittee in place that was considering attorney conduct issues in bankruptcy cases. Professor Resnick stated that contemporary bankruptcy practice—with thousands of creditors and claimants in an individual case—raises a number of specialized conduct issues that may not be addressed adequately by existing state rules or by model local court rules. He pointed out, for example, that the Bankruptcy Code itself defines a "disinterested person," and it requires court approval of certain appointments. The statutory definition, he said, was troublesome and had been interpreted in different ways by the various courts of appeals. He also noted that the advisory committee was considering potential amendments to FED. R. BANKR. P. 2014, which requires an attorney, or other professional person, to disclose certain information to the court as part of the appointment process.

Committee Action

Professor Hazard moved that the committee begin drafting rules, identifying the problems, and eliciting discussion.

Judge Stotler concluded that there was a consensus among the committee members that work should begin on drafting a set of national rules providing that state law governs attorney conduct in the federal courts except in a few limited areas, such as certain investigatory functions and certain aspects of bankruptcy practice. She asked Professor Coquillette to continue with the work of drafting potential rules and making presentations on attorney conduct issues to the advisory committees.

97-14

POSTING LOCAL RULES AND OFFICIAL BANKRUPTCY FORMS ON THE INTERNET

Mr. Rabiej reported that courts are required by statute and rule to send copies of their local rules to the Administrative Office. The AO maintains the rules in loose-leaf binders in its library. They are not readily available to the public.

He stated that the rules office intends to begin posting the local rules on the Internet as a service to public. He added that the office had also proposed posting the official bankruptcy forms on the Internet.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker, chair of the subcommittee, reported that the subcommittee had met with Professor Coquillette and had drafted a short set of proposed guidelines designed to expedite the process of reviewing proposed amendments for style. He pointed out that the advisory committees and their reporters faced extremely short deadlines for completing drafts of proposed amendments and committee notes.

Judge Parker said that the guidelines recommended that drafts be submitted by the respective reporters to the rules office in the AO at least 30 days in advance of an advisory committee meeting. The rules office immediately would send copies to the advisory committee, the style subcommittee, and Mr. Garner, the style consultant. Mr. Garner would then coordinate and consolidate the comments of the style subcommittee within 10 days and return them to the advisory committee reporter.

The reporter would then have 10 days to consider the comments of the style subcommittee, incorporate those he or she deemed appropriate, and return a revised draft to the rules office for transmission to the advisory committee members. Accordingly, the advisory

ITEM NO. 97-16

April 8, 1996

TO: Director Ralph Mecham

FROM: Judge J. Clifford Wallace

RE: Jurisdiction of the Federal Circuit

I freely confess that I strongly believe that federal judges should be generalist judges, and I oppose specialty courts for the federal system. Why? Because our caseload is relatively small (less than 2% of the nation's litigation), deals only with federal issues, and law areas are never cabined alone -- there is always an overlap by jurisdiction or effect on the federal system. Thus, it is no surprise I opposed exclusive appellate jurisdiction in the Federal Circuit of patent cases. Patents deal with the national economy and intersect with other issues -- they should remain in the regular, general jurisdiction courts of appeals.

The judges of the Federal Circuit are fine judges -- but I would eliminate this part of the jurisdiction of the Federal Circuit. My position is institutional, not personal.

The Ninth Circuit recently decided an antitrust case that had a patent issue, Hydranautics v. FilmTec Corp., 70 F.3d 533 (9th Cir. 1995) (Hydranautics). A few months earlier the Federal Circuit decided a parallel appeal of the very same case. Apparently, the circuits' appellate jurisdictions overlapped, thereby allowing appellants to appeal the same case to two different courts, getting two bites from the proverbial apple.

This bizarre result points out yet another procedural problem which the Federal Circuit's exclusive patent jurisdiction creates. The Hydranautics situation is not a freak case, but rather it is symptomatic of the intractable jurisdictional and administrative difficulties which plague the Federal Circuit and which support, I think, abolition of its patent jurisdiction.

Without getting bogged down in this case's convoluted history, I will outline the highlights. In April 1988, FilmTec sued Hydranautics for patent infringement in the United States District Court for District of Delaware; the action was transferred to the Southern District of California. Appeal was taken to the Federal Circuit. Skipping a few steps, after the Federal Circuit gave a ruling on the patent claim adverse to FilmTec, see FilmTec v. Hydranautics, 982 F.2d 1546 (Fed. Cir. 1992), Hydranautics sued in March 1993 in the District Court for the Southern District of California, asserting an antitrust violation resulting from FilmTec's allegedly fraudulent and monopolistic patent litigation. Hydranautics brought its action concurrently with a motion to amend its answer to FilmTec's original patent infringement litigation to allege the antitrust violations.

The district court dismissed Hydranautic's antitrust violation claim and denied the motion to amend its answer to the patent infringement suit. Hydranautics appealed the antitrust dismissal to our court, basing its jurisdiction on its antitrust counterclaim. Hydranautics also appealed to the Federal Circuit,

basing jurisdiction on the district court's denial to amend to allege antitrust violations to its answer to the patent infringement suit. Thus, Hydranautics received two appellate determinations of the same issue.

Its strategy paid off. The two appellate courts in this close case arrived at two different results, one of which was favorable to Hydranautics. In FilmTec v. Hydranautics, 67 F.3d 931 (Fed. Cir. 1995), the Federal Circuit affirmed the district court's dismissal. It opined that Hydranautics should have been allowed to amend its answer to include the antitrust claim; however, it concluded that such a claim would be futile. Because the patent infringement suit was not a sham, the Federal Circuit ruled that the Noerr-Pennington doctrine shielded FilmTec against the antitrust litigation.

In contrast, the Ninth Circuit in Hydranautics reversed the district court's dismissal of Hydranautic's antitrust claim. We held that if FilmTec obtained its patent through intentional fraud, there could be antitrust liability for predatory patent litigation. We remanded on the question of fraud. We distinguished the Federal Circuit's decision by asserting that in that case "there is no dispute over the facts." 70 F.3d at 538 n.1. However, in the case presented to our court, there were disputed facts -- or, at least, the panel perceived that there were.

Thus, Hydranautics received appellate review of its antitrust claim in two different courts. By exploiting the

jurisdictional peculiarities of the Federal Circuit, Hydranautics doubled its chances of a favorable result. The Federal Circuit assumed jurisdiction on the basis of an amendment to an answer to a patent infringement claim, and the Ninth Circuit assumed jurisdiction over the same issue, simply characterized as a separate claim. The Hydranautics case points to a true difficulty in Federal Circuit jurisdiction. If a particular claim can be characterized both as an amendment to an answer and as a separate, permissive counterclaim, and if the facts allow a delayed amendment and counterclaim, then the appellant can essentially appeal the same issue to two different appellate courts.

The situation in Hydranautics is not necessarily unique to antitrust claims. The Federal Circuit exercises jurisdiction over claims which are often pendent to patent claims like Lanham Act, copyright, and contract and property claims. See 8 Moore's Federal Practice, ¶ 110.31[2] at 372-73 (2d ed. 1995). These other types of claims could easily result in a Hydranautics-like situation. For instance, the Federal Circuit has exercised jurisdiction over copyright claims even when they are the only claims remaining in an original suit. Abbott Labs. v. Brennan, 952 F.2d 1346, 1350 (Fed. Cir. 1992) ("although the [patent] issue was not appealed, the appeal of the other issues was correctly taken to the Federal Circuit"). One could easily imagine a similar copyright case -- in which prior determination of the patent claim justified a delayed permissive copyright counterclaim and amended answer -- that would result in appellant's parallel

appeals to both the general jurisdiction and Federal Circuits.

Moreover, as in the Hydranautics situation, the Federal Circuit has shown little inclination to shift appellate jurisdiction back to the general jurisdiction circuit courts to avoid problems of judicial administration and appellate procedure. Indeed, without a rule or statutory change, it may be that the Federal Circuit would not have the discretion to do so. See 9 Moore's Federal Practice, ¶ 110.31[2]; see also Christianson v. Colt Indus. Oper. Corp., 486 U.S. 800, 818 (1988) (Christianson). While prudential considerations often lead courts to limit their jurisdiction to some degree, the Federal Circuit's jurisdiction is, by statute, not discretionary. In addition, the Federal Circuit already has precedent allowing it to reconsider jurisdiction on the basis of amended complaints. See Gronholz v. Sears, Roebuck, 836 F.2d 515 (Fed. Cir. 1987) (transferring appeal back to regular circuit court of appeals after parties agreed, by stipulation, to amend the original complaint, dropping the patent claim). Therefore, the Federal Circuit appears unwilling or unable to resolve this Hydranautics problem through prudential jurisdictional rulings of its own.

Courts and commentators have recognized that the Federal Circuit creates forum shopping opportunities. Theoretically, the Federal Circuit is to assume jurisdiction in limited circumstances only over those cases with "outcome[s] . . . substantially governed by considerations unique to the field of patent law." Robert L. Harmon, Patents and Federal Circuit 631 (3d ed. 1994),

citing In re Innotron Diagnostics, 800 F.2d 1977 (Fed. Cir. 1986). However, actual practice often does not measure up to that theory, allowing litigants to manipulate jurisdiction.

The Supreme Court has held, in its lead case on the jurisdiction of the Federal Circuit, that only one of a plaintiff's claims needs be a patent claim to confer jurisdiction. See Christianson, 486 U.S. at 809; see Joseph R. Re, Federal Circuit Jurisdiction Over Appeals from District Court Patent Decisions, 16 AIPLA Q.J. 169 (1988). There are exceptions to this version of the "well-pled complaint" rule, including the extension of jurisdiction over counterclaims and consolidated cases. Id. at 177-78. The rule creates significant opportunities for forum shopping. At the initial, district court level, parties can forum shop by drafting artful pleadings -- by simply adding or omitting patent claims. See Rochelle C. Dreyfuss, The Federal Circuit: A Case Study in Specialized Courts, 64 N.Y.U. L. Rev. 1, 36-37 (1989) (Dreyfuss) ("The well-pleaded complaint rule does nothing to deter forum shopping . . . [allowing] a plaintiff to maneuver around jurisdictional boundaries."). Both the plaintiff and defendant can play this game, as the Federal Circuit can exercise jurisdiction on the basis of counterclaims. See Schwarzkopf Development Corp. v. Ti-Coating, 800 F.2d 240, 244 (Fed. Cir. 1986) ("[a]djudication of a patent counterclaim is the exclusive province of the federal courts").

The pattern in the Hydranautics case simply adds to this confusion, allowing forum shopping not merely at the pleading

level but at the appeals level. In the normal appeal, there always is a bit of forum shopping to the degree that there is a dispute concerning whether the claim truly is a claim "arising under" the patent laws. Ever since 1819, when the "arising under" became part of the patent law, this question has created considerable confusion. See generally Donald S. Chisum, The Allocation of Jurisdiction Between State and Federal Courts in Patent Litigation, 46 Wash. L. Rev. 633, 648 (1971). Simultaneous appeals can be taken in the hope that the desired-for court rules that the case falls within its jurisdiction. Once a court makes a transfer decision, the Supreme Court has ruled that the sister appellate court must accept the transfer as the law of the case. See Christianson, 108 S. Ct. at 2178; see also Dreyfuss, 64 N.Y.U. L. Rev. at 35 n.205. Thus, a party can appeal a case which only ambiguously involves a patent claim to the court of choice with the hope that it will exercise jurisdiction.

The Hydranautics case creates an extra level of appellate forum shopping whenever a party has the choice either to bring a permissive counterclaim or amend its answer. Under such circumstances, a party can, in effect, choose which court it wants to hear its claims -- or, as in Hydranautics, that party can choose to have two courts hear the same claim.

Taking two appeals to two different courts on the same issue strikes me as both unfair to litigants and wasteful of judicial resources. At the very least, I recommend a revision of the Federal Rules of Appellate Procedure to prevent the recurrence

of the Hydranautics procedural pattern. More broadly, I suggest a reevaluation of the role and purpose of the Federal Circuit. The Hydranautics case is part of a pattern of jurisdictional confusion; rather than furthering uniformity of decisions -- which is the Federal Circuit's primary stated purpose -- these jurisdictional problems, as Hydranautics shows, create inconsistency, at least at the level of the individual case.

I suggest this be referred to the appropriate Judicial Conference of the United States committees.

United States Court of Appeals
for the Federal Circuit

Chambers of
Glenn L. Archer, Jr.
Chief Judge

717 Madison Place, N.W.
Washington, D.C. 20439
Phone: 202-633-5816

May 29, 1996

Honorable Stephen H. Anderson
Chair, Committee on Federal-State
Jurisdiction
Judicial Conference of the United States
4201 Wallace F. Bennett Federal Building
125 South State Street
Salt Lake City, Utah 84138-1102

Dear Judge Anderson:

I noticed the item on the agenda for the June 20-21 meeting of your Committee entitled "Review of the Jurisdiction and Role of the United States Court of Appeals for the Federal Circuit." Being curious to know how this issue arose, I obtained a copy of Senior Judge Clifford Wallace's letter to Ralph Mecham that was forwarded to your Committee. This will respond to his discussion and perception of the *FilmTec* case, which I and other judges of the Federal Circuit view as an aberration.

First, however, I would call your attention to the fact that Judge Wallace indirectly raised the question of the Federal Circuit's patent jurisdiction (and perhaps its existence) in connection with the Judiciary's Long Range Plan for the Federal Courts when it was in proposed form. Judge Wallace objected to the recognition and approval given the Federal Circuit by Recommendation 17(b) (Recommendation 16(b) in the final Long Range Plan) and asked that this matter be given further study. *See* Report of Proceedings of the Judicial Conference of the United States (March 14, 1995), p. 23. Under the procedures then in place, Recommendation 17(b) was referred to your Federal-State Jurisdiction Committee, which reported back to the September 1995 meeting of the Judicial Conference that no change should be made to the Long Range Planning Committee's Recommendation 17. Report of Committee on Federal-State Jurisdiction (September 1995), p. 29. Judge Wallace opposed your Committee's report for no change but the Judicial Conference voted to support your Committee. Report of the Proceedings of the Judicial Conference of the United States (September 19, 1995),

p. 45. Thus, it was surprising to me that essentially the same issue that was decided by the full Judicial Conference, following review by your committee, would be considered again by your committee at the insistence of the same judge less than a year later. Nonetheless, I offer the following comments in response to Judge Wallace's letter of April 8, 1996.

The *FilmTec* case has a complicated history. Its facts are not different from those that Judge Wallace describes, but his conclusions and his related comments about the Federal Circuit are off-base.

In the Federal Circuit's third decision in the *FilmTec* case, we upheld a decision by the district judge to deny amendment of the answer to add an antitrust counterclaim on the ground that it would have been futile, citing the Noerr-Pennington doctrine. *FilmTec Corp. v. Hydranautics*, 67 F.3d 931, 937-39 (Fed. Cir. 1995). The Ninth Circuit, a month later, when it might have deferred to the Federal Circuit's decision, reversed the dismissal by the same district judge of a separate antitrust complaint based on the same contention that the patent was fraudulently procured. It also held that the antitrust claim was not a mandatory counterclaim in the patent suit, even though it was based on fraudulent procurement of the patent. It can be argued that the Ninth Circuit was wrong on both counts and, therefore, erroneously remanded the case for factual development. But regardless of who was correct – the Ninth or Federal Circuit – the two parallel appeals on the same issue in *FilmTec* should not cause concern about the Federal Circuit's jurisdiction.

Judge Wallace refers to "intractable jurisdictional and administrative difficulties which plague the Federal Circuit." I would think that we are in a better position to address whether such difficulties "plague" us. Clearly they do not. The *FilmTec* case is a rarity – a sport if you will. We cannot recall any other similar situation occurring since the Federal Circuit was created in 1982.

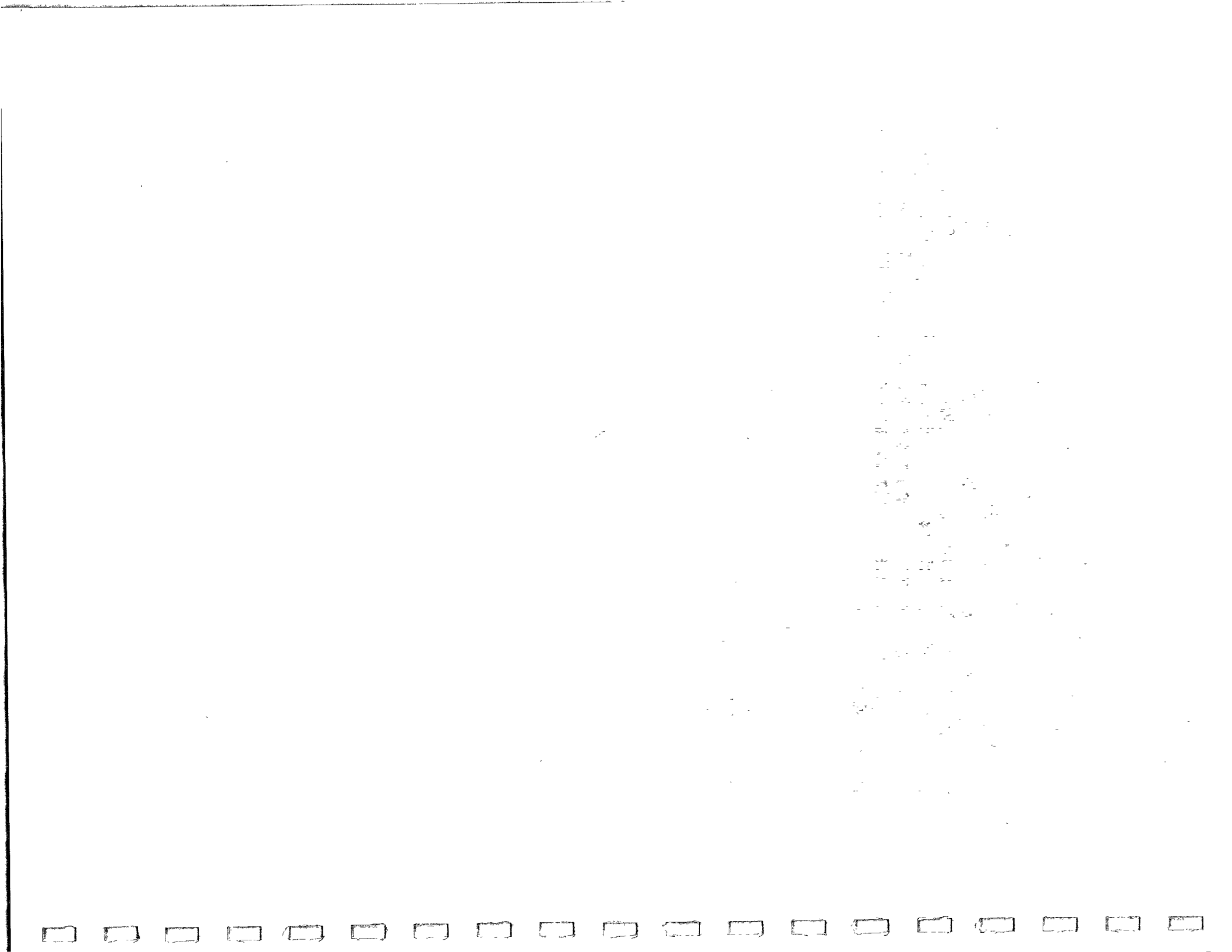
Judge Wallace states that the Federal Circuit has created "forum shopping opportunities." This statement is wrong. One case does not support his conclusion that there is forum shopping. Even if the system were to create an occasional conflict, that would not overcome the clear advantages that have been achieved since the Federal Circuit was created. The Federal Circuit was created to eliminate the extensive forum shopping that existed prior to the court's formation and the near unanimous opinion of those who litigate before the court has been that forum shopping is in fact a thing of the past. There are no longer pro-patent circuits and anti-patent circuits. And the potential for forum shopping on non-patent issues is deflated by the Federal Circuit's consistent adoption of regional circuit law for "substantive legal issues over which we do not have

exclusive subject matter jurisdiction." *Payless Shoesource Inc. v. Reebok Int'l. Ltd.*, 998 F.2d 985, 987 (Fed. Cir. 1993). *See also, e.g., Brooktree Corp. v. Advanced Micro Devices, Inc.*, 977 F.2d 1555, 1561 (Fed. Cir. 1992) (using Ninth Circuit law on issues under the Semiconductor Chip Protection Act); *Carroll Touch, Inc. v. Electro Mechanical Systems, Inc.*, 15 F.3d 1573, 1583 (Fed. Cir. 1993) (using Seventh Circuit law on antitrust issue); *Atari, Inc. v. JS&A Group Inc.*, 747 F.2d 1422, 1437-40 (Fed. Cir. 1984 (*in banc*) (using Seventh Circuit law on copyright issues). As a result, the patent bar and the corporate world, which lobbied intensely for the creation of the Federal Circuit, are not seeking to change or remove the Federal Circuit's patent jurisdiction. To my knowledge, only Judge Wallace is trying to do this and I am confident that those who may share his views are few.

Finally, Judge Wallace recommends a revision of FRAP, without specifying any particular revision, and a reevaluation of the role and purpose of the Federal Circuit. I submit that any objective reevaluation would affirm the wisdom of its creation. I also doubt that a rule revision is needed to respond to one strange case. But whether that is needed is quite a different matter from destroying the very basis on which the Federal Circuit was created and on which it has achieved significant success.

Sincerely,

Glenn L. Archer, Jr.
Chief Judge



ITEM NO. 97-17

SETTLEMENT PROGRAM
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
121 SPEAR STREET
P.O. BOX 193939
SAN FRANCISCO, CALIFORNIA 94119-3939

TEL (415) 744-9900
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DAVID E. LOMBARDI, JR.
DIRECTOR AND
CHIEF CIRCUIT COURT MEDIATOR

CLAUDIA L. BERNARD
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ANN JULIUS
DANA L. CURTIS
C. LEWIS ROSS
CIRCUIT COURT MEDIATORS

November 12, 1996

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Problem with Current FRAP 4(a)(4)

Dear Mr. McCabe:

I am a court mediator with the Ninth Circuit Court of Appeals. I am writing in my personal rather than official capacity to bring to your attention what I think is a problem with the current formulation of FRAP 4(a)(4).

One of the recent improvements to the rule was the addition of FRCP 60 motions filed within 10 days of entry of judgment to the list of tolling motions. I assume that this change was motivated by a desire to obviate the need for courts of appeals to determine in the timeliness context whether a motion expressing dissatisfaction with a judgment was more like a FRCP 59 motion or more like a FRCP 60 motion. I applaud the endeavor. Unfortunately, because the counting rules are different for FRAP and FRCP, the amendment as crafted doesn't quite solve the problem.

For an FRCP 59 motion to toll the time to appeal, it must be "timely." According to Rule 59, the motion must be filed "no later than 10 days after entry of judgment." FRCP 6 states that in the computation of periods of less than 11 days, Saturdays, Sundays and legal holidays are excluded. As a result, the 10 day period in Rule 59 can be anywhere from 14 to 17 calendar days.

For an FRCP 60 motion to toll the time to appeal, it also must be filed "no later than 10 days after entry of judgment." Unfortunately, this 10 day period is set out in FRAP 4 and, as a result, FRAP 26 governs the computation of time. Under FRAP 26, "10 days" means 10 calendar days, not 10 court days.

The result appears to be that where a post-judgment motion is filed after 10 calendar days but within 10 court days, the court of appeals is going to have to determine whether the motion is a Rule 59 motion or a Rule 60 motion in order to decide whether it tolls the time to appeal. I admit that this is probably not a huge practical problem, but it does create an unnecessary complication in the appellate process.

I see two staight-forward ways to address the problem. The first is to move the 10 day time constraint for filing a tolling Rule 60 motion into the FRCP. Then the same counting rules would apply to both 10 day periods.

The more desirable approach from my perspective would be to have the same counting rules for FRAP and FRCP. The difference is a frequent source of confusion and serves no purpose that I can understand. My choice would be for the FRAP rules, which I find more intuitive. In most cases under FRAP, "7 days" is less than "10 days" is less than "14 days." Under FRCP, "10 days" is always equal to or greater than "14 days."

Another change that would at least ameliorate the situation is to amend FRAP 4 to specify that FRCP 60 motions filed within 14 days toll the time to appeal. With that change, only a truly freakish set of circumstances would require a court to differentiate between Rules 59 and 60 for tolling purposes.

I appreciate your hard work to make the rules of federal practice more rational. I hope this furthers your efforts. I note again that this is not an official position of the Ninth Circuit -- only my personal perspective.

Sincerely,

Chris Goelz

ITEM NO. 97-18

97-18

DRAFT

MINUTES OF THE
ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 3 & 4, 1997

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Judge Logan introduced Judge Motz and welcomed her to the Advisory Committee.

Approval of Minutes

The minutes of the April 1996 meeting, and of the May 1, 1996, telephonic meeting, were approved without any additions or corrections.

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Rule 1

The Advisory Committee recommended making no post-publication changes in Rule 1. The Reporter had recommended changing Rule 1(a)(2) to state that "[w]hen these rules provide for making and filing a motion or other document in the district court, the procedure must comply with the practice of the district court." The Committee disagreed. To the extent that "making" is distinguished from "filing," it refers either to service - as in making a motion by serving it - or it refers to making an "oral" motion. To the extent that the Appellate Rules are concerned with district court practice, the rules deal only with the filing of papers in the district court.

Judge Easterbrook asked that Rule 1(b) be placed on the Committee's agenda for future consideration. He noted that it says that the appellate rules "do not extend or limit the jurisdiction of the court of appeals." Yet, the Supreme Court has clearly stated that failure to comply with Rules 3, 4, or 5 creates a jurisdictional defect. The recent amendments to the Rules Enabling Act permit the rules to define finality for purposes of appeal. 97-18

Rule 2

The Advisory Committee approved the minor style changes suggested by the Reporter.

Rule 3

The Advisory Committee approved one major change in Rule 3 and several minor changes.

The major change is to incorporate the sole remaining paragraph of Rule 3.1 as subparagraph 3(a)(3) and move existing subparagraph (3) to subparagraph (4).

Several commentators suggested that paragraph (b) of the published rule blurred the distinction between joint and consolidated appeals. The Committee rejected the suggested language aimed at clarifying the distinctions. In particular, the Committee found the description of consolidated cases misleading for two reasons: first, appeals from a single judgment may be consolidated rather than joined when the interests of the appellants are such that joinder is not practicable; second, the extent to which consolidated appeals functions as a single appeal is unclear. The Committee also decided to alter a provision, contained in the published version, requiring that a court "order" consolidation. The Committee agreed that consolidation should be court initiated, but that consolidation could be accomplished by court rule rather than by court order.

ITEM NO. 97-19

97-19

DRAFT

MINUTES OF THE
ADVISORY COMMITTEE ON APPELLATE RULES
APRIL 3 & 4, 1997

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judgment has been entered; in contrast, notice from a judge that the judge intends to enter judgment is not sufficient.

Rule 4(b)(1)(B)(ii) was changed back to the language in the existing rule so that it says the government may appeal within 30 days after entry of judgment or "the filing of a notice of appeal by any defendant." The published rule would have permitted the government to appeal within 30 days after "the filing of the last defendant's notice of appeal." The published version eliminated an ambiguity created by the term "any defendant." Requiring the government to appeal within 30 days after the filing of a notice by "any defendant" could mean that the government may file its notice of appeal as to all defendants as late as 30 days after the last notice is filed by any defendant. Conversely, it may mean that the government must file its notice within 30 days after the first defendant files a notice of appeal. The published version, however, created its own problems. One of the commentator's noted that a co-defendant can plead guilty and begin serving time perhaps a year or more prior to the sentencing of another co-defendant. The published language could permit the government to simultaneously appeal both sentences if the second defendant appeals. The government's appeal from the first sentence could, therefore, be filed long after the first defendant began serving time. 97-19

Before deciding to return to the current language, the Committee considered, and ultimately rejected, alternative solutions to the problem. The 4(b)(1)(B)(ii) problem is not solved by limiting the government's filing time to 30 days after judgment or "the filing of a notice of appeal by the defendant or, if there were multiple defendants, the filing of the last notice of appeal filed by any of the defendants who were tried together and whose judgments were entered on the same day." That solution is problematic because defendants who are tried on the same day often are not sentenced simultaneously, nor are their judgments entered by the clerk on the same day. Eliminating the requirement that the judgments be entered on the same day reopens the possibility of the government being able to appeal as much as a year, or more, after a co-defendant's judgment has been entered when there is a significant delay in the sentencing of one co-defendant. Another alternative considered was to allow the government to appeal within 30 days after the filing of the last notice of appeal by any of the defendants whose appeals were entered within 30 days of another co-defendant's appeal. The problem with that solution is that if there are more than two co-defendants there is still a rolling window. Appeal one could be followed by 30 days later by appeal two and appeal three could follow 15 days later, etc. As the discussion became increasingly convoluted, the Committee unanimously decided to return to the "ambiguous" existing language and to place the problem on Committee's docket for later thorough discussion.

Two commentators opposed the change in (c) that would require an inmate to use the special internal mail system for legal mail, if there is such a system. The

ITEM NO. 97-20

DRAFT

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A 3-calendar-day period is also used in Rules 25(c) [dealing with manner of service] and 26(c) [dealing with a party's additional time to act after service by mail or commercial carrier].

Rule 26

The Advisory Committee's discussion of the meaning of "calendar days" in Rule 25 led the Committee to also recommend amendment of Rule 26(a)(2) to provide that Saturdays, Sundays, and legal holidays are not excluded when a period is stated in calendar days.

The discussion again surfaced about whether Rule 26(a)(2) should be amended to exclude intermediate Saturdays, Sundays, and holidays whenever a period is less than 11 days. That would make the appellate rule consistent with the civil rule. It was decided that such a substantive change should not be made at this point, but that it should be considered in the future.

Rule 26.1

The only changes suggested in Rule 26.1 were adopted following the publication of the rule in September 1995. The changes were tentatively approved by the Standing Committee in summer 1996.

The Committee Note developed in conjunction with the prior publication will be used. Minor modifications have been made so that it is consistent with the other notes in the style package.

Rule 27

Rule 27(a)(3)(A) was amended to clarify that if a court intends to grant a motion authorized by Rules 8, 9, 18, or 41, but the court does not want to await a response to such a motion, the court must give reasonable notice to the parties before the court grants the motion. The Committee agreed that it is implicit in the rule that a court may deny a motion at any time; a court need not await a response or give notice prior to denying a motion. There was discussion about the advisability of adding a sentence to Rule 27(a)(3)(A) stating that a motion may be denied at any time. It was decided that because of the substantive nature of the recommendation, consideration of any such language should be taken up at a later time. Because Rule 27(b) states that a court may act on a motion for a procedural order without awaiting a response, the reference in 27(a) to procedural orders was omitted.

97-20

It was also agreed that a court may act without awaiting a reply to a response. In an effort to remove any implication that there is an absolute right to file a reply

ITEM NO. 97-22

97-22

DRAFT

MINUTES OF THE ADVISORY COMMITTEE ON APPELLATE RULES APRIL 3 & 4, 1997

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There was discussion about the mixture of singular and plural nouns in the title of Rule 32. The Advisory Committee voted to make them all plural, but noted that the title of the rules do not consistently use either singulars or plurals. The Committee asked Bryan Garner to assume review of the titles.

The Advisory Committee noted that the Committee Note will need to be amended to conform to the changes made in the text of the rule. The Reporter was also asked to try to incorporate some of the examples found in the seventh circuit's explanation of its rule.

Rule 33

No changes were recommended in Rule 33.

Rule 34

The Reporter's memorandum suggested that any statement about oral argument must be included in the party's brief. One member objected to the suggestion, stating that the parties are in a better position to assess the need for oral argument after the briefs are filed. Another member suggested that Rule 34 should authorize local rules that require a party's principal brief to state whether the party requests oral argument. There was discussion about whether such a rule would violate Rule 32(d). Rule 32(d) restricts adoption of local rules concerning "form" and presumably would not preclude such a requirement.

97-22

The Committee decided not to direct when or how the statement should be filed. The Committee did recommend, however, a number of amendments to Rule 34(a). First, it was decided to authorize local rules that require parties to file a statement concerning oral argument. Second, the language was altered to make it clear that the statement may indicate that the parties do not want oral argument. Third, the first sentence of 34(a) was made a separate paragraph (1).

Because some members believed that a uniform federal rule governing the time and placement of statements concerning oral argument would be preferable to authorizing local rules, it was suggested that the consideration of a uniform federal rule should be added to the Committee's table of agenda items.

Judge Parker noted that subdivisions (a), (b), (d), (e), and (f) refer to a "party" but subdivisions (c) and (g) refer to "counsel". If an unrepresented party is not allowed to argue or bring physical exhibits to the argument, the distinctions are correct. But if unrepresented parties are allowed to so act, the distinctions may be problematic. Changing both (c) and (g) to passive voice would eliminate identification of the actor. But because an unrepresented party who presents the oral argument is acting as

ITEM NO. 97-23

97-23

DRAFT

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counsel, and because the language distinctions have not caused any difficulties, the Advisory Committee agreed not to make changes in either (c) or (g).

Another problem that sometimes arises under Rule 34(g) is whether, during oral argument, an attorney may use a chart or diagram that has not been admitted into evidence. Disputes have arisen about whether the use of such a chart is an attempt to introduce new evidence at oral argument. A suggestion was made that Rule 34 should state that an exhibit that is not already a part of the record may be used only with consent of the other party, or with the court's permission. Most members of the committee understand the current rule to allow use of charts, etc, that have not been admitted into evidence. The fact that the rule permits the circuit clerk to destroy the exhibits if counsel does not reclaim them within a reasonable time indicates that the rule refers, at least in part, to items not admitted into evidence in the trial court. The circuit clerk may not, of course, destroy evidence. The Committee decided to add the issue to its table of agenda items. 97-23

Rule 35

Most of the recommended changes in this rule are the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication, and the Advisory Committee's post-publication recommendations, were tentatively approved by the Standing Committee in July 1996.

The only additional changes recommended were in subdivision (f) and some other minor style changes.

Within the last year new legislation was passed concerning participation of a senior judge in an en banc hearing. Congress, in Pub. L. 104-175, amended 28 U.S.C. § 46(c). As amended § 46(c) provides:

> A court in banc shall consist of all circuit judges in regular active service or such number of judges as may be prescribed in accordance with section 6 . . .; except that any senior circuit judge of the circuit shall be eligible
>
> (1) to participate, at his election and upon designation and assignment pursuant to section 294(c) of this title and the rules of the circuit, as a member of an in banc court reviewing a decision of a panel of which such judge was a member, or
>
> (2) to continue to participate in the decision of a case or controversy that was heard or reheard by the court in banc at a time when such judge was in regular active service.

The statutory language governs which judges can participate in an en banc

ITEM NO. 97-24

DRAFT

97-24

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Rule 36

The Advisory Committee recommended amendment of the title of Rule 36 so that it becomes: "Entry of Judgment; Notice".

Rules 37 and 38

No changes were recommended in either Rules 37 or 38. A commentator stated that Rule 38 violates the First Amendment because the right to petition the government for redress of grievances is not limited to non-frivolous petitions. Members of the committee noted, however, that the Supreme Court has decided that there is no constitutional right to file a frivolous law suit.

Rule 39

The Advisory committee recommended minor word changes in Rule 39. One commentator suggested amending the rule to clarify whether the court of appeals or the district court determines attorney's fees that are awarded as costs on appeal. Because such a change would be substantive, the Advisory Committee placed that suggestion on its agenda for future consideration.

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Rule 40

The only change recommended was to amend the rule so that it consistently refers to "panel rehearing" rather than simply to "rehearing." Some time was spent comparing Rules 35 and 40 and any possible unintended effects flowing from the amendments of those two rules. One member asserted that until now Rule 40 governed both petitions for panel rehearing and for rehearing en banc. Another disagreed. Previously, Rule 35 governed "suggestions" for rehearing en banc and Rule 40 governed only "petitions" for rehearing. Given the fact that under the amended rules both panel rehearings and rehearings en banc will be requested in "petitions" the Advisory Committee concluded that it would be best to amend Rule 40 so that it clearly governs only "panel rehearings".

The difference between 35(e) and 40(a)(3) was discussed. Rule 35(e) says that a response to a petition may not be filed unless the court orders a response. Rule 40(a)(3) also says that an answer may not be filed absent court permission, but that a panel rehearing ordinarily will not be granted in the absence of the court's request for an answer. The consensus was that the distinctions are appropriate. When an en banc rehearing is granted, it is not as important that the winning party have an opportunity to speak before the court grants the rehearing. In those instances the winner will be heard during the rehearing. If a panel rehearing is granted, however, the court usually enters a new dispositive judgment and the winning party should have an opportunity to

ITEM NO. 97-25

DRAFT

97-25

MINUTES OF THE ADVISORY COMMITTEE ON APPELLATE RULES APRIL 3 & 4, 1997

Judge James K. Logan, Chair of the Advisory Committee, called the meeting to order at 8:40 in the conference room of the Thurgood Marshall Federal Judiciary Building. The following Advisory Committee members were present: Judge Will Garwood, Judge Alex Kozinski, Judge Diana Gribbon Motz, Mr. Michael Meehan, Mr. Luther Munford, and Mr. John Charles Thomas. Mr. Robert Kopp was present representing the Solicitor General. Judge Stephen Williams, whose term on the Advisory Committee had recently expired, was in attendance. Judge Alicemarie Stotler who chairs the Standing Committee, Judge Frank Easterbrook who is the liaison from the Standing Committee, Judge James Parker who chairs the Standing Committee's Subcommittee on Style, and Professor Daniel Coquillette who is the Reporter for the Standing Committee were all present, as was Mr. Joseph Spaniol who is a consultant to the Standing Committee. Mr. Patrick Fisher, who represents the clerks, was present. Ms. Judy McKenna, from the Federal Judicial Center, and Mr. John Rabiej, of the Administrative Office, were also present. Mr. Bryan Garner was present for portions of the meeting via speaker phone connection.

Judge Logan introduced Judge Motz and welcomed her to the Advisory Committee.

Approval of Minutes

The minutes of the April 1996 meeting, and of the May 1, 1996, telephonic meeting, were approved without any additions or corrections.

Restylization of the Rules

The primary item on the Committee's agenda for the meeting was consideration of the packet of restyled rules published for comment during 1996. Each member of the Committee received copies of all comments submitted during the publication period. Prior to the meeting the Reporter summarized the comments and made recommendations concerning their implementation.

The reaction to the undertaking was strongly positive. Of the eighteen commentators who offered general observations on the value of the project, all but one was very favorable. The consensus was that substantial improvements had been made in both the language of the rules and in their structure, that the rules are easier to comprehend, and, that they are, as a result, fairer.

be heard before the new judgment is entered.

The possible merger of Rules 35 and 40 was discussed and added to the Committee's table of agenda items. At least one difficulty with the merger was noted: Rule 35 governs initial en banc hearings as well as rehearings en banc. That is the apparent reason for the placement of Rule 35 prior to the rule governing Entry of Judgment (Rule 36) and before Rule 40. 97-25

Rule 41

All but one of the recommended changes were the result of comments submitted following the September 1995 publication of this rule. The amendments suggested in the September 1995 publication and the Advisory Committee's post-publication recommendations were tentatively approved by the Standing Committee at its July 1996 meeting.

The one new change recommended by the Advisory Committee is in Rule 41(d)(2)(B). The change requires a party who files a petition for a writ of certiorari to notify the circuit clerk in writing that the petition has been filed.

Rule 42

No changes were recommended.

Rule 43

The only change recommended was to change "Office-Holder" to "Officeholder" in the caption of 43(c)(2).

Rule 44

No changes were recommended.

Rule 45

The only change recommended was to substitute "under the court's direction" for "under the direction of the court" in 45(b)(2).

Rule 46

A number of language changes were recommended in Rule 46(a)(2). First, the language stating that the form would be "furnished by the clerk" was deleted as

ITEM NO. 97-26

97-26

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALEX KOZINSKI
U.S. CIRCUIT JUDGE

February 18, 1997

(818) 583-7014
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kozinski@mizar.usc.edu

The Honorable James K. Logan
Senior Judge
U.S. Court of Appeals
for the Tenth Circuit
P.O. Box 790
Olathe, Kansas 66051-0790

Dear Judge Logan:

A colleague has proposed several modifications to Rule of Appellate Procedure 28(j); I agree that they are worth the Committee's consideration.

As you know, under Rule 28(j), a litigant who discovers -- or merely decides -- that an authority not cited in his brief is relevant to the case may send a letter to the court "setting forth the citation[]."

We receive such letters in a high percentage of cases. These letters arrive, in some cases, hours or minutes before oral argument. Frequently, the cases themselves are not attached, requiring law clerks to scramble for books or Westlaw printouts. In addition to newly available cases and statutes, the letters sometimes reference materials the party merely overlooked in a previous filing.

The proposed amendments (which could be adopted individually or jointly) are

(1) require the parties to attach copies of the cases or statutes to their letters.

(2) require that, absent extraordinary circumstances, all 28(j) submissions be made at least 24 hours before oral argument;

The Honortable James K. Logan
Senior Judge
U.S. Court of Appeals
for the Tenth Circuit

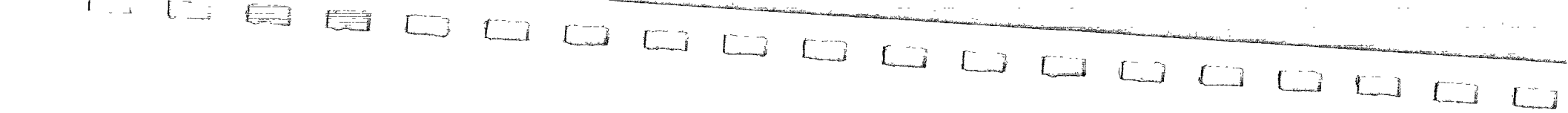
(3) limit 28(j) submissions to materials that became available after the filing of the party's most recent brief.

Sincerely,

Alex Kozinski

AK:FAB/fb

ITEM NO. 97-27



97-21

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97-AP-D
Supplement

May 21, 1997

Our File: 91091

Mr. Peter G. McCabe, Secretary
Committee on Rules of Practice and
Procedure of the Judicial Conference
of the United States
Washington, D.C. 20544

Dear Mr. McCabe:

Thank you for your letter dated May 8.

I missed the April 1996 preliminary draft of the Committee's proposed revision of FRAP Rule 46(a). Thank you for sending me a copy of the Request for Comment published last year.

To be frank, I'm not at all certain what the status is of the High Court for the Trust Territory now that Palau's status has been stabilized. I think it would be prudent for the Committee to inquire of the Solicitor of the Interior Department.

There are <u>two</u> Northern Mariana courts from which appeals may be taken directly to the Ninth Circuit: the District Court and the Supreme Court. This structure would be analogous to the United States District Court and the Supreme Court of Puerto Rico if appeals from both were taken to the First Circuit (which, of course, is not the case since appeals from the latter go to the U.S. Supreme Court). Accordingly, I believe Rule 46(a) ought to mention the N.M.I. Supreme Court (unless in the Rule the word "state" is defined to include commonwealths).

Incidentally, many years ago, the Maritime Law Association urged Congress to give the Ninth Circuit certiorari jurisdiction over decisions of the High Court of American Samoa, now the only American court with Federal jurisdiction whose decisions are not appealable. Unfortunately, the effort was frustrated by Samoan objections to determinations being made off island on issues of title to land and succession to hereditary tribal office. These are surely not insurmountable obstacles and it may be time for someone (the Judicial Conference?) to propose it again.

Sincerely,

Michael Marks Cohen

MMC:epa

cc: Mark O. Kasanin, Esq.

ITEM NO. 97-28

97-28

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Honorable James K. Logan
United States Circuit Judge
P.O. Box 790
Olathe, Kansas 66061

23 December 1996

RE: Advisory Committe on Appellate Rules
Rule 36; 11th Cir. R. 36-1 Affirmance Without Opinion

Dear Judge Logan:

Federal Rule of Appellate Procedure No. 36 permits the court to issue a judgment without an opinion. Federal appellate courts take this rule to mean that the court may simply state "affirmed" or "denied."

It is a fundamental requirement of due process that the decision maker state the reason for his opinion. It is the reason for a judicial decision which gives that decision its legitimacy, not the person who makes it and not the position which that person holds. If a judge takes the time to read the briefs, certainly she can take a few minutes to tell her clerk why she reached her decision to affirm or deny.

Rule 36 should not give the appellate courts free reign to issue judgments which fail to providing reasons for them. The practice of propounding judgments without giving reasons for them too easily deteriorates to giving unreasoned, expedient judgments; this is especially true when the decision maker has judicial immunity.

Respecting Rule 36, the first line below should be struck and the second line substituted therefore:

> If a judgment is rendered without opinion, the clerk shall prepare, sign, and enter the judgment following instructions from the court.
>
> No judgment shall be entered without first a reason being stated for reaching it.

Very Truly Yours,

Bruce Committe

FRAP 36. Entry of judgment

The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment following receipt of the opinion of the court unless the opinion directs settlement of the form of the judgment, in which event the clerk shall prepare, sign and enter the judgment following final settlement by the court. If a judgment is rendered without an opinion, the clerk shall prepare, sign and enter the judgment following instruction from the court. The clerk shall, on the date judgment is entered, mail to all parties a copy of the opinion, if any, or of the judgment if no opinion was written, and notice of the date of entry of the judgment.

* * * *

11th Cir. R. 36-1 Affirmance Without Opinion. When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

11th Cir. R. 36-2 Unpublished Opinions. An opinion shall be unpublished unless a majority of the panel decides to publish it. Unpublished opinions are not considered binding precedent. They may be cited as persuasive authority, provided that a copy of the unpublished opinion is attached to or incorporated within the brief, petition, motion or response in which such citation is made.

11th Cir. R. 36-3 Publishing Unpublished Opinions. At any time before the mandate has issued, the panel, on its own motion or upon the motion of a party, may by unanimous vote order a previously unpublished opinion to be published. The timely filing of a motion to publish shall stay issuance of the mandate until disposition thereof unless otherwise ordered by the court. The time for issuance

ITEM NO. 97-29

The Deep Issue: A New Approach to Framing Legal Questions

Bryan A. Garner

Introduction

Though critical to good legal writing, issue-framing is a subject mired in confusion. In fact, anyone seeking to learn how to frame a legal issue is certain to hear some hogwash such as, "Phrase it in a single sentence," or "Start with the word *whether*," or "Omit all particulars." Largely because of all this benighted advice, lawyers' memos and briefs, as well as judges' opinions, often read like long-winded impromptu sermons, the point being only faintly discernible. Indeed, poor issue-framing is the most serious defect in modern legal writing.

We need a new paradigm. The well-written issue — what I call a "deep" issue — should:

- Consist of separate sentences.
- Contain no more than 75 words.
- Incorporate enough detail to convey a sense of story.
- End with a question mark.
- Appear at the very beginning of a memo, brief, or judicial opinion — not after a statement of facts.
- Be simple enough that a stranger, preferably even a nonlawyer, can read and understand it.

This model leads to tighter, more cogent writing by putting the context before the details. And, as I hope to demonstrate, it helps test how sound the ideas are.

A Neglected Art

Why the concern with issues? Because no point is more important in persuasive and analytical writing. If you have clearly in mind what question you're addressing, the writing will inevitably be much clearer than it otherwise would be.

That may sound obvious, but in fact very few legal writers frame their issues well. As a result, legal memos, briefs, and judicial opinions are often diffuse, repetitive, and poorly organized. Sometimes these documents do not reveal precisely what question they purport to answer, even to the reader who works hard to find out. When confronting a document of that kind, the industrious reader works in vain to find the main point — the upshot.

Any piece of persuasive or analytical writing must deliver three things: the question, the answer, and the reasons for that answer. The better the writing, the more clearly and quickly those things are delivered. The legal stylist should insist that the writing lead the reader to have those things well in mind within 90 seconds of picking up the document.

To do this consistently, the writer should open the discussion with a factually specific issue that captures the essence of the problem. Although few legal writers have mastered this technique, it is not new. Consider the following issue, framed in 1835:

> A Turk, having three wives, to whom he was lawfully married, according to the laws of his own country, and three sons, one by each wife, comes to Philadelphia with his family, and dies, leaving his three wives and three sons alive, and also real property in this State to a large amount. Will it go to the three children equally, under the intestate law of Pennsylvania?[1] [67 words]

Anyone of moderate legal sophistication can understand that question. And most readers, having seen the question, would probably like to know the answer.

---

[1] *A Question of the Conflict of Laws*, 14 AM. JURIST 275, 275 (1835).

But six lawyers in ten would probably build up to the question with at least two pages of facts explaining how the Turk came to the U.S., when and where the marriages were solemnized, what the names and birthdates of each of the sons are, and so on. In other words, those six writers would open with a badly overparticularized statement of facts — a statement that would leave many readers bewildered about the upshot of it all.

Three more of the ten would probably assume that the intended reader knows the facts and therefore dispense with them altogether. If they were writing analytical memos, the so-called "issues" framed by these three lawyers would read something like this: "Is our client entitled to take one-third under Pennsylvania law?" Then the writing would launch into a legal discussion of the intestacy laws. Never mind that the intended reader and the writer don't have an identical understanding of the facts — something that will likely never emerge if the memo is written in this way. Further, a reader who later comes across the memo will remain none the wiser even after reading it in full; as a result, the memo can never be useful in future research.

Perhaps the one other lawyer would write an issue more like the 1835 version than either the overparticularized or the overvague approach, but hardly one in a hundred would frame it with equal brevity and clarity.

Those are the two goals of the deep issue: brevity and clarity. As between those two, of course, clarity is paramount.

The Clarity of a Deep Issue

A "deep" issue is concrete: it sums up a case in a nutshell, and is therefore difficult to frame but easy to understand. By contrast, a "surface" issue is abstract: it requires the reader to know everything about the case before it can be truly comprehended, and is therefore easy to frame but hard to understand.

Assume that a defendant is moving for summary judgment. Which of the following statements is more helpful?

1. Can Jones maintain an action for fraud?

2. To maintain a cause of action for fraud under California law, a plaintiff must show that the defendant made a false representation. In his deposition, Jones concedes that neither Continental nor its agents or employees made a false representation. Is Continental entitled to summary judgment on Jones's fraud claim? [49 words]

The shorter version sends the reader elsewhere to learn what, precisely, the issue is; the longer version asks the reader to do considerably less work. Whereas the surface issue says next to nothing about what the court is really being asked to decide, the deep issue explains precisely what that something is. To put it differently, the surface issue does not disclose the decisional premises; the deep issue makes them explicit. It yields up what Justice Holmes once called the "implements of decision."[2]

The goal is ease of understanding. Generally speaking, the more abstract the issue is, the more superficial it is: the reader must learn much more to make any sense of it. The more tangible the issue is, the deeper it is: the reader need hardly exercise the brain to understand.

Consider another set of examples — different versions of the same issue considered from the same side of the case:

1. Does the cessation-of-production clause modify the habendum clause in an oil-and-gas lease?

2. Since first considering the issue 30 years ago, this Court has consistently held that the word "produced" — as used in the habendum clause of an oil-and-gas lease — means "*capable* of being produced in paying quantities." Should this Court now adopt a novel interpretation that would cast doubt on the validity of tens of thousands of leases in the State? [61 words]

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[2] Quoted in John W. Davis, *The Argument of an Appeal*, in ADVOCACY AND THE KING'S ENGLISH 212, 216 (George Rossman ed., 1960).

The first is a dry legal question seemingly devoid of any real interest to anyone but oil-and-gas experts. The second, in addressing what are probably the judges' true concerns, defines the issue in a way that anyone can understand: its premises are explicit.

The Brevity of a Deep Issue

Besides being clear, a deep issue must be brief. Typically, a deep issue will range from 50 to 75 words. Ideally, 75 words is the upper limit.

Why? Because whenever an issue exceeds 75 words or so, the writer loses focus and the reader loses interest. If you can't frame your issue in 75 words, you probably don't know quite what the issue is.

Working out the 75-word issue can be excruciatingly difficult. Sometimes, in a complex piece of litigation, it can take days to refine the statement. But it's well worth the effort because you're more likely to spot problems in the logic, and you'll certainly write more cogently.

But is the 75-word limit always achievable? In my experience, it is. In fact, all the memo examples and briefing examples in this article — and hundreds of other issues I've looked at — have met this standard. And I haven't yet encountered the legal issue that couldn't be framed in 75 words. It may exist, but I haven't found it.

How Deep Issues Work in Memos

Almost all the examples so far have been persuasive issues — written from an advocate's point of view. But we should back up to the pretrial stage, when the lawyers are first analyzing problems. For the analytical issue differs markedly from the persuasive issue.

Unlike the persuasive issue, the analytical issue is open-ended. It doesn't have an implicit answer. Still, it makes the reader yearn to know the answer — e.g.:

1. Section 273 of the Immigration Act makes it a crime to bring an undocumented alien to the U.S. Meanwhile, section 2304 of the Maritime Act makes it a crime for the master of a vessel to fail to rescue persons aboard a vessel in distress. Does a master commit a crime under the Immigration Act when he rescues illegal aliens aboard a ship in distress and brings them to the U.S.? [71 words]

2. Mr. and Mrs. Zephyr were killed in the crash of an airplane negligently piloted by Mr. Zephyr. Their daughter, Kate, has sued the estate of her deceased father for the wrongful death of her mother. Does the doctrine of interspousal immunity bar Kate's recovery when there is no marital harmony to preserve? [52 words]

3. Appleseed School District, a public employer, has uncovered evidence that an employee in one of its school cafeterias is stealing money from the register. Appleseed wishes to confirm its suspicions so that it may fire the suspected employee. Is it legal under California and federal law for Appleseed to covertly videotape the employee at her workstation? If it is legal, do any restrictions apply? [64 words]

4. The Internal Revenue Service requires all persons who receive more than $10,000 in cash in a trade or business to report the payment and provide the name of the payor. Paul Smith, an attorney, receives $14,000 in cash from a client and reports the payment but omits the client's name in the belief that disclosure would violate the attorney-client privilege. Is there an attorney-client-privilege exception to the IRS disclosure requirements? [73 words]

5. Georgette Frye, Mayor of Monrovia, California, owns two office buildings in downtown Monrovia. The California Political Reform Act prohibits a public official from participating in a decision in which he or she has a material financial interest. Is Frye prohibited from voting on a Council resolution to provide a new sewer system for downtown Monrovia? [55 words]

6. Johnson was convicted of aggravated robbery in 1988 at the age of 16. Five years later, the Kansas Legislature enacted the Sentencing Guidelines Act, requiring that prior juvenile convictions be used to enhance the sentence of an adult convicted of a crime. After Johnson was convicted of criminal damage to property in 1994, the court used his 1988 conviction to enhance the sentence. Does this procedure violate the U.S. Constitution's ex post facto clause? [74 words]

7. Missouri law provides that a party to a contract cannot tortiously interfere with its own contract. Dr. Borstead claims that St. Anthony's Hospital tortiously interfered with a lease between himself and St. Anthony's Properties, Inc., the hospital's wholly owned subsidiary. Can St. Anthony's Hospital tortiously interfere with the lease of its wholly owned subsidiary? [54 words]

And precisely because readers want to know the answer to an analytical issue, there is no better way to capture their interest.

In an analytical memo, such an issue should be followed immediately by a brief answer (with reasons stated explicitly within it). Thus, the question and the answer amount to something resembling an executive summary: the reader understands the gist of the memo merely by reading the first few lines.

"But isn't that how most legal memos read?" you might ask. The answer, unfortunately, is no. Not at all. Given a sampling of hundreds of memos in major law firms and corporate law departments throughout the country, you'd find — as I have found — that only about 1% of the memos begin with a deep issue and a short answer.

Let's take an example. Harry, a first-year associate at a law firm, writes a memo for Sarah, his supervisor, on a matter that they've worked on together for six months. The memo begins this way:

> Does 29 C.F.R. § 181.009 apply to the Photostat transactions?

The follow-up discussion for this memo, under the heading "Discussion," is inevitable:

> 29 C.F.R. § 181.009 states in pertinent part: . . . .

Then a block quotation, and we're off to the tortoise races.

On a better day, Harry would have followed his surface issue with a short answer, but still the memo would be unsatisfactory. Why? First, because Sarah wouldn't know whether she and Harry had an identical understanding of what he refers to as "the Photostat transactions." Were there no nuances there? And what are the prominent aspects of those transactions? Second, even if Sarah and Harry once had identical understandings of "the Photostat transactions," their understandings have probably changed over time, so that six months later they think very differently about what they mean by that phrase. If the memo doesn't disclose the writer's premises, it will be impossible to assess the context in which it was written. Third, Sarah's and Harry's colleagues may wish to capitalize on Harry's research. Unfortunately, though, when they get Harry's memo, it reads like a private conversation in coded language.

Fourth — and perhaps most important — Barbara, the chair of the associates committee, reads the memo and feels stupid. And Barbara knows that good legal writing makes readers feel smart, whereas bad legal writing makes readers feel stupid. Barbara writes an uncomplimentary comment in Harry's file. His annual review will not be pleasant.

A fanciful scenario, you say? Well, it's played out routinely in hundreds of law offices throughout the United States. It would be interesting to quantify the amount of wasted time, money, and

energy that goes into producing and deciphering poorly written memos.

Before we leave Harry, it's a fair question to ask how he might have framed the Photostat issue. Here's one way:

> Photostat, Inc. is a Colorado franchiser that wants to sell franchises to foreign customers who will operate their franchises in foreign countries. FTC regulations require that franchisers disclose certain information to all prospective franchisees. Do these regulations apply to Photostat's sale of franchises to foreign franchisees? [46 words]

Once again, the issue is at least faintly interesting to most legal readers. And upon reading the short answer immediately following, the reader sees an orderly mind at work.

In sum, a memo containing a deep issue has the following advantages:

- Because the premises are explicit, the assigning attorney will typically be able to spot any erroneous assumptions.
- Both primary and secondary readers will be able to read and understand the memo. It won't read like a conversation between insiders.
- The memo will be more comprehensible, even to the insiders, a year or two after it's written.
- Colleagues researching similar points in different cases will find the memo more helpful.
- The analytical issue can be readily transformed into a persuasive issue, and thus the memo into a brief.

How Deep Issues Work in Briefs

Many advocates seem not to appreciate fully that the outcome of a case rests on how the court approaches the issues presented. As an advocate, you want to state the issue fairly, to be sure, but

in a way that supports your theory of the case. A good persuasive issue, in other words, should answer itself.

Take *Eisenstadt v. Baird*, in which the plaintiffs attacked a state law that prohibited the sale of contraceptives to unmarried people. Here is how the Supreme Court framed the issue:

> If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.[3]

Richard A. Posner has observed that the decision might not have seemed so clear-cut if the Court hadn't "set up a straw man" (to use his words).[4] If, instead, the Court had posed the question with different premises, the outcome might have been different:

> We must decide whether the state is constitutionally obligated to allow the sale of goods that facilitate fornication and adultery by making those practices less costly.[5]

How do the premises differ? The Court's premise is that the prohibition is an "unwarranted governmental intrusion"; Posner's hypothetical premise is that contraceptives "facilitate fornication and adultery."

As an advocate, you want to find the premises that will pull the court toward your conclusion, and then make your premises explicit. If the court decides to answer the question you pose, then the court will probably reach the conclusion you urge.

A noted advocate — who, exactly, is unclear, because the quotation is variously attributed to Rufus Choate, Clarence Darrow, and John W. Davis, among others — once said that he'd gladly take either side of any case as long as he could pick the

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[3] 405 U.S. 438, 453 (1972).

[4] RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 305 (1988).

[5] Adapted from *id.*

issues. If you pick the issues that are actually decided, you ought to win. It's that simple.

Karl Llewellyn, one of the great legal thinkers and writers of the 20th century, well understood this truth:

> Of course, the first thing that comes up is the issue and the first art is the framing of the issue so that if your framing is accepted the case comes out your way. Got that? Second, you have to capture the issue, because your opponent will be framing an issue very differently. . . . And third, you have to build a technique of phrasing your issue which will not only capture the Court but which will stick your capture into the Court's head so that it can't forget it.[6]

Llewellyn's initial point is the most powerful: the *first* art is framing the issue so that, if your framing is accepted, you win. The persuasive issue, then, can have only one answer.

Still, the persuasive issue is much more than a mere statement of the conclusion. The advocate comes forward asking the court to address a straightforward question — e.g.:

1. Texas law provides that a lease predating a lien is not affected in foreclosure. Nelson's lease predates Marshall's lien, on which Marshall judicially foreclosed last month. Was Nelson's lease affected by the foreclosure? [33 words]

2. Liability-insurance coverage for directors and officers of financial institutions is universally required in order to recruit well-qualified directors and officers. When the Trew Group acquired First Eastern from the FDIC in 1987, the FDIC agreed to pay the "reasonable and necessary" operating costs of First Eastern. Is the FDIC obligated to pay the cost of directors' and officers' liability insurance for First Eastern? [65 words]

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[6] Karl N. Llewellyn, *A Lecture on Appellate Advocacy*, 29 U. CHI. L. REV. 627, 630 (1962).

3. On dozens of occasions over the course of a decade, United Peoria hired and paid a waste-hauler to haul its hazardous liquid waste to a landfill. In accordance with United Peoria's instructions, the hauler discharged thousands of gallons of United Peoria's waste into the landfill. Were these discharges an "accident" from United Peoria's point of view? [57 words]

4. Boskey Insurance issued an excess-insurance policy to BEC for liability exceeding $100,000. BEC represented to Boskey that it had purchased primary coverage (for the first $100,000 of liability) from Cooper Insurance. If Cooper becomes insolvent, should Boskey be required to step down and provide primary coverage when it never bargained for a role as — or contracted to be — a primary insurer, and when its premium reflected only the risk taken as an excess insurer? [75 words]

As in the first two examples, an issue often proceeds from the law to the facts. Yet, as in the third and fourth examples, it may sometimes proceed from the facts to the law. The only key to organizing the statements is to allow the whole to be readily absorbed — and this usually means putting the most challenging pieces of information at the beginning and the end (the emphatic positions), and the most easily comprehensible part in the middle. Following are still more examples:

5. Texas prohibits a person from bringing a claim for breach of implied warranty when that person knowingly purchased used goods. Paula Wheelock admitted at her deposition that she purchased a 1986 Chevrolet — the car she claims General Motors impliedly warranted — with 11,000 miles on the odometer. Should Wheelock's claim for breach of implied warranty be dismissed because the car was used when she bought it? [65 words]

6. California Civil Code § 1504 states that a duly made offer of performance stops the running of interest on an obligation. Jim mailed a refund check to Tom, but Tom failed to cash the check for several years. Is Tom now entitled to the interest that accrued on the refunded amount while the check went uncashed? [55 words]

7. At 7:30 one morning last spring, Father Michael Prynne, a Roman Catholic priest, was on his way to buy food for himself at the grocery store when his car collided with Ed Grimley's truck. The Catholic Church neither owned Michael Prynne's car nor required its priests to buy groceries as part of their priestly functions. Was Michael Prynne acting as an agent for the Church at the time of the accident? [71 words]

8. The Colorado Water Board lowered Cherry Creek's minimum stream flow from 12 cubic feet per second to 7. The Board's decision — reached after four public hearings — was based on recommendations of both the Colorado Division of Wildlife and three independent aquatic biologists, all of whom concluded that 7 cubic feet per second was the optimal minimum for Cherry Creek. Was the Board's decision arbitrary and capricious under the Administrative Procedure Act? [71 words]

9. In 1946, ABC manufactured and sold to Feldspar a hoist designed for attachment to a free-swinging trolley system. Thirty years later, without ABC's knowledge, Trubster acquired the hoist, added a new motor, pulley, and cable, and integrated the hoist into a fixed elevator dumbwaiter system. Is ABC liable for injuries resulting from integration of its hoist into a system defectively designed by Trubster? [64 words]

Occasionally, you'll need to assume that your audience knows something about some area of the law. In #10, the writer assumes that the reader understands comparative negligence. In #11, the writer assumes that the reader knows something about the availability of injunctions as a remedy. And in #12, the writer assumes that the reader knows basic trademark law.

10. Misunderstanding the comparative-negligence scheme in this state, the trial court erroneously instructed the jury that if Parker was 50% or more liable for the accident that injured him, he could not recover. Even so, the jury found that the defendant, Davis, was not liable for Parker's injuries. Was the erroneous instruction harmless error, when the jury never considered the degree of Parker's fault in the accident? [67 words]

11. Solsoft has granted a license to Creative Capital to use copyrighted computer software solely in support of Creative Capital's internal business operations. Creative Capital now says it will offer third parties services based on uses of that software. Under principles of copyright and breach of contract, can Creative Capital be enjoined from doing that? [54 words]

12. Nabisco uses its valuable "Shredded Wheat" trademark to identify Nabisco's breakfast cereal, but the Examiner rejected Nabisco's trademark application on descriptiveness grounds. A survey conducted last month shows that most cereal consumers associate the "Shredded Wheat" trademark with a single source, and that a significant percentage of consumers know that Nabisco is that single source. Should Nabisco's "Shredded Wheat" trademark be registered on grounds that it has acquired secondary meaning? [70 words]

Some briefs would take at least ten pages to deliver the information contained in any of those formulations. And you wouldn't find a concise statement even on page 10. Instead, you would find the relevant tidbits strewn amid other facts throughout the first ten pages. To glean the issue, the judge would have to read slowly, and with intense concentration. That's quite a demand to impose on busy judges. And yet brief-writers seem to make this imposition routinely.

A big part of the problem seems to stem from fear — fear that if the judge doesn't see the issue in the same way as the advocate, the advocate is sunk. "How do I know what the judge will latch onto?" the diffident advocate asks. "I won't state the issue in a single way, but rather talk about the case and the parties in a way that gives the judge several handles on the case. But I'm not going to marry myself to a single issue or set of issues." Unfortunately, the result of this understandable fear is that the advocate has no clearly framed issues — no theory of the case.

And the judicial reader becomes frustrated. Why? Because, at first, only one thing matters to the judge: "What question am I supposed to answer in this case? If I can figure that out," thinks the

judge, "I'll be ready to decide the case. But until I find out what that is, I'm just groping for it."

Framing the deep issue at the outset is a way of capturing the judicial imagination. Whoever does that well is most likely to win. Indeed, a well-framed issue can often become the starting point for the majority opinion.

Deep Issues in Judicial Opinions

It's no accident that the most readable judicial opinions invariably begin with a brief statement of the overarching issue in the case. Among the ablest practitioners of this art was Judge Thomas Gibbs Gee, of the Fifth Circuit, who enshrined it as the first principle in his style sheet for opinions: "Try to state the principal question in the first sentence."[7]

Even when the judge ignores that advice, though, an adept legal reader will usually try to deduce from the judicial opinion just what the issue is. Let's take an example.

Probably the most famous hypothetical case ever posed is Lon Fuller's *Case of the Speluncean Explorers*.[8] In that case, a panel of five appellate judges, in the year 4300 A.D., must decide the fate of four cave explorers who — having been trapped in a cave for 23 days, told by miners that it would take 10 more to dig them out, and advised by doctors that all would die of starvation during that additional period — killed and ate one of their companions. The murder statute reads as follows: "Whoever shall willfully take the life of another shall be punished by death."

In Fuller's fictitious opinions, no two of the five judges approach the case in the same way. They all answer different questions. Here is how I would frame those questions:

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[7] *A Few of Wisdom's Idiosyncrasies and a Few of Ignorance's: A Judicial Style Sheet*, 1 SCRIBES J. LEGAL WRITING 55, 56 (1990).

[8] 62 HARV. L. REV. 616 (1949).

Truepenny, C.J.

> If a statute unambiguously requires the death sentence — without exception — for anyone who willfully takes another's life, may judicial sympathies properly lead an appellate court to make allowances for those who violate the statute under extraordinary circumstances?

Foster, J.: 1st issue

> Does the statutory law of murder apply to persons who find themselves buried and starving in a cave — their only hope being cannibalism — who, in short, have returned to a state of nature and drawn a new social compact?

Foster, J.: 2d issue

> The murder statute requires the death penalty for anyone who willfully takes another's life. Yet the statute has never been thought to apply literally to every case. Must we now apply it literally in a case in which everyone agrees that the result would be grossly unfair?

Tatting, J.

> Can I participate in a case in which I am repelled by either result, and in which I cannot resolve the doubts that beset me? (He decides that he cannot.)

Keen, J.

> Four speluncean explorers, trapped in a cave, killed Roger Whetmore and ate his flesh. Did they not willfully take Whetmore's life?

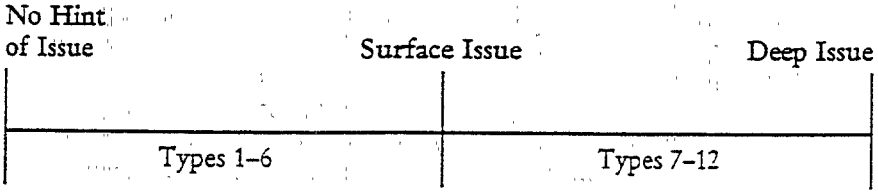
Handy, J.

> Four men, trapped in a cave, resorted to homicide and cannibalism to survive. Fully 90% of society and 90% of this court believe that these men should be pardoned or given a token punishment. They have undoubtedly already suffered more torment and humiliation than most people would endure in a thousand years. Should we now affirm their death sentences?

Consider which of those issues is best from the prosecutor's point of view, and which one from the defense lawyer's point of view. It's a matter of gauging which question most judges would want to answer — at least, assuming the judges are at all inclined to your view of the case. In my view, the best issues are clear-cut. For the prosecution, Keen's issue is best because it doesn't muddy the waters the way Truepenny's does by dragging judicial sympathies into the issue-statement. For the defense, Foster's second issue is best because it's a true legal argument based on an eminently plausible interpretation of a statute.

Let's return, though, to Gee's point: "Try to state the principal question in the first sentence." In fact, his own usual practice was to state it in the first *paragraph*, and the advice would be sounder if we replaced "sentence" with "paragraph." Still, the insight was a great one, and it provides a reliable standard by which to evaluate judicial openers.

Roughly speaking, there are a dozen types of judicial openers, which you can place on a continuum:



The least satisfactory opener for a judicial opinion has nothing to do — from all that appears — with the question that the court is to answer. The most satisfactory, on the other end of the spectrum, puts the issue neatly up front.

Of the dozen types — ranging from worst to best — the first six fall on the left side of the continuum, and the last six fall on the right. Here they are:

Categories 1 Through 6: Unsatisfactory Judicial Openers

1. The first type of opener — very common — states how the case got to the court when that's not a determinative point. In this type, the writer just perfunctorily announces why the court has heard the case — e.g., "This is an appeal by the State under Neb. Rev. Stat. § 29-2320 (Reissue 1989)."[9] The problem is that most readers are initially uninterested in how the case got there. They want to know about the core conflict.

How helpful as an opener is the following laborious treatment of procedure? Why are we being told any of this?

> This is the second appeal to this court relating to the resolution of the question of whether the plaintiff or the defendants held title to the property located at 8 Orange Street in New Haven, prior to the taking of the property by the city of New Haven by eminent domain in 1989. See *Papagorgiou v. Anastopoulous*, 23 Conn. App. 522, 582 A.2d 1181 (1990). There are two other actions involving this property presently pending in the courts. The first, which was argued with this appeal; *New Haven v. Konstandinidis*, 29 Conn. App. 139, 612 A.2d 822 (1992); is an appeal to this court from the granting of a summary process judgment of possession in favor of the city of New Haven against Angelika Papagorgiou, the plaintiff in this action. The other action, which has been stayed in the trial court pending disposition of this appeal, involves a challenge by the defendants in this action to the statement of compensation filed by the city of New Haven on August 11, 1989, in the condemnation proceeding. The plaintiff here, Angelika Papagorgiou, was permitted to intervene in the condemnation action because of her claim that she possessed equitable title to the property on the date of the condemnation.[10]

Even stripped of tedious detail, an opener in this category doesn't inspire confidence in the writer's logic:

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[9] State v. Foral, 462 N.W.2d 626, 627 (Neb. 1990).

[10] Papagorgiou v. Anastopoulous, 613 A.2d 853, 854 (Conn. Ct. App. 1992).

> This case comes to us on an expedited appeal filed by the government from an order granting a motion to suppress tangible evidence. We reverse.[11]

If all the information in the first of those examples is really necessary, it ought to appear *after* the facts — and well after the issue. As for the second, are we to conclude that this court invariably reverses expedited appeals filed by the government? In fact, if the second example is read literally, it contains a rather bad miscue.

And where does this non sequitur come from? It seems to result inevitably from the well-meaning view that the court's ultimate disposition should appear in the opening paragraph. Of course, it probably should, but only if it somehow follows from whatever has already been stated. If it doesn't relate to the preceding statements, then placing it at the outset suggests a grotesque lapse in logic.

2. The second type of opener hardly moves any closer to the issue. It states the subject matter of the case — and gives a resolution — but doesn't disclose the issue. This opener typifies opinions that never get around to clarifying the deep issues in the case. The court merely begins with either a procedural recitation or a general statement about what type of case it is. For example, the court might say, in substance, "This is a tort case. We reverse and remand." Whether the court ever really reaches the deep issues in the case seems often a matter of chance. Here are some typical examples:

- This appeal from summary judgment challenges the district court's interpretation of a contract provision to require reimbursement of legal expenses incurred in litigation against a subrogated insurer. We affirm in part and reverse in part.[12]

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[11] United States v. Harris, 617 A.2d 189, 190 (D.C. 1992).

[12] Unpublished opinion of a state intermediate court.

- Otha "Buddy" Chandler, Jr. appeals his conviction on one count of causing a false entry to be made in a book, report or statement of a savings and loan association, a violation of 18 U.S.C. § 1006 (1988). We affirm.[13]

- We have for review *Murray v. State* [citation], based on conflict with *State v. Rucker* [citation]. We have jurisdiction. Art. V, § 3(b)(3), Fla. Const. We quash the district court decision in *Murray*.[14]

- Defendant Grand Properties, Ltd. appeals the judgment of the trial court awarding the sum of $18,675.81 to plaintiff Latter & Blum, Inc. We affirm.[15]

This type of opener accounts for a significant percentage of American opinions.

3. A third type of opener — still on the left side of the continuum — states some facts but omits the issue and the resolution. Sometimes facts can be interesting: the authors of the following narratives at least tried to create reader interest. The first begins with startling facts but fizzles at the end of the sentence — the position of greatest emphasis — with the word *misdemeanor*. The result is what rhetoricians call "bathos," an anticlimactic progression from something serious to something commonplace:

> James Sumpter shot and killed his wife, Lois Sumpter, with a handgun. He was convicted by a jury of felony murder and of pointing a pistol at another, and was sentenced to life imprisonment and for a misdemeanor.[16]

The next example begins vividly — almost as if the author had attended a judicial-writing seminar and learned the wrong lessons.

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[13] United States v. Chandler, 910 F.2d 521, 521 (8th Cir. 1990).

[14] Murray v. State, 616 So. 2d 955, 955 (Fla. 1993).

[15] Latter & Blum, Inc. v. Grand Properties, Ltd., 617 So. 2d 80, 81 (La. Ct. App. 1993, writ denied).

[16] Sumpter v. State, 398 S.E.2d 12, 13 (Ga. 1990).

Note how the ending of the distress call is equated with the ending of three human lives — a rhetorical flourish whose effect seems callous at best:

> "We're going over, now!" Thus ended a brief distress call on the night of February 1, 1982 from the master of the fishing vessel CHICA to the Coast Guard, and shortly thereafter, his life and that of his two crewmen.[17]

But even an opener that states interesting facts — if that's all it does — falls short of focusing the reader on the legal issue and how it will be resolved.

And then, of course, some openers in this category do nothing at all to interest the reader — there are facts, yes, but hardly interesting ones:

> In 1975 Golden Sun Feeds, Inc. (GSF) entered into an agreement with the Chicago, Rock Island and Pacific Railroad (the predecessor of Chicago and North Western Transportation Company — CNW) to have a switch and spur track constructed to service its facility in Estherville, Iowa. GSF spent over $150,000 on this project. After 1981 GSF received a declining number of carloads over the track. In 1984, 1985, and 1986 it received no rail shipments and, in 1987, GSF received ten rail cars in order to test the cost as compared to truck shipments.[18]

4. The fourth category moves only a mite down the continuum: it states some abstract facts and the resolution of the case — but it doesn't state the issue. Often, as the following example illustrates, merely stating the facts will not lead directly to an issue:

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[17] Brophy v. Lavigne, 801 F.2d 521, 522 (1st Cir. 1986).

[18] Chicago & North Western Transp. Co. v. Golden Sun Feeds, Inc., 462 N.W.2d 689, 690 (Iowa Ct. App. 1990).

> The appellant, Lavon Guthrie, was convicted after a jury trial of the capital offense of murder committed during a robbery in the first degree, in violation of § 13A-5-40(a)(2), Code of Alabama 1975. At the sentencing phase of the trial, the jury voted unanimously to recommend that the appellant be sentenced to death. At the trial court's sentencing hearing held pursuant to § 13A-5-47, the trial court sentenced the appellant to death by electrocution.
>
> This case must be remanded to the circuit court for that court to determine whether the state exercised its peremptory challenges in a racially discriminatory manner in violation of *Batson v. Kentucky* [citation] and *Ex parte Branch* [citation]. Although the appellant neither raised this issue in the trial court nor argued it on appeal, the plain error doctrine requires our review of this issue.[19]

Take another example:

> In a civil-forfeiture action, the registered owner of a vehicle used in the commission of a felony appeals the trial court's determination that the vehicle was owned by his stepson. We affirm.[20]

The surface issue there is ownership. The deep issue is whether sufficient evidence overrode the legal presumption that the registered owner of a car is the true owner. The reason for the holding was that the stepson took possession immediately upon the stepfather's purchase; the stepson always used the car, the rest of the family rarely; the stepson "souped up" the car in various ways; and the stepfather made a nonverbal admission by nodding his head when his wife said that the car had been a graduation present to the stepson.

The court could have reached the deep issue more concisely by opening the opinion in this way:

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[19] Guthrie v. State, 616 So. 2d 913, 913 (Ala. Crim. App. 1992).

[20] Unpublished opinion of a state intermediate court.

> In this civil-forfeiture action, the registered owner of a seized car — one involved in drug transactions — contests the trial court's determination that his stepson owned the car. Because abundant evidence, including the stepfather's own admission to the police, overrides the legal presumption that the registered owner is the true owner and establishes that the stepson was the true owner, we affirm.

The advantage of this rewrite — into a "deep issue" form — is that, as the details are filled in later, the reader will assimilate them through the filter that the opener provides.

5. The next type — the fifth category — brings a glimmer of an issue. Here, the judicial writer states what the issue "involves" without saying what it is. In this category belong some of the most frustrating openers that legal readers encounter. Upon seeing words such as "The issue here . . . ," the reader inevitably perks up. But with the word "involves," the sentence typically crumbles:

- The issue here involves the rule requiring corroboration of the confession of an accused by some independent evidence of the *corpus delicti*. We return to this well plowed ground because of the contentions of the petitioner, Robert Leslie Ballard, Jr. (Ballard), who stands convicted, *inter alia*, of felony murder in an attempted robbery. Ballard contends that corroboration of the *corpus delicti* in this case requires independent proof of the attempted robbery. As explained below, this contention greatly overstates the corroboration requirement.[21]

- This case involves the transfer of assets by George Dumas to an *inter vivos* trust and a suit by his wife, appellee, alleging that the transfer of those assets constituted a fraudulent transfer and that her late husband intended to defraud her by depriving her of her elective share of his probate estate.[22]

In framing issues, the word "involves" ought to be a no-no.

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[21] Ballard v. State, 636 A.2d 474, 474 (Md. 1994).

[22] Dumas v. Estate of Dumas, 627 N.E.2d 978, 979 (Ohio 1994).

6. The sixth and final unsatisfactory opener brings us to the brink of an issue. Because it states what amounts to a surface issue, the reader can't really hope to understand it until after reading much more. The question is on the order of, "Has the plaintiff stated a claim?" You're only a little wiser after reading it.

- This is an appeal from the forfeiture of two bail bonds to appellee, the State of Maryland. Appellant, Fred W. Frank Bail Bondsman, Inc., on behalf of Allegheny Mutual Casualty Company and All American Bail Bonds, has appealed from an order of the Circuit Court for Wicomico County denying its Petition to Strike Forfeiture, Set Aside Judgment, and Release Bond. On appeal, we are asked:

  > Whether the Circuit Court erred in denying the Petitions to Strike Forfeiture, Set Aside the Judgments Against the Bail Bondsman and the Surety, and Release the Bonds because it was impossible for the surety to fulfill its contractual obligation to produce the defendants.

  Finding no error, we shall affirm the judgment of the circuit court.[23]

- Earl Rhymer appeals the denial of his petition for post-conviction relief. He raises five issues for our review, which we consolidate into four and restate as follows:

  I. Whether Rhymer should be granted post-conviction relief based on newly-discovered evidence.
  II. Whether the post-conviction court denied Rhymer due process and a fair hearing.
  III. Whether the post-conviction court failed to issue sufficient findings of fact and conclusions of law.
  IV. Whether Rhymer was denied the effective assistance of trial and appellate counsel.

  We reverse and remand.[24]

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[23] Fred W. Frank Bail Bondsman, Inc. v. State, 636 A.2d 484, 485 (Md. Ct. Spec. App. 1994).

[24] Rhymer v. State, 627 N.E.2d 822, 823 (Ind. Ct. App. 1994).

Although the writer wisely focuses on the issue, the opener fails: far too much is being postponed. The issue-statement is unedifying.

Categories 7 Through 12: Satisfactory Judicial Openers

7. The seventh type comes much closer to the deep issue: the writer gives everything but one dispositive fact. This category approaches the ideal because the reader now knows what to look for — something the writer hasn't yet been explicit about. The writer could make the reader's job easier by supplying whatever that something is. In the following examples, what's the one missing ingredient that would transform the introductory passage into a deep issue?

- William Fraser appeals from an order dismissing his amended complaint under Super. Ct. Civ. R. 12(b)(6) for failure to state a claim upon which relief could be granted. Fraser had sued appellees Gottfried and Bush for an accounting, money damages, and other relief based on appellees' supposed breach of a partnership agreement, but the trial court ruled that the complaint failed to allege the existence of a partnership. We disagree and, accordingly, reverse and remand for further proceedings.[25]

- Donald Smith appeals from a Workers' Compensation Board decision denying Smith's petition to commute his future benefits into a lump-sum settlement. 39 M.R.S.A. § 71-A (1989). Smith contends that there is no rational basis for the hearing officer's decision that a lump-sum settlement would not be in Smith's best interest. Because we conclude that the hearing officer had a rational basis for his decision, we affirm the decision and decline to reach the issues raised by Great Northern Paper Co. and the amicus parties.[26]

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[25] Fraser v. Gottfried, 636 A.2d 430, 430 (D.C. 1994).

[26] Smith v. Great N. Paper, Inc., 636 A.2d 438, 439 (Me. 1994).

In the first of those openers, we need to know — succinctly — what the complaint alleged. In the second, we need to know just what the rational basis is. With those facts supplied, both could easily be transformed into deep issues.

8. The eighth category — already in the upper reaches of American judicial writing — provides a strong narrative setup with something approaching a deep issue. Like a brief, a judicial opinion shouldn't begin with a "statement of facts" or "factual background" section — though many opinions do just that. Instead, the opinion should set the stage for factual exposition — usually by providing a deep issue. The following examples come close to succeeding because they blend analytical language into the facts being supplied:

> • Although the substantive issues raised by this appeal are fairly significant, they are not nearly as significant as the procedural quagmire that we find before us. What began as a developer's test of a newly enacted Anne Arundel County tax ordinance has brought to light an apparent anomaly in the statutory scheme that provides administrative review by both the Anne Arundel County Board of Appeals (the Board) and the Maryland Tax Court of the imposition of certain local taxes.[27]
>
> • Arrested for feeding the pigeons and walking her dogs in the park, Anita Kirchoff recovered $25,000 from the police. The defendants gave up, but Kirchoff's lawyers did not. They wanted some $50,000 in fees under 42 U.S.C. § 1988. The district court gave them $10,000 on the ground that their contingent fee contract with the Kirchoffs entitled them to 40% of any award. The case requires us to decide whether the contingent fee is the appropriate rate under § 1988 when the case resembles private tort litigation in which contingent fees are customary. First, however, we pause for the facts.[28]

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[27] Crofton Partners v. Anne Arundel County, 636 A.2d 487, 488 (Md. Ct. Spec. App. 1994).

[28] Kirchoff v. Flynn, 786 F.2d 320, 320 (7th Cir. 1986).

The second example states both the essential facts and the issue with elegant economy, and neatly ushers us into a narrative of what happened to cause the lawsuit. Still, we're left to wonder how the issue will be resolved — and that may leave us feeling unfocused. Then again, this example may generate enough interest that the reader will be naturally inclined to read further.

9. In the ninth category, the writer frames the deep issue — elegantly or inelegantly — but postpones the answer. Though most modern judicial writers consider it desirable to state the court's resolution up front, along with the reasoning in a nutshell, there are exceptions. If the issue is cleanly stated and sufficiently intriguing, it might just as well stand alone in the opener, as in the examples following. Such openers can cue us quite effectively, as these four examples illustrate:

- This case presents the question whether certain statutes and regulations of the State of Mississippi violate our constitutional guarantee of freedom of speech because they effectively ban liquor advertising on billboards and in printed and electronic media within the state.[29]

- We have for review *Metropolitan Dade County v. Metro-Dade Fire Rescue Service District*, 589 So. 2d 920 (Fla. 3d DCA 1991), in which the Third District Court of Appeal certified to this Court the questions resolved by its opinion as ones of great public importance. *Id.* 589 So. 2d at 924 n.6. The district court did not articulate a question; however, we have constructed the following question for resolution:

  > Does the Dade County Commission have legislative authority over the Metro-Dade Fire and Rescue Service District to determine what specific governing powers the district's governing body may exercise when the voters of

[29] Lamar Outdoor Advertising, Inc. v. Mississippi State Tax Comm'n, 701 F.2d 314, 316 (5th Cir. 1983) (per Gee, J.) (postponing until the last page the holding that, indeed, advertisers' constitutional rights had been violated).

> Dade County have passed an amendment to the county charter which specifically states that the County Commission shall not be the governing body of the district?[30]

- The issue in this case is whether a court may render a judgment partially maintaining an exception of no cause of action when the judgment adjudicates one or more, but less than all, of the demands or causes of action asserted against the excepting party. A related issue is whether the party opposing the exception must appeal from the judgment partially maintaining the exception in order to prevent the judgment from acquiring the authority of the thing adjudged. These issues implicate the concepts of cumulations of actions and joinder of parties, partial final judgments, and appealability of partial final judgments.[31]

- The Federal Bureau of Investigation (FBI) has accumulated and maintains criminal identification records, sometimes referred to as "rap sheets," on over 24 million persons. The question presented by this case is whether the disclosure of the contents of such a file to a third party "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of the Freedom of Information Act (FOIA), 5 U.S.C. § 552(b)(7)(C) (1982 ed., Supp. V).[32]

Even so, a stall is a stall, and readers may impatiently flip to the last paragraph to appease their wakened curiosity.

10. The tenth category — drawing ever closer to the fully deep issue — has all the basic ingredients, but abstract facts. Some judicial writers manage to state the key facts, the legal question presented, and the conclusion, all with admirable succinctness. Consider the following example, from a recent United States Supreme Court opinion:

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[30] Metro-Dade Fire Rescue Serv. Dist. v. Metropolitan Dade County, 616 So. 2d 966, 967 (Fla. 1993) (question put into lowercase).

[31] Everything on Wheels Subaru, Inc. v. Subaru South, Inc., 616 So. 2d 1234, 1235 (La. 1993).

[32] United States Dep't of Justice v. Reporters' Comm. for Freedom of Press, 489 U.S. 749, 751 (1989).

> An undercover government agent was placed in the cell of respondent Perkins, who was incarcerated on charges unrelated to the subject of the agent's investigation. Respondent made statements that implicated him in the crime that the agent sought to solve. Respondent claims that the statements should be inadmissible because he had not been given *Miranda* warnings by the agent. We hold that the statements are admissible. *Miranda* warnings are not required when the suspect is unaware that he is speaking to a law enforcement officer and gives a voluntary statement.[33]

The problem there is excessive abstractness. Such a recital feels devoid of human interest.

Occasionally, however, the issue may be so riveting that the concrete facts can wait for further development:

> Today we are asked to decide whether an elected judge may constitutionally be reprimanded for making truthful public statements critical of the administration of the county judicial system of which he is a part. Concluding (1) that such statements address matters of legitimate public concern and (2) that the state's interest in promoting the efficiency and impartiality of its courts does not, under the circumstances of this case, outweigh the plaintiff's countervailing first amendment right to air his views, we reverse the judgment of the district court and remand for further proceedings.[34]

11. The eleventh category is a special one: the perfect way to handle a messy appeal, where the best you can do is describe the issues and their resolution. In the example below, Judge Gee fully orients us to the concrete facts, the issue, the reasoning, and the conclusion — no small feat in a complicated case:

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[33] Illinois v. Perkins, 496 U.S. 292, 294 (1990).

[34] Scott v. Flowers, 910 F.2d 201, 201 (5th Cir. 1990).

> Appellant Jeetendra Bhandari sued appellee First National Bank of Commerce after First National declined to issue him a credit card. First National refused Bhandari credit in part because he was not a citizen of the United States. The district court held that neither 42 U.S.C. § 1981 nor the Equal Credit Opportunity Act ("ECOA") gave Bhandari a legal remedy for private alienage discrimination. The court determined, however, that First National had violated the ECOA by not telling Bhandari all its reasons for denying him credit. The court awarded damages, costs, and attorneys' fees. Bhandari appeals, contending that the district court erred in various respects. We hold that the law of this Circuit recognizes actions for private alienage discrimination under § 1981, but that alienage discrimination is not actionable under the ECOA. Accordingly, we affirm in part, reverse in part, and remand.[35]

To avoid getting bogged down in Bhandari's various claims, Gee used general language at a crucial point in the paragraph: "Bhandari appeals, contending that the district court erred *in various respects*." In many judges' hands, that three-word phrase (*in various respects*) would be expanded into three paragraphs or even three pages of exposition, all before the holding is announced. But Gee understood the need for *swiftly* identifying the type of case and the issue. Then, of course, the opener proceeds with the bifurcated holding.

Here's another example in this category:

> This is an appeal from a jury verdict in favor of Dudley M. Maples in the Lauderdale County Special Court of Eminent Domain. The State Highway Commission ("the Commission") sought to condemn a portion of Maples' property for purposes of a highway expansion project, offering Maples fair market value for the affected tract. Maples filed a Statement of Values which included not only a claim for the fair market value of the land taken, but also for damages to the remainder resulting from diminished access. The jury awarded Maples more than the Commission proposed to pay, but substantially less than Maples

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[35] Bhandari v. First Nat'l Bank of Commerce, 808 F.2d 1082, 1084 (5th Cir.), *superseded*, 829 F.2d 1343 (5th Cir. 1987), *vacated*, 492 U.S. 901 (1989).

> demanded. Maples appeals, assigning eight errors, arguing generally that he did not receive a fair trial, that the jury award was insufficient, that Lauderdale County should not have been a named defendant, and that the court erred in not allowing him to recover expenses and attorney's fees for the defense of the suit. Finding no reversible error, we affirm.[36]

If the court tried to capsulize its reasons on each of the eight alleged errors — or on each of the four main thrusts — the opener might have been extended intolerably.

12. Now to category number twelve. Below are three openers that have all the essentials: concrete facts, a deep issue, and a clear resolution. And even though these openers aren't flawless, they're the best here collected. They grab the reader's attention with their wording, both concise and precise. In short, they do exactly what an introduction should do: they introduce. And what follows each opener should be an elegant opinion:

- While investigating some serial murders near Kansas City, Hough, a federal undercover agent, posed as a prisoner confined in the same cell as the primary suspect in the murders, Perkins, who had been jailed on unrelated charges. On Hough's second day as Perkins's cellmate, Perkins confided that he knew where two of the bodies were buried. He now claims that his incriminating statements should be held inadmissible because he had received no *Miranda* warnings. But we disagree because the warnings are not required when a suspect, though unaware that his conversation is with a law-enforcement officer, engages in the conversation voluntarily.[37]

- Appellant, Frederick Ward Associates, Inc., appeals from a declaratory judgment entered in the Circuit Court for Cecil County (Cole, J.) in favor of appellees, Venture, Inc., and

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[36] Maples v. Mississippi State Highway Comm'n, 617 So. 2d 265, 266 (Miss. 1993).

[37] Revision of the first example under category #10 — with hypothetical concreteness supplied.

Charles Cupeto. The court ruled that appellant's judgment against a "Chris Walker" did not constitute a lien against land deeded to a "John C. Walker" and subsequently transferred to appellees. Appellant asks:

> Did the court err in ruling that the judgment entered against "Chris Walker" does not constitute a lien against land owned by him, but titled in the name of "John C. Walker"?

We answer this question in the negative and, therefore, affirm.[38]

- Congress enacted the Clean Water Act "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (1988). As one means of improving water quality, Congress ordered the Environmental Protection Agency (EPA) to design pretreatment standards for industrial water discharges into publicly owned treatment works. 33 U.S.C. § 1317(b). Under the Act, someone who knowingly violates these standards and knows that he or she thereby places another person in imminent danger of death or serious injury commits a felony. 33 U.S.C. § 1319(c)(3) (1988 & Supp. II 1990). Does this criminal sanction apply when the imminent danger is not to people at the publicly owned treatment works, municipal sewers or other downcharge, but rather to employees handling the pollutants on the premises from which the illegal discharge originates? We hold that it does not.[39]

Imagine how much shorter judicial opinions might be if the deep issue were to become standard. But, of course, without better briefing, courts would find it difficult to frame deep issues consistently. Still, it can be done, as Judge Gee and various others have demonstrated.

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[38] Frederick Ward Assocs., Inc. v. Venture, Inc., 636 A.2d 496, 496 (Md. Ct. Spec. App. 1994).

[39] United States v. Borowski, 977 F.2d 27, 27 (1st Cir. 1992).

The Vocabulary of Judicial Issues

Many examples quoted above contain phrases that every appellate judge ought to keep handy:

> *This case presents the question whether . . . .*
>
> *The case requires us to decide whether . . . .*
>
> *Today, we must decide whether . . . .*
>
> *We are confronted with the question whether . . . .*

Because these phrases usually signal a deep issue, they are worth adding to the stock judicial vocabulary. If the writer can't fill in the blank, then more thought is required before the writing can begin. Concededly, though, given the state of American brief-writing, the blanks will often be devilishly hard to fill in.

For maximal clarity and rhetorical impact, the word *because* should figure prominently in most opening paragraphs. A good formula is *Because . . . , we hold that . . . .* If the *because*-clause is long, the judge could reverse the clauses: "We hold that . . . for two reasons. First, ... Second, ..."

The difference between openers that use that formula and those that don't is palpable. Consider how these two openers, by the same judge, affect you as a reader. The first gives only a conclusion, while the second couples a reason with the conclusion:

> • The petitioner-appellant in this case, Martha's Vineyard Scuba Headquarters, Inc. (Mavis), took not a particle of comfort when an order was entered in a federal district court awarding title to various artifacts received from a sunken ship to a rival, Marshallton, Inc. (Marshallton). Mavis appeals. We affirm.[40]

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[40] Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked, and Abandoned Steam Vessel, 833 F.2d 1059, 1061 (1st Cir. 1987).

> • A disappointed faculty member, Harriet Spiegel, sued the trustees of Tufts College in the United States District Court for the District of Massachusetts following rejection of her tenure application. The district court dismissed most — but not all — of her statements of claim without requiring defendants to answer, and thereafter authorized a partial judgment in Tufts' favor . . . . Because we conclude that the judgment was prematurely entered, we dismiss the appeal.[41]

Readers' Reactions to Deep Issues

The purpose of using separate sentences and of limiting the issue to 75 words is to help the reader. A one-sentence issue of 75 or so words is difficult to follow, especially when the interrogative word begins the sentence and the end is merely a succession of *when*-clauses — e.g.:

> Can Barndt Insurance deny insurance coverage on grounds of late notice when Fiver's insurance policy required Fiver to give Barndt notice of a claim "immediately," and when in May 1994, one of Fiver's offices was damaged by smoke from a fire in another tenant's space, and when 10 months later, Fiver gave notice, and when Barndt investigated the claim for 6 months before denying coverage and did not raise a late-notice defense until 18 months after the claim was filed? [81 words]

That's a muddle. Readers forget the question by the time they reach the question mark. Part of the reason is that the time is out of joint: we begin with a present question, then back up to what happened, and then, with the question mark, jump back to the present.

The better strategy is to follow a chronological order, telling a story in miniature. Then, the pointed question — which emerges inevitably from the story — comes at the end:

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[41] Spiegel v. Trustees of Tufts College, 843 F.2d 38, 40–41 (1st Cir. 1988).

> Fiver's insurance policy required it to give Barndt Insurance notice of a claim "immediately." In May 1994, one of Fiver's offices was damaged by smoke from a fire in another tenant's space. Ten months later, Fiver gave notice. Barndt investigated the claim for 6 months before denying coverage and did not raise a late-notice claim until 18 months after the claim was filed. Can Barndt now deny coverage because of late notice? [73 words]

Instead of one 81-word-long sentence, we have five sentences with an average length of 15 words. And the information is presented in a way that readers can easily understand.

Because seasoned legal readers are always impatient to reach the issue, opening a memo, brief, or judicial opinion with the deep issue satisfies a need that almost all readers feel.

But is the 75-word limit a fair one? Where does it come from? It is the result of experimentation and informal testing. Once an issue goes beyond that length, it is likely to be rambling. You lose the rigor of a concentrated statement. And you probably lose readers.

The Importance of It All

At first glance, these principles of issue-framing may seem elementary. Yet, judging from most legal writing, they are not at all obvious. And, in any event, stylists who cultivate the ability to frame good issues know just how difficult it is: it requires a great deal of mental energy.

It is therefore easy to forgo the effort, and many writers do. Legal writers everywhere seem preoccupied with answers, and rarely with the questions they are answering or the premises from which their conclusions might follow. As a result, much of the "analysis" and advocacy that goes on is sloppy — or worse.

Even the greatest legal intellects must remain vigilant about these points. One of the most important 20th-century legal philosophers warned about how easy it is to stumble over fundamentals. H.L.A. Hart was writing about theories of punishment,

but the same point holds true in any field: "One principal source of trouble is obvious: it is always necessary to bear in mind, and fatally easy to forget, the number of different questions [that various theories] seek to answer."[42] Even the great philosophers, then, can benefit from giving more thought to their issues.

Charting a Course

For the past six years, deep issues have been the cornerstone of my CLE teaching. The ideas underlying the deep issue have been tested now on thousands of lawyers throughout the United States — lawyers who have helped refine these ideas. And the lawyers I deal with week by week confirm what I have long thought: the deep issue is central both to good writing and to good thinking.

Yet the idea is still considered novel: one-sentence surface issues still pervade law-school writing texts, appellate-practice texts, and collections of model briefs. In fact, Illinois appellate rules contain "model" issues that have all the classically bad qualities.[43]

But perhaps things are changing. Many advocates now use deep issues, and they report good results. Perhaps the law-school text-writers will adapt their recommended forms so that law graduates won't have to unlearn so many bad habits.

Undoubtedly the most important reform, though, must occur in court rules. If courts began to mandate deep issues, they would find it easier to handle their caseloads. Many weak cases would die because the exercise of writing a deep issue would reveal their weaknesses more palpably than anything else. Strong cases would prevail more easily because their strengths would be made plainer than they typically are today.

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[42] H.L.A. Hart, *Postscript: Responsibility and Retribution*, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 210, 231 (1968).

[43] *See* ILL. SUP. CT. R. 341(e)(3).

Therefore, in rules on briefing, courts might include a provision that reads something like this, a possible amendment to Federal Rule of Appellate Procedure 28:

28. Briefs

(a) **Contents.** A brief must contain:

(5) a list of one or more questions presented for review.

(A) The questions should be stated in the following form:

(i) in separate sentences, with factual and legal premises followed by a short question;

(ii) in no more than 75 words per issue;

(iii) with enough facts woven in that the court will understand how the question arises in this particular case.

(B) The following issue statements illustrate the clarity and brevity to be aimed for:

(i) As Hannicutt Corporation planned and constructed its headquarters, the general contractor, Laurence Construction Co., repeatedly recommended a roof membrane and noted that the manufacturer also recommended it. Even so, the roof manufacturer warranted the roof without the membrane. Now that the manufacturer has gone bankrupt and the roof is failing, is Laurence Construction jointly responsible with the insurer for the cost of reconstructing the roof?

(ii) Under Florida law, administrative agencies have only those powers provided by statute. No statute gives the Florida Natural Resources Commission the authority to impose sanctions for discovery abuse. May the Commission nevertheless dismiss a permit application if it finds that the applicant has failed to respond to proper discovery requests?

> (iii) Under California discovery rules, computer-stored information is as freely discoverable as tangible, written materials. Even though the defendants' second request for production asked for computer-stored information, the State refuses to search its computers for relevant information. Given that a search for this computer-stored information would not entail any more effort than searching for tangible, written materials, did the trial court err in ordering the State to produce it?

A less elaborate rule might read as follows:

> (5) a statement of the issues presented for review, each issue preferably being phrased:
>
> (A) in separate sentences that show how the legal question arises;
>
> (B) in no more than 75 words; and
>
> (C) with a question mark at the end.

With either rule, of course, advocates would complain. After all, this method of issue-framing isn't easy.

But perhaps the profession would gradually regain a skill that it has lost. What is that skill? Well, it is multifaceted and difficult to describe without lapsing into clichés such as these:

- home in on the problem;
- separate the wheat from the chaff;
- see the forest, not just the trees;
- cut to the chase;
- go to the heart of the matter;
- convey the big picture;
- aim at the bullseye;
- zero in.

But the very fact that we have so many clichés referring to aspects of this skill demonstrates how highly we value it in the Anglo-American tradition.

If readers yearn to understand the problem and resent having to sweat unnecessarily to understand it, then most legal writers engender resentment every day. They could instead build credibility. And as far as I know, the deep issue is the best model for doing that consistently.

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August 13, 1997

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Judge William L. Garwood
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Re: Agenda for September Meeting

Dear Judge Garwood:

I don't know what's on the agenda for the September meeting of the Appellate Rules Advisory Committee. I would like to suggest two possible items for consideration:

1. Preparation of a form for the certificate of compliance that will be needed under new Fed. R. App. P. 32. Enclosed for your information is a form our office has developed to use with the new Fifth Circuit rule. Other circuits that have already adopted word count systems may have forms that they use that would be better.

2. Following up on the recommendations found in the American Academy of Appellate Lawyers' report circulated at our last meeting, I would like to recommend that we amend Rule 47(a)(1) to provide: "All new and amended local rules shall take effect on the first day of December after their adoption." The purpose of this amendment would be to conform the timing of the changes in local rules with the changes in national rules. It would be a great advantage to the bar, and perhaps also to the courts, to know when to look for rules changes.

Very truly yours,

Luther T. Munford

LTM:szr
Enclosure
cc: Mr. John Rabiej (w/enc.)

PD3:191242.1

(CHOSE CORRECT ALTERNATIVE LANGUAGE AND FILL IN BRACKETS WITH INFORMATION REQUESTED)

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2.7(c), the undersigned certifies this brief complies with the type-volume limitations of 5th Cir. R. 32.2.7(b), for the following reasons:

1. Exclusive of the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains [number] words.

or

Exclusive of the exempted portions in 5th Cir. R. 32.2.7(b)(3), the brief contains [number] lines of text in monospaced typeface.

2. The brief has been prepared in proportionally-spaced typeface using [software name and version] in [typeface name and font size].

or

The brief has been prepared in monospaced (nonproportionally-spaced) typeface using [typeface name and number of characters per inch].

3. If the court so requests, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. I understand that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5th Cir. R. 32.2.7, may result in the court's striking the brief and imposing sanctions against me.

(s)_____

Attorney for_____

(PLACE THIS AS LAST DOCUMENT IN BRIEF BEFORE BACK COVER)