ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, D.C.
April 16-17, 1998

Agenda for Spring 1998 Meeting of
Advisory Committee on Appellate Rules
April 16 & 17, 1998
Washington, D.C.

I. Introductions

II. Approval of Minutes of September 1997 Meeting

III. Report on January 1998 Meeting of Standing Committee

IV. Action Items

A. Item No. 97-5 (FRAP 24(a)(2) — PLRA)

B. Item No. 97-7 (FRAP 28(j) — permit brief explanation of supplemental authorities)

C. Item No. 97-9 (FRAP 32 — cover colors for rehearing petitions, etc.)

D. Item No. 97-12 (FRAP 44 — notify state AG of constitutional challenges to state statutes)

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

F. Item Nos. 97-31 & 98-01 (FRAP 47(a) — uniform effective date for local rules and requirement of filing with AO)

G. Item No. 97-41 (FRAP 4 — orders entered on motion for writ of *coram nobis*)

V. Discussion Items

A. Recommendation of the Technology Subcommittee Regarding the Receipt of Comments on Proposed Rules Via the Internet

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

C. Item No. 91-17 (uniform plan for publication of opinions)

D. Item Nos. 97-10 & 97-28 (require opinions in every case)

E. Item Nos. 95-4 & 97-1 (FRAP 26(a) — making time computation under FRAP consistent with time computation under FRCP and FRCrP)

F. Item No. 95-5 (FRAP 32 — require digitally readable copy of brief, when available)

G. Item No. 95-8 (FRAP 4(a)(7) — repeal collateral order doctrine?)

H. Items Awaiting Initial Discussion and Prioritization

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

2. Item No. 97-33 (FRAP 3(c) — require filing of statement identifying all parties and counsel)

3. Item No. 97-34 (FRAP 3(d)(1) — specify when district clerk must forward updated docket entries)

4. Item No. 97-35 (uniform standards for docketing of complex cases)

5. Item No. 97-36 (FRAP 25(a)(4) — authorize clerk to refuse to accept non-complying documents for filing)

6. Item No. 97-37 (require counsel who represents criminal defendant at trial to continue to represent defendant on appeal)

7. Item No. 97-38 (prohibit district courts from permitting counsel who represents criminal defendant at trial to withdraw before notice of appeal is filed)

8. Item No. 97-39 (FRAP 15(c) — require petitioner seeking review of agency order to identify respondents and attach agency order)

9. Item No. 97-40 (require advance notice and pre-filings in state and federal death penalty cases)

10. Item No. 97-42 (FRAP 3(d) — permit service of notice of filing of appeal by fax or e-mail)

11. Item No. 97-43 (FRAP 22 — prescribe time period for seeking certificate of appeal)

12. Item No. 97-44 (permit appeal of district court's refusal to stay enforcement of judgment pending resolution of post-trial motions)

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

VII. Scheduling of Dates and Location of Fall 1998 Meeting

VIII. Adjournment

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Advisory Committee on Appellate Rules
Table of Agenda Items — Revised March 1998

FRAP Item	Proposal	Source	Current Status
91-17	Uniform plan for publication of opinions.	Local Rules Project & Federal Courts Study Committee	Awaiting initial discussion Further study recommended 12/91 Retained on agenda with high priority 9/97
95-3	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 9/97
95-4	Amend computation of time to conform to Civil Rules method. (Related to No. 97-1.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97
95-5	Amend FRAP 32 to require submission of digitally readable copy of brief, when available.	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with medium priority 9/97
95-7	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period. (Related to No. 96-2.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97
95-8	Does FRAP 4(a)(7) repeal collateral order doctrine?	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97
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. (Related to No. 95-7.)	Hon. Richard A. Posner (CA7)	Awaiting initial discussion Retained on agenda with low priority 9/97
97-1	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to No. 95-4.)	Advisory Committee & Los Angeles County Bar Assn.	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-4	Amend FRAP 15(c)(1) re: informal rulemaking.	Advisory Committee & Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-5	Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 9/97
97-7	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97

FRAP Item	Proposal	Source	Current Status
97-9	Amend FRAP 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 Retained on agenda with low priority 9/97
97-10	Amend FRAP 36 re: disposition without opinion. (Related to No. 97-28.)	Philip Lacovara, Esq.	Awaiting initial discussion Retained on agenda with high priority 9/97
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 9/97
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 Retained on agenda with low priority 9/97
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 Retained on agenda with high priority 9/97
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 Retained on agenda with high priority 9/97
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 Draft approved 9/97 for submission to Standing Committee after 12/1/98
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 Retained on agenda with medium priority 9/97
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 Retained on agenda with high priority 9/97

FRAP Item	Proposal	Source	Current Status
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 Retained on agenda with high priority 9/97
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 Retained on agenda with medium priority 9/97
97-32	Amend FRAP 12(a) to require the appellate caption to identify only the parties to the appeal.	Methods Analysis Program	Awaiting initial discussion
97-33	Amend FRAP 3(c) to require that an appellant file with the notice of appeal a statement identifying all appellants, all appellees, and counsel for all represented parties.	Methods Analysis Program	Awaiting initial discussion
97-34	Amend FRAP 3(d)(1) to specify when the district clerk must forward updated docket entries to the appellate clerk.	Methods Analysis Program	Awaiting initial discussion
97-35	Amend unspecified rules to establish uniform standards for the docketing of complex cases by district courts, bankruptcy courts, and BAPs.	Methods Analysis Program	Awaiting initial discussion
97-36	Amend FRAP 25(a)(4) to permit the clerk to refuse to accept for filing documents that do not comply with the rules.	Methods Analysis Program	Awaiting initial discussion
97-37	Amend unspecified rules to require counsel who represents a criminal defendant at trial to continue to represent the defendant on appeal unless relieved by the appellate court. (Related to No. 97-38.)	Methods Analysis Program	Awaiting initial discussion
97-38	Amend unspecified rules to prohibit district courts from permitting counsel who has represented a criminal defendant at trial to withdraw before a notice of appeal is filed. (Related to No. 97-37.)	Methods Analysis Program	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
97-39	Amend FRAP 15(c) to require the petitioner to list respondents and to attach a copy of the agency order to the petition for review.	Methods Analysis Program	Awaiting initial discussion
97-40	Amend unspecified rules to require advance notice and pre-filings in state and federal death penalty cases.	Methods Analysis Program	Awaiting initial discussion
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Hon. Seth P. Waxman Acting Solicitor General	Awaiting initial discussion
97-42	Amend FRAP 3(d) to permit clerk to serve notice of filing of appeal by fax or e-mail.	Michael E. Kunz Michael N. Milby William S. Brownell District Court Clerks	Awaiting initial discussion
97-43	Amend FRAP 22 to prescribe a time period for seeking a certificate of appealability.	John J. McCarthy	Awaiting initial discussion
97-44	Amend unspecified rules to permit appeal of district court's refusal to stay enforcement of judgment pending resolution of post-trial motions.	Michael F. Dahlen, Esq.	Awaiting initial discussion
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office.	Standing Committee	Awaiting initial discussion

DRAFT

Minutes of the Fall 1997 Meeting of the
Advisory Committee on Appellate Rules
September 29, 1997
Santa Fe, New Mexico

I. Introductions

Judge Will L. Garwood called the meeting of the Advisory Committee to order on Monday, September 29, 1997, at 8:35 a.m. at the Homewood Suites Hotel in Santa Fe, New Mexico. The following Advisory Committee members were present: Judge James K. Logan, Chief Justice Pascal F. Calogero, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, Mr. Michael J. Meehan, and Mr. Luther T. Munford. Mr. Douglas N. Letter, Appellate Staff, Civil Division, U.S. Department of Justice, was present representing the Acting Solicitor General. Judge Alicemarie H. Stotler, who chairs the Standing Committee, was present, as was Judge Frank H. Easterbrook, the liaison from the Standing Committee. Mr. Patrick J. Fisher, Jr., the liaison from the appellate clerks, and Mr. Charles R. "Fritz" Fulbruge, III, who will replace Mr. Fisher as liaison on October 1, were both present. Also present were Ms. Judy McKenna from the Federal Judicial Center and Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office.

Judge Garwood made a series of announcements: Prof. Mooney, longtime Reporter to the Committee, has been appointed a member of the Committee, and Prof. Patrick J. Schiltz of Notre Dame Law School has been appointed to replace her as Reporter. Mr. Letter has replaced Mr. Robert E. Kopp as the representative of the Acting Solicitor General. Judge Alex Kozinski has resigned from the Committee; his replacement has not yet been appointed. Judge Stanwood R. Duval, Jr., of the Eastern District of Louisiana has been appointed to the Committee, but was unable to attend today's meeting. Judge Phyllis A. Kravitch will replace Judge Easterbrook as the liaison from the Standing Committee, and Mr. Fulbruge will replace Mr. Fisher as the liaison from the appellate clerks.

Judge Logan explained that he technically remains Chair of the Advisory Committee until October 1, when Judge Garwood's appointment as Chair becomes effective. However, Judge Logan asked Judge Garwood to preside at today's meeting because the focus of the meeting will be to set priorities for Judge Garwood's tenure.

II. Approval of Minutes of April 1997 Meeting

The minutes of the April 1997 meeting were approved, with one correction: The first sentence of the last full paragraph on page 3 was in err in stating that, "[i]n Rule 4(a)(5)(A)(i), the Committee approved changing 'not later than' to 'within.'" In fact, the Committee approved changing "within" to "not later than."

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

Judge Logan reported that, at its June 1997 meeting, the Standing Committee approved the restylized rules and accompanying advisory committee notes ("ACNs"), with one exception: The Standing Committee deleted the sentence in the ACN to FRAP 35 that had urged the Supreme Court to delete the last sentence of Supreme Court Rule 13.3. Judge Logan further reported that neither the Executive Committee of the Judicial Conference nor any member of the Conference had placed the restylized rules on the discussion calendar for the Conference's September 1997 meeting. Thus, the rules were deemed to be submitted to the Supreme Court with the Conference's unanimous approval.

Mr. Rabiej stated that the Administrative Office was in the process of proofreading the restylized rules carefully and would submit them to the Supreme Court within three to four weeks. Judge Garwood asked that each member of the Advisory Committee be provided with a copy of the version of the restylized rules that is submitted to the Supreme Court.

IV. Moratorium on Submission of New Changes for Public Comment

Judge Garwood suggested that the Committee should give the bench and bar a chance to become familiar with the restylized rules before publishing proposed changes to those rules. He recommended that the Committee continue to send proposed amendments to the Standing Committee, but ask the Standing Committee not to publish them for comment until sometime after December 1, 1998, when the restylized rules will take effect (if approved by the Supreme Court and not blocked by Congress).

Judge Logan agreed and stated that changes to the rules should not even be submitted to the Standing Committee before 1999, unless there was an urgent need for a change. He suggested that the Advisory Committee continue to consider and approve amendments, but that the amendments be held back and then presented as a group to the Standing Committee sometime after the restylized rules take effect.

Judge Easterbrook agreed with Judge Logan. He stated that there is substantial sentiment within the Standing Committee that the bench and bar deserve a "period of reticence" in which they can grow accustomed to the new rules and be spared yet another round of amendments. Judge Stotler agreed with Judge Easterbrook and Judge Logan and strongly recommended that amendments to FRAP not be forwarded to the Standing Committee, but instead be forwarded as a group sometime after the restylized rules take effect.

After further discussion, the Advisory Committee reached a consensus that, barring an emergency, no amendments to FRAP will be forwarded to the Standing Committee until after the restylized rules have been in effect for at least a few months. However, the Standing Committee will continue to be informed of the work of the Advisory Committee through the Committee's minutes and reports from Judge Garwood.

V. Presentation on Electronic Filing Technology

Judge Garwood announced that, immediately after lunch, a demonstration of electronic filing technology would be presented.

VI. Action Items

A. Item 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.

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 ("S.G."), 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 S.G. 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.

A member questioned the need for the change. He noted that the government brings an appeal in only a very small percentage of criminal cases, that the government loses very few of those appeals, and that, even when the government loses, the legal issues are rarely worthy of en banc consideration. In the rare case in which the issues are important, the government can seek an extension of time within which to file a rehearing petition. In the member's experience, those requests are virtually always granted.

Mr. Letter replied that, although the percentage of criminal cases in which the government brings and loses an appeal is small, the total number of such cases is still substantial, and in those cases it is difficult for the S.G.'s office to decide whether to petition for rehearing within 14 days. Often, the S.G. is not even informed of a decision until three or four days after it is issued, and often, in "the heat of the moment," the losing U.S. Attorney pressures the S.G. to file a rehearing petition. Extending the 14 day period would ensure that there was enough time for cooler heads to prevail and for the S.G. to give careful consideration to the matter, without having to burden the court with a potentially needless motion for an extension. Also, Mr. Letter reported, when it is clear that the issue is worthy of en banc consideration, the S.G. is reluctant to gamble on getting an extension, and thus the rehearing petition must be hastily prepared.

Several members of the Committee expressed concern about the degree to which the S.G.'s proposal would burden the system. There was substantial sentiment on the Committee that the deadline for filing a rehearing petition should be "symmetrical" — that is, identical for the government and the defendant. Thus, agreeing to the S.G.'s request would mean that every one of the thousands of criminal defendants who lose appeals each year would get 45 days to petition for rehearing. One member predicted that such an extension would result in more and lengthier rehearing petitions. Other members pointed out the cost to the system of delaying the

mandates in all criminal cases for an additional 31 days. One possible cost would be an increase in motions to expedite the issuance of mandates.

Mr. Letter asked whether extending the 14 day deadline to 21 days would be more acceptable to the Committee. In response, Mr. Letter was asked whether the S.G. would accept a universal 21 day deadline that would apply to all parties in all cases, civil and criminal. Mr. Letter replied that a 21 day deadline in civil cases would cause significant hardship for the S.G.'s office. In criminal cases, generally only the responsible U.S. Attorney and perhaps one or two other agencies need to be consulted about a potential rehearing petition. In civil cases, though, a half dozen or more agencies may have to be consulted.

Several members of the Committee wondered why the S.G., after operating successfully under the 14 day deadline for many years, was now seeking an extension. What has changed? Mr. Letter pointed to the large number of appeals created by the enactment of the sentencing guidelines. A member responded that most of the major issues raised by the sentencing guidelines have been decided, and that few sentencing guideline cases today present issues worthy of en banc consideration.

A member moved that FRAP 40 be retained as presently written. The motion was seconded. The motion carried (6-1).

B. Item 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."

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 noted this omission at the Committee's April 1997 meeting, and the Committee added the matter to its study agenda.

The Committee considered the following amendment and ACN:

Rule 31. Serving and Filing Briefs

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

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.

Several members expressed concern about the last two sentences of the draft ACN. One member noted that in suggesting that one pro se litigant could serve as the legal representative of another, the sentences appeared to be encouraging the unauthorized practice of law. Judge Easterbrook also pointed out that any ACN that encourages further disparity in local rules will be a "red flag" for the Standing Committee.

A member moved that the amendment and all of the ACN except the last two sentences be approved. The motion was seconded. The motion carried (unanimously).

Judge Garwood noted that, pursuant to the Advisory Committee's new policy, the amendment would not be forwarded to the Standing Committee until sometime after the restylized rules take effect.

VII. Discussion Items

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

Judge Garwood asked that the 14 items listed under § VII(A) of the agenda be removed from the Table of Agenda Items. These are items upon which the Advisory Committee, Standing Committee, and Judicial Conference have all completed action.

A member moved that 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 be removed from the Table of Agenda Items. The motion was seconded. The motion carried (unanimously).

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

Judge Garwood asked that the two items listed under § VII(B) of the agenda be removed from the Table of Agenda Items. No. 92-11, regarding the requirement of some courts of appeals that government attorneys join their bars before appearing before them, was withdrawn by the S.G. No. 97-17, a proposal that FRAP 4 be amended to provide that the 10 day deadline for filing a "tolling" FRCP 60 motion be calculated pursuant to FRCP 6(a) rather than pursuant to FRAP 26(a), has been implemented in the restylized rules.

A member moved that Nos. 92-11 and 97-17 be removed from the Table of Agenda Items. The motion was seconded. The motion carried (unanimously).

The Committee took a 15 minute break.

C. Prioritization of Other Proposals on Table of Agenda Items

The Reporter informed the Committee that there were 40 proposals on the Table of Agenda items that had received little or no Committee attention and nine more proposals that had been received by Judge Garwood after the Agenda Book had been distributed. Those nine proposals come from the Methods Analysis Program's appellate working group and were conveyed in a September 15, 1997 letter to Mr. McCabe from Mr. Fisher. Copies of Mr. Fisher's letter were distributed to the Committee. Mr. Fisher stated that the working group was not seeking immediate action, but merely asking that its proposals be put on the Advisory Committee's study agenda for discussion at a future meeting. Judge Garwood indicated that the proposals would receive initial discussion at the Committee's Spring 1998 meeting.

Judge Garwood stated that, unless there were any objections, he would lead the Committee through each of the 40 proposals remaining on the study agenda and ask the Committee to decide whether each item should remain on the agenda and, if so, what priority the item should receive.

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

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 Judicial Conference approved and forwarded to the Supreme Court, 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.

At Judge Garwood's invitation, the Reporter informed the Committee of the following:

> Sections 2072(c) and 1292(e) resulted from a suggestion made by Prof. Thomas D. Rowe, Jr., a member of the Federal Courts Study Committee. In April 1991, Judge Kenneth F. Ripple, who then chaired the Advisory Committee, wrote to Prof. Rowe and asked him exactly what he had in mind in suggesting the amendments to §§ 2072 and 1292. Prof. Rowe replied that he did not have any specific problems in mind; he merely thought that when specific problems did arise, the Advisory Committee, Standing Committee, and Judicial Conference would have "an especially valuable additional perspective to bring to the process." Prof. Rowe cautioned, though, that his "suggestion was truly procedural in the most contentless sense of the word." His view was that, if the Advisory Committee had ideas for improving the law, great; if not, "no harm done."
>
> In January 1993, Judge Ripple wrote to the chief judges of all of the courts of appeals and to the S.G., and asked for suggestions about how the Advisory Committee might use its authority under §§ 2072(c) and 1292(e). Mr. Rabiej's recollection is that virtually all of the chief judges responded, and that they were overwhelmingly opposed to the Committee using its newly granted authority to broadly 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. However, the only documentation of the responses to Judge Ripple's request that can be located today are copies of letters that Judge Ripple received from the Fifth, Sixth, Tenth, and District of Columbia circuits. Those letters are consistent with Mr. Rabiej's recollection. Also, according to the minutes of the Committee's April 1993 meeting, the S.G. told Judge Ripple that he "hope[d] that the Committee would not take an activist role simply because the authority had been granted."

After the Reporter conveyed this information, the Advisory Committee discussed the question of whether No. 91-3 should remain on its agenda. Several members expressed agreement with Prof. Rowe's suggestion that, in the future, specific problems relating to finality or interlocutory appeals might be productively addressed through the Rules Enabling Act process. However, at this point, the only question before the Committee was whether it should attempt to write into FRAP a broad "restatement" of the law of finality or interlocutory appeals. The consensus of the Committee was that attempting such a codification would be

extraordinarily difficult and time-consuming, and thus that No. 91-3 should be removed from the study agenda.

A member moved that No. 91-3 be removed from the study agenda, without prejudice to any future proposals requesting the Committee to use its authority under §§ 2072(c) or 1292(e) to address specific problems. The motion was seconded. The motion carried (unanimously).

A member asked that the minutes reflect that the Committee's decision should in no way be interpreted as reflecting reluctance to use its authority under §§ 2072(c) and 1292(e) to address specific problems that are brought to its attention, as it did in rewriting FRAP 5 to accommodate the interlocutory appeals that will be authorized by new FRCP 23(f). At this point, however, no such specific proposals were before the Committee.

2. Item No. 95-8: Does FRAP 4(a)(7) repeal collateral order doctrine?

The Committee next considered No. 95-8, as it is related to No. 91-3.

No. 95-8 was placed on the Committee's study agenda by Mr. Munford, who is concerned that FRAP 4(a)(7) may be read to effectively repeal the collateral order doctrine. FRAP 4(a)(1)(A) generally provides that, in a civil case, a notice of appeal "must be filed . . . within 30 days after the judgment or order appealed from is entered." FRAP 4(a)(7) then provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Mr. Munford explained that the source of his concern is the phrase "entered in compliance with Rule[] 58." Some orders that traditionally have been appealable under the collateral order doctrine are not, in fact, "entered in compliance with Rule[] 58."

A member said that he did not share Mr. Munford's concern, as, to his knowledge, orders have continued to be appealed under the collateral order doctrine notwithstanding the language in FRAP 4(a)(7) upon which Mr. Munford focuses. Judge Easterbrook agreed and referred to a unanimous decision that he wrote for the en banc Seventh Circuit that accepted as uncontroversial the proposition that FRAP 4(a)(7) does not affect the collateral order doctrine.[1] Mr. Munford replied that he is aware of at least one Fifth Circuit case to the contrary.

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[1] *Otis v. City of Chicago*, 29 F.3d 1159, 1165 (7th Cir. 1994) (en banc) ("[W]e know from *Mallis* [*Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978)] and *Schaefer* [*Shalala v. Schaefer*, 509 U.S. 292 (1993)] that a Rule 58 judgment is not the *sine qua non* of appeal. It has been clear since *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), that § 1291 permits appeals from final 'decisions' that are not final 'judgments.' See also *Digital Equipment Corp. v. Desktop Direct, Inc.*, 114 S. Ct. 1992, 1995-96 (1994).").

A member moved that No. 95-8 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

Judge Garwood asked Mr. Munford to draft a proposed amendment to FRAP 4 that would address his concern. Mr. Munford agreed.

3. Item No. 91-17: Uniform plan for publication of opinions.

In its 1990 report, the Federal Courts Study Committee recommended to the Judicial Conference that it appoint an ad hoc committee to develop uniform guidelines regarding the practice of the courts of appeals of designating certain opinions as "unpublished." In 1991, the Judicial Conference considered but declined to follow the FCSC recommendation. The question for the Advisory Committee is whether it wishes to pursue this issue, notwithstanding the lack of interest expressed by the Judicial Conference six years ago.

A member said that he favored retaining this issue on the study agenda. He said that rules governing unpublished opinions ought to be uniform. He also expressed concern that current practice favors wealthy lawyers and clients, who can afford to retrieve unpublished opinions through Westlaw and LEXIS.

Another member agreed that the Committee ought to look at this issue. He thought it quite possible that, given the technological developments of the past few years and the turnover in the membership of the Judicial Conference, the Conference might have more interest in the issue today than it did in 1991.

Another member said that at least two issues were before the Committee: First, should FRAP be amended to require that all opinions be published? Second, if not, should FRAP be amended to impose uniform rules regarding the citation and precedential effect of unpublished opinions? The member described how his circuit has struggled with these issues.

Judge Easterbrook essentially agreed, although he said that phrasing the first issue in terms of whether an opinion should be "published" is anachronistic. In years past, talking about "publishing" opinions made sense, as, roughly speaking, what was published was what was available to the bar. Westlaw and LEXIS have changed that; whether or not they are "published," judicial opinions find their way into the Westlaw and LEXIS databases and become available to the bar. The real issue, Judge Easterbrook said, is not which opinions should be "published," but rather which opinions should be cited, and which opinions should be regarded as precedential — that is, as binding on subsequent panels.

A member argued that uniform rules are badly needed. He said that the varying and conflicting local rules of the circuits create a hardship for government attorneys and other attorneys with national practices.

Mr. Rabiej reported that, in 1995, the Judicial Conference approved a Long Range Plan for the Federal Courts. Recommendation 37d of that plan is a proposal to develop uniform rules regarding the publication of opinions. That item was assigned to the Committee on Court Administration and Case Management ("CACM"). CACM has subsequently appointed a subcommittee to work on the issue. Mr. Rabiej said that CACM does not have "exclusive" jurisdiction — *i.e.*, the assignment of the issue to CACM does not preclude the Advisory Committee from also taking up the issue — but the Advisory Committee should try to avoid duplicating CACM's efforts.

A member said that he thought that the Advisory Committee ought to take up the issue, notwithstanding the assignment to CACM. He noted that the composition of CACM is considerably different from that of the Advisory Committee. He also thought it important that the Committee solicit the views of the chief judges of the circuits on this issue.

Judge Easterbrook said that the Committee should study the practice of affirming district court judgments without *any* opinion at the same time that it studies the question whether unpublished opinions should be cited or have precedential effect. A member disagreed, stating that the question of whether an opinion of some kind should be required in every case can be separated from the question of whether opinions that are issued can be cited or are precedential.

A member said that, while he would have no objection to amending FRAP to address which opinions may be *cited*, he was concerned that the question of which opinions are *precedential* is substantive and thus beyond the Committee's authority. Another member disagreed, pointing to the fact that local rules already govern both issues.

Ms. McKenna warned that, in studying this issue, it is important to go beyond what the local rules of each circuit say, and examine how unpublished opinions are treated in practice. Ms. McKenna said that the practice of some circuits is inconsistent with their rules. Ms. McKenna also pointed out that three or four circuits do not provide their unpublished opinions to Westlaw and LEXIS for inclusion in their databases. Finally, Ms. McKenna said that, although a lot of work was already underway on this issue as a result of the assignment of Recommendation 37d to CACM, she hoped that the Advisory Committee would also get involved.

A member said that Recommendation 37d seemed to him to be addressed mainly to the availability of unpublished opinions, and not to the question of whether unpublished opinions can be cited and/or treated as precedential.

Mr. McCabe agreed with Ms. McKenna that the Advisory Committee had a valuable role to play in studying this issue, notwithstanding the involvement of CACM. CACM is primarily devoted to addressing matters of internal case management, whereas the Advisory Committee addresses more fundamental policy issues. Moreover, the Advisory Committee has broader representation than CACM, and the Advisory Committee's process is public.

Judge Garwood stated that he intended to appoint a subcommittee of the Advisory Committee to address this issue, and that he would ask the subcommittee to work with CACM's subcommittee to try to avoid duplication.

Judge Stotler reinforced the notion that the Advisory Committee's subcommittee should be careful to avoid duplicating work being done by others. She pointed out that the Judicial Conference is also considering the ABA's uniform citation proposal and is attempting to establish a universal database containing all opinions — published and unpublished — of all federal courts.[2]

Judge Garwood said that he did not think any of the judges on the Fifth Circuit read any of the court's unpublished opinions. Indeed, unpublished opinions, unlike published opinions, are not even circulated to the court. Judge Logan reported that the practice of the Tenth Circuit is different. Until he took senior status, Judge Logan received and read the unpublished opinions of his court.

Mr. Fulbruge reported that, during the year ended June 30, 1997, the Fifth Circuit issued roughly 500 published opinions and 2700 unpublished opinions. He agreed with Judge Garwood that no Fifth Circuit judge could possibly read all of the court's unpublished opinions.

Ms. McKenna said that the circuits differ: In some, unpublished opinions are not circulated to the court, and thus are presumably not read by the judges. In others, the unpublished opinions are circulated and, presumably, read.

A member of the Committee pointed out that state courts are also confronting this issue. In some states, only 10 to 15 percent of the court's opinions are published. Thus, with respect to many issues, the only way that a practitioner can get a sense of the court's recent thinking is to read the court's unpublished opinions.

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[2]Judge Stotler clarified this comment in an October 6, 1997 memorandum to Judge Garwood. Judge Stotler reported that while CACM "is generally charged with carrying out Long Range Plan Recommendation 37d," the Committee on Automation and Technology ("CAT") is specifically charged with studying the "desirability, feasibility, and cost of establishing a centrally maintained, publicly accessible electronic database of all opinions submitted by federal courts for inclusion in the database." Judge Stotler stated that the Advisory Committee's work should not overlap with CAT's, as CAT is studying the feasibility of establishing a database containing opinions that the federal courts choose to submit, while the Advisory Committee is studying the advisability of establishing uniform rules governing the publication, citation, and precedential value of appellate opinions. However, the Advisory Committee's work could overlap with CACM's, depending upon how broadly CACM construes Recommendation 37d.

Chief Justice Calogero described the practice of the Louisiana courts. The Supreme Court publishes all of its opinions, although some are very brief. The Court of Appeals does not publish all of its opinions. Chief Justice Calogero said that he understands the need for being able to issue unpublished opinions, but he is concerned that judges sometimes use the option of designating opinions as unpublished as a "crutch" to avoid coming to grips with difficult issues.

A member moved that No. 91-17 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

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

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 she objected. Some circuits hold that such intervention is necessary, while others hold that it is not. A commentator has urged that FRCP 23(e) be amended to provide that no such intervention is necessary. If such an amendment is adopted, the commentator suggests that a "conforming amendment" to FRAP "may also be appropriate."

A member stated that, in his view, this is a "substantive" matter that should not be addressed in FRAP.

Mr. Rabiej reported that this proposal was considered by the Advisory Committee on Civil Rules, and that the Committee had decided not to act upon it.

A member stated that any action on this proposal should first come from the Advisory Committee on Civil Rules. Another member agreed. He stated that the problem may be that FRCP 23, as presently worded, misleads absent class members into believing that intervention is not necessary, but fixing FRCP 23 is obviously not the responsibility of this Advisory Committee.

A member moved that No. 95-1 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

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

Two commentators complain that the United States District Court for the Western District of Tennessee 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 in FRAP 4(a)(1) to file a notice of appeal, and the deadline in 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)(A)) and "tolled" by 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 will be appealing.

A member stated that, to his knowledge, this problem had not been experienced outside the Western District of Tennessee, and thus was not worth the Committee's attention. Another member agreed, pointing out that FRAP 24(a)(5) states that, after the district court denies leave to proceed on appeal IFP, the litigant "*may*" seek permission to proceed IFP from the court of appeals within 30 days, not that the litigant *must* do so. The member further noted that, in cases in which an appellant has proceeded IFP in the district court, his court treats the appeal from the merits as an automatic application for permission to proceed IFP on appeal.

Mr. Fisher speculated that this problem may be unique to the Sixth Circuit. He said that, to his knowledge, all other circuits read FRAP 24(a)(5) as had been suggested and permit a litigant to seek permission to proceed on appeal IFP more than 30 days after being informed of the denial of his motion by the district court.

A member moved that No. 95-2 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

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

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 Stephen Williams of the D.C. Circuit 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 moves 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 motion 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 motions to rehear, reopen, or reconsider the order, would become effective when the agency disposes of the last such petition outstanding.

Mr. Letter stated that, although the S.G. does not have any objection to the Committee studying Judge Williams' proposal, the S.G. was skeptical that FRAP could be amended to achieve what Judge Williams suggests. Mr. Letter further stated that Judge Williams has himself "backed off" his proposal. The problem is that agencies have widely differing rules regarding petitions to rehear, reopen, or reconsider. Some of those rules are internal, and others are imposed by statute. Amending FRAP in the manner suggested by Judge Williams would be nearly impossible and might exceed the Committee's powers under the Rules Enabling Act.

A member suggested that Judge Williams' two proposals could be separated. He agreed that Judge Williams' first proposal — essentially defining in FRAP when an agency action is final for purposes of appeal — should be dropped. He pointed out, though, that there may be some value in studying Judge Williams' second proposal. FRAP could provide that when a petition for review of an agency action is filed, and then a motion is made before the agency which motion has the legal effect of rendering the action unappealable because of lack of finality, the petition for review will be deemed effective after the agency disposes of the "finality-blocking" motion. In other words, FRAP 15 might be amended to conform to FRAP 4(a)(4)(B)(i), even if it cannot be amended to conform to FRAP 4(a)(4)(A).

A member agreed with this suggestion, but stated that, before the Committee takes any action on Judge Williams' second proposal, it should study how much of a "trap" currently exists for attorneys involved in agency practice. The member reminded the Committee that FRAP 4(a)(4)(B)(i) was necessary to remove a trap that FRAP itself created. (See the ACN to the 1993 amendment to FRAP 4(a)(4).) FRAP does not create a similar trap with respect to petitions to review agency action.

A member moved that the first of Judge Williams' two suggestions — amending FRAP 15 to define finality in agency proceedings similar to the manner in which FRAP 4(a)(4)(A) defines finality in district court proceedings — be removed from the study agenda, but that the second of Judge Williams' two suggestions — amending FRAP 15 so that premature petitions to review agency actions are treated the same as premature notices of appeal under FRAP 4(a)(4)(B)(i) — be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

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

8. Item No. 97-1: Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a).

These two proposals are identical. 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, creating a trap for unwary litigants. The question before the Committee is whether FRAP 26(a)(2) should be amended to remove this trap.

Judge Easterbrook pointed out that there are actually three different methods of calculating time: The appellate rules method, the civil rules method (which is identical to the criminal rules method), and the bankruptcy rules method (which differs from both the appellate rules method and the civil/criminal rules method). He stated that the Standing Committee should adopt a uniform method of calculating deadlines that would apply in all four sets of rules — preferably, a rule that said that "all days count," except that, when the last day of a time period falls on a Saturday, Sunday, or legal holiday, the deadline moves ahead to the next working day.

One member expressed his support for amending FRAP 26(a)(2), so that at least the appellate, civil, and criminal rules would be uniform on this point. Another member agreed.

A member moved that Nos. 95-4 and 97-1 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

9. Item No. 95-5: Amend FRAP 32 to require submission of digitally readable copy of brief, when available.

No. 95-5 comes from Judge Easterbrook, who 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. This would permit judges with impaired vision to enlarge the text and all judges to search the text for particular words or citations.

Judge Easterbrook reported that the Seventh Circuit amended its local rules to implement this change. Counsel appearing before the Seventh Circuit must now file both a paper copy and an electronic copy of their briefs, and must serve both a paper copy and an electronic copy on the other parties. This rule applies only if the brief was prepared on computer; if not, filing and service of paper copies is sufficient. Judge Easterbrook said that a number of the judges on the Seventh Circuit are pleased with the change, particularly because they no longer have to carry around stacks of briefs, but instead can carry briefs on disk or in their laptop computers.

Judge Easterbrook expressed the hope that the Advisory Committee would not read his suggestion narrowly. He pointed out that, by the time that FRAP can be amended to require the filing and service of briefs on disk, it might already be clear that putting briefs on CD-ROM or filing and serving briefs through the Internet would be preferable.

Judge Garwood said that he supported keeping No. 95-5 on the study agenda, but that he would like to survey the chief judges and circuit clerks about the proposal before taking any action.

Mr. Fulbruge said that the Fifth Circuit now requests — but does not require — attorneys to provide the court with electronic copies of their briefs. He said that the Fifth Circuit has found it extremely helpful to receive briefs on disk; it makes information management much easier for the clerk's office and for the staff attorneys.

A member moved that No. 95-5 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

The Committee broke for lunch at 12:00 noon. At 1:45 p.m., the Committee reconvened and watched a brief demonstration of electronic filing technology. The Committee then returned to the task of paring and prioritizing its study agenda.

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

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. The question for the Advisory Committee is whether FRAP should be amended to require service by the filing party instead of by the clerk.

Several members briefly expressed satisfaction with the manner in which the rules currently operate. No member spoke in favor of the proposal.

A member moved that No. 95-6 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

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

12. Item No. 97-2: Amend FRAP 4(a)(5) — standard for granting extension in first 30 days different than in second 30 days.

These two proposals are identical. 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: (1) 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. (2) 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 seven other circuits). In making this distinction, these courts have relied heavily upon the ACN 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.

The First Circuit 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 — then the "good cause" standard applies. *See Virella-Nieves v. Briggs & Stratton Corp.*, 53 F.3d 451, 453 (1st Cir. 1995).

Mr. Munford has suggested that FRAP 4(a)(5) be amended to resolve this circuit split.

The Reporter called the Committee's attention to restylized FRAP 4(b)(4) — the criminal counterpart to FRAP 4(a)(5). FRAP 4(b)(4) clearly provides that the "excusable neglect" standard can be applied either "before or after the time has expired," and that the "good cause"

standard can likewise be applied "before or after the time has expired." The ACN to restylized FRAP 4(b)(4) confirms that the Rule "does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so . . . ." Thus, there is a bit of a "conflict" between the majority construction of FRAP 4(a)(5) and restylized FRAP 4(b)(4).

A member noted that the majority construction of FRAP 4(a)(5) seems inconsistent with the language of the Rule, and that the source of the discrepancy appears to be the 1979 ACN. But, the member said, Wright & Miller report the following:

> As originally drafted, the Rule allowed an extension on a showing of good cause only if the motion was filed during the original appeal time. The Note of the Advisory Committee to that earlier draft stated that only excusable neglect would justify an extension on motion filed after expiration of the original time. The text of the Rule was changed, but the Note was not changed.

16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148 (1996).

One member said that he favored amending FRAP 4(a)(5) to read more like FRAP 4(b)(4) and thus to make clear that either the "excusable neglect" or "good cause" standard can be applied at any time. Another member said that the wording of FRAP 4(b)(4) reflected an intentional decision by the Committee that, in the criminal context, either standard can be applied at either stage.

Another member said that he did not have a strong view on the matter, but that, if the Committee was comfortable with the majority interpretation of FRAP 4(a)(5), then the Rule should be amended to give fair warning to litigants. As written, the Rule does not suggest that the standard applied after expiration of the original period will be tougher than that applied before expiration, as most circuits have held.

One member asked whether the 1979 ACN could be "amended." Several members expressed the view that it could not.

A member moved that Nos. 95-7 and 96-2 be retained on the study agenda with low priority, and that No. 97-2 (which is identical to No. 95-7) be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

13. Item 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.

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.

No. 96-2 was not separately discussed by the Committee, except that one member made a brief comment in support of it during the discussion of Nos. 95-7 and 97-2 (to which No. 96-2 is related). As noted above, at the same time that a motion was made with respect to Nos. 95-7 and 97-2, it was also moved that No. 96-2 be retained on the study agenda with low priority. That motion was seconded, and it carried (unanimously).

14. Item No. 96-3: Add presumption against oral argument for all matters other than the substance of the appeal (in FRAP 34?).

A member stated that this suggestion was his, that he had thought better of it, and that he now moved that No. 96-3 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

15. Item No. 97-3: Amend FRAP 6 to require service of statement of issues on all parties not just on appellee.

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. A commentator asks why the appellant should not be required to serve the statement of issues and record designation on *all* parties. And the commentator asks a similar question 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."

The Reporter informed the Committee that he had received a call from Prof. Alan N. Resnick, the Reporter to the Advisory Committee on the Bankruptcy Rules. Prof. Resnick explained that this "discrepancy" was intentional: Bankruptcy proceedings can involve hundreds or even thousands of "parties," but an appeal from an order entered in such a proceeding may involve only a couple of those parties. Prof. Resnick said that FRAP 6(b)(2)(B) works well in ensuring that statements of issues and designations of records are served on those parties who

need them, but not on those parties who do not. Prof. Resnick does not know any bankruptcy judge or bankruptcy attorney who believes that FRAP 6(b)(2)(B) needs "fixing," and he recommends that the Advisory Committee leave well enough alone.

A member moved that No. 97-3 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

16. Item No. 97-4: Amend FRAP 15(c)(1) re: informal rulemaking.

FRAP 15(c)(1) requires the petitioner to serve a copy of her 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 D.C. Cir. 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").

Mr. Letter said that the D.C. Circuit Advisory Committee had struggled with this problem. He recalled an administrative proceeding that involved 25,000 commentators, each of which was considered a "party" by the agency. He strongly recommended that No. 97-4 be retained on the study agenda, and that the Advisory Committee talk with the clerk and chief staff counsel of the D.C. Circuit about how D.C. Cir. Local Rule 15(a) has worked.

A member asked whether the D.C. Circuit Advisory Committee had given any thought to adopting a rule that would require that a petition for review be served on every commentator who had filed a written request for such service with the agency. Mr. Letter replied that the Committee had considered such a rule, but thought that it did not have the authority to order the agencies to invite and collate such requests.

A member agreed that FRAP 15(c)(1), as written, is ambiguous because it is often not clear who was "admitted to participate" in the proceedings of an agency. Another member agreed, noting that each agency has its own rules about who is considered a "party" to agency proceedings.

A member wondered why, if this issue is primarily a problem for the D.C. Circuit, and if the D.C. Circuit's local rule is working well, the Advisory Committee should give the issue any further attention. Another member responded that the question whether the D.C. local rule is working well and the question whether other circuits are experiencing problems are precisely what the Committee should study.

A member moved that No. 97-4 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

17. Item No. 97-5: Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.

There appears to be a conflict between FRAP 24(a)(2) and the Prisoner Litigation Reform Act of 1996 ("PLRA"), Pub. L. No. 104-134. 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." By contrast, 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).)

One member stated that it was obvious that FRAP 24(a)(2) needed to be amended to address this conflict. Several other members agreed.

A member moved that No. 97-5 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

18. Item No. 97-13: Amendments made necessary by Antiterrorism and Effective Death Penalty Act of 1996 (Pub. L. 104-132).

The Committee next considered No. 97-13, as it relates to No. 97-5.

A member stated that 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. No other conflicts had been brought to the Committee's attention. That being the case, he recommended that No. 97-13 be removed from the study agenda, without prejudice to any specific problems that might be brought to the Committee's attention in the future.

A member moved that No. 97-13 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

19. Item No. 97-6: Amend FRAP 27(b) to permit appellate commissioners to rule on procedural motions.

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." A commentator 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 the Ninth Circuit.

A member pointed out that, as far as he can tell, the position of "appellate commissioner" does not exist outside the Ninth Circuit, and the position is not authorized or even mentioned in any statute or regulation. Judge Easterbrook agreed.

Mr. McCabe reported that the Ninth Circuit tried, without success, to interest the Judicial Conference in creating the position and that, after it became clear that the Judicial Conference had no interest in the proposal, the Ninth Circuit went forward and created the position anyway.

A member said that FRAP should not be amended to address the powers of appellate commissioners until the position is formalized in some way outside the Ninth Circuit. Other members agreed.

A member moved that No. 97-6 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

20. Item No. 97-7: Amend FRAP 28(j) to allow brief explanation and statement of significance.

21. Item 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.

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, as parties often are unable to resist the temptation to slip in a few words of argument. A commentator 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." That is the source of No. 97-7.

No. 97-26 comes from Judge Alex Kozinski of the Ninth Circuit. 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."

A member stated that he favored No. 97-7. FRAP 28(j) violations are a persistent problem in his court. He is inclined to amend the Rule to permit some explanation, but to place a strict word limit — one easily enforced by the clerks — on the explanation.

The member said that he did not favor No. 97-26. He cannot imagine a judge *not* wanting to be informed of a supplemental authority. Although he sympathizes with Judge Kozinski's frustration, he does not favor amending FRAP 28(j) to bar the parties in some circumstances from informing the court of supplemental authorities. If a supplemental authority exists, he would rather hear about it late than not hear about it at all.

Another member expressed support for both No. 97-7 and No. 97-26. He expressed frustration at being ambushed in cases in which he followed the Rule in both spirit and letter — by informing the court of supplemental authorities as soon as they came to his attention, and by resisting the temptation to argue about those authorities in his FRAP 28(j) letter — only to have his opponent make argumentative 28(j) submissions at the last minute.

Another member expressed opposition to both No. 97-7 and No. 97-26. He argued that the problem giving rise to No. 97-7 was a problem of enforcement. FRAP 28(j) is perfectly clear; the circuit courts just lack the will to enforce it. He agreed with the earlier comments about FRAP 97-26.

Judge Easterbrook said that the Seventh Circuit had studied proposals similar to both No. 97-7 and No. 97-26 and decided to act on neither. The Seventh Circuit concluded that a word limit on 28(j) explanations would likely be no better enforced that the current ban on explanation, and that trying to regulate the timing of 28(j) submissions would be fruitless: Parties are going to notify the court of supplemental authorities, even if the rules discourage or forbid it.

One member suggested that it may be helpful at least to amend FRAP 28(j) to instruct the parties to notify the court of supplemental authorities as soon as they are discovered. Judge Easterbrook responded that the Seventh Circuit had done that in its local rules, with no discernable impact on the conduct of attorneys.

A member expressed confusion at why a lawyer would be concerned about being "ambushed" with a 28(j) submission made to the court immediately before oral argument. He said that the practice in his court — and, he assumes, in most circuits — is to give the ambushed party a chance to file a supplemental brief after oral argument to address the authorities cited in the last minute 28(j) submission. This gives the ambushed party an advantage.

A member moved that No. 97-7 be removed from the study agenda. The motion was seconded. The motion failed (3-4). By consensus, No. 97-7 was assigned low priority.

A member moved that No. 97-26 be removed from the study agenda. The motion was seconded. The motion carried (5-2).

22. Item No. 97-8: Amend FRAP 29 to permit a state officer or agency to file without consent or leave of court.

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. A commentator has requested that FRAP 29(a) be amended so that state officers and agencies are treated the same as federal officers and agencies.

A member said that amending FRAP 29 was unnecessary because in the unusual case in which an attorney general of a state seeks to file an amicus brief in the name of one of the state's officers or agencies, but not in the name of the state itself, the attorney general can seek and be virtually assured of receiving permission to file the brief.

Another member asked Mr. Fisher and Mr. Fulbruge whether state officers and agencies had any difficulty getting permission to file amicus briefs. Both clerks replied that they could not recall such permission being denied.

A member moved that No. 97-8 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

23. Item No. 97-9: Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.

A commentator has asked that FRAP 32 be amended to provide uniform national rules 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.

One member said that he did not understand the need for such a rule, given that FRAP 32(c)(2)(A) states that no covers are *necessary* on rehearing petitions and the like. The Reporter responded by explaining that the problem is with varying local rules, which provide that if, say, a rehearing petition is filed with a cover, the cover must be a particular color. Judge Easterbrook agreed. He said that the Seventh Circuit has such a local rule, and the rule is widely violated by attorneys unfamiliar with Seventh Circuit practice. He urged the adoption of uniform national rules.

A member agreed. He said that the varying local rules created a hardship for government attorneys and others with national practices. He said that he personally has made several dozen calls over the years to clerks about cover colors.

Another member asked whether new FRAP 32(d) solves this problem by providing that "[e]very court of appeals must accept documents that comply with the form requirements of [FRAP 32]." Judge Easterbrook replied that a problem remains: If a litigant puts *no* cover on her petition, the petition must be accepted. But if she uses a cover of the "wrong" color, the petition can be rejected consistent with FRAP 32(d).

A member moved that No. 97-9 be retained on the study agenda with low priority. The motion was seconded. The motion carried (unanimously).

24. Item No. 97-10: Amend FRAP 36 re: disposition without opinion.

25. Item 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.

FRAP 36(a)(2) contemplates that a court of appeals can render a judgment without an opinion. Two commentators object that this practice violates due process, is unfair to litigants, creates doubts about the grounds for the court's decision, and "effectively — and unfairly — insulates the appellate court's judgment from a rehearing petition and from a petition for certiorari." The commentators ask that FRAP 36 be amended to require that an opinion of at least a few sentences be issued in every case.

A member expressed opposition to the proposals, noting that some courts — such as his own — simply could not function if they had to write an opinion in every case. Another member agreed that any attempt by the Committee to amend FRAP 36 to bar dispositions without opinion would encounter fierce opposition among many circuit judges. Judge Easterbrook agreed, but added that the proposals were serious and deserved discussion. He noted that the present practice reflects a trade-off between circuit size and opinion writing: If Congress expanded the number of judges on each circuit, disposing of appeals without opinion would become less necessary. But Congress has resisted expanding the circuit courts, leaving a few circuits with little choice but to dispose of some appeals without opinion.

Mr. Fulbruge said that, in the Fifth Circuit, very few appeals are disposed of without any opinion, but a substantial number are disposed of with one or two sentence "opinions" that either say that the Fifth Circuit is affirming for the reasons given by the district court or give only a few words of explanation of the judgment.

A member said that his understanding is that the Eleventh Circuit disposes of about a third of its cases without opinion. Another member said that the Virginia Supreme Court likewise disposes of a substantial number of appeals without opinion. Chief Justice Calogero said that the Louisiana Supreme Court issues an opinion in all cases. He pointed out, though, that the Court has discretionary review and that many of its opinions are brief per curiams drafted by staff attorneys.

A member expressed the view that the issue was worth studying, even if the proposals had little chance of getting through the Judicial Conference. Judge Garwood agreed, and said that he would poll the chief judges of the courts of appeals on the matter.

Ms. McKenna reported that the practice of disposing of appeals without opinion is far more prevalent in the Third Circuit than in the Eleventh. She also warned that the statistics kept by various circuits on this matter are sometimes misleading.

A member moved that Nos. 97-10 and 97-28 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

26. **Item No. 97-11: Amend FRAP 39 re: procedure for determining award of attorney's fees for appeal.**

27. **Item 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.**

Nos. 97-11 and 97-24 apparently refer to the same proposal.

A commentator suggests that FRAP 39 be amended to set forth the procedure under which attorneys' 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. This suggestion is ambiguous, as FRAP 39 does not authorize an award of attorneys' fees "as an element of costs on appeal," and thus the issue should never arise. *See Hirschensohn v. Lawyers Title Ins. Corp.*, 1997 WL 307777, at *6 (3rd Cir. June 10, 1997). 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). It is not clear whether the commentator was suggesting that

FRAP 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*.

A member said that this matter should be removed from the study agenda, as it simply has not presented much of a problem for the courts of appeals. His court's approach is typical: The question of whether *any* attorneys' fees should be awarded is decided by the court of appeals. The question of the *amount* of those fees — when the amount is disputed — is remanded to the district court, which can take testimony and other evidence.

A member moved that Nos. 97-11 and 97-24 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

28. Item No. 97-12: Amend FRAP 44 to apply to constitutional challenges to federal regulations.

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. Judge Cornelia Kennedy of the Sixth Circuit has asked the Committee to consider whether FRAP 44 should be expanded to require notice in cases in which a party questions the constitutionality of a federal *regulation*.

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. Thus, there are two issues before the Committee: (1) Should FRAP 44 be amended as Judge Kennedy suggests? (2) Should FRAP 44 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?

A member said that he was hesitant to adopt Judge Kennedy's suggestion. First, it seems inconsistent with Congressional intent, as expressed in § 2403(a). Second, it will create drafting

and interpretation problems, as courts and parties struggle to distinguish "regulations" from "policy statements" from "interpretive bulletins" and so on. And finally, the need for the change is doubtful. If a regulation is not authorized by statute, it will be struck down on that basis. If it is authorized by statute, then the constitutionality of the *statute* will be challenged. It is hard to imagine a "stand alone" challenge to the constitutionality of a *regulation.*

Another member agreed and added that, in any such case that arose, the agency would almost certainly already be a party.

Mr. Letter said that the S.G. did not support Judge Kennedy's suggestion, although he did not object to studying the § 2403(b) problem.

A member moved that the Committee continue to study (with low priority) the question whether FRAP 44 should be amended to require any party who questions the constitutionality of a state statute in a case in which that state is not a party to provide written notice of that challenge to the clerk. The motion was seconded. The motion carried (unanimously). (No motion was made with respect to Judge Kennedy's proposal, although a member commented that it would not hurt to discuss it again at the time the Committee considers amending Rule 44.)

29. **Item 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.**

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).

Prof. Daniel R. Coquillette, the Reporter to the Standing Committee, has suggested four options for addressing this problem: (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 are of "primary concern" to the bench and bar. (4) Draft both a model local rule and national rules.

Judge Easterbrook reported that, at its June 1997 meeting, the Standing Committee essentially decided to keep its options open. There is widespread agreement among the members of the Committee that *something* ought to be done, but widespread disagreement as to *what.* Judge Easterbrook said that the Standing Committee has asked Prof. Coquillette to draft national

rules and model local rules, but that request does not in any way indicate what action the Committee will eventually take.

A member said that this matter should stay on the Advisory Committee's study agenda, but that the Advisory Committee should devote no time to it until the Standing Committee decides what it intends to do with respect to the district courts. At that point, this Advisory Committee could decide whether to recommend conforming amendments to FRAP. In the appellate courts, the disparity of standards has just not been a problem. There are very few FRAP 46 cases, and almost all of those cases involved obvious misbehavior.

A member moved that No. 97-14 be retained on the study agenda, but with (very) low priority until the Standing Committee adopts attorney conduct rules governing practice in the district courts. The motion was seconded. The motion carried (unanimously).

30. Item No. 97-16: Amend unspecified FRAP to address potential overlap in jurisdiction between the Federal Circuit and the regional circuits in patent cases.

In 1996, Judge J. Clifford Wallace of the Ninth Circuit contacted the Administrative Office to describe a series of related cases that (in his view) supported his longstanding contention that the exclusive patent jurisdiction of the Federal Circuit should be eliminated. Judge Wallace's suggestion was referred to the Committee on Federal-State Jurisdiction, which considered and rejected Judge Wallace's proposal. 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."

The Reporter briefly summarized the litigation cited by Judge Wallace (the *FilmTec* litigation) and described how one of the parties to that litigation was essentially permitted to get two inconsistent appellate decisions (one from the Federal Circuit and one from the Ninth Circuit) on the same issue.

A member said that he favored dropping No. 97-16 from the study agenda. The *FilmTec* litigation was not only highly unusual, but the problem it created stemmed not from the fact that the two circuits lacked the authority to prevent the inconsistent determinations, but from the fact that they chose not to use the authority that they had.

A member moved that No. 97-16 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

31. Item 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."

At the April 1997 meeting of the Advisory Committee, Judge Easterbrook suggested that FRAP 1(b) is wrong 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 ACN accompanying FRAP 3 specifically states (quoting *United States v. Robinson*, 361 U.S. 220, 224 (1960)) that the timely filing of a notice of appeal under FRAP 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 again asked that the Advisory Committee give consideration to FRAP 1(b), which, he said, is "flat wrong," and should be deleted. A member agreed.

A member moved that No. 97-18 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

32. Item 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.

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* such notice of appeal is filed? 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.

A member said that it was obvious that the Committee had to address this problem, and he added another concern: He pointed out that 18 U.S.C. § 3731 provides that appeals brought by the United States in criminal cases "in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered." FRAP 4(b)(1)(B)(ii), by permitting the United States to appeal in some circumstances more than "thirty days after the decision, judgment or

order has been rendered," seems inconsistent with § 3731. Judge Logan said that he had written an opinion addressing this conflict.[3]

A member moved that No. 97-19 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

33. Item 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.

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.

Judge Easterbrook said that he saw no reason to address this issue at this time. Rather, he recommended that the Advisory Committee wait to see if a problem develops in practice.

A member moved that No. 97-20 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

34. Item 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.

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

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[3] *United States v. Sasser*, 971 F.2d 470, 472-75 (10th Cir. 1992) (holding that the court had no jurisdiction over an appeal by the United States that was "filed in the district court within 30 days after . . . (ii) the filing of a notice of appeal by any defendant" for purposes of FRAP 4(b), but that was not filed "within thirty days after the decision, judgment or order has been rendered" for purposes of § 3731).

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.

A member said that his court has a local rule requiring that statements regarding opening argument be made in each party's opening brief, and that he had found the rule helpful. Another member said that his court has a similar rule, and that parties generally put their statement regarding oral argument either on the cover of the brief or at the end of the brief. The member was concerned, though, that parties be given a chance to "back out" of a request for oral argument. As far as he is concerned, if a party wants to waive oral argument as late as the day before the argument is scheduled, the party should not be prohibited from making that request.

Mr. Letter said that the S.G. favors the issue being addressed, one way or the other, in FRAP. Rules governing statements regarding oral argument should be uniform. The current hodgepodge of local rules creates unnecessary inconvenience for the government and others with national appellate practices.

A member moved that No. 97-22 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

Judge Garwood said that he would survey the chief judges of the circuits on this issue.

35. **Item 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.**

Apparently, 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. At its April 1997 meeting, the Advisory Committee decided to add to its study agenda the question whether this issue should be more explicitly addressed in FRAP 34(g).

A member said that he sees no reason for a rule. He has never seen a problem arise, and he cannot imagine that a rule could address any potential problem better than the panel before which the problem arises. Another member agreed; this has never been a problem in his court.

A member said that he did not want to drop No. 97-23 from the study agenda. He described a recent experience in which the judge and parties had a conference regarding one attorney's desire to set up a computer with several monitors in the courtroom. The member said that he anticipated more such issues arising in the future, and he thought FRAP 34(g) might well be amended to provide guidance in those situations.

Judge Easterbrook agreed that technology will continue to present such issues, but he disagreed that FRAP 34 should be amended to address these issues. The technology is developing too rapidly, and the situations presented to courts are too diverse, for this area to be profitably addressed by rule. Rather, Judge Easterbrook said, FRAP 34 should continue to maintain its silence on this issue, so that each judge has discretion to address each problem as it arises.

Another member agreed with Judge Easterbrook, pointing out that nothing in FRAP 34 prohibits judges from accommodating technological innovations.

Another member agreed, but stated that he would still like the Committee to study how FRAP 34 might be amended to *encourage* the use of technology in the courtroom.

A member moved that No. 97-23 be removed from the study agenda. The motion was seconded. The motion carried (4-2).

36. Item No. 97-25: Merge FRAP 35 (governing en banc determinations) and FRAP 40 (governing panel rehearings) into a single rule.

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.

A member expressed opposition to the proposal, noting that it would be extremely difficult to combine FRAP 35 — which permits *initial* arguments before the court en banc (as well as en banc rehearings of panel decisions) — with FRAP 40 — which addresses only *rehearings* of panel decisions.

Another member also expressed opposition to the proposal, arguing that the Committee should not undertake such an extensive rewriting of two important rules so soon after the restylized rules were approved.

A member moved that No. 97-25 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

37. Item 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.

FRAP 46(a)(1) provides that an attorney is eligible for admission to the bar of a court of appeals if that attorney 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)." A commentator informs the Committee that there are *two* courts in the Northern Mariana Islands from which appeals may be taken to the Ninth Circuit: 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 but not the former are eligible for admission to the bar of a court of appeals.

A member expressed opposition to the proposal. He said that it was difficult to believe that any such lawyer exists — that is, a lawyer who belongs to the bar of the Supreme Court of the Commonwealth of the Northern Mariana Islands, but who does not belong to the bar of the U.S. District Court for the Northern Mariana Islands. If such a lawyer does exist, he or she should simply join the District Court bar.

Judge Easterbrook wondered whether the Supreme Court of the Commonwealth of the Northern Mariana Islands is not "the highest court of a state" for purposes of FRAP 46(a)(1). After all, FRAP 46(a)(1) does not explicitly mention the highest courts of the District of Columbia, or Puerto Rico, or American Samoa, yet Judge Easterbrook has never heard of any problem involving attorneys admitted to practice before any of those courts.

One member suggested that the Committee contact the commentator to determine whether he is aware of any attorney in the Northern Mariana Islands for whom FRAP 46 has presented a problem. Another member agreed. A couple other members disagreed, though, expressing the view that such an inquiry would be a poor use of Committee time.

A member moved that No. 97-27 be removed from the study agenda. The motion was seconded. The motion carried (6-1).

38. Item 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.

In an article in the 1994-95 edition of *The Scribes Journal of Legal Writing*, Bryan A. 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, *inter alia*, "consist of separate sentences," "contain no more than 75 words," and "end with a question mark." 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 said that he had asked that Mr. Garner's proposal be put on the study agenda out of respect for Mr. Garner, who has done outstanding work in assisting the Committee with

the restylized rules project. Judge Logan said, though, that he had tried to use Mr. Garner's approach in writing opinions, and found it difficult to implement in multi-issue cases.

A member asked the judges present whether they were encountering substantial problems with the manner in which litigants were framing the issues presented. Judges Garwood and Logan said that statements of the issues are written no better or worse than other parts of most briefs. Judge Easterbrook said that poorly written briefs are a significant problem, but it is not a problem that can be addressed through FRAP. Judge Garwood agreed that FRAP should not be used to teach attorneys how to write.

A member moved that No. 97-29 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

39. Item No. 97-30: Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.

This proposal comes from Mr. Munford. Mr. Munford reported that the Fifth Circuit had recently adopted a local rule that is essentially the same as restylized FRAP 32, and that the Fifth Circuit has adopted a standard certificate of compliance that attorneys can use to certify that their brief complies with the type-volume limitations contained in the rule. Mr. Munford wonders whether it might be helpful to include such a form in FRAP. The form would be exemplary, not mandatory.

Two members of the Committee agreed that such a form would be helpful.

Mr. Rabiej pointed out that it is not clear whether forms that are merely exemplary need to be approved by the Supreme Court and reviewed by Congress. That has been done in the past, he said, but recently some have questioned whether the involvement of the Supreme Court and Congress is necessary.

A member moved that No. 97-30 be retained on the study agenda with high priority. The motion was seconded. The motion carried (unanimously).

40. Item No. 97-31: Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1.

This proposal also comes from Mr. Munford and arises from a recommendation made by the American Academy of Appellate Lawyers. Amendments to FRAP generally take effect on December 1. Mr. Munford suggests that, for the convenience of the appellate bench and bar, FRAP 47(a)(1) should be amended to require that amendments to the local rules of the courts of appeals also take effect on December 1.

A member expressed reservations about the proposal. He noted that at times the circuit courts find themselves "out of step" with the national rules or with newly enacted statutes, and have to act immediately to change their local rules.

Judge Easterbrook agreed. He pointed to the recently enacted Antiterrorism and Effective Death Penalty Act, which required his circuit and others to move quickly to implement local rules. Amending FRAP 47(a)(1) as Mr. Munford suggests would present a difficult drafting exercise; essentially, the Rule would have to say, "All local rules must take effect on December 1, unless it is important that they take effect before December 1."

Mr. Fisher reported that the Tenth Circuit attempts to make changes to local rules effective on January 1, one month after changes to the national rules take effect.

A member noted that the publication deadlines of the United States Code Annotated may be relevant to this problem. It is important that, if local rules are to take effect on the same date, that the date be set so that the amended rules will make it into the next edition of the U.S.C.A.

A member suggested that the publication deadlines of the popular state compilations published by West are even more important. More attorneys look up local rules in those volumes than in the U.S.C.A.

Judge Easterbrook cautioned that the Committee should not confuse the issue of when new rules are provided to a publisher with the issue of when new rules take effect. A set of rules scheduled to take effect on December 1 could be provided to a publisher long before then. Also, he reminded the Committee again that any constraints on local rules would have to include an exception for emergencies.

A member suggested that the rule could be drafted very generally — *e.g.*, "Except in an emergency, all local rules must take effect on December 1." Each circuit could then define for itself what qualifies as an "emergency." Presumably, very few local rules would qualify, and thus the vast majority of new local rules would take effect on December 1.

Judge Easterbrook pointed to the language of 28 U.S.C. § 2071(e) as providing helpful guidance: "If the prescribing court determines that there is an immediate need for a rule, such court may proceed under this section without public notice and opportunity for comment, but such court shall promptly thereafter afford such notice and opportunity for comment." Perhaps the emergency exception to a "December 1" rule could be phrased in terms of "immediate need."

A member expressed interest in the Tenth Circuit's practice of making changes in local rules effective one month after changes in the national rules. This gives the circuits a chance to be certain of the nature of changes to the national rules before they make changes to their local rules. Another member pointed out, though, that changes in national rules are usually known 14 months before they take effect.

A member moved that No. 97-31 be retained on the study agenda with medium priority. The motion was seconded. The motion carried (unanimously).

VIII. Additional Old Business and New Business

There was no additional old business.

Mr. Letter noted that the S.G. had recently sent a proposal for an amendment to FRAP to Mr. Rabiej, and that initial discussion of the proposal could wait until the Spring 1998 meeting.

Judge Garwood announced that, with respect to scheduling that meeting, his first preference would be April 16 and 17. His second preference would be March 19 and 20. The meeting will be in Washington, D.C. Judge Garwood asked Mr. Rabiej to survey the members of the Advisory Committee regarding their availability on those dates.

Judge Garwood concluded the meeting by presenting a certificate of appreciation to Judge Logan, and by thanking Judge Logan for his excellent work as Chair of the Advisory Committee. Judge Garwood said that the appellate bench and bar owed an enormous debt to Judge Logan.

IX. Adjournment

By unanimous consent, the Advisory Committee adjourned at 5:00 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
DRAFT MINUTES of the Meeting of January 8-9, 1998
Santa Barbara, California

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Santa Barbara, California on Thursday and Friday, January 8-9, 1998. The following members were present:

Judge Alicemarie H. Stotler, Chair
Judge Frank W. Bullock, Jr.
Professor Geoffrey C. Hazard, Jr.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Alan C. Sundberg, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Associate Attorney General Eileen C. Mayer represented the Department of Justice at the meeting. Member Patrick F. McCartan, Esquire was unable to be present.

Participating in the meeting, at the request of the chair, were Judge Frank H. Easterbrook, former member of the committee, and Judge Harry L. Hupp, representing the Judicial Conference Committee on Court Administration and Case Management.

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; and Mark D. Shapiro, senior attorney in that office.

Representing the advisory committees were:

Advisory Committee on Appellate Rules -
Judge Will L. Garwood, Chair
Professor Patrick J. Schiltz, 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 W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules -
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, project director of the Local Rules Project; and Thomas E. Willging and Marie Leary of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Stotler introduced the new advisory committee chairs — Judge Garwood of the Advisory Committee on Appellate Rules and Judge Davis of the Advisory Committee on Criminal Rules— and the new advisory committee reporter — Professor Schiltz of the Advisory Committee on Appellate Rules. Following committee tradition, all the members, participants, and observers introduced themselves in turn and made brief remarks.

September 1997 Judicial Conference Action

Judge Stotler reported that the committee's September 1997 report to the Judicial Conference had been placed on the Conference's consent calendar and all its recommendations approved without change. The proposed rules amendments in the report had been submitted to the Supreme Court shortly after the Conference meeting and were scheduled to take effect on December 1, 1998.

Judge Stotler added that the members of the committee had been provided with copies both of the committee's report to the Conference and the package of amendments and supporting materials transmitted to the Supreme Court in November 1997. She noted that she had included in the Supreme Court package a memorandum to the justices summarizing the amendments and inviting them to contact her or the advisory committee chairs for any assistance. She said that the Court had not yet acted on the amendments.

Judicial Conference Committee Practices and Procedures

The committee considered suggested changes in Judicial Conference committee practices and procedures and authorized the chair to communicate the committee's views to the Executive Committee of the Conference.

Federal Courts Improvement Act

Judge Stotler reported that the Executive Committee of the Judicial Conference had asked each committee of the Conference to review the Federal Courts Improvement Act of 1997 — a comprehensive compilation of various legislative recommendations approved by the Judicial Conference — and to identify any provisions that should be deleted from the bill. The Executive Committee advised that it intended to conduct similar reviews of all pending Conference legislative positions contained in future court improvements acts at the beginning of each Congress with a view towards eliminating any provisions that are no longer needed or have virtually no chance of being enacted.

Several members expressed support for this new procedure. None of the members, however, identified any provision in the current legislation that should be deleted.

Authority of the Federal Judicial Center and the Administrative Office

Judge Stotler reported that an ad hoc committee of the Judicial Conference had been appointed to consider two motions forwarded by the director of the Federal Judicial Center regarding: (1) the respective mission and authority of the Federal Judicial Center vis a vis the Administrative Office in education and training, and (2) the creation of a special mechanism to resolve disputes between the two organizations. She advised that she had asked Chief Judge Sear to appear before the ad hoc committee as the representative of the rules committees to address the potential impact of these proposals on the work of the rules committees. She added that Chief Judge Sear had spent considerable time studying the history of these matters and had served on the Judicial Conference, its Executive Committee, and several other Conference committees.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 19-20, 1997.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 18 bills had been introduced in the Congress that would impact, directly or indirectly, on the federal rules and the rules process. A status report of each bill had been included in Agenda Item 3A.

He pointed out that the Civil Justice Reform Act of 1990 had expired generally on December 1, 1997. The Congress, however, had recently amended the Act's sunset provision to make 28 U.S.C. § 476 a part of permanent law, thereby requiring continued public reporting of individual judges' pending motions, trials, and cases. The Congress also had continued 28 U.S.C. § 471 into permanent law, requiring each district court to implement a civil justice expense and delay reduction plan. Judge Hupp reported that the Court Administration and Case Management Committee had on its pending agenda a proposal to seek legislation repealing 28 U.S.C. § 471.

Professor Coquillette advised that it had been anticipated that local Civil Justice Reform Act plans would all sunset in 1997. Thereafter, local procedural provisions would have to be promulgated formally as local rules through the process specified in the Rules Enabling Act. He suggested that the continuation of 28 U.S.C. § 471 by the Congress could create mischief because it might be argued that courts could continue to operate under local plans that are inconsistent with the national procedural rules.

Mr. Rabiej stated that comprehensive crime control legislation had been introduced in the Congress that would impact on both the criminal rules and the evidence rules. He added that the Advisory Committee on Criminal Rules and the Advisory Committee on Evidence Rules had considered the proposed legislation at their fall meetings. An analysis of the pertinent provisions in the legislation was contained in correspondence from Judge Stotler to Senator Hatch and set forth in Agenda Item 3A.

Mr. Rabiej reported that several bills had been introduced in the Congress to provide constitutional or statutory rights to victims of crimes. He noted that the bills, among other things, would give victims the right to notice of court proceedings and the right to address the court.

He pointed out that, at the request of the Department of Justice, civil forfeiture legislation had been introduced that would, among other things, alter the time limits set forth in the admiralty rules and conflict with proposed amendments to those rules recently approved by the Advisory Committee on Civil Rules. He noted that the Department of Justice was working with the advisory committee to ensure that the differences between the proposed legislation and the admiralty rules were eliminated.

Mr. Rabiej reported that recently introduced legislation would enact, with style revisions, the committee's proposed new FED. R. CRIM. P. 32.2, governing criminal forfeiture proceedings. He pointed out that the committee had published the rule for public comment in August 1997, and Judge Stotler had written to the chairman of the House Judiciary Subcommittee on Crime requesting that he defer action on the bill until the rulemaking process has been completed and the bench, bar, and public have an opportunity to review and comment on the rule.

Finally, Mr. Rabiej reported that Representative Howard Coble, chair of the House Judiciary Subcommittee on Courts and Intellectual Property, had written to Judge Niemeyer, chair of the Advisory Committee on Civil Rules, requesting that the committee delay consideration of any changes in the copyright rules in order to allow Congress to consider the need for changes in substantive law.

Administrative Actions

Mr. Rabiej reported that his office had assembled a docket of all actions of the Advisory Committee on Evidence Rules over the past four years, and it had updated the dockets for the other advisory committees. He stated that a letter was being circulated for approval requesting that courts send their local rules to the Administrative Office in electronic format for posting on the Internet. Finally, Mr. Rabiej stated that the Administrative Office had compiled and published the committee's working papers on attorney conduct and was proceeding to compile the working papers of the Advisory Committee on Civil Rules on its discovery project.

REPORT OF THE FEDERAL JUDICIAL CENTER

Ms. Leary presented an update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) Among other things, she noted that substantial progress had been made in installing the judiciary's new satellite television facilities and that the Center was producing many new seminars and television programs, including programs on evidence and voir dire.

Mr. Willging stated that the Research Division of the Center had conducted a national survey of 2,000 lawyers in recently terminated civil cases (of whom 59% responded), examining the frequency and nature of problems in discovery, the impact of the 1993 amendments to the civil rules, and the need, if any, for additional rules changes. He said that the lawyers reported that comparatively little discovery activity occurred in the great majority of cases. Moreover, the cost of discovery was generally about 50% of the total litigation cost and about 3% of the financial stakes in the litigation.

The attorneys reported that they had experienced relatively few problems with discovery in general. Most of the problems they had in fact encountered appeared to have occurred in large, complicated cases, where both contentiousness and financial stakes were high.

Mr. Willging said the survey had disclosed that mandatory disclosure procedures were in wider use than previously thought. Even in districts opting out of FED. R. CIV. P. 26(a), a sizeable number of the judges imposed mandatory disclosure. The Center, he noted, had found

that a majority of the lawyers responding to the survey reported that they had not experienced any measurable effect from mandatory disclosure. But a majority of those reporting an effect stated that mandatory disclosure had been favorable in reducing cost and delay, in promoting settlement, and in increasing procedural fairness.

He reported that the Center had been unable to replicate the finding of the RAND Civil Justice Reform Act study that early discovery cutoffs are related to reducing cost and delay. The Center had not found any statistically significant or otherwise meaningful correlation between the length of the discovery cutoff period and litigation costs or the time to disposition of civil cases. He concluded that in the absence of further research, the empirical data did not support imposing national discovery cutoffs.

Mr. Willging further reported that the Center was in the process of analyzing experiences in districts that have imposed less restrictive disclosure requirements than FED. R. CIV. P. 26(a), *i. e.*, requiring disclosure only of information supporting a party's claim or defense. The Center is also analyzing local rules and general orders that impose specific limits on interrogatories and depositions.

One member of the committee suggested that there was a need for the civil rules to address the issues of discovery conducted by court-appointed experts. Mr. Willging noted that the Center was examining the use of court-appointed experts in the breast implant cases.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of November 14, 1997. (Agenda Item 5)

He reported that, after four years of work, the advisory committee had completed its restyling of all the appellate rules. The package of proposed amendments had been approved by the Judicial Conference in September 1997 and forwarded to the Supreme Court.

Judge Garwood said that the advisory committee had handled a large agenda at its September 1997 meeting, consisting of a general review of all matters still pending on its docket. The committee eliminated many items from the docket, identified several items that merited further study, and established priorities for future committee agendas.

He pointed out that the advisory committee had approved a change in FED. R. APP. P. 31, to require that briefs be served on all parties. But the committee decided as a matter of policy not to forward any further rules changes to the Standing Committee until the restyled appellate rules have been in effect for a while.

Judge Garwood reported that the advisory committee was considering the advisability of uniform national rules on the publication of court opinions that would address, among other things, such issues as the precedential effect, if any, of unpublished opinions. He noted that the subject matter is addressed in many local rules of the circuits, but those rules conflict with each other in several respects. He added that the Court Administration and Case Management Committee was also looking into the matter, and that he had conferred with Judge Brock Hornby, chair of that committee. They had agreed that it was appropriate for both committees to examine the subject, but the Advisory Committee on Appellate Rules might have a more immediate concern because it is covered in local circuit court rules.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier presented the report of the advisory committee, as set forth in his memorandum and attachments of December 2, 1997. (Agenda Item 6)

Judge Duplantier reported that the advisory committee had no action items to present. He noted that a package of bankruptcy rules amendments was pending before the Supreme Court and, if approved, would take effect on December 1, 1998. Another set of 16 proposed amendments had been published for comment in August 1997 and would be considered at the advisory committee's March 1998 meeting.

He noted that the advisory committee had a major project underway to revise the litigation provisions of the Federal Rules of Bankruptcy Procedure. He explained that the project had emanated from a survey of bankruptcy judges and lawyers conducted by the Federal Judicial Center in 1996. The results of the survey showed that there was general satisfaction with the substance and organization of the bankruptcy rules, but significant dissatisfaction was expressed with the rules governing motion practice.

Judge Duplantier stated that the project of rethinking and reorganizing the litigation rules was very complex and controversial. It had taken up a great deal of the committee's time over the past two years.

Professor Resnick stated that the revisions that the advisory committee was considering would not affect adversary proceedings, which are akin to civil cases in the district courts and are governed largely by the Federal Rules of Civil Procedure. Rather, the proposed amendments would materially change the procedures for handling (1) routine administrative matters that are usually unopposed, and (2) "contested matters." He explained that the latter category of bankruptcy matters are usually initiated by motion, but are not like motions filed in the district courts. They may involve complex disputes that are unrelated to any other litigation in a bankruptcy case.

Professor Resnick reported that the advisory committee was in the process of considering the recommendations contained in the October 1997 report of the National Bankruptcy Review Commission. He noted that the report was more than 1,300 pages long and contained 172 recommendations. He pointed out that many of the Commission's recommendations called for substantive changes in the Bankruptcy Code, which — if enacted — would eventually require conforming changes to the rules. He noted, for example, that the report recommended giving Article III status to bankruptcy judges. If signed into law, this provision would likely eliminate the need in both the Code and the rules for maintaining distinctions between "core" and "non-core" proceedings.

Other Commission recommendations were directed expressly to the Advisory Committee on Bankruptcy Rules and called for specific changes in the Federal Rules of Bankruptcy Procedure and the Official Bankruptcy Forms.

Professor Resnick stated that he was in the process of drafting a report on the Commission's recommendations for the advisory committee's consideration at its March 1998 meeting. He added that it was unlikely that there would be a single, comprehensive bill introduced in the Congress to enact all the recommendations of the Commission. Rather, several bills are likely to be introduced by various members of Congress, incorporating some of the Commission recommendations and offering other proposals contrary to the Commission's recommendations.

He reported that the advisory committee has also been considering proposals to improve the effectiveness of notices to governmental units in bankruptcy cases. He pointed out that, under current practice, governmental offices experience difficulties in having bankruptcy notices routed to them in time to take appropriate action in a case. He added that the advisory committee had been dealing with this problem for some time and that, at the committee's invitation the chairman of the bankruptcy commission had attended committee meetings and presented their views and proposed solutions.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Niemeyer presented the report of the advisory committee, as set forth in his memorandum and attachments of December 8, 1997. (Agenda Item 7)

Amendments to the Admiralty Rules

Judge Niemeyer reported that the advisory committee was seeking the Standing Committee's approval to publish proposed amendments to the Supplemental Rules for Certain Admiralty and Maritime Claims and a conforming amendment to FED. R. CIV. P. 14. He

explained that the changes had been prompted in large part by the increasing use of admiralty in rem procedures in civil forfeiture proceedings.

Judge Niemeyer explained that the proposed amendments had been prepared over a long period of time with the assistance of a special subcommittee, chaired by advisory committee member Mark Kasanin. He said that the subcommittee had worked from proposals drafted by the Maritime Law Association and the Department of Justice, and it had analyzed and monitored proposed civil forfeiture legislation pending in Congress. He added that the chair of the Maritime Law Association's rules committee and a representative of the Department of Justice had participated in the advisory committee's October 1997 meeting.

Professor Cooper explained that there had been increased use of the admiralty in rem procedures for drug-related civil forfeiture proceedings. The advisory committee determined, however, that there was a need to make certain distinctions in the rules between pure admiralty proceedings and forfeiture proceedings. To that end, the proposed amendments would provide a longer time to respond in forfeiture proceedings than in admiralty proceedings. It would also provide an automatic right to participate to a broader range of persons who assert rights against the property in forfeiture proceedings than in admiralty proceedings.

He also pointed out that FED. R. CIV. P. 4 had been amended in 1993, but conforming changes had not been made in the admiralty rules. He said that it was time to correct that omission.

He noted that the advisory committee had decided that it should, as far as possible, make stylistic improvements in the admiralty rules, using the style conventions incorporated in the recent omnibus revision of the appellate rules. Nevertheless, the committee believed that it was necessary to preserve certain traditional admiralty terminology.

He added that the style subcommittee had suggested changes in the language of the amendments following the October 1997 advisory committee meeting, most of which had been included in the draft set forth in Agenda Item 7. He noted that Mr. Spaniol had also suggested a number of thoughtful stylistic changes, but the advisory committee had not had time to consider them fully and recommended that they be included with the public comment materials.

ADMIRALTY RULE B

Professor Cooper reported that the advisory committee was proposing three changes to Rule B, which deals with maritime attachment and garnishment in in personam actions.

First, new Rule B(1)(d)(ii) would allow service to be made by persons other than the United States marshal when the property to be arrested is not a vessel or tangible property on

board a vessel. This change would adopt the service provisions of Rule C(3) providing service alternatives in an in rem proceeding. Where the property is a vessel, however, service under item (d)(i) may only be made by the marshal.

Second, the revised rule would eliminate the current rule's reference to FED. R. CIV. P. 4 and state quasi in rem jurisdiction remedies. Instead, revised Rule B(1)(e) refers expressly to FED. R. CIV. P. 64, ensuring that Rule B is not inconsistent with Rule 64 in a way that would prevent an admiralty plaintiff from invoking state-law remedies.

Third, the revised rule conforms the notice provisions of subdivision (2) to revised FED. R. CIV. P. 4, without designating any of its subdivisions.

Some members stated that there was an ambiguity in Rule B, which limits the use of maritime attachment and garnishment to cases in which the defendant is not found in the district. They explained that a defendant occasionally will appoint an agent for service of process after the action is commenced, hoping by this means to defeat attachment or garnishment. Rule B can be read to provide that the defendant is "found" in the district only at the moment the action is commenced, but this reading is not entirely clear. Dissatisfaction also was expressed by some members with ex parte proceedings, noting that plaintiffs "always appear at 4:45 on Friday afternoon." It was suggested that the advisory committee might explore these matters and consider future rules amendments to deal with them.

ADMIRALTY RULE C

Professor Cooper said that the proposed advisory committee note to revised Rule C provided statutory references and an introduction and background to the rule. He pointed out that a growing number of statutes invoke admiralty in rem proceedings for forfeiture proceedings. But Rule C, governing in rem actions, had not been adjusted to reflect that reality. Accordingly, most of the proposed amendments to Rule C were designed to distinguish between pure admiralty proceedings and forfeiture proceedings.

He noted that a number of forfeiture statutes permit a forfeiture proceeding against property that is not located in the district. The proposed new item C(2)(d)(ii) would reflect those statutory provisions. Paragraph C(3)(b)(i) would be amended to specify that the marshal must serve any supplemental process addressed to a vessel or tangible property on board a vessel, as well as the original warrant.

He said that Rule C(4) provided for notice and contained two changes. The first would require that public notice state both the time for filing an answer and the time for filing a statement of interest or claim. The second would allow termination of publication if the property is released more than 10 days after execution but before publication is completed.

Professor Cooper stated that the most important changes in Rule C were set forth in subdivision (6). The advisory committee had created separate paragraphs on responsive pleading to distinguish civil forfeiture actions from maritime in rem proceedings. He pointed out that, in admiralty actions, a response must be filed within 10 days of execution of process or completed publication of notice. He said that the need for speed is not as great in forfeiture proceedings, and the advisory committee proposal would allow 20 days to respond. He added that legislation pending in the Congress would amend Rule C to provide for a uniformly longer period of 20 days in both admiralty proceedings and forfeiture proceedings.

A second distinction related to who may participate in the proceeding. In a forfeiture action, the rule would allow anyone who asserts an interest in, or right against, the property to file a response. The admiralty provision reflects the long-standing rule that only those who assert a right of possession or an ownership interest in the property may respond.

He pointed out that paragraph C(6)(c) authorized interrogatories to be served with the complaint in an in rem action without leave of court. This provision departed from the general provision of FED. R. CIV. P. 26(d) requiring that discovery be deferred until after the parties have met and conferred. He explained that the special needs of expedition that often arise in admiralty justify continuing the practice of allowing interrogatories to be filed with the complaint in an in rem proceeding.

ADMIRALTY RULE E

Professor Cooper stated that Rule E, governing in rem and quasi in rem proceedings, would be amended to reflect statutory provisions that permit service of process outside the district in certain forfeiture proceedings. But service in an admiralty or maritime proceeding still must be made within the district. Professor Cooper added that he had conferred with representatives of the Department of Justice, who informed him that they were unaware of any quasi in rem forfeitures. Accordingly, he recommended that the words "or quasi in rem" be deleted from Rule E(3)(b).

He said that the proposed amendment to subdivision (7)(a) would make it clear that a plaintiff must give security to meet a counterclaim only when the counterclaim is asserted by a person who has given security in the original action.

Subdivision (8) would reflect the proposed change in Rule B(1)(e) that would delete the provision in the current rule authorizing a restricted appearance when state quasi in rem jurisdiction provisions are invoked.

Subdivision (9)(b)(ii) would be amended to reflect the changes in terminology made in amended Rule C(6), substituting "statement of interest or right" for "claim." Judge Niemeyer explained that the advisory committee had retained the word "claim" in the amended admiralty

rules only where it was consistent with the meaning of that term as used in FED. R. CIV. P. 9. In all other cases, it had been eliminated because it had created confusion. Professor Cooper added that the word "claim" had different meanings in the current admiralty rules.

Professor Cooper said that subdivision (10) was new. It would make clear that the court has authority to preserve and prevent removal of attached or arrested property remaining in the possession of the owner or another person.

FED. R. CIV. P. 14

Professor Cooper explained that the proposed change in terminology in Rule C(6), eliminating the terms "claim" and "claimant" required parallel changes in FED. R. CIV. P. 14(a) and (c).

Judge Niemeyer explained that in revising the admiralty rules the advisory committee had not attempted to change admiralty law or address all current procedural problems. It just intended to preserve the admiralty process, fill in some of the gaps in the process, and improve the organization and language of the rules.

Judge Niemeyer stated that the representatives from the Maritime Law Association and the Department of Justice who had worked on the proposal had recommended that the period of public comment on the proposed admiralty amendments be reduced from the normal six months to three months. An abbreviated comment period could expedite the effective date of the amendments by one year. He stated, however, that the advisory committee had decided that there was not a sufficient emergency to justify reducing the period for public comment on the proposals.

Professor Cooper stated that the advisory committee had approved a draft revision of Rule E(3)(a) and was presenting it to the Standing Committee together with alternative language rejected by the advisory committee but preferred by Messrs. Garner and Spaniol. He asked whether the amendments published for public comment should include both the advisory committee's approved language and the alternative language. **The committee decided to publish only the version approved by the advisory committee.**

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

Informational Items

Judge Niemeyer stated that the advisory committee in August 1996 had published several proposed changes to FED. R. CIV. P. 23, dealing with class actions. But after considering the public comments and conducting public hearings, the advisory committee voted to forward only two of the proposed changes to the Standing Committee.

At its June 1997 meeting, the Standing Committee approved one proposed amendment to Rule 23 — to authorize interlocutory appeals of class action certification determinations. That change was later approved by the Judicial Conference and forwarded to the Supreme Court. It is scheduled to take effect on December 1, 1998, if approved by the Court and not altered by Congress.

Judge Niemeyer said that the advisory committee had deferred consideration of the other proposed changes to Rule 23, largely because a consensus could not be reached on them. The committee had decided, for example, that further case law development was necessary on such issues as settlement classes and maturity of litigation.

The committee, moreover, concluded that many of the solutions to the problems of mass torts lay beyond its own jurisdiction and might require legislation. Therefore, it had recommended that a task force be formed across Judicial Conference committee lines to address broadly the problems of mass torts.

Judge Niemeyer reported that the Chief Justice had approved a modified version of the advisory committee's proposal, authorizing an informal working group, under the leadership of the Advisory Committee on Civil Rules, to study the problems of mass torts litigation over a 12-month period and make recommendations for further action. He said that Judge Anthony Scirica would serve as chair of the working group and that Professor Francis McGovern would serve as special consultant to the group.

Judge Niemeyer reported that the advisory committee had sponsored a symposium on discovery at Boston College Law School in September 1997. The program focused on the costs of discovery and whether the benefits of discovery to the dispute resolution process are worth those costs. He reported that the symposium had been a great success. Members of the Standing Committee had attended, together with corporate counsel, experienced plaintiff lawyers and defendant lawyers, representatives of national bar organizations, leading academics, and other judges. He added that several consensus themes emerged from the symposium, including the following:

1. The discovery process works well in most civil cases.
2. There are, however, serious problems in a small percentage of civil cases.
3. Full disclosure is a policy inherent in federal practice and should be retained.
4. Too much discovery is generated in certain cases.

5. Uniformity of practice among federal districts is a desirable goal.
6. Attorney costs related to discovery account for about 50% of litigation costs in civil cases.
7. In large cases, plaintiffs complain about the number and costs of depositions. In fact, depositions are the largest single cost item for plaintiffs.
8. Defendants, on the other hand, complain most about the amount and cost of document discovery. They point particularly to heavy costs incurred in reviewing documents and compiling logs in order to avoid waiving privileges.
9. Ready access to a judge in order to resolve discovery disputes is number one on the lawyers' wish list.
10. Both plaintiffs and defendants favor fixed trial dates and discovery cutoff periods.
11. Mandatory disclosure draws mixed opinions among the bar. Some attorneys like it, and others do not. The empirical data from the early academic studies, moreover, are also inconclusive.

Judge Niemeyer stated that the advisory committee planned to offer amendments to the discovery rules in light of the "sunsetting" of the Civil Justice Reform Act. He added that the committee was striving for greater national uniformity, particularly in such areas as disclosure. He pointed out that the advisory committee was examining a range of other discovery issues, including the appropriate scope of discovery.

He stated that the advisory committee would consider, at its March 1998 meeting, a package of proposed amendments addressing both the concerns identified at the symposium and the discovery-related recommendations contained in the Judicial Conference's 1997 report to Congress on the Civil Justice Reform Act. The advisory committee then plans to present a package of recommendations for publication at the Standing Committee's June 1998 meeting. He added that it was very important for the committees to achieve broad consensus on a package that is widely acceptable to both bench and bar.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Davis presented the report of the advisory committee, as set forth in his memorandum and attachments of December 1, 1997. (Agenda Item 9)

Reduction in the Size of Grand Juries

Judge Davis reported that the advisory committee had been asked to study a pending legislative proposal (H.R. 1536) that would reduce the size of grand juries to not less than nine jurors nor more than 13, with seven jurors required to return an indictment. Currently, under FED. R. CRIM. P. 6(a) — which tracks 18 U.S.C. § 3321 — the size of a grand jury is 16 to 23

persons, with a requirement that 16 be present. Under Rule 6(f), 12 jurors must concur in order to return an indictment.

He stated that the advisory committee had voted unanimously to oppose any reduction in the size of the grand jury. He noted that several members of the committee believed that most people serving on grand juries have a positive feeling about the experience and that it was sound policy to have more, rather than fewer, persons involved in the grand jury process. Other members had stated that a reduction in the size of the grand jury would increase the likelihood of runaway indictments. He reported also that the state chief justice who serves on the advisory committee had pointed out that his state had reduced the size of grand juries, and that the experience had not been successful. Finally, he mentioned that the Department of Justice was opposed to legislating a reduction in the size of the grand jury.

Judge Davis reported that the advisory committee was recommending that the Judicial Conference go on record as opposing any attempts to reduce the size of grand juries. Judge Stotler asked whether the proposed Judicial Conference action should state a general policy or merely be directed to commenting on the specific provisions contained in H.R. 1536. In response, Judge Davis amended the advisory committee's recommendation to limit its reach to address only the specific pending legislation.

The committee voted unanimously to approve the recommendation of the advisory committee to have the Judicial Conference oppose H.R. 1536, which would reduce the size of the grand jury.

Informational Items

Judge Davis reported that the advisory committee had received many comments on the proposed amendment to FED. R. CRIM. P. 6, which would authorize any interpreter necessary to assist a jury to be present at a grand jury proceeding.

He pointed out that the advisory committee had proposed amending 18 U.S.C. § 3060 to remove its prohibition on a magistrate judge granting a continuance of a preliminary examination without the consent of the defendant. The Standing Committee, however, decided at its June 1997 meeting not to seek a statutory amendment. It referred the matter back to the advisory committee to consider making the change through an amendment to FED. R. CRIM. P. 5(c), which tracks the language of 18 U.S.C. § 3060. The advisory committee considered the matter afresh at its October 1997 meeting and decided that the problem sought to be addressed through the amendment was just not serious enough to warrant seeking an amendment to FED. R. CRIM. P. 5(c).

Judge Davis stated that the advisory committee had canceled the public hearings scheduled for December 12, 1997. Instead, it had invited the witnesses to appear at a hearing to be held contiguous to the committee's April 1998 meeting.

Judge Davis also reported that he had appointed a subcommittee to continue monitoring victims' rights legislation.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Smith presented the report of the advisory committee, as set forth in her memorandum and attachments of December 3, 1997. (Agenda Item 10)

Action Items

Judge Smith reported that the advisory committee was seeking approval to publish three proposed amendments for public comment. She explained that the amendments were being brought to the Standing Committee at its January 1998 meeting in order to lessen the heavy agenda for the committee's June 1998 meeting. She added that the advisory committee did not intend to accelerate or otherwise change the regular schedule for public comment.

FED. R. EVID. 103

Judge Smith pointed out that the proposed amendment to Rule 103 — designed to clarify when an attorney must renew a pretrial objection to, or proffer of, evidence — had a long history. The advisory committee had published an amendment in September 1995, but withdrew it after publication because public comments demonstrated little consensus.

She noted that the advisory committee had redrafted the amendment at its April 1997 meeting and sought approval from the Standing Committee in June 1997 to publish it. The Standing Committee, however, questioned aspects of the proposal and referred it back to the advisory committee for further study. The advisory committee then took a fresh look at the rule at its October 1997 meeting and prepared a new draft amendment to meet the concerns voiced by the Standing Committee.

Judge Smith stated that the advisory committee had restructured the proposal from the earlier versions, now setting forth the changes as a new paragraph within subdivision (a). She explained that the proposed amendment would codify the principles of *Luce v. United States,* 469 U.S. 38 (1984) — concerning the preservation of a claim of error when admission of evidence is dependent on an event occurring at trial — and would make them applicable in both civil and criminal cases. She added that the advisory committee had tried to make clear that the rule applied to all rulings on evidence, whether made at or before trial, including in limine rulings. Finally, she pointed out that the proposed amendment appeared to be stylistically inconsistent with a convention established by the style subcommittee in that it contained an unnumbered paragraph in subdivision (a). She welcomed the input of the style subcommittee on this matter.

One of the members suggested that the advisory committee might consider dropping the word "definitive" from the first line of the amendments and eliminating the second sentence.

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

FED. R. EVID. 404

Judge Smith said that the proposed amendment to Rule 404(a) had not been initiated by the Advisory Committee on Evidence Rules. Rather, the committee was responding to legislation pending in the Congress that would amend Rule 404(a) to provide that evidence of a criminal defendant's pertinent character trait is admissible if the defendant attacks the character of the victim. She pointed out that the majority of the advisory committee agreed generally with what the sponsors of the legislation were trying to achieve, but believed that the language of the legislation was too broad and would cause technical problems. The Congressional language, she suggested, appeared to allow the prosecution to introduce evidence of any character trait of the accused. Accordingly, the committee decided to draft its own version of Rule 404(a), providing that if a defendant attacks a character trait of the victim of the crime, the prosecution could offer evidence of the same character trait of the accused.

Judge Smith said that the advisory committee also wished to move an amendment to line 11 of its proposal by adding the words "offered by an accused and" before the word "admitted."

She also pointed out that the advisory committee had used the word "accused" rather than the word "defendant" because it was consistent with usage in the Federal Rules of Criminal Procedure.

Some of the members of the Standing Committee expressed disapproval of the proposal on the merits because it would lessen the rights of the accused in certain types of criminal cases. Judge Smith responded that the decision of the advisory committee to proceed with the amendment was not unanimous, and that the committee would not have proposed the change except for the pending legislation. She explained that the majority of the advisory committee were of the view that the proposal represented a fair trade-off, believing that if the defense introduces character trait evidence, the prosecution should be allowed to do so also.

Professor Capra pointed out that there was precedent for the advisory committee's approach, noting that the Judicial Conference had offered alternate language on FED. R. EVID. 413 to 415 when the Congress was considering enacting these rules by legislation.

The committee approved the proposed amendment for publication by an 8 to 3 vote.

FED. R. EVID. 803 and 902

Judge Smith reported that the proposed amendments to Rules 803(6) and 902 were designed to provide for uniform treatment of business records and to rectify an inconsistency in the present rules dealing with foreign records. She explained that admissibility of foreign business records can be established — without a foundation witness — by certifications in criminal cases, but not in civil cases. She said that the advisory committee believed that foreign records should not be deemed more trustworthy than domestic records in any cases. The amendments were based on the procedures governing the certification of foreign business records in criminal cases under 18 U.S.C. § 3055 and would establish a similar procedure for domestic and foreign records offered in civil cases.

She added that the language of the amendments differed in certain respects and it mixed the terms "certification" and "declaration." The advisory committee had done so to incorporate language from existing statutes. She said that if that approach would cause problems in distinguishing between the two, the language could be made consistent throughout to require certification by a signed declaration. She added that there was a typographical error in the agenda item, as the word "record" on lines 42 and 44 of the proposal should read "declaration."

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

Informational Items

Professor Capra explained that he had reviewed the original advisory committee notes to the Federal Rules of Evidence and produced the document set forth at Agenda Item 10B, identifying inaccuracies and inconsistencies created because several of the rules adopted by Congress in 1975 differ materially from the version approved by the advisory committee. He pointed out that the inconsistencies between the text of the rules, as enacted by legislation, and the accompanying advisory notes created a trap for the unwary. He added that the Federal Judicial Center had agreed to publish his memorandum.

Judge Smith reported that she had appointed a subcommittee to review Article VII of the evidence rules, dealing with opinions and expert testimony. She noted that there was legislation pending in the Congress that attempted — inadequately — to amend FED. R. EVID. 702 and codify *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). She pointed out that the advisory committee had decided in 1995 to delay considering any amendments to the evidence rules regarding expert testimony until the courts had been given enough time to digest and interpret the *Daubert* opinion. She reported, though, that the advisory committee at its October 1997 meeting had decided that there was now enough case law, and conflicts among the circuits, to justify consideration of amendments to Rule 702 to

clarify the standards of reliability applicable to expert testimony. The subcommittee will prepare a report for consideration by the advisory committee at its April 1998 meeting.

Judge Smith said that the advisory committee would also consider whether any amendments were necessary to accommodate technological innovations in the presentation of evidence. Among other things, it would review Rule 1001 to determine whether the terms "writings" and "recordings" should be redefined and whether they should apply to the entire body of the evidence rules.

Judge Stotler suggested that the Advisory Committee on Civil Rules should examine FED. R. CIV. P. 44, regarding proof of official records, to see whether it dovetails properly with provisions in the evidence rules. She also suggested that the advisory committee might wish to consider the advisability of a cross-reference to FED. R. EVID. 1001, regarding written records. She added that the Standing Committee had discussed in the past the issue of creating standard definitions that would apply throughout all the federal rules.

ATTORNEY CONDUCT

Professor Coquillette reported that a wealth of background materials had been specially prepared to assist the committee in determining whether national rules should be promulgated to govern attorney conduct in the federal courts. He pointed out that the materials included Agenda Item 8, seven background studies conducted by his office and the Federal Judicial Center, and the proceedings of two conferences of attorney conduct experts.

Professor Coquillette noted that the committee at its June 1997 meeting had requested him to draft a proposed set of uniform attorney conduct rules for discussion purposes. Therefore, he had prepared the 10 draft rules set forth in Agenda Item 8. He suggested that the members not debate the substance of the draft rules, but focus on the general approach and outline of the document. He recommended that if the committee were generally comfortable with the draft, it should be forwarded to each of the advisory committees for study and comment.

Professor Coquillette explained that proposed Rule 1 was a "dynamic conformity" rule, specifying that a district court must apply the standards of attorney conduct currently adopted by the highest court of the state in which the court sits. He pointed out that the proposed rule had the advantages of avoiding any conflicts with the states and obviating the need for a federal bureaucracy. He suggested that the first option that the committee might consider would be to adopt only Rule 1, thereby creating no uniform federal attorney conduct standards and leaving all issues of attorney conduct to the states.

A second option, he suggested, would be for the committee to do nothing regarding attorney conduct, thereby leaving the matter to local court rules. He recommended against that

course of action, however, because the participants in the committee's recent attorney conduct conferences had agreed overwhelmingly that the status quo was unacceptable. Although they had differed in their proposed solutions, there was a strong consensus that something had to be done to address attorney conduct in the federal courts in a more uniform manner.

Professor Coquillette stated that a third option would be to adopt proposed Rule 1 plus some, or all, of the other nine rules. He explained that he had selected the 10 rules very narrowly to address only those conduct issues that raise a substantial federal interest and have resulted in actual problems in the federal courts. All other matters would be deferred to the states.

He explained, for example, that proposed Rule 10 dealt with communication with persons who are represented by counsel, which is the subject of Rule 4.2 of the American Bar Association's Model Rules of Professional Conduct. He emphasized that the matter was very controversial and had been the subject of lengthy negotiations between the Conference of Chief Justices and the Department of Justice. He recommended that the language eventually agreed upon by the Conference and the Department be incorporated as the national rule applicable in the federal courts.

Professor Coquillette noted that most attorney conduct issues addressed by the proposed rules arise in the district courts. Therefore, he recommended that the rules committees' efforts be directed principally to considering conduct rules for the district courts.

He noted that fewer attorney conduct problems arose in the courts of appeals. He pointed out that FED. R. APP. P. 46 authorized a court of appeals to take any appropriate action against an attorney for "conduct unbecoming a member of the bar." He said that the language of the rule was unworkably vague, prompting most courts of appeals to adopt their own local rules governing attorney conduct.

Professor Coquillette reported that the local rules of the bankruptcy courts generally adopted the rules of the district courts, but that bankruptcy practice presented a number of additional, unique problems because the Bankruptcy Code prescribed certain specific conduct standards of its own. For that reason, he stated that the Advisory Committee on Bankruptcy Rules was generally of the view that separate rules should be tailored to govern attorney conduct in bankruptcy practice. Professor Resnick added that Professor Coquillette's draft rules had specifically exempted bankruptcy proceedings, whether conducted by a bankruptcy judge or a district judge. He stated that it would be necessary — because of specific provisions in the Bankruptcy Code and pertinent case law — to consider drafting specific provisions governing such issues as disinterestedness and confidentiality in bankruptcy proceedings.

Mr. Schreiber moved that the package of proposed attorney conduct rules be referred to each of the advisory committees for review and comment by June, if possible.

Ms. Mayer stated that the Department of Justice favored reducing balkanization of attorney conduct rules in the federal courts. She explained that the Department would not support the option of simply adopting only Rule 1 of the proposed draft rules because it would turn over federal interests to the states and effectively turn state laws into national laws. She added that the Department also had problems with the specific language of some of the other nine draft rules.

Ms. Mayer pointed out that the Department was concerned about how the proposed attorney conduct rules would be interpreted and enforced. She emphasized that there was a need to lodge authority in the federal courts to issue binding interpretations of the rules.

Chief Justice Veasey stated that serious federalism interests were at stake. He personally favored adoption of only Rule 1 as the best solution and would not support adoption of all 10 proposed attorney conduct rules. He added, though, that substantial additional information and debate were essential before the committees could make meaningful decisions on the appropriate course of action to pursue.

He explained that a special committee of the Conference of Chief Justices had just arrived at a negotiated solution with the Attorney General on the controversial issue of communication with represented parties for consideration by the Conference at its annual meeting. [The Conference postponed its consideration of the proposal until a later time so that the members could have more time to study it carefully.] He noted, too, that the American Bar Association had appointed an ethics commission to study needed revisions to the rules of professional responsibility. He added that the commission, which he chaired, would convene following the meeting of the Conference of Chief Justices. In sum, he said, attorney conduct issues were receiving considerable attention at the highest levels of the legal profession. In light of this imminent activity and the evolving nature of the debate, he recommended that Professor Coquillette's draft federal rules be tabled.

Ms. Mayer suggested that the committee consider appointing an ad hoc subcommittee to review the proposed attorney conduct rules. Other members added that the rules could be referred to a special committee comprised of members from each of the advisory committees.

Several members countered that a better course of action would be to refer Professor Coquillette's draft and the supporting documentation to each of the advisory committees for study, with the expectation that there would be extensive coordination among the advisory committees, their reporters, and the Standing Committee.

One member stated that it would be impossible for the advisory committees to make any meaningful contributions in time for consideration at the Standing Committee's June 1998 meeting because the issues addressed in the proposed rules were simply too complex and controversial. He emphasized that it was essential for the committees to give appropriate deference to the rights of the states to oversee the conduct of the attorneys they license.

Accordingly, the committees needed to consider whether paramount federal interests were at stake that warranted superseding state rules in certain matters.

Judge Stotler stated that she did not favor directing the advisory committees to accomplish a specific task by a specific date. Rather, she emphasized the need for the advisory committees to make recommendations on the best ways to deal with the attorney conduct issues.

The committee agreed to have each advisory committee consider the proposed draft rules and supporting materials presented by Professor Coquillette and present status reports to the Standing Committee at its June 1998 meeting.

LOCAL RULES OF COURT

Uniform Renumbering of Local Rules

Professor Squiers reported that in March 1996 the Judicial Conference had required the courts to renumber their local rules in accordance with the national rules. As of June 1997, 41% of the district courts had renumbered their rules, and by December 1997, 58% had completed the renumbering. She said that she had contacted the remaining district courts by telephone to determine whether they were making progress in renumbering and had received largely positive responses.

Several members stated that the renumbering requirement had been very helpful in motivating the courts to review their local rules, improve them, and eliminate inconsistencies. They also said that the project had fostered the goal of greater national uniformity and would prove to be of substantial benefit to the bar.

Impact on Local Rules of the Expiration of the Civil Justice Reform Act

Professor Squiers reported that with the recent sunsetting of the Civil Justice Reform Act, she had examined the local CJRA plans of all the district courts. She found that 31% of the district plans referred to the court's local rules and specified the court's interest in eventually integrating the content of the plans into the court's local rules. The other plans were silent on the matter. Accordingly, she telephoned 12 district courts randomly and inquired whether they anticipated incorporating the content of their CJRA plans into their local rules or intended to use their CJRA plans in another fashion. She reported that seven of the 12 courts had already taken action to modify their local rules as of December 1997. Three of the courts said that they anticipated doing so at some point, and the remaining two districts reported that they contemplated taking no action.

Other Proposed Changes in Local Rule Requirements

A number of members added that it would also be beneficial to require courts to send their local rules to the Administrative Office for posting on the Internet. One participant suggested that consideration be given to amending the Rules Enabling Act to require that all local rules take effect on or shortly after December 1 of each year, in coordination with the effective date of amendments to the national rules. Judge Garwood responded that the Advisory Committee on Appellate Rules had placed that suggestion on its agenda. Another participant said that consideration might be given to amending the national rules to provide that local rules may not take effect until they are filed electronically with the Administrative Office

Judge Stotler agreed to refer to each of the advisory committees the various suggestions raised at the meeting regarding the effective date and the effectiveness of local court rules.

Judge Stotler requested that Professor Squiers and the Local Rules Project study the impact on local court rules of the 1995 amendments to FED. R. CRIM. P. 57, FED. R. BANKR. P. 8018 and 9029, and FED. R. APP. P. 47. She also asked the project to consider the merits and impact of a requirement that all local rules be posted in electronic format.

Limitations on the Number of Local Rules

Judge Wilson stated that there were too many local rules of court and too many local procedural variations. Therefore, he recommended that the rules committees take appropriate action to promote greater uniformity in federal practice and place limits on local rulemaking authority. **To that end, he moved to request that the Advisory Committee on Civil Rules study amending FED. R. CIV. P. 83 by striking the words "imposing a requirement of form" from subdivision (2) and adding a new subdivision (3) that would prohibit a court from adopting more than 20 local rules, including discrete subparts.**

The committee thereupon engaged in an extensive discussion regarding the number, scope, and merit of local rules. Some members stated that a number of courts were strongly attached to their own practices and would resist efforts to limit local rulemaking authority. They noted that the district courts had taken a wide variety of approaches to local rules. Some courts have very few local rules, while others have promulgated lengthy and detailed sets of rules.

Several members stated that there had been a long-standing consensus among the members of both the Standing Committee and the advisory committees that (1) there were too many local rules, and (2) local rules should fill the gaps in the national rules, rather than legitimize local variations in federal practice. Several pointed out that the rules committees had debated these issues extensively in the past and had concluded that it would not be feasible to eliminate local variations simply by limiting local rules. Local procedural variations would

likely continue in effect through the use of standing orders, individual case orders, and other, less formal mechanisms.

A number of members pointed out that the 1995 amendments to FED. R. CIV. P. 83 — together with companion amendments to FED. R. CRIM. P. 57, FED. R. BANKR. P. 8018 and 9029, and FED. R. APP. P. 47 — had been designed expressly to foster national uniformity by requiring that:

1. all local rules be consistent with the national rules and federal statutes;
2. all local rules conform to a national numbering system;
3. no local rule imposing a requirement of form be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement; and
4. no sanction or other disadvantage be imposed for noncompliance with any requirement not published in federal law, federal rules, or local rules, unless the alleged violator has been furnished with actual notice of the requirement in a particular case.

One member emphasized that the judicial councils of the circuits have — and should exercise — the authority to abrogate any local rules that are illegal or inconsistent with the national rules. He added that there was a need to collect and analyze more information on local rules. Professor Coquillette suggested that it would be very desirable for the Local Rules Project to conduct a new study of local rules, particularly in the wake of the sunset of the Civil Justice Reform Act.

Another member suggested that Judge Wilson amend his motion to have the Advisory Committee on Civil Rules study local rules issues broadly, rather than mandate that it consider a specific amendment to Rule 83. He added that the rules committees also needed to address local rule issues in both the district courts and the bankruptcy courts.

Judge Wilson agreed to amend his motion to require that the other advisory committees also study appropriate limitations on local rules. He added, however, that it was essential that the committees address the merits of imposing a national limit on the number of local rules that any court may promulgate.

Other members responded that it was premature to consider additional amendments to the rules governing local rules because the impact of the 1995 amendments had only begun to be felt. They warned, moreover, against changing the language of those amendments because they had been very carefully crafted and subjected to extensive committee discussion and public comment. They pointed out, for example, that the language of the proposed motion could create practical problems because it deleted the specific limitation in the current rules on locally imposed requirements of form.

Some participants suggested that it would be better to have a single, coordinated local rules initiative conducted under the direction of the Standing Committee, rather than have the five advisory committees each undertake their own efforts. One member added that the ultimate goal of the committees might be to prepare a set of proposed model local rules.

The committee voted 6-5 to defeat Judge Wilson's motion.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the style subcommittee would proceed to prepare a restyled draft of the body of criminal rules for initial consideration by the advisory committee. He added that the style subcommittee was not considering an effort to restyle any other set of rules until the Supreme Court has acted on the restyled appellate rules.

In the interim, as amendments and new rules are proposed by any of the advisory committees, the style subcommittee would continue with the procedure that has been in place. That is, once the reporter drafts an amendment or new rule, it will be submitted to the Rules Committee Support Office of the Administrative Office. That office will then provide copies to all members of the style subcommittee. The subcommittee members will have 10 days to submit their comments to Mr. Garner, who will review them and contact the reporter of the appropriate advisory committee with the collective views of the style subcommittee. The reporter will then edit the suggestions provided by the style subcommittee and return a revised draft to the Administrative Office for transmission to the advisory committee members.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte presented the report of the Technology Subcommittee, which was set forth in his report and attachments of December 5, 1997. (Agenda Item 11)

Rules Issues Raised by Technology

He reported that the subcommittee was in the process of gathering information on the interrelationship between technology and the rules. He said that Judge Stotler had asked each of the advisory committees to identify for the subcommittee any future rules amendments that they were considering to take account of advances in automation.

He noted that the advisory committees had responded by pointing to such topics as the filing of briefs on disk, electronic case filing generally, electronic service of notices and other documents, taking of testimony from remote locations, discovery of information contained in electronic format, publication and citation of opinions in electronic form, and including electronic materials in the various definitions contained in the rules.

Mr. Lafitte said that electronic case filing and the serving of notices by electronic means appeared to be the most significant matters to be addressed. He noted that several electronic case file prototypes had been established in the federal courts, and the Administrative Office was monitoring the information gathered in the pilot courts.

Mr. McCabe stated that the Administrative Office had been in regular contact with the pilot courts and had obtained and analyzed copies of their local rules. Judge Stotler added that the chart that the Office of Judges Programs had prepared on these rules was very helpful, and that the committee should also be provided with copies of the local rules governing the pilot programs.

Receiving Rules Comments on the Internet

Mr. Lafitte reported that his subcommittee was also examining whether to permit public comments on proposed rules amendments to be sent to the Administrative Office electronically. He had asked the Administrative Office to provide the subcommittee with the pros and cons of permitting the public to use the Internet to submit comments on the rules. The most significant benefit cited by the Administrative Office was that it would make it easier for the public to comment, thereby furthering the rules committees' policy of reaching out to the bar and encouraging more comments on proposed amendments. A disadvantage of electronic comments would be that many of them may be less thoughtful than written comments. Another disadvantage would be that any significant increase in the number of comments might place an intolerable burden on the reporters.

Mr. Lafitte said that the subcommittee expected to receive the views of the advisory committees on this proposal. It would then make recommendations to the Standing Committee at its June 1998 meeting. He added that the informal responses he had received to date had been very favorable toward receiving comments electronically.

ELECTRONIC CASE FILES DEMONSTRATION

Karen Molzen, law clerk to Chief Judge Conway of the United States District Court for the District of New Mexico, presented a demonstration of the electronic case file systems being piloted in the District of New Mexico and nine other federal district and bankruptcy courts. Mr. McCabe pointed out that electronic filing raises a number of important procedural issues that had not yet been addressed by the federal rules. He added that the pilot courts were filling in the gaps in the national rules, where necessary, by provisions in their local rules and by obtaining consent of the parties.

FORUM ON COMMITTEE PRACTICES AND PROCEDURES

Judge Stotler asked the members to reflect on the committee's December 1995 *Self-Study of Federal Judicial Rulemaking,* to comment on the way the committees were currently conducting their business, and to provide a retrospective look at changes occurring in the rules process during their service on the committees.

She pointed out that the volume of materials sent to the Standing Committee had increased substantially, and it was very important for every member to be made aware of all developments in the rules process. She said that it was incumbent upon the members to read the material promptly and identify any matters with which they disagree. She recommended that any member of the Standing Committee who has a concern with the substance or language of any amendment call the chair or reporter of the appropriate advisory committee in advance of the Standing Committee meeting to address or correct the proposal. In that way, the Standing Committee's meeting can be devoted to discussing the merits of proposals.

She also suggested that the committees should propose changes in the rules only when amendments are essential. They should also ensure that they are carefully considered and well drafted because they are scrutinized by the bench and bar, the Judicial Conference, the Supreme Court, and the Congress. She noted that lawyers and judges use the rules on an everyday basis and are generally comfortable with them. Many tend to react negatively to changes, particularly if they are viewed as nonessential. Accordingly, the rules committees should appraise the value of any proposed change against the anticipated opposition. In addition, the committees need to strike the correct balance between the need for national uniformity and legitimate local variations.

Following the custom of having retiring members provide a retrospective view of their service on the committee, Judge Easterbrook noted that when he started on the committee six years earlier, its procedures had been very different. An advisory committee would bring a proposed amendment to the committee's attention and be asked to provide little description. The committee's ensuing discussion would mix both substance and style, and a good deal of time would be spent in making language improvements.

He said that the Standing Committee's procedures had changed materially for the better, thanks in large part to the *Self-Study* and the leadership of the current chair. He added that the committee had also profited greatly from the work of its style consultant, Bryan Garner, and the style subcommittee. The Standing Committee, he said, had concluded that it was simply too difficult to draft language in large groups. Rather, style and expression problems are best resolved by having the members speaking directly to the advisory committee. The alternative was for the Standing Committee — as a reviewing body — to remand an amendment to an advisory committee, rather than attempt to rewrite it. On this point, Judge Stotler pointed out that the committee's *Self-Study* stated specifically that the advisory committees have the responsibility for drafting amendments and that the Standing Committee should normally remand rules, rather than redraft them.

One of the participants concurred that style matters used to take up much of the time of Standing Committee meetings, but now are normally handled in advance of the meetings. He thanked Judge Keeton for appointing a style subcommittee, which, he said, had produced standard style conventions and worked closely with the advisory committees. He emphasized that the advisory committees were uniformly producing substantially improved drafts. Several other members expressed their support for the style process and stressed the need for consistent usage in the rules.

Judge Easterbrook added that the agendas of the Standing Committee had improved, as a wider variety of matters had been included, and members are now given greater opportunities to raise policy issues. He also pointed out that the Standing Committee had coordinated the promulgation of a number of common provisions in the various sets of federal rules and had placed certain policy matters on the agendas of the advisory committees. It had also fostered better communications among the reporters and the advisory committees and should continue to play a coordinating role with the advisory committees.

Judge Stotler stated that the work of the Rules Committee Support Office had increased greatly, and others added that the staff had been instrumental in fostering enhanced relations with the state bars. Chief Justice Veasey said that he would like to see a strengthening of the process of providing state courts with timely information of proposed changes in the rules, particularly rules that the state courts are likely to adopt. He said that state courts commonly only consider the merits of a rule after it has been adopted in the federal courts. He mentioned that he intended to discuss this matter with the Conference of Chief Justices.

One of the participants said that there was a large gap between the time a proposed amendment is published for public comment and the time it is adopted as a rule, often with changes. He suggested that interim notice of actions taken by the Standing Committee and the Judicial Conference would be very helpful. Chief Justice Veasey suggested that notice of rules developments might be sent electronically to the states.

One of the reporters stated that the work of the advisory committee chairs and reporters had increased enormously. He expressed appreciation for the procedural improvements of the last few years, which had resulted in better communications, guidance, and coordination.

Several members stated that the rules process was excellent and needed to be protected. They said that despite recurring legislative attempts in every Congress to amend rules directly by statute, Congress in fact defers in most cases to the rules process.

Judge Stotler pointed out that one of the recommendations in the *Self-Study* was to ask the Chief Justice to consider making the chairs of the advisory committees voting members of the Standing Committee. She said that the Standing Committee had not made a recommendation on the matter and might wish to give the matter further thought.

SUPPORT SERVICES

The committee approved the following motion made by Judge Wilson:

> **We resolve to acknowledge the excellent support of the Administrative Office for the work of the rules committees—all six — and especially the devotion to duty shown by Peter McCabe, our Secretary, Chief John K. Rabiej, Attorney-Advisor Mark Shapiro, and the entire distinguished staff of the Rules Committee Support Office. Further, the Chair of the Committee is instructed to so report to the Director of the Administrative Office.**

Judge Stotler thanked Professor Coquillette and the reporters of the advisory committees for the enormous amount of quality work that they produce.

NEXT COMMITTEE MEETINGS

The committee voted to hold its next meeting, scheduled for Thursday and Friday, June 18 and 19, 1998, in Santa Fe, New Mexico.

The committee scheduled the following meeting for Thursday and Friday, January 7 and 8, 1999, with a location to be determined later.

Respectfully submitted,

Peter G. McCabe,
Secretary

IV-A

MEMORANDUM

DATE: February 6, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-5

Attached is a draft amendment to Rule 24(a)(2) and a draft Advisory Committee Note. The amendment attempts to resolve a conflict between Rule 24(a)(2) and the Prison Litigation Reform Act ("PLRA"). The precise nature of that conflict is described in the draft Note.

Also attached as background information are copies of 28 U.S.C. § 1915 (as amended by the PLRA) and *Leonard v. Lacy*, 88 F.3d 181 (2nd Cir. 1996) (which discusses the relevant provisions of the PLRA at length).

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

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

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

(B) claims an entitlement to redress; and

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

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

Advisory Committee Note

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

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

§ 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.

himself in; who decided unilaterally that he would delay sentencing for at least another month because that was his preference; and who, realizing that law enforcement officers had located him, ran.

In light of the district court's supportable findings and its reliance on the record as a whole, we conclude that the enhancement for obstruction of justice was neither a misapplication of the Guidelines nor an abuse of discretion.

CONCLUSION

[13] Reed has also argued that the district court's denial of credit for acceptance of responsibility was erroneous because it was premised on the court's obstruction-of-justice analysis. Having concluded that the obstruction enhancement was appropriate, we also uphold the district court's denial of credit for acceptance of responsibility.

We have considered all of Reed's arguments on this appeal and have found in them no basis for reversal. The judgment of the district court is affirmed.

Leslie Thomas LEONARD, Plaintiff–Appellant,

v.

Peter J. LACY, Superintendent, Bare Hill Facility, and Myaddow, Correctional Officer, Defendants–Appellees.

Docket No. 96–2393.

United States Court of Appeals, Second Circuit.

Submitted July 3, 1996.

Decided July 10, 1996.

Prisoner filed § 1983 action against superintendent of facility and corrections officer, and moved to proceed in forma pauperis. The United States District Court for the Northern District of New York, Thomas J. McAvoy, Chief Judge, denied motion for in forma pauperis status and dismissed complaint as frivolous. Prisoner filed notice of appeal and motion to proceed in forma pauperis. The Court of Appeals, Jon O. Newman, Chief Judge, held that: (1) provision of Prison Litigation Reform Act (PLRA) imposing obligation for filing fees, to be paid in installments, applies to all prisoners who seek to appeal civil judgments without prepayment of fees, and obligation will be imposed prior to any assessment of frivolousness of appeal on motion to proceed in forma pauperis; (2) PLRA's obligations apply to both $5 filing fee and $100 docketing fee required for "commencement" of appeal within meaning of PLRA; and (3) Court of Appeals would satisfy PLRA's requirements that prisoner submit certified copy of prison trust fund account statement and that court collect initial filing fee payment by obliging prisoner to submit authorization for prison to furnish certified copy of account statement and to calculate and disburse funds from prison account.

Ordered accordingly.

1. Federal Courts ⇐661

Provision of Prison Litigation Reform Act (PLRA) imposing obligation for filing fees, to be paid in installments, applies to all prisoners who seek to appeal civil judgments without prepayment of fees, and obligation will be imposed prior to any assessment of frivolousness of appeal on motion to proceed in forma pauperis, in light of abundant legislative history indicating that Congress was endeavoring to reduce frivolous prisoner litigation by making all prisoners seeking to bring lawsuits or appeals feel deterrent effect created by liability for filing fees. 28 U.S.C.A. § 1915.

2. Federal Courts ⇐661

Payment obligations imposed by Prison Litigation Reform Act (PLRA) on all prisoners who seek to appeal civil judgments without prepayment of fees apply to both $5 filing fee and $100 docketing fee required for "commencement" of appeal within meaning

of PLRA; docketing fee is independent of fees that might be assessed in course of appeal, and Congress, in seeking to deter frivolous appeals, would not likely have imposed administrative burdens of Act on courts and prisons for only nominal $5 filing fee. 28 U.S.C.A §§ 1915(b)(1, 3), 1917.

See publication Words and Phrases for other judicial constructions and definitions.

3. Federal Courts ⇐661

Court of Appeals would satisfy provisions of Prison Litigation Reform Act (PLRA), requiring that prisoner submit certified copy of prison trust fund account statement and that court collect initial filing fee payment, by obliging prisoner to submit authorization for agency holding prisoner in custody to furnish to Court certified copy of prisoner's prison account statement for preceding six months, and to calculate and disburse funds from prison account, including initial partial filing fee payment and subsequent monthly payments as required by PLRA. 28 U.S.C.A. § 1915(a)(1, 2).

Leslie Thomas Leonard, pro se, Malone, N.Y.

Before: NEWMAN, Chief Judge, KEARSE and WINTER, Circuit Judges.

JON O. NEWMAN, Chief Judge:

This motion by a state prisoner for leave to appeal *in forma pauperis* obliges this Court to consider the application of the fee requirements of the Prison Litigation Reform Act of 1995 ("PLRA"). We conclude that an appellate court must take steps to assure compliance with the fee requirements of the PLRA before making any assessment of whether an appeal should be dismissed as frivolous, pursuant to 28 U.S.C. § 1915(e)(2)(B)(i). We also conclude that a procedure must be established to assure the prompt and efficient compliance with the PLRA. We outline in this opinion the procedure this Court will use when prisoners seek to appeal from a judgment in a civil action without prepayment of fees. Since Leonard has not had an opportunity to submit the authorization we now require, we will dismiss the appeal in 30 days unless within that time he files such authorization.

Facts

Leslie Thomas Leonard, a prisoner incarcerated in a New York corrections facility, filed a complaint under 42 U.S.C. § 1983 against the superintendent of the facility and a corrections officer. He alleged verbal harassment, which he claimed violated his First Amendment rights. Leonard accompanied his complaint with a motion to proceed *in forma pauperis* ("i.f.p.") pursuant to 28 U.S.C. § 1915(a). The District Court for the Northern District of New York (Thomas J. McAvoy, Chief Judge) denied the motion for i.f.p. status and dismissed the complaint as frivolous. From the judgment entered April 29, 1996, Leonard filed a notice of appeal on May 2, 1996. Leonard thereafter filed in this Court the pending motion to proceed *in forma pauperis*.

Discussion

Prior to the enactment of the PLRA, this Court responded to applications for leave to appeal *in forma pauperis* under subsection 1915(a) by making a threshold assessment of the merits of the appeal in order to determine whether the appeal surmounted the standard of frivolousness set forth in former subsection 1915(d) (renumbered subsection 1915(e) by the PLRA). Upon a determination that an appeal was frivolous within the meaning of former subsection 1915(d), *see Neitzke v. Williams*, 490 U.S. 319, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989), we dismissed the appeal. Generally, we denied the motion for i.f.p. status when we dismissed the appeal. On occasion, we first granted the motion for i.f.p. status upon determining that the appellant's lack of financial resources qualified him for i.f.p. status, then made the threshold assessment of the merits, and, upon concluding that the appeal was frivolous, dismissed it. *See, e.g., Hidalgo–Disla v. INS*, 52 F.3d 444 (2d Cir.1995).

On April 26, 1996, the President signed the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub.L. 104–134, 110 Stat. 1321 (1996), Title VIII of which is the

Prison Litigation Reform Act of 1995. Section 804 of the PLRA makes a series of amendments to 28 U.S.C. § 1915, the provision of the Judicial Code governing *in forma pauperis* status. Since the new language affects not only Leonard's pending motion but also numerous other motions now pending in this Court or likely to be filed, we set forth in full those provisions of section 1915 that the PLRA amends, lining out those words deleted from the prior version and italicizing new matter:

§ 1915. Proceedings in forma pauperis

~~(a) Any~~ *(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 ~~and costs~~ or security therefor, by a person who ~~makes affidavit~~ *submits an affidavit that includes a statement of all assets such prisoner* [*sic*] *possesses* [and] that ~~he~~ *the person* is unable to pay ~~such costs~~ *such fees* or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that ~~he~~ *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.

~~An appeal~~ *(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 ~~subsection (a) of this section~~ *subsections (a) and (b) and the prepayment of any partial filing fee as may be required under subsection (b)* .... [balance of former subsection (b) is unchanged].

(d) .... [balance of former subsection (c) is unchanged].

~~(d) The court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.~~

(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.

Before the PLRA, section 1915 required all litigants seeking to proceed in a trial court or on appeal without prepayment of fees to file an affidavit of poverty. The PLRA amends section 1915 by imposing additional requirements on prisoners seeking to avoid prepayment of fees in civil actions and in appeals in civil actions. The prisoner must pay the full amount of filing fees by subjecting the prisoner's "trust fund account ... (or institutional equivalent)," 28 U.S.C. § 1915(a)(2) (hereinafter "prison account"), to periodic partial payments. The initial payment is 20 percent of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, *id.* § 1915(b)(1), unless the prisoner has no assets, *id.* § 1915(b)(4). Subsequent payments are 20 percent of the preceding month's income,[1] in any month in which the account exceeds $10, until the filing fees are paid. *Id.* § 1915(b)(2).

The PLRA's amendments to section 1915 raise several issues that apply to Leonard's pending motion. Preliminarily, we note that there is no issue as to the applicability of the PLRA to his motion since both his notice of appeal and his motion to proceed *in forma pauperis* were filed after the April 26, 1996, effective date of the Act.

I. At What Point Does the Prisoner Become Liable for Filing Fees?

A basic issue arising under the PLRA is whether a prisoner filing an appeal becomes liable for appellate filing fees before or after his motion for leave to appeal *in forma pauperis* has been adjudicated. The language of subsection 1915(b)(1) could be read to mean that fee liability attaches only after i.f.p. status has been granted. The requirement of payment of the full amount of a filing fee is imposed "if a prisoner *brings* a civil action or *files* an appeal in forma pauperis." 28 U.S.C. § 1915(b)(1) (emphasis added). This wording is slightly different from subsection 1915(a)(2), which imposes the requirement of filing an affidavit of poverty and a certified copy of the trust fund account for the prior six months upon "[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." *Id.* § 1915(a)(2). Subsection 1915(a)(2) plainly applies to a prisoner approaching a court and "seeking" to proceed i.f.p. Arguably, subsection 1915(b)(1) applies only to a prisoner who already has i.f.p. status, *i.e.*, a prisoner who has been granted such status in the district court with respect to his complaint and has been continued in such status for purposes of his appeal,[2] or who has been granted such status by this Court.

In courts like ours, however, in which the decision to grant a motion to appeal i.f.p. is usually made only after determining that the appeal surmounts the standard of "frivolousness," such a construction would produce a bizarre result: the prisoner whose complaint or appeal is determined to be frivolous would be spared the obligation to pay a filing fee, while only the prisoners who surmount the "frivolousness" standard would become obligated for filing fees. The text does not require such a construction. The phrase "brings a civil action or files an appeal in forma pauperis" can be read to include both prisoners who have been granted i.f.p. status and those who seek such status.

1. Subsection 1915(b)(2) uses the word "income" as the base on which the subsequent 20 percent payments are to be calculated, although subsection 1915(b)(1)(A) uses the word "deposits" as the base on which the initial 20 percent payment is to be calculated (if greater than the average monthly balance). We need not decide at this point whether different meanings were intended.

2. If a litigant is granted i.f.p. status in a district court, and if that status is not revoked in the district court, the litigant, upon filing a notice of appeal, continues on appeal in i.f.p. status. Fed. R.App.P. 24(a).

Moreover, there is abundant legislative history to indicate that Congress was endeavoring to reduce frivolous prisoner litigation by making all prisoners seeking to bring lawsuits or appeals feel the deterrent effect created by liability for filing fees. *See* 141 Cong.Rec. S7526 (daily ed. May 25, 1995) (statement of Senator Kyl) ("The subsection provides that whenever a Federal, State, or local prisoner seeks to commence an action or proceeding in Federal court as a poor person, the prisoner must pay a partial filing fee...."); *PLRA: Hearing on S. 3 and S. 866 Before the Senate Committee on the Judiciary,* 104th Cong., 1995 WL 496909 (F.D.C.H.) (July 27, 1995) (prepared statement of O. Lane McCotter, Exec. Dir., Utah Dep't of Corrections) ("The driving force behind this flood of litigations is that inmates have 'nothing to lose' in filing even the most frivolous case...."); 141 Cong.Rec. S14417 (daily ed. Sept. 27, 1995) (section summary) ("This section ... [r]equires an inmate seeking to file in forma pauperis to submit to the court a certified copy of the inmate's prison trust fund account ... [and] to pay, in installments, the full amount of filing fees, unless the prisoner has absolutely no assets.").

Furthermore, construing the statute to impose the fee requirement only on those granted i.f.p. status would place on courts precisely the burden that the statute was intended to avoid: they would have to expend judicial and staff time to make the determination of whether every complaint or appeal surmounts the "frivolousness" threshold. By requiring the prisoner to file a certified copy of his trust account statement and to become obligated to pay the filing fee before frivolousness is assessed, many prisoners can be expected to make their own assessment of frivolousness and will elect not to file a considerable number of complaints and appeals.

Nor is there any unfairness in imposing the fee obligation, subject to installment payments, upon all prisoners. Every fee-paying litigant who files a lawsuit or takes an appeal accepts the risk that the complaint or appeal may be determined to be frivolous, in which event the complaint or appeal will be dismissed and the filing fee will be lost. *See Pillay v. INS,* 45 F.3d 14, 17 (2d Cir.1995). There is nothing unfair about obliging prisoners to accept that same risk, and there is every reason to believe Congress expected precisely that result.

One provision of the PLRA arguably suggests that at least in some instances a court that has received a prisoner's civil complaint should make a threshold assessment of its merits and dismiss upon a determination of frivolousness, prior to the prisoner's exposure to liability for filing fees. Section 1915A of Title 28, added by section 805 of the PLRA, provides that a court shall review "before docketing if feasible, or, in any event, as soon as practicable after docketing" a complaint by a prisoner against a governmental entity or its employee, and, on such review, shall dismiss the complaint if, among other things, it is frivolous. Depending on what Congress understood the "docketing" step to involve, this provision could mean that judicial assessment of the complaint is to precede any steps concerning filing fees.

Apparently docketing practices are not uniform among district courts. A docket is a court's official record of what occurs in a case. It may be maintained either on paper or electronically. In some courts, as soon as a complaint is received, a "docket" is opened, meaning that a paper or electronic record is begun on which all subsequent actions occurring in the case will be recorded. The filing of the complaint is usually the first entry on the docket. In other courts, however, *pro se* complaints are given a preliminary screening prior to the opening of a docket, and if a judge determines that the complaint is frivolous, a docket is later opened in which is simultaneously recorded the filing of the complaint, the plaintiff's motion to proceed *in forma pauperis,* and the judge's order of dismissal. As to such dismissed complaints, the i.f.p. motion is granted in some courts, and denied in other courts. Only in courts that delay docketing until frivolousness has been determined could the screening contemplated by section 1915A occur before docketing. And even in such courts, Congress likely did not intend the section 1915A screening to insulate prisoners from liability for filing

fees for complaints determined to be frivolous.

In any event, section 1915A requires screening before docketing "if feasible," and appears not to interfere with the practice of many courts to open a docket as soon as a complaint is received and thereafter make a determination as to frivolousness. Furthermore, the screening procedure appears to be designed for district courts, since it refers to review of a complaint, rather than an appeal. We do not regard section 1915A as detracting from the evident Congressional purpose of obliging all prisoners who file complaints or appeals to become liable for filing fees, except those who have no assets and no means to pay the initial partial filing fee.

[1] For all of the reasons stated, we will apply the PLRA to impose any required obligation for filing fees (subject to installment payments) upon all prisoners who seek to appeal civil judgments without prepayment of fees. That obligation will be imposed prior to any assessment of the frivolousness of the appeal.

II. What Appellate Fees Are Subject to the PLRA?

The filing of an appeal requires the payment of two different fees, a $5 fee, usually referred to as a "filing fee," and a $100 fee, usually referred to as a "docketing fee." The $5 fee is required by 28 U.S.C. § 1917 "[u]pon the filing of any separate or joint notice of appeal," although that provision does not label the fee as a "filing fee." The $100 "docketing fee" is required by resolution of the Judicial Conference of the United States, *see Report of the Proceedings of the Judicial Conference of the United States* 12 (March 17, 1987) (hereinafter "Judicial Conference Report"), acting pursuant to its authority to determine "[t]he fees and costs to be charged and collected in each court of appeals." 28 U.S.C. § 1913.

[2] Though it is arguable that, with respect to appeals, the PLRA payment obligations apply only to the $5 fee, we believe that the Act must be applied to both the $5 fee and the $100 docketing fee. First, the PLRA creates an obligation to pay "any court *fees* required by law," 28 U.S.C. § 1915(b)(1) (emphasis added), and further provides that "[i]n 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 . . .," *id.* § 1915(b)(3) (emphasis added). Both the $5 and the $100 fees are required for the "commencement" of an appeal. Second, the $100 fee is entirely independent of any particular fees that might be assessed in the course of an appeal, such as fees for the copying of court documents. Finally, it is not likely that Congress would have applied the PLRA to appeals in the expectation of creating some deterrent effect against frivolous appeals if the Act applied only to the $5 fee. Nor would Congress likely have imposed administrative burdens on appellate courts and prisons only for such a nominal amount. We will apply the PLRA payment obligations to both the $5 fee and the $100 fee.

III. What Procedure Shall Be Used to Accomplish the Imposition of an Obligation for Appellate Filing Fees?

The PLRA purports to implement the fee obligations by imposing three distinct requirements. The prisoner must submit a certified copy of the prisoner's trust fund account statement for the prior six months. 28 U.S.C. § 1915(a)(2). The court "shall assess and, when funds exist, collect," the initial partial filing fee. *Id.* § 1915(b)(1). Each month thereafter, the agency having custody of the prisoner "shall forward payments from the prisoner's account to the clerk of the court" in the amount of 20 percent of the preceding month's income credited to the prisoner's account "each time the amount in the account exceeds $10 until the filing fees are paid." *Id.* § 1915(b)(2).

[3] Though subsection 1915(a)(2) imposes on the prisoner the requirement to submit a certified copy of his trust fund account statement and subsection 1915(b)(1) imposes on the court the requirement to collect the initial filing fee payment, we believe that a court is entitled to satisfy these requirements by obliging the prisoner to submit an *authorization* for both tasks to be performed by the prison. Our Clerk's Office can then send a copy of the prisoner's authorization to the

prison, thereby precipitating receipt of the certified copy of the trust fund account statement and the initial partial filing fee payment, as well as the subsequent payments that subsection 1915(b)(2) requires the prison to remit from the prisoner's account. The authorization procedure satisfies the statutory requirements that the prisoner cause the certified statement to be furnished and that the court cause the initial partial payment to be collected. This procedure can be expected to minimize disputes between the prisoner and Clerk's Office personnel. The prisoner will remain responsible for furnishing to this Court the affidavit of poverty, required by subsection 1915(a)(1).

We will therefore implement the payment obligations of the PLRA by taking the following steps:

1. This Court will require every prisoner seeking to appeal a judgment in a civil action without prepayment of fees to file with this Court, in addition to an affidavit of poverty, required by subsection 1915(a)(1), a signed statement authorizing the agency holding the prisoner in custody (a) to furnish to this Court a certified copy of the prisoner's prison account statement for the preceding six months, as required by subsection 1915(a)(2), and (b) to calculate and disburse funds from the prison account, as required by subsection 1915(b), including the initial partial filing fee payment and the subsequent monthly payments.[3]

2. Upon the receipt of the prisoner's authorization, the appeal will be processed in the normal course, including consideration of whether the appeal should be dismissed as frivolous.

3. The agency with custody of the prisoner shall have the obligation to send to this Court the certified copy of the prisoner's trust fund account statement for the prior six months, and to send to this Court or the District Court[4] the initial partial filing fee payment, and the subsequent monthly payments until the entire $105 has been paid. Once the prisoner has authorized sending the certified copy of his prison account statement and making the disbursements from his prison account, the failure of the agency to send the statement or to remit any required payment shall not adversely affect the prisoner's appeal.

4. If a prisoner files an appeal without prepayment of appellate fees and does not furnish this Court with the required authorization, this Court will dismiss the appeal in 30 days unless within that time the prisoner files in this Court the required authorization.

Conclusion

Since Leonard has not complied with the PLRA and will now become aware, from this

3. The prisoner's authorization shall be substantially in the following form (which has been adapted from the form currently in use in the District Court for the Southern District of New York):

> I, _____, request and authorize the agency holding me in custody, to send to the clerk of the United States Court of Appeals for the Second Circuit a certified copy of the statement for the past six months of my trust fund account (or institutional equivalent) at the institution where I am incarcerated. I further request and authorize the agency holding me in custody to calculate and disburse funds from my trust fund account (or institutional equivalent) in the amounts specified by 28 U.S.C. § 1915(b). This authorization is furnished in connection with an appeal, and I understand that the total appellate filing fees for which I am obligated are $105. I also understand that these fees will be debited from my account regardless of the outcome of my appeal. This authorization shall apply to any other agency into whose custody I may be transferred.

Unlike the authorization form in use in the Southern District, our form omits from the second sentence the concluding words "if so required by the court" because it is our view that, under the PLRA, every prisoner seeking to appeal without prepayment of fees must become obligated to pay the fees required by subsection 1915(b) and no further order of this Court is needed.

4. Fees are paid to the clerk of a district court for commencing an appeal. Fed.R.App.P. 3(e) (requiring $5 filing fee pursuant to 28 U.S.C. § 1917 and $100 docketing fee pursuant to the Judicial Conference Report). Fees are paid to the clerk of a court of appeals for commencing a petition for review of an agency decision, Fed. R.App.P. 15(e) (requiring $100 docketing fee pursuant to the Judicial Conference Report), or for commencing an application for an extraordinary writ, Fed.R.App.P. 21(a) (same).

opinion, of the minimum steps he must take to bring himself into compliance, his appeal will be dismissed in 30 days unless within that time Leonard files in this Court an authorization, in the form set forth in note 2, or as subsequently promulgated by the Clerk's Office, to facilitate transmission from his place of incarceration to this Court of the certified copy of his prison fund account statement and the initial and subsequent payments of the $105 in appellate fees. Leonard is cautioned that if he avoids dismissal of his appeal by filing the required authorization and the appeal is subsequently determined to be frivolous or for any other reason is later dismissed, the $105 of appellate fees will continue to be debited from his prison account.

Thomas Kevin McDOWELL, Appellant,

v.

DELAWARE STATE POLICE; John Campanella, Detective; Peachey, Trooper; Romanelli, Trooper; Simpson, Trooper.

No. 96-7058.

United States Court of Appeals,
Third Circuit.

Submitted Under Third Circuit LAR 34.1(a)

May 22, 1996.

Decided July 5, 1996.

Motorist filed pro se § 1983 complaint against state police, minus filing fee or application to proceed in forma pauperis, within applicable limitations period, and subsequently filed in forma pauperis (IFP) application outside limitations period. The United States District Court for the District of Delaware, Sue L. Robinson, J., dismissed complaint upon deeming it filed as of date of IFP application. Motorist appealed. The Court of Appeals, Garth, Circuit Judge, held that complaint would be deemed to have been constructively and timely filed as of filing date, where district court ultimately granted plaintiff leave to proceed IFP, and there was no evidence that motorist acted in bad faith or that state police was prejudiced by delay.

Reversed and remanded.

1. Federal Courts ⇐763.1

Court of Appeals exercises plenary review over district court's grant of motion to dismiss for failure to state claim. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

2. Federal Courts ⇐763.1

Court of Appeals cannot affirm dismissal of pro se complaint for failure to state claim unless it can say with assurance that under allegations of pro se complaint, which Court holds to less stringent standards than formal pleadings drafted by lawyers, it appears beyond doubt that plaintiff can prove no set of facts in support of claim which would entitle him or her to relief. Fed.Rules Civ.Proc. Rule 12(b)(6), 28 U.S.C.A.

3. Federal Civil Procedure ⇐626, 671

District court clerk improperly refused to docket complaint, which was improperly captioned "Motion for Compensation," because of technical deficiencies in format of pleading; complaint was served on defendants and alleged sufficient facts to put defendants on notice of claims.

4. Federal Civil Procedure ⇐664

Remittance of filing fee is not jurisdictional.

5. Federal Civil Procedure ⇐664

Clerk of district court should have accepted complaint despite plaintiff's failure to submit filing fee or request in forma pauperis (IFP) status.

6. Federal Civil Procedure ⇐664
Limitation of Actions ⇐118(2)

Although complaint is not formally filed until filing fee is paid, complaint is deemed to be constructively filed as of date that clerk received complaint, as long as plaintiff ulti-

MEMORANDUM

DATE: February 10, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-7

Attached is a draft amendment to Rule 28(j) and a draft Advisory Committee Note.

At present, 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, as parties often are unable to resist the temptation to slip in a few words of argument. A commentator has argued 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 September 1997 meeting, the Advisory voted 4-3 to retain this suggestion on its study agenda.

The amendment attempts to meet the goals of the commentator and those members of the Advisory Committee who support his suggestion. It eliminates the restriction on "argument" in Rule 28(j) letters, and instead limits the bodies of such letters to 250 words (roughly the length of a single page letter).

Rule 28. Briefs

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

Advisory Committee Note

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

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

IV-C

MEMORANDUM

DATE: March 2, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-09

Rule 32(a)(2) provides that "the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; and any reply brief, gray." Rule 32(b)(1) provides that "[t]he cover of a separately bound appendix must be white." Otherwise, FRAP makes it clear that a cover is not required on any other kind of paper. Rule 27(d)(1)(B) states that "[a] cover is not required" on any motion, response to a motion, or reply to a response to a motion. And Rule 32(c)(2)(A) provides that "a cover is not necessary" on "[a]ny other paper," as long as certain information is contained in the caption and signature page.

Public Citizen Litigation Group has suggested that FRAP be amended to specify cover colors for petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing, responses to petitions for hearing or rehearing en banc, and supplemental briefs. Public Citizen complains that conflicting local rules create a hardship for counsel who practice in more than one circuit. In light of Rule 32(d), no circuit can *require* that covers be used when FRAP has provided that covers are unnecessary. However, the circuits can promulgate local rules providing that *if* a cover is "voluntarily" used, the cover must be a particular color.

The circuits have not been shy about using this authority. Four circuits specify cover colors for petitions for panel rehearing or rehearing en banc (CAFC, CA7, CA9, and CA11), three circuits specify cover colors for answers to petitions for panel rehearing or responses to petitions for rehearing en banc (CAFC, CA9, and CA11), two circuits specify cover colors for supplemental briefs (CADC and CA11), and one circuit specifies cover colors for motions (CA7). I should note that four circuits (CAFC, CA5, CA6, and CA11) specify cover colors for briefs filed in cases in which there are cross-appeals, a matter not raised by Public Citizen.

Attached are draft amendments to Rules 27(d)(1)(B), 32(a)(2), and 32(c)(2)(A), that would implement the changes requested by Public Citizen. Under the amendments, yellow covers would be required on petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing, and responses to petitions for hearing or rehearing en banc. Brown covers would be required on supplemental briefs. And FRAP would provide that, although covers on other papers are not necessary, if such covers are nevertheless used, the covers must be white. In this way, local rulemaking on the subject of cover colors would be completely preempted.

Rule 27. Motions

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

(1) **Format.**

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

Advisory Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

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

(a) Form of a Brief.

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

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

(B) the name of the court;

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

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

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

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

Advisory Committee Note

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

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

(c) Form of Other Papers.

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

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

(A) The cover of a petition for panel rehearing, a petition for hearing or rehearing en banc, an answer to a petition for panel rehearing, and a response to a petition for hearing or rehearing en banc must be yellow. A a cover on any other paper is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2);. If a cover is used, it must be white.

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

Advisory Committee Note

Subdivision (c)(2)(A). Rule 32(c)(2)(A) has been amended to require that yellow covers be used on petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing (when such answers are permitted under Rule 40(a)(3)), and responses to petitions for hearing or rehearing en banc (when such responses are permitted under Rule 35(e)). The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions

for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

As Rule 32(c)(2)(A) makes clear, a cover is not required on any other paper. However, Rule 32(c)(2)(A) has been amended to provide that if a cover is nevertheless used, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

IV-D

MEMORANDUM

DATE: February 11, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-12

Attached is a draft amendment to Rule 44 and a draft Advisory Committee Note.

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

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

Interestingly, the subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. Specifically, § 2403(b) states that:

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

The draft amendment to Rule 44 would change its title and split it into two subdivisions. Current Rule 44 — pertaining to cases in which the constitutionality of a *federal* statute is

questioned — will become Rule 44(a). New language — pertaining to cases in which the constitutionality of a *state* statute is questioned — will become Rule 44(b). The language of Rule 44(b) is identical to that of Rule 44(a), ***mutatis mutandis***.

A copy of 28 U.S.C. § 2403 is attached for your information.

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

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

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

Advisory Committee Note

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

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

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional

challenge to any statute of that state. Curiously, though, § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

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

Citation
28 USCA s 2403
28 U.S.C.A. § 2403

Found Document

Rank 1 of 1

Database
USCA

UNITED STATES CODE ANNOTATED
TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART VI--PARTICULAR PROCEEDINGS
CHAPTER 161--UNITED STATES AS PARTY GENERALLY

Current through P.L. 105-153, approved 12-17-97

§ 2403. Intervention by United States or a State; constitutional question

(a) 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 presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The United States shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.

CREDIT(S)

1994 Main Volume

(June 25, 1948, c. 646, 62 Stat. 971; Aug. 12, 1976, Pub.L. 94-381, § 5, 90 Stat. 1120.)

<General Materials (GM) - References, Annotations, or Tables>

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on Title 28, U.S.C., 1940 ed., § 401 (Aug. 24, 1937, c. 754, § 1, 50 Stat. 751).

Word "action" was added before "suit or proceeding", in view of Rule 2 of the Federal Rules of Civil Procedure.

Since this section applies to all Federal courts, the word "suit" was not required to be deleted by such rule.

"Court of the United States" is defined in section 451 of this title. Direct appeal from decisions invalidating Acts of Congress is provided by section 1252 of this title.

Changes were made in phraseology.

IV-E

MEMORANDUM

DATE: March 5, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-30

Rule 32(a)(7) provides that a party's principal brief may not exceed 30 pages, unless it contains no more than 14,000 words or, if it uses a monospaced typeface, it contains no more than 1,300 lines of text. Rule 32(a)(7) also provides that a party's reply brief may not exceed 15 pages, unless it contains no more than 7,000 words or, if it uses a monospaced typeface, it contains no more than 650 lines of text. Rule 37(a)(7)(B)(iii) instructs that, in calculating whether a brief meets the word or line limitations, headings, footnotes, and quotations count, but the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, addendum, and certificates of counsel do not count.

If a party's principal brief does not exceed 30 pages (or a party's reply brief does not exceed 15 pages), then the party need not certify compliance with the page limitations of Rule 32(a)(7)(A). However, if a party's brief exceeds 30 pages (15 if the brief is a reply brief), then the party must certify that the brief complies with the word or line limitations of Rule 32(a)(7)(B). Rule 32(a)(7)(C) specifically states:

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

(i) the number of words in the brief; or

(ii) the number of lines of monospaced type in the brief.

No example of the certificate required by Rule 32(a)(7)(C) is provided in the Appendix of Forms to FRAP. Mr. Munford has suggested that a Form 6 be added to the Appendix to provide an illustrative form that parties could use (but would not be *required* to use) to meet their obligations under Rule 32(a)(7)(C).

Attached are four alternative drafts of the Form 6:

The first ("Alternative A") meets the bare bones requirements of Rule 32(a)(7)(C): It certifies either that the brief meets the word limitation of Rule 32(a)(7)(B) or that the brief uses a monospaced typeface and meets the line limitation of Rule 32(a)(7)(B).

The second ("Alternative B") contains the information found in the first version of Form 6, and goes on to provide information about whether the brief has been prepared in a proportionally spaced typeface or a monospaced typeface. If the former, the certificate identifies the word processing program used to produce the brief, the font size, and the type style name; if the latter, the certificate identifies the word processing program used to produce the brief, the type style name, and the number of characters per inch. This information is not required by Rule 32(a)(7)(C), but it would assist the clerks in enforcing other provisions of Rule 37 (particularly Rule 37(a)(5) and (6)).

The third ("Alternative C") is identical to the first, except that instead of asking a party to state the exact number of words or lines in the brief, it merely requires the party to certify that the brief does not exceed 14,000 words or 1,300 lines (7,000 words or 650 lines in the case of a reply brief). This would spare an attorney whose brief is in obvious compliance with the type volume

limitations from having to re-count the words or lines of the brief if he or she makes last minute revisions. At the same time, this version of Form 6 may not comply with the literal terms of Rule 32(a)(7)(C), which requires that "[t]he certificate must state either (i) the number of words in the brief; or (ii) the number of lines of monospaced type in the brief."

The fourth ("Alternative D") is identical to the second, except that, like the third version of Form 6, it does not require a party to specify the precise number of words or lines in the brief, but only to certify that the number does not exceed 14,000 or 1,300, respectively (7,000 or 650, respectively, in the case of a reply brief).

Attached please find the following: (1) The "short" versions of a draft Form 6 ("Alternative A" and "Alternative C"); (2) The "expanded" versions of a Form 6 ("Alternative B" and "Alternative D"); (3) A copy of restylized Rule 32; and (4) Copies of the local rules of the Fifth, Seventh, and Ninth Circuits regarding certifying compliance with type volume limitations.

ALTERNATIVE A

Form 6. Certificate of Compliance With Rule 32(a)(7)(B)

Certificate of Compliance With Type Volume Limitations

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

or

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

(s)_____

Attorney for _____

Dated: _____

ALTERNATIVE B

Form 6. Certificate of Compliance With Rule 32(a)(7)(B)

Certificate of Compliance With Type Volume Limitations

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

or

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*].

or

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

ALTERNATIVE C

Form 6. Certificate of Compliance With Rule 32(a)(7)(B)

Certificate of Compliance With Type Volume Limitations

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

this is a principal brief and contains no more than 14,000 words, *or*

this is a reply brief and contains no more than 7,000 words,

excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

or

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and

this is a principal brief and contains no more than 1,300 lines of text, *or*

this is a reply brief and contains no more than 600 lines of text,

excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(s)_____

Attorney for _____

Dated: _____

ALTERNATIVE D

Form 6. Certificate of Compliance With Rule 32(a)(7)(B)

Certificate of Compliance With Type Volume Limitations

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this is a reply brief and contains no more than 7,000 words,

excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

or

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and

this is a principal brief and contains no more than 1,300 lines of text, *or*

this is a reply brief and contains no more than 600 lines of text,

excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*].

or

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

(b) **Number of Copies.** Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served 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 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.

(c) **Consequence of Failure to File.** If an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument unless the court grants permission.

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

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

(1) **Reproduction.**

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

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

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

(B) the name of the court;

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

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

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

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

(3) **Binding.** The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) **Paper Size, Line Spacing, and Margins.** The brief must be on 8 ½ by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) **Typeface.** Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10 ½ characters per inch.

(6) **Type Styles.** A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) **Length.**

(A) **Page limitation.** A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) **Type-volume limitation.**

(i) A principal brief is acceptable if:

- it contains no more than 14,000 words; or
- it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

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

(i) the number of words in the brief; or

(ii) the number of lines of monospaced type in the brief.

(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 ½ by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other Papers.

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

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

(A) a cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2); and

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

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

Rule 33. Appeal Conferences

The court may direct the attorneys — and, when appropriate, the parties — to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

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REVISED CERTIFICATE OF COMPLIANCE

(PLACE THIS AS LAST DOCUMENT IN YOUR BRIEF BEFORE THE BACK COVER)

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).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR. R. 32.2.7(b)(3), THE BRIEF CONTAINS (select one):

   A. _____ words, OR

   B. _____ lines of text in monospaced typeface.

2. THE BRIEF HAS BEEN PREPARED (select one):

   A. in proportionally spaced typeface using:

   Software Name and Version: _____

   in (Typeface Name and Font Size): _____, OR

   B. 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. THE UNDERSIGNED UNDERSTANDS 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 THE PERSON SIGNING THE BRIEF.

_____
signature of filing party

(PLACE THIS AS LAST DOCUMENT IN BRIEF BEFORE BACK COVER)

CAS

Fifth Circuit Rule 32.2.7

32.2.7 Length.

(a) Page Limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with 5th Cir. R. 32.2.7(b) and (c).

(b) Type-volume Limitation.

(1) A principal brief is acceptable if: it contains no more than 14,000 words; or, it uses a monospaced face and contains no more than 1,300 lines of text.

(2) A reply brief is acceptable if it contains no more than half of the type-volume specified in 5th Cir. R. 32.2.7(b)(1).

(3) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, and any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitation. A "Brief of Appellees/Cross-Appellants" and a "Reply Brief of Cross Appellees/Appellants" are considered principal briefs for purposes of the page length and word-volume length limitations.

(c) Certificate of Compliance. A brief submitted under 5th Cir. R. 32.2.7(b) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The form of the certificate will be available from the clerk's office and must state either the number of words in the brief or the number of lines of monospaced type in the brief. In addition, the preparer must identify the name and version of the word-processing system used and must agree to furnish the court an electronic version of the brief upon request. A material misrepresentation may result in striking the brief and in sanctions against the person signing the brief.

CA7

or fax machine is not acceptable in either a brief or an appendix. Photoreductions of original documents are not acceptable.

(2) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(b) **Typeface.** Either a proportionally spaced or a monospaced face may be used.

(1) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 12-point or larger, in both body text and footnotes.

(2) A monospaced face may not contain more than 10½ characters per inch.

(c) **Type Style.** A brief or motion must be set in a plain, roman style, although italics may be used for emphasis. Case names must be italicized or underlined. The document may use boldface only for case captions, section names, and argument headings. The document may use all-capitals text only for case captions and section names. Nevertheless, quoted passages may use the original type styles and capitalization.

(d) **Length of a Brief.** (1) *Page Limitation.* A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Circuit Rule 32(d)(2) and (3).

(2) *Type Volume Limitation.* (A) A principal brief is acceptable if it contains no more than the greater of 14,000 words, 75,000 characters (excluding punctuation and spaces), or 90,000 characters (including punctuation and spaces). A brief using a monospaced face also is acceptable if it does not contain more than 1,300 lines of text.

(B) A reply brief is acceptable if it contains no more than half of the type volume specified in Circuit Rule 32(d)(2)(A).

(C) Headings, footnotes, and quotations count toward the word, character, and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitations.

(3) *Certificate of Compliance.* A brief submitted under Circuit Rule 32(d)(2) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type volume limitation. The certificate must state the number of words, characters, or lines of type in the brief, and the name and version of the word-processing system employed. The person preparing the certificate may rely on the word or character count of the word-processing system used to prepare the brief.

(Added Jan. 1, 1990; amended Jan. 1, 1992; Feb. 1, 1992; Jan. 1, 1996; Jan. 1, 1997.)

CA7

(C) Headings, footnotes, and quotations count toward the word, character, and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules, or regulations, and any certificates of counsel do not count toward the limitations.

(3) *Certificate of Compliance.* A brief submitted under Circuit Rule 32(d)(2) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type volume limitation. ~~The certificate must state the number of words, characters, or lines of type in the brief, and the name and version of the word processing system employed.~~ The person preparing the certificate may rely on the word or ~~character~~ line count of the word-processing system used to prepare the brief. The certificate ~~must state either:~~

(i) the number of words in the brief; or

(ii) the number of lines of monospaced type in the brief.

This is what certificate must contain

9. Circuit Rule 34(g) is amended to conform to changes in Circuit Rule 28:

(g) *Citation of Authorities at Oral Argument.* Counsel may not cite or discuss a case at oral argument unless the case has been cited in one of the briefs or drawn to the attention of the court and opposing counsel by a filing under Fed. R. App. P. 28(j) ~~Rule 28(j), Fed R. App. P. and Circuit Rule 28(j)~~. The filing may be made on the day of oral argument, if absolutely necessary, but should be made sooner.

10. Circuit Rule 38 is rescinded as redundant with Fed. R. App. P. 38.

11. Circuit Rule 40(c) and (d) are amended to reflect changes in the national rules:

(c) *Time for Filing After Decision in Agency Case.* The date on which this court enters a final order or files a dispositive opinion is the date of the "entry of judgment" for the purpose of commencing the ~~running of~~ the 14 ~~day~~ period for filing a petition for rehearing in accordance with Fed. R. App. P. 40 ~~Rule 40(a), Fed. R. App. P.~~, notwithstanding the fact that a formal detailed judgment is entered at a later date.

(d) *Time for Filing after Decision from the Bench.* The ~~14 day~~ time limit for filing a petition for rehearing shall run from the date of this court's written order following a decision from the bench.

12. Circuit Rule 54 refers to Supreme Court Rule 52.3. This reference is changed to Supreme Court Rule 45.3 to match amendments to that Court's rules.

13. Circuit Rule 60(b): "magistrate" is changed to "magistrate judge", and "assistant circuit executive" to "deputy circuit executive."

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Office of the Clerk
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
95 Seventh Street
San Francisco, California 94103

Cathy A. Catterson
Clerk of Court

(415) 556-9800

February 9, 1998

NOTICE AND OPPORTUNITY FOR COMMENT ON PROPOSED AMENDMENTS TO THE CIRCUIT RULES

Comments are invited on the following proposed amendments to the Rules of the United States Court of Appeals for the Ninth Circuit. Comments should be submitted to Cathy A. Catterson, Clerk/Court Executive, no later than March 20, 1998. ***Proposed amendments or new rules are in bold and italicized.***

1. **CIRCUIT RULE 4-1 – COUNSEL IN CRIMINAL APPEALS**

(d) Post Appeal Proceedings

If the decision of this court is adverse to the client, counsel shall advise the client of the right to initiate a further review by the filing of a petition for a writ of certiorari in the United States Supreme Court ~~and~~. ***[I]***f requested to do so by the client, ***counsel shall*** file such a petition ***if in counsel's considered judgment sufficient grounds exist.*** If the client does not request ***that counsel file a petition for a writ of*** certiorari, counsel shall file with the Clerk of this Court a statement to that effect, signed by the counsel and the client. If the client refuses to sign, counsel shall so state.

If the client requests that counsel file a petition for a writ of certiorari, counsel may, within twenty-one (21) days after the entry of judgment or denial of a petition for rehearing, move for leave to withdraw ***if*** ~~counsel determines that a petition for certiorari would be frivolous~~ ***in counsel's considered judgment, there are no grounds for seeking Supreme Court review that are non-frivolous and consistent with the standards for filing a petition.*** ***See Sup. Ct. R. 10.*** A conclusory statement of frivolity is not a sufficient basis for withdrawal. See Austin v. United States, 513 U.S. 5 (1994) (per curiam). ~~In addition~~ [C]ounsel shall ***also,*** within this same period, ~~so advise the client in writing~~ ***serve the motion to withdraw on the*** client and inform the client, ***in writing, regarding*** the procedures for filing a petition for a writ of certiorari. ~~pro se~~ If relieved by this Court, counsel ***shall within seven (7) days after such motion is granted,*** notify the client, in writing, and, if unable to do so, inform this Court.

CA 9

supplemental excerpts and shall serve one (1) copy of such excerpts of record on each of the other parties.

(b) If a supplemental brief filed pursuant to court order requires review of portions of the reporter's transcript or documents not included in any previously filed excerpts, the party filing the supplemental brief shall, at the time the supplemental brief is filed, file additional excerpts of record. The party shall file five (5) copies of the excerpts. ~~*The party*~~ ***and shall serve one (1) copy of such excerpts of record on each of the other parties.***

Purpose of Amendment: To permit supplemental excerpts of record without motion.

Circuit Rule 17-1.7 Further Excerpts of Record

The provisions for further excerpts shall be governed by Ninth Circuit Rule 30-1.7, with references in Rule 30-1.7 to appellant to be read as references to petitioner.

5. AMENDMENTS TO CIRCUIT RULE 32, FORM OF BRIEFS

****

(e)(4) Certificat~~ione~~ ***of Compliance***: ***Each copy of*** the brief must contain ~~be accompanied by~~ a ***completed*** certificat~~eion~~ of compliance ***as found in the Appendix to the rules under Form 8.***

~~(i) The brief is proportionately spaced, together with the typeface, point size and word count, or~~

~~(ii) the brief uses a monospaced typeface, together with the number of characters per inch, and word count, or the number of counted pages (1) or (2) (i) above.~~

A party preparing this certificate may rely on the word count of the word processing system used to prepare the brief. The certification is not included in calculating the brief's length.

Form 8. Certification Pursuant to Circuit Rule 32(e)~~(3)~~***(4)***, Form of Brief

Pursuant to Ninth Circuit Rule 32(e)~~(3)~~***(4)***, I certify that the ~~opening/answering/reply~~ attached brief ~~is~~

☐ Uses proportionately spaced type of 14 points or more and contains _____ words or

- ☐ Uses monospaced type, has 10.5 or fewer characters per inch and
  - ☐ Does not exceed 40 pages (opening and answering briefs) or 20 pages (reply briefs)
  - ☐ Contains _____ words

_____
DATE

_____
SIGNATURE OF ***ATTORNEY OR UNREPRESENTED PARTY***

Purpose of Amendment: To provide clearer guidance on the requirements of Circuit Rule 32.

IV-F

MEMORANDUM

DATE: February 20, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item Nos. 97-31 and 98-01

Attached is a draft amendment to Rule 47(a)(1) and a draft Advisory Committee Note. The amendment would do two things: First, it would bar the enforcement of any local rule that had not been filed with the Administrative Office. Second, it would require that any change to a local rule must take effect on December 1, barring an emergency.

The amendment was prompted by the Local Rules Project, which recommended, in its final report to the Standing Committee, that FRAP 47 be amended "to provide that local rule amendments and additions be made effective on only specified dates (*e.g.*, January 1 of each year only or January 1 and July 1 of each year)." Daniel R. Coquillette & Mary P. Squiers, Report of the Local Rules Project: Local Rules on Appellate Practice 79 (Jan. 14, 1991).

The amendment was also prompted by the American Academy of Appellate Lawyers, which, like the Local Rules Project, has recommended a uniform effective date for changes in the local rules. Obviously, it is difficult for those members of the Academy who practice in more than one court of appeals to keep abreast of changes to several sets of local rules. Providing a uniform effective date would ease this burden, as counsel would know that, barring an emergency, no local rule would be changed except on, say, December 1.

Finally, the amendment was prompted by the Standing Committee. At its January 1998 meeting, the Standing Committee expressed considerable frustration with the proliferation of local rules. It also expressed disappointment that the modest steps that have been taken to address that proliferation have had little success. Courts have widely ignored the requirements of FRAP 47(a)(1), FRCP 83(a)(1), and FRCrP 57(a)&(c) that local rules be furnished to the Administrative Office and that local rules be numbered pursuant to the uniform numbering system prescribed by the Judicial Conference.

The Standing Committee clearly wants to "do something" about the proliferation of local rules. The Standing Committee defeated by one vote a motion that the Advisory Committees be instructed to draft rules limiting the number of local rules that any one court could promulgate. As a less drastic alternative, the Standing Committee directed the Advisory Committees to consider amending their rules so as to provide a uniform effective date for changes in local rules and to provide that no rule could be enforced until it had been filed with the Administrative Office.

The attached amendment to FRAP 47(a)(1) attempts to respond to these concerns. I chose to split Rule 47(a)(1) into three subsections because, as written, the rule is already one of the longest of the restylized rules. I did not want to add two more sentences to an already long rule. The operative language of Rule 47(a)(1) remains unchanged.

December 1 made sense as the uniform effective date for several reasons. First, it is, of course, the effective date of changes to FRAP, as well as to other federal rules. Specifying a December 1 effective date for local rules makes it possible for attorneys to acquaint themselves with changes to local rules at the same time that they are acquainting themselves with changes to

national rules. Second, a uniform effective date of December 1 means that on those occasions on which a change in FRAP requires (or at least inspires) a change in local rules, the changes to the national and local rules can take effect on the same date. Finally, December 1 fits nicely with the deadlines of the two major legal publishers. Updates to the USCA are published in late January. West Publishing informs me that changes to the local rules given to them as late as the first week of January can be included in the USCA updates that are published later that month.[1]

The popular softbound state rules compilations distributed by West and by LEXIS Law Publishing ("LLP") are published at various times during the year, depending upon each state legislature's schedule. As far as West and LLP are concerned, a December 1 effective date is as good as any other when it comes to the state rules compilations. Supplements to the USCS (published by LLP) are shipped in May, and include all changes received by LLP by the end of February.

Most of the courts of appeals do not address the question of the effective date of changes to local rules in the local rules themselves. Only CA1[2] and CA9[3] have a local rule that establishes a uniform date for future changes to local rules. However, other circuits may observe a uniform

---

[1]March 1 might also serve well as the uniform effective date. Attorneys who subscribe to the USCA would then have new local rules in hand *before* they take effect.

[2]"Except in special circumstances, amendments to these Rules will become effective on a day of the year to be designated by the court as Rule Day, which will be chosen in so far as possible to insure maximum availability in published sources." CA1 Local Rule 47.4. I am told by the Circuit Executive that this rule is ignored. CA1 does not, in fact, observe a "Rule Day."

[3]"Amendments to these rules shall be effective on January 1 or July 1 following their adoption, unless otherwise directed by the Court." CA9 Local Rule 47-1.

date as a matter of unwritten practice. For example, at our last meeting, Pat Fisher reported that CA10 attempts to make all changes to local rules effective on January 1.

Attached is a copy of Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997). The article was circulated to members of the Advisory Committee a year or so ago, but, given the turnover in the membership of the Committee, and given the need to focus on the proliferation of local rules in connection with this proposed amendment to Rule 47(a)(1), Judge Garwood thought it might be helpful to include the article in your materials. Also attached is a copy of the relevant recommendation of the Local Rules Project.

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) **Promulgation of Local Rules.**

(A) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. A local rule or internal operating procedure must not be enforced before it is received by the Administrative Office of the United States Courts.

(C) An amendment to the local rules or internal operating procedures of a court of appeals must take effect on the December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment.

Advisory Committee Note

Subdivision (a)(1). Rule 47(a)(1) has been divided into subparts. Former Rule 47(a)(1), with the exception of the final sentence, now appears as Rule 47(a)(1)(A). The final sentence of former Rule 47(a)(1) has become the first sentence of Rule 47(a)(1)(B).

Two substantive changes have been made to Rule 47(a)(1). First, the second sentence of Rule 47(a)(1)(B) has been added to bar the enforcement of any local rule or internal operating procedure — or any change to any local rule or internal operating procedure — prior to the time that it is received by the Administrative Office of the United States Courts. Second, Rule 47(a)(1)(C) has been added to provide a uniform effective date for changes to local rules and internal operating procedures. Such changes will take effect on December 1 of each year, absent exigent circumstances.

The changes to Rule 47(a)(1) are prompted by the continuing concern of the bench and bar over the proliferation of local rules. *See* Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997). That proliferation creates a hardship for attorneys who practice in more than one court of appeals. Not only do those attorneys have to become familiar with several sets of local rules, they also must be continually on guard for changes to the local rules. In addition, although Rule 47(a)(1) requires that local rules be sent to the Administrative Office, compliance with that directive has been inconsistent. By barring enforcement of any rule that has not been received by the Administrative Office, the Committee hopes to increase compliance with Rule 47(a)(1) and to ensure that current local rules of all of the courts of appeals are available from a single source.

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

Memorandum

TO: Committee on Rules of Practice and Procedure

FROM: Daniel R. Coquillette, Reporter, and
Mary P. Squiers, Director, Local Rules Project

RE: Report of the Local Rules Project:
Local Rules on Appellate Practice

DATE: January 14, 1991

Attached for your review and comment at the meeting of the Committee on Rules of Practice and Procedure scheduled for February 4, 1991 is the Report of the Local Rules Project concerning the local rules on appellate practice. The Report will consist of three sections. Two of these sections are attached and the third section will arrive under separate cover. The format of this material is quite similar to that of the Project Report on Local Civil Rules that you reviewed two years ago and the Report on Admiralty Rules that you reviewed last summer.

The first section consists of a discussion and analysis of the existing local rules on appellate practice. The rules are discussed by topic. The topics covered in this material are arranged according to the Appellate Rules. Within the discussion of each topic, the material is further arranged into one or more of the following four categories: 1. Rules that Should Remain Subject to Local Variation; 2. Rules that Repeat; 3. Rules that Conflict; and, 4. Rules that Form a Topic for Advisory Committee Review. There are local rules which do not correspond to any existing provision of an Appellate Rule. If such rules were appropriately the subject of one particular Appellate Rule, then the discussion was set forth under that Rule, as an additional subheading. If the rules did not relate to any Supplemental Rule, they were discussed under the heading "Miscellaneous."

The second portion of the material are lists of the local appellate rules of each individual circuit court. Each of these lists contains the local appellate rules of a particular court, using its original numbering system. Each rule is numbered and, then, identified as a repetitive local rule, an inconsistent local rule, a rule that should remain subject to local variation, or a rule that should be incorporated into the Appellate Rules. There is also a

Criminal Justice Act, 18 U.S.C. §3006A. *E.g.*, 1st Cir. LR46.5; 11th Cir. LR46-1; 7th Cir. LR4. Seven of the courts have local rules that discuss the qualifications for law student admission. *E.g.*, 2d Cir. LR46; 4th Cir. LR46(a); 8th Cir. LR23. All of these local rules are appropriately the subject of local rulemaking.

Nine of the courts also have rules addressing the discipline procedures used by the courts. *E.g.*, 1st Cir. LR46.2; 7th Cir. LR46; 11th Cir. LR46-1. These rules should also remain as local directives.

Rule 47. Rules by Courts of Appeals

Seven circuit courts have directives addressing the local rulemaking procedures of the courts. Two of the rules repeat Appellate Rule 47. Other rules in the six courts should remain subject to local variation. The Local Rules Project suggests that the Advisory Committee consider amending this Appellate Rule to include a uniform effective date for local rule amendments and additions.

RULES THAT REPEAT

Two courts have directives that repeat the procedure for the court to use in making local rules as set forth in Appellate Rule 47. D.C. Cir. Hdbk. I.D; 3d Cir. LR1. These rules are unnecessary.

RULES SUBJECT TO LOCAL VARIATION

Six of the courts have rules that supplement Appellate Rule 47 and should, therefore, remain subject to local variation. For example, all of these courts have rules authorizing the formation of an advisory committee to review and comment on proposed rule changes as required by section 2077(b) of Title 28. *See* 28 U.S.C. §2077(b); *e.g.*, 10th Cir. LR47.3 (describes composition of the committee, its meetings and its duties); 7th Cir. LR47 (describes

composition of the committee); 6th Cir. LR27 (describes purpose of the committee, its membership, the terms of office, and the schedule of meetings). Other local rules explain the rulemaking process. *E.g.*, 1st Cir. LR47.3 (explains how comments from the public are solicited); 4th Cir. LR47(a) (explains general procedure); D.C. Cir. LR22 (explains general procedure).

A TOPIC FOR ADVISORY COMMITTEE REVIEW

The Local Rules project recommends that the Advisory Committee consider amending Appellate Rule 47 to provide that local rule amendments and additions be made effective on only specified dates (*e.g.*, January 1 of each year only or January 1 and July 1 of each year). Such a uniform date for rule changes and additions would minimize confusion among practitioners. An attorney would not be forced to secure a new copy of the local rules each time he or she had an appeal before a particular court to check if one local rule in that court had been amended. Rather, the attorney could assume the local rules provided by the court were accurate for a certain and defined period of time.

Rule 48. Title

Miscellaneous—Courthouse Library

RULES SUBJECT TO LOCAL VARIATION

Ten of the courts have local rules that discuss the use and funding of the courthouse library. *E.g.*, 1st Cir. LR45.2 (describes who has access to the library); 3d Cir. LR7 (describes who has access, the role of the librarian, and how the library is funded); Fed. Cir. LR54 (describes who has access). These rules should remain subject to local variation.

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THE BALKANIZATION OF APPELLATE JUSTICE: THE PROLIFERATION OF LOCAL RULES IN THE FEDERAL CIRCUITS

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I. INTRODUCTION

In the waning years of the twentieth century, the leading story of federal procedure is one of growing disunity in practice and fragmentation in rules. A little more than half a century

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after federal procedure was unified in 1938 with the adoption of the Federal Rules of Civil Procedure,[1] the federal judicial system is de-evolving into a collection of largely autonomous court units with separate procedural regimes.[2] Instead of a unitary federal judicial system, joined together in a common procedural enterprise, each district and each circuit has become its own fiefdom with its own independent rules governing the progress and disposition of litigation.[3] As Professor Charles Alan Wright laments, "[p]rocedural anarchy is now the order of the day."[4]

Both the Legislative and Judicial Branches have contributed to this state of division by encouraging, in different ways, the development of local practice rules in the district courts that differ from the federal rules or conflict with procedures in neighboring districts. In 1990, Congress enacted the Civil Justice Reform Act[5] directing local district courts to experiment with alternative approaches for efficient disposition of civil litigation and authorizing innovative variations on the federal rules.[6]

1. *See* Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 ARIZ. ST. L J 1393, 1394 (1992) (stating that the drafters of the Federal Rules of Civil Procedure in 1938 intended "to devise a code of federal civil procedure that was simple and uniform"), Stephen N. Subrin, *Federal Rules, Local Rules, and State Rules: Uniformity, Divergence, and Emerging Procedural Patterns*, 137 U PA L. REV. 1999, 2001 (1989) ("When the proponents of the Enabling Act and the Federal Rules talked and wrote about uniformity they either explicitly or implicitly utilized several interconnected themes: efficiency, professionalization, federalism or nationalism, effective law application, power, and politics."); Judith Resnik, *Failing Faith. Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 503-04 (1986) (stating that the original drafters of the Federal Rules of Civil Procedure aimed to "'slay[ ] the dragons' of their procedural world. the felt needs for uniformity of federal practice across the country, for uniformity of practice between law and equity, for reducing the possibility of technical errors, and for greater court (rather than legislative) control of rulemaking").

2. *See* Erwin Chemerinsky & Barry Friedman, *The Fragmentation of Federal Rules*, 46 MERCER L REV. 757, 757 (1995) (saying that, almost sixty years after adoption of the Federal Rules of Civil Procedure, "the central accomplishment of uniform federal rules is in serious jeopardy").

3 Professor Paul D. Carrington has described the devolution of the unified federal courts as the rise of a new Confederacy with individual district courts seceding from the union of the federal judiciary. *See* Paul D. Carrington, *A New Confederacy? Disunionism in the Federal Courts*, 45 DUKE L.J. 929, 929-30 (1996).

4. Charles A Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 11 (1994).

5 Civil Justice Reform Act of 1990, Pub. L. No. 101-650, 104 Stat 5089 (codified at 28 U.S.C. §§ 471-82 (1994)).

6 *See, e.g.*, Friends of the Earth, Inc. v. Chevron Chem. Co., 885 F. Supp 934, 937 (E.D Tex. 1995) (holding that the Civil Justice Reform Act authorizes district courts to develop local rules "uninhibited by the [Rules Enabling Act] or the Federal Rules of Civil Procedure"). *But see* Carrington, *supra* note 3, at 979 (concluding that the Civil Justice Reform Act "did not authorize local plans in defiance of national rules"); Lauren Robel, *Fractured Procedure: The Civil Justice Reform Act of 1990*, 46 STAN. L REV. 1447, 1448 (1994) (arguing that the Civil Justice Reform Act "neither compels nor authorizes local deviations from the Federal Rules of Civil Procedure or other statutory law").

Thereby, as one scholar has observed, Congress effectively created "ninety-four amateur 'advisory committees on the civil rules.'"[7] By "creating an environment in which many courts were experimenting simultaneously," the stage was set for a further erosion of "uniformity and simplicity while increasing judicial discretion, cost, and delay."[8]

In 1993, the Supreme Court adopted, at the recommendation of the Judicial Conference, amendments to the federal discovery rules that added controversial mandatory disclosure requirements.[9] Nearly every element of the bar had opposed the proposal, arguing that, rather than decreasing the amount of discovery, it would add another layer, produce satellite litigation over the adequacy of disclosure, and increase litigation expense.[10] Three justices dissented from the Court's adoption of the rule, expressing concern that these "radical reforms to the discovery process" threatened the adversarial system and might impair professional ethics by requiring lawyers to exercise judgment as to whether information damaging to their clients falls within the disclosure obligation.[11] Proponents of mandatory disclosure contended that, by providing the parties with material information at the outset, the scope and amount of discovery may be reduced; by encouraging more specific fact allegations in pleadings to trigger an opponent's duty of disclosure, the issues may be

7. Judith Resnik, *Revising the Canon: Feminist Help in Teaching Procedure*, 61 U. CIN. L. REV. 1181, 1194 (1993); *see also* Lauren K. Robel, *Grass Roots Procedure: Local Advisory Groups and the Civil Justice Reform Act of 1990*, 59 BROOK. L REV. 879, 881 (1993) (describing the "more novel aspect" of the Civil Justice Reform Act of 1990 as "its creation of ninety-four district court advisory groups charged with reinventing procedures at the trial court level").

8 Carl Tobias, *Improving the 1988 and 1990 Judicial Improvement Acts*, 46 STAN. L. REV. 1589, 1619 (1994)

9. *See* Amendments to Federal Rules of Civil Procedure and Forms, 146 F.R.D. 401 (1993).

10. *See, e.g.*, Tobias, *supra* note 8, at 1612; Griffin B. Bell et al , *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 28-32 (1992); Thomas M. Mengler, *Eliminating Abusive Discovery Through Disclosure: Is It Again Time for Reform?*, 138 F.R.D. 155, 157-60 (1991).

11. Amendments to Federal Rules of Civil Procedure and Forms, 146 F.R.D 401, 510-11 (1993) (Scalia, J , dissenting).

narrowed earlier in litigation; and by establishing an obligation to cooperate in disclosing information, the level of professionalism would be enhanced.[12]

On a matter of such profound philosophical and practical disagreement, it is unthinkable that the crucial choice of procedure would be left to each individual district court—and yet that is precisely what has occurred. For the first time in history, a federal rule explicitly authorized each district court to determine by local rule whether to follow the nationally-adopted procedural approach.[13] Some districts have "opted-out" altogether, others have fully accepted the new disclosure rule, and others have taken a middle ground.[14] As a result, discovery in the federal courts is a patchwork quilt with fundamental procedures varying widely from district to district.[15] This has exacerbated the preexisting problem of the exponential growth of local rules during the last two decades.[16]

Although generally unremarked upon by scholars, the federal courts of appeals have not been immune to this centrifugal procedural tendency. While the academic community has widely decried the excessive proliferation of local rules in the district

12. *See* Ralph K. Winter, *In Defense of Discovery Reform*, 58 BROOK. L. REV. 263, 266-71 (1992), William W. Schwarzer, *Slaying the Monsters of Cost and Delay Would Disclosure Be More Effective Than Discovery?*, 74 JUDICATURE 178, 183 (1991)

13. *See* FED. R. CIV. P. 26(a)(1), (a)(4), (b)(2), (d), (f). *See also* Linda S Mullenix, *Discovery in Disarray: The Pervasive Myth of Pervasive Discovery Abuse and the Consequences for Unfounded Rulemaking*, 46 STAN. L. REV 1393, 1444 (1994) ("For the first time in history, the Federal Rules of Civil Procedure include a nonuniversal rule."); Lauren K Robel, *Mandatory Disclosure and Local Abrogation. In Search of a Theory for Optional Rules*, 14 REV LITIG. 49, 50 (1994) (explaining that the rule "is unprecedented in authorizing each federal district court to excuse all attorneys within the court's jurisdiction from many of the obligations Rule 26 imposes, particularly that of mandatory early disclosure").

14 *See* Donna Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure 26, published in* 164 F.R.D. No. 4 (advance sheet No. 4) LXXXIII (Apr. 1996) *reprinted in* 8 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE 35 (Supp. 1996) (reporting on behalf of the Federal Judicial Center that half of the districts have implemented the federal initial disclosure rule, and half of the districts have not, although many of these districts require disclosure by local rule or allow individual judges to require disclosure).

15 *See* Mullenix, *supra* note 13, at 1444 ("[D]iscovery is in hopeless, balkanized disarray ").

16. *See* Tobias, *supra* note 1, at 1397 (commenting upon the "remarkable proliferation of local rules that has occurred since the 1938 Federal Rules' adoption but that has grown almost exponentially over the last two decades").

courts,[17] it has thus far been largely left to organizations of the practicing bar and the judiciary to point out the similar splintering of federal appellate practice.[18] As with developments at the district court level, the proliferation of local circuit rules has impaired the uniformity of federal appellate procedure and has unnecessarily complicated appellate practice, while destroying the unity of the federal appellate system. Sadly, this is occurring and accelerating less than thirty years after federal appellate procedure was unified under the Federal Rules of Appellate Procedure ("FRAP").[19]

Many of the local rules adopted by the individual circuits are in sharp conflict with the FRAP.[20] These rules thereby deprive

17. *See, e.g.*, CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 62, at 431-32 (5th ed. 1994); Chemerinsky & Friedman, *supra* note 2; Daniel R. Coquillette et al , *The Role of Local Rules*, A.B.A. J., Jan. 1989, at 62, 64-65; Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 377-81 (1992); David M. Roberts, *The Myth of Uniformity in Federal Civil Procedure: Federal Civil Rule 83 and District Court Local Rulemaking Powers*, 8 U. PUGET SOUND L. REV. 537, 540 (1985); Tobias, *supra* note 1; Wright, *supra* note 4, at 10-11; *see also* A. Leo Levin, *Local Rules as Experiments: A Study in the Division of Power*, 139 U. PA. L. REV. 1567 (1991) (arguing in favor of uniformity in general, while suggesting legislation to authorize limited local experimentation with innovative procedures on a case-by-case basis upon approval of a national authority under the Judicial Conference); Laurens Walker, *Perfecting Federal Civil Rules: A Proposal for Restricted Field Experiments*, 51 LAW & CONTEMP PROBS. 67 (1988) (proposing a program of restricted "field experiments" in the district courts for empirical testing of procedures).

18. *See, e.g.*, Section of Litig., ABA, Local Appellate Rules—Effect on Quality of Justice (Apr. 11, 1994) (unpublished report submitted as the Section of Litigation's comments to the Judicial Conference on proposed amendments to the Federal Rules of Appellate Procedure) (on file with the *University of Colorado Law Review*); Daniel R. Coquillette & Mary P. Squiers, Report of the Local Rules Project: Local Rules on Appellate Practice (Jan. 14, 1991) [hereinafter Report of the Local Rules Project] (report to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States). However, academic scholars played major roles in the studies relating to the proliferation of local circuit rules that have been conducted under the auspices of professional and judicial organizations. Professors Daniel R. Coquillette and Mary P. Squiers prepared the report of the Local Rules Project conducted by the Committee on Rules of Practice and Procedure of the Judicial Conference. After joining the Drake law faculty, I served as the reporter for the American Bar Association report adopted by the Section of Litigation *See supra* note *.

19. *See* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Federal Rules of Appellate Procedure with Conforming Amendments to Federal Rules of Civil Procedure and Federal Rules of Appellate Procedure, 43 F.R.D. 61 (1968) (announcing Federal Rules of Appellate Procedure as prescribed and adopted December 4, 1967, and effective July 1, 1968)

20. *See infra* Part II.

the federal regime of much of its force and deny counsel the right to rely in their appellate practice upon those rules adopted by the Supreme Court through the more visible and regular national judicial rulemaking process. Local circuit variations on and supplementation of the FRAP raise technical obstacles to the efficient prosecution and defense of federal appeals.[21] As a consequence, significant lawyer time is diverted to discovery of and compliance with technical requirements, thereby adding to the expense of appellate litigation and undermining the ability of federal appellate practitioners to represent parties effectively in appellate cases.[22]

Because a single circuit generally covers a larger geographical area than a district, the impact of divergent circuit rules is more diffuse, but no less real, than that of variant district court rules. Particularly for institutional entities engaged in litigation across the nation, the often dramatic differences among the circuits complicate practice and increase the cost of compliance with procedural rules. Even for the local practitioner, and especially the lawyer whose contact with the appellate courts is occasional, the complexity of local practice stands as an obstacle to efficient and cost-effective representation of clients and denies justice in individual cases.[23] Moreover, the growth of local circuit rules conveys an unmistakable symbolic message of disunity among the federal appellate courts.[24] As Judge Joseph F. Weis, Jr. recently stated in another context, the "thirteen federal courts of appeals function at times as separate sovereignties."[25] Indeed, the radiation of inconsistent circuit rules poses a direct challenge to the fundamental concept of a *federal* procedure.

The time has come to revitalize the FRAP as the uniform national regime governing federal appellate practice and procedure.[26] The Supreme Court, Judicial Conference, and individual

21. *See infra* Part III.B.
22. *See infra* Part III.C.
23. *See infra* Part III.B.
24. *See infra* Part III.A.
25. Joseph F Weis, Jr., *Disconnecting the Overloaded Circuits—A Plug for a Unified Court of Appeals*, 39 ST LOUIS U. L.J. 455, 458 (1995) (criticizing "the lack of uniformity that results from the practice of one United States Court of Appeals deliberately handing down a decision that diverges from previous opinions of other courts of appeals, thus creating conflict and uncertainty in the law," and proposing a unified court of appeals).
26. *See infra* Part V

circuits should implement the directive of FRAP 47 that local circuit rules and circuit practice must not be inconsistent with the uniform federal rules.[27] Or else Congress should intervene to halt the slip and slide away from national uniformity and toward local autonomy. Full compliance with the provisions of a federal rule on any matter should be sufficient in any circuit. Only when a circuit rule addresses a matter of uniquely local concern and the federal rules expressly authorize such local variation, when the federal rules are silent on a subject, or when a local rule simplifies or streamlines the process, should the various courts of appeals be permitted to formulate their own procedural schemes.[28] Otherwise, innovations in procedure should be proposed as amendments to the FRAP, to become effective only after an opportunity for public comment, deliberation by the Judicial Conference of the United States, adoption by the Supreme Court, and submission to Congress, as required by the Rules Enabling Act.[29]

Through a revitalization of the federal rules, the unitary nature of the federal system can be preserved—or, rather, restored. Those responsible for governance of the federal judicial system must take firm action to ensure the consistency of local circuit rules with the federal rules and to control the increasing diffusion of the federal rules by divergent requirements of local practice. The alternative is the continued balkanization of federal appellate justice.

II. THE PROLIFERATION OF LOCAL CIRCUIT RULES

There is a remarkable disunity in rules of appellate practice among the federal courts of appeals, including notable instances of actual conflict between local practice and the FRAP.[30] In the

27. *See* FED. R. APP. P. 47(a) ("A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 . . . .")
28. *See infra* Part IV.
29. *See* 28 U.S.C. §§ 2071-77 (1994).
30. To conduct a brief survey of local circuit rules, I wrote to each of the 13 circuits, all of which provided me copies of their local rules, internal operating procedures, and letters sent to counsel upon the docketing of an appeal—with the exception of the United States Court of Appeals for the District of Columbia Circuit, which did not respond to repeated written requests. *See also infra* note 169 and accompanying text. Because local circuit rules are being constantly revised, this limited survey also reflects amendments to each circuit's rules as reported in the *Federal Reporter* advance sheets as of October 7, 1996. In addition to an examination

discussion below, rather than provide a comprehensive survey of all local circuit rules on all aspects of appellate practice, I examine but a few central elements of the ordinary civil appeal, with illustrative examples of the diversity of local circuit rules. However, if anything, the diversity and complexity of local rules is more pronounced with respect to other special appellate matters, ranging from applications for a stay or a writ of mandamus at the outset of the appellate process to petitions for rehearing and applications for attorney's fees at the conclusion of an appeal.[31]

A. *Notice of Appeal and Docketing of Appeal*

Several circuits provide for preparation and filing of appeal information or docketing statements. Two circuits require that this docketing form, including a description of the matter, be completed and submitted to the district court together with the notice of appeal,[32] while other circuits require the form to be filed with the appellate court within a short time period after filing the appeal.[33] Failure to comply with these rules often results in sanctions, ranging from dismissal to monetary penalties. Because circuits demand these documents at a very early stage, especially

of the local rules of each of the 13 circuits, the description of the proliferation of local rules and local procedures and the effects upon appellate justice are based upon interviews with appellate attorneys, in both the public and private sectors, and my prior study as an appellate attorney with the Department of Justice of the problems encountered by the Department's litigating divisions in dealing with the growing disunity of the federal courts of appeals. *See* Letter from Stuart E. Schiffer, Acting Assistant Attorney General, Civil Division, United States Department of Justice, to Mary P. Squiers, Director, Local Rules Project (June 22, 1989) (report that I compiled and drafted on behalf of the Department's litigating divisions on the local rules of the courts of appeals for submission to the Judicial Conference's Local Rules Project in support of its ongoing study) (on file with the *University of Colorado Law Review*).

31. *See generally* Report of the Local Rules Project, *supra* note 18 (surveying circuit rules on all aspects of appellate procedure).

32. *See* 8TH CIR. R. 3B; 9TH CIR. R. 3-4. For consistency, and because individual citation to the latest advance sheet showing the most recent amendment to a particular circuit's rules is awkward, circuit rules are cited in this article simply as "X CIR. R. #". As noted earlier, *supra* note 30, all circuit rules cited in this article are current to October 7, 1996, as reported in the advance sheets to the *Federal Reporter*.

33. *See, e.g.*, 1ST CIR. R. 47.5(1)(a)(1); 4TH CIR. R. 3(b); 7TH CIR. R. 3(c); 10TH CIR. R. 3.4; 11TH CIR. R. 33-1. The Second Circuit requires filing of a docketing statement within ten days by provision in the "Civil Appeals Management Plan," which is Appendix C to the circuit's local rules, rather than by including the requirement in a rule. *See* 2d Cir. Civil Appeals Management Plan 3(a), 2D CIR. R. app. C at 39 (1993).

when the form must be filed with the notice of appeal, counsel may not yet have had the opportunity to fully determine what issues should be raised on appeal, particularly if the case is being handled by a different attorney on appeal.

FRAP 12 has recently been amended by the addition of a new subdivision (b) requiring the attorney who files the notice of appeal to file a statement naming each party represented on appeal by that attorney.[34] The representation statement allows the court of appeals to identify the individual appellants, especially since FRAP 3 was simultaneously amended to allow the notice of appeal to specify the appellants by general description rather than naming them individually.[35] The federal rules do not, however, provide for the filing of a docketing statement providing detailed information about the nature of the appeal at such an early stage.[36]

In addition to the basic jurisdictional requirement of filing a notice of appeal, the Third Circuit requires the appellant to mail a copy of the notice of appeal to the trial judge.[37] Although the rule carefully provides that failure to give notice of the appeal to the trial judge does not affect appellate jurisdiction,[38] it remains an additional duty imposed upon counsel, presumably enforceable by other sanctions.

B. *Motions*

Even the basic process of filing motions, however simple or routine, has become complicated by the expansion of local rules. Some courts have adopted detailed rules, not only on the length, but also on the format of motions. The District of Columbia ("D.C.") and Federal Circuits have each adopted specific page

34. *See* Amendments to Federal Rules of Appellate Procedure, 147 F.R.D. 287, 307-08 (1993) (amending FED. R. APP. P. 12).

35. *See id.* at 291-92 (amending FED. R. APP. P. 3(c) to provide: "An attorney representing more than one party may fulfill [the requirement of specifying the party or parties taking the appeal] by describing those parties with such terms as 'all plaintiffs,' 'the defendants,' 'the plaintiffs A, B, et al.,' or 'all defendants except X'").

36. The Local Rules Project, under the auspices of the Judicial Conference, recommended amendment of the federal rules to provide a uniform format for docketing statements and a uniform time limit for filing such statements, because "[l]ocal variation on any of these issues may promote confusion, without any corresponding benefit." Report of the Local Rules Project, *supra* note 18, at 22-23.

37. *See* 3D CIR. R. 3.1.

38. *See id.*

limits for motions, with the D.C. Circuit permitting twenty pages while the Federal Circuit limits motions to ten pages.[39] The Second Circuit, as discussed immediately below, has a set of forms that must be used for motions and limits the length of memoranda of law supporting the motion to ten pages.[40] The D.C. Circuit has adopted a set of detailed rules governing motions, including schedules for the filing of and required attachments to dispositive motions,[41] and special rules on motions to extend filing deadlines and to exceed page limits for other documents.[42]

The Second Circuit has imposed an especially burdensome procedure, requiring that a motion be attached to a "notice of motion" form.[43] This "notice of motion" essentially asks for the very kind of information that would be included in the motion itself. Moreover, the Second Circuit insists upon exact compliance with this rule, returning non-conforming documents, although technical errors are made more likely by the inherent complexity of the procedure.

C. Content and Format of Briefs

The preparation of an appellate brief is the heart of appellate practice. One thus would expect a uniform national standard concerning the content and format of briefs in the federal courts of appeals. Because appellate briefs are central to any appeal, wide variation and confusing inconsistencies among the circuits

39. *See* D.C. CIR. R. 27(a)(2); FED. CIR R. 27(c). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 27 that would set a page limit on motions of 20 pages. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, 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 to Appellate Rules 27, 28, and 32, at 83, *published in* 165 F.R.D. 117, 211 [hereinafter 1996 Proposed Amendments].

40. *See* 2D CIR. R. 27(a)(1), (a)(2)(b). The Advisory Committee on Appellate Rules has proposed an amendment to FRAP 27 that would prohibit the filing of a separate brief supporting the motion. *See* 1996 Proposed Amendments, *supra* note 39, at 80, 165 F.R D. at 208. The Committee Note explains that "all legal arguments should be presented in the body of the motion," thereby adopting the "single document approach" used by the Supreme Court. *Id.* at 83-84, 165 F.R.D. at 211-12.

41. *See* D.C. CIR. R. 27(g).

42. *See id.* 27(h).

43. *See* 2D CIR. R. 27(a)(1). The Advisory Committee on Appellate Rules has proposed an amendment to FRAP 27 that expressly states that a "notice of motion is not required." 1996 Proposed Amendments, *supra* note 39, at 80, 165 F.R.D. at 208.

are least acceptable in this area.[44] In fact, however, the local rules of the various circuits probably deviate more on this point than on any other. The circuits have developed a wide range of regulations on content and format of the brief and frequently demand strict compliance with such rules.

1. Content of Brief

In addition to the detailed requirements set forth in FRAP 28 respecting the content of the appellate brief,[45] many circuits require a preliminary statement identifying the decision-maker below,[46] a statement of related cases,[47] or a statement regarding oral argument.[48] The Eighth Circuit requires that the statement of issues also include a list of up to four of the most apposite cases and the most apposite constitutional and statutory provisions relied upon by counsel.[49] The Ninth Circuit directs that any party who intends to seek attorney's fees for the appeal include in the brief "a short statement to that effect and must identify the authority under which the attorneys fees will be sought."[50] FRAP 28(a)(4) specifically provides for a statement of the case, including a "statement of the facts relevant to the issues presented for review, with appropriate references to the record."[51] Nevertheless, the Fourth Circuit recently adopted a new local rule elaborating on this provision by requiring inclusion in the brief of a "separate section" to be entitled "STATEMENT OF FACTS" (in all capitalized letters) consisting of a "narrative statement" of the necessary facts and "references showing the source of the facts stated."[52]

44. As a model of the possible, the United States Court of Appeals for the First Circuit notably has found little need to supplement the federal rules with respect to briefing. However, even the First Circuit has departed to a limited degree by including a specific rule on citation of authorities, *see* 1ST CIR. R. 28.1, and a requirement that an addendum of the district court's judgment and certain other district court documents be attached to the brief. *See* 1ST CIR. R. 28 2

45. *See* FED. R. APP. P. 28.

46. *See* 2D CIR. R. 28(2); 8TH CIR. R. 28A(i)(3)(i).

47. *See* D.C. CIR R. 28(a)(1)(C); 3D CIR. R. 28.1(a)(11); 9TH CIR. R. 28-2.6; 10TH CIR. R. 28.2(a); FED. CIR. R. 28(a)(4), 47.5.

48. *See* 5TH CIR. R. 28.2.4; 8TH CIR. R. 28A(h)(1), (i)(1); 10TH CIR. R. 28 2(e); 11TH CIR. R. 28-2(c).

49. *See* 8TH CIR. R. 28A(i)(4).

50. 9TH CIR. R. 28-2.3.

51. FED. R. APP. P. 28(a)(4).

52. *See* United States Court of Appeals, Fourth Circuit, Notice of Proposed

Circuits requiring the same additional element may nonetheless contradict one another in how it is to be presented. For example, the Fifth Circuit directs that a request for oral argument be included as a preamble to the brief;[53] the Eighth Circuit requires that a one-page summary of the case and request for oral argument be placed at the beginning of the brief;[54] the United States Court of Appeals for the Eleventh Circuit locates the request for oral argument following the certificate of interested persons and corporate disclosure statement at the beginning of the brief;[55] and the United States Court of Appeals for the Tenth Circuit mandates that a statement as to whether oral argument is desired be placed on the front cover of the brief and that a statement of the reasons for oral argument follow the conclusion of the brief.[56]

Other circuits multiply the complications in the already painstaking task of preparing the table of authorities that prefaces the main text of the brief. The D.C. and Eleventh Circuits direct that asterisks be placed in the table of authorities next to those authorities that are primarily relied upon.[57] The D.C. Circuit also mandates inclusion of a glossary of abbreviations used in the brief.[58]

Individual circuits have entered the business of prescribing citation form. Several circuits enunciate rules, concerning the citation of cases and statutes,[59] which conflict with one another. For example, the D.C. Circuit's rule directs that "[c]itations of state court decisions included in the National Reporter System shall be to that system in both the text and the table of authori-

Amendment to and Adoption of Local Rules 22(a), 22(b), 22(d), 28(g), and 34(b), *published in* 86 F 3d No. 2 (advance sheet No. 30) CLXXVIII, CLXXXI (July 22, 1996) (on file with the *University of Colorado Law Review*) (including text of new 4TH CIR. R. 28(g)) Although this new rule appears to add nothing to FRAP 28(a)(4) beyond verbiage and the demand that the statement of facts be set out separately with a heading in all capitalized letters, the Fourth Circuit determined that there was "an immediate need for these changes" and therefore implemented them immediately and before seeking comment *Id.* at CLXXIX.

53. *See* 5TH CIR. R. 28.2.4.

54. *See* 8TH CIR. R. 28A(h)(1), (i)(1).

55. *See* 11TH CIR. R. 28-2(c).

56 *See* 10TH CIR. R. 28.2(e).

57. *See* D.C CIR. R. 28(a)(2); 11TH CIR. R. 28-2(e).

58 *See* D.C. CIR. R. 28(a)(3).

59. *See, e g.*, D.C. CIR. R. 28(b); 1ST CIR. R 28 1, 3D CIR. R. 28.3(a); 11TH CIR R. 28-2(k); *see also* FED. CIR R. 28(e) (specifying preferred form of citation to the Federal Circuit and its predecessors).

ties."[60] By contrast, the First Circuit departs from the modern citation trend and mandates that references to state court decisions be to "both the official state court citation and the National Reporter System citation when such decisions have been published in both reports."[61] The Eleventh Circuit falls in the muddled middle. On the one hand, that court provides that citations "shall comply with rules of citation in the latest edition of *A Uniform System of Citation*,"[62] thereby adopting *The Bluebook*.[63] *The Bluebook* citation manual now provides, like the D.C. Circuit's rule, that in documents submitted to federal courts, citations to state court decisions should note only the relevant regional reporter.[64] However, the Eleventh Circuit's rule further provides that "[f]or state reported cases the national reporter series should be cross referenced,"[65] which suggests that parallel citations to the state reporter are anticipated. In all likelihood, changes in *The Bluebook*'s citation rules simply moved ahead of the First and Eleventh Circuits. The lesson here is that the circuits more profitably could entrust citation rules to other authorities.[66]

On another matter of citation—the permissibility of citing unpublished opinions issued by that circuit—the courts of appeals are also notably inconsistent. Diversity among the circuits prevails even on so fundamental a matter as the definition of legal authority. The majority of the circuits forbid the citation of their unpublished decisions as precedent, but allow citation in related cases or when the preclusive effect of the disposition on those particular parties is relevant.[67] The Third Circuit hedges

60. D.C. CIR. R 28(b). The Third Circuit requires that citations to state decisions "should include the West Reporter system whenever possible, with an identification of the state court," 3D CIR. R. 28 3(a), thus apparently leaving citation of the parallel state court reporter to the option of the practitioner

61. 1ST CIR R. 28 1.

62 11TH CIR. R. 28-2(k)

63. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (16th ed. 1996).

64 *See id.* rule 10 3.1.

65. 11TH CIR. R. 28-2(k).

66 *But see* Report of the Local Rules Project, *supra* note 18, at 49 (recommending that local rules "that discuss how cases are to be cited in the briefs" should "remain subject to local variation").

67. *See, e g.*, D.C. CIR. R. 28(c); 1ST CIR. R. 36.2(b)(6); 2D CIR. R. 0.23; 7TH CIR. R. 53(b)(2)(iv); 9TH CIR R. 36-3. On circuit rules regarding publication of opinions and citation of unpublished opinions, see generally Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV 757,

somewhat, stating that it "historically has not regarded unpublished opinions as precedents that bind the court," and therefore "the court by tradition does not cite to its unpublished opinions as authority."[68] Thus, while the court discourages counsel from citing an unpublished opinion lacking precedential value, counsel is not prohibited from doing so. The Eighth, Tenth, and Eleventh Circuits similarly declare that their unpublished opinions are not binding precedents, but then authorize citation of such decisions for their "persuasive" value.[69]

Still other circuits are dangerously ambiguous about the precedential effect of their unpublished dispositions and consequently uncertain in their direction to counsel regarding reference to these dispositions.[70] In the Fourth Circuit, for example, citation of the court's unpublished decisions is "disfavored,"[71] but, along with the Sixth Circuit, that court permits citation when counsel believes that the unpublished opinion "has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well."[72] Perhaps the greatest confusion follows the Fifth Circuit's new rule, under which unpublished opinions issued by that court before January 1, 1996, are precedential, while those issued after that date are denied precedential effect, but may still be cited as "persuasive" authority.[73]

By declaring that "an increment of precedent is . . . unusable," a nonpublication/noncitation rule directly diminishes the principle of stare decisis.[74] The authorities that may be cited in an appellate brief define the parameters of legal authority, that is, what constitutes the "law" in that court.[75] On this question of the cognizable content of the law, there should be no daylight between one circuit and another. Accordingly, as Professor

761-62 & nn 12-17 (1995)

68. 3D CIR. INTERNAL OPERATING PROC. 5 8.

69. *See* 8TH CIR. R. 28A(k); 10TH CIR. R. 36.3; 11TH CIR. R. 36-2.

70 *See* Dragich, *supra* note 67, at 791 (stating that when a circuit disfavors citation of an unpublished disposition, but allows it, the result is "an unacceptably ambiguous statement of precedential effect").

71. *See* 4TH CIR. R. 36(c).

72. *Id.*; *see* 6TH CIR. R 10(f).

73. *See* 5TH CIR. R. 47.5.3-47.5.4.

74. *See* THOMAS E. BAKER, RATIONING JUSTICE ON APPEAL. THE PROBLEMS OF THE U.S COURTS OF APPEALS 130 (1994).

75. *See* Dragich, *supra* note 67, at 758 ("To the extent our 'law' is embodied in precedents, published opinions are the authoritative source of law.").

Thomas E. Baker concludes, the "time has come for rigorous evaluation and adoption of a single uniform national standard"[76] governing when a federal appellate decision may be left unpublished, when it lacks precedential effect, and when it may be rendered uncitable.[77]

2. Printing and Length of Briefs

Although FRAP 32 provides directions on the form of the brief,[78] the circuits are all over the page in providing further detailed rules about printing of briefs. For example, the Second Circuit, although aware of the office computer, views it negatively and specifically prohibits the use of proportional computer fonts, unless the result is visually identical to standard typographic

76 BAKER, *supra* note 74, at 134.

77 However, as Professor Robel observes, forbidding citation of an unpublished decision does not make it entirely disposable. *See* Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989). As she discovered, institutional entities, such as the Department of Justice, with unique access to unpublished opinions, may still make other uses of them, including incorporation of analysis in briefs and arguments, and evaluation in making litigation and settlement decisions. *See id.* at 955-59

78 *See* FED R. APP. P 32. The Judicial Conference's Advisory Committee on Appellate Rules has proposed several amendments to FRAP 32 allowing for proportionately spaced typeface and altering the length of briefs. *See* 1996 Proposed Amendments, *supra* note 39, at 104-08, 165 F R D. at 232-36. Moreover, if amended as proposed, FRAP 32(d) would provide that the courts of appeals "must accept documents that comply with the form requirements of this rule." *Id.* at 109, 165 F R.D. at 237 As the Committee Note explains, "[l]ocal rules may move in one direction only"; they may "authorize noncompliance with certain of the national norms" but may not "impose requirements that are not in the national rule." *Id.* at 113, 165 F R.D. at 241. This is the second time that these proposals have been offered by the Advisory Committee. In 1995, the Judicial Conference's Committee on Rules of Practice and Procedure recommitted a similar set of proposed amendments to FRAP 28 and 32 to the Advisory Committee for further study as to whether a national rule concerning the details of brief form and length was appropriate or whether these matters instead should be left to local rules. *See* Report of the Judicial Conference Committee on Rules of Practice and Procedure at 6 (Sept. 1995) (on file with *University of Colorado Law Review*). Although some Committee members believed "the proposal was too technical and overly specific for a national rule," other members recognized that a comprehensive approach was necessary because "otherwise the local rules of the courts of appeals would (as most already have) fix specific and technical requirements that are equally as detailed, but which vary from court to court." *Id.* The discussion in the text demonstrates the disarray and inconsistency that follows when the national rule fails to fix the standard clearly. Through the 1996 proposals, the Advisory Committee has confirmed its commitment to establishing national unity on the form of briefs.

printing, which is permitted.[79] The Tenth Circuit, while not prohibiting proportional computer fonts, "prefers typewritten briefs."[80]

Other circuits have recognized the advent of the computer age and provide separate options for non-proportional typewriting and for proportional computer fonts. The D.C., Fourth, Fifth, Seventh, and Ninth Circuits authorize use of proportional fonts, but then proceed to limit the length of the briefs in a manner different from the federal rules.[81] FRAP 28(g) provides that the length of principal briefs shall not exceed fifty pages and that reply briefs shall not exceed twenty-five pages, although the rule allows variation on page length by local rule.[82] The Fourth and Fifth Circuits allow fewer briefing pages when proportional fonts are used.[83] The D.C. Circuit measures the permissible length of briefs prepared by word processing and typographical printing by number of words (12,500 for principal briefs and 6250 for reply briefs).[84] The Seventh and Ninth Circuits recently adopted new rules that also measure the length of briefs printed with proportionately spaced type in terms of number of words, but with a different count (14,000 words for principal briefs and 7000 words for reply briefs).[85]

79. *See* 2D CIR. R. 32(b).

80. 10TH CIR. R. 32.1. By measuring type size (other than for standard typographical printing) only in terms of characters per inch, the Sixth Circuit also is decidedly unfriendly to word-processing proportional fonts which are not easily measured by that standard. *See* 6TH CIR R 10(h)

81. *See, e.g.*, D C. CIR R. 28(d); 4TH CIR. R 28(d), 32(a), 5TH CIR. R 28 1, 32.1; 7TH CIR R. 32(d); 9TH CIR. R. 32. The Third and Federal Circuits expressly permit use of proportional fonts without altering the page length requirements, although these circuits differ in the font size permitted—12 point in the Third Circuit, *see* 3D CIR R 32.1(c)(ii), and 11 point in the Federal Circuit, *see* FED CIR. R. 32(a).

82. *See* FED. R. APP. P. 28(g). The Judicial Conference's Advisory Committee has proposed deletion of FRAP 28(g), and substitution of detailed rules on length of briefs in a rewritten FRAP 32, with express prohibition of local rules imposing requirements in addition to those in the national rule. *See* 1996 Proposed Amendments, *supra* note 39, at 104-09, 165 F.R.D. at 232-37. *See also infra* notes 205-08 and accompanying text (explaining that FRAP 28(g) was intended to allow circuits to *expand*, not retract, the permissible length of briefs).

83. *See* 4TH CIR R. 28(d), 32(a); 5TH CIR. R. 28.1, 32.1.

84 *See* D.C. CIR. R. 28(d)(1).

85. *See* 7TH CIR. R. 32(d); 9TH CIR. R. 32(e)(1); Richard C. Reuben, *Courts Playing Against Type*, A.B.A. J., Aug. 1996, at 42, 42 (stating that the new Seventh and Ninth Circuit rules on brief lengths went into effect on January 1, 1996). In the Seventh Circuit, the brief-writer has a choice between a page, word, or character measure of length—either 30 pages, 14,000 words, or 90,000 characters for a principal brief. *See* 7TH CIR R 32(d)(1)-32(d)(2)(A). The Seventh Circuit rule applies to briefs with either a proportional or a mono-spaced type, although a brief "using mono-spaced type also is acceptable if it does not contain more than 1,300 lines of text." *Id.* The Seventh Circuit's rule is identical to the proposed amendment to FRAP 32 that was recently circulated for comment by the Judicial Conference's Advisory Committee on Appellate Rules. *See* 1996 Proposed Amendments, *supra* note 39, at 107, 165 F.R.D. at 235.

Even with ordinary typewritten briefs, the Ninth Circuit has staked out its independence from FRAP 28(g) by limiting the page length for principal briefs to forty pages and for reply briefs to twenty.[86] The Eleventh Circuit has moved in the opposite direction, expanding the permissible length of the appellant's brief to fifty-five pages.[87] By contrast, the D.C. Circuit recently brought itself back in line with the national standard by changing its prior rule limiting reply briefs to twenty pages and readopting FRAP 28(g)'s limitation of twenty-five pages (but only when the brief is produced on a typewriter or printed with non-proportional fonts).[88]

When briefs are typewritten, the D.C. and Eleventh Circuits limit type size to ten characters per inch,[89] while the Sixth and Seventh Circuits allow up to eleven characters per inch.[90] Under the new Seventh and Ninth Circuit rules, those circuits split the difference at 10.5 characters per inch for monospaced type.[91] The Eighth Circuit recently weighed in with yet another choice, announcing by letter to counsel (rather than by local rule)[92] that

86. *See* 9TH CIR R. 32(e)(2) The Seventh Circuit also establishes page limitations different from present FRAP 28 (30 pages for principal briefs and 15 pages for reply briefs), which apply whether the brief is printed with a proportional or monospaced type, but the circuit rule allows an alternative (and more generous) measurement of the length by words, characters, or, for monospaced type, by lines *See* 7TH CIR R. 32(d).

87. *See* 11TH CIR. R. 28-1(a).

88 *See* D.C. CIR. R. 28(d)(2); *see also* Proposed Rules, United States Court of Appeals for the District of Columbia Circuit, Explanation of New Proposed D.C. Circuit Rules, *published in* 979 F.2d No. 1 (advance sheet No 3) CXXXVIII, CXL (Jan 18, 1993) (on file with the *University of Colorado Law Review*) (explaining that the amendment to D.C. Circuit Rule 28 "changes the Court's present rule limiting reply briefs to 20 pages, and instead adopts the FRAP provision for 25 pages").

89. *See* D.C. CIR. R. 28(d)(2); 11TH CIR. R. 32-4(b).

90 *See* 6TH CIR. R. 10(h), 7TH CIR. R. 32.

91. *See* 7TH CIR. R. 32(b)(2); 9TH CIR. R. 32(b). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 32 to provide for monospaced typeface producing no more than 10.5 characters per inch, the same figure arrived at by the Seventh and Ninth Circuits. *See* 1996 Proposed Amendments, *supra* note 39, at 106, 165 F.R D. at 234.

92. *But see* FED. R APP. P. 47(a)(1) ("A generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rule rather than an internal operating procedure or standing order.").

it will reject appellate briefs that contain more than twelve characters per inch.[93]

The type size and spacing of footnotes has not escaped the attention of the local rule codifiers. Some circuits require that footnotes be printed in the same size type as the text of the brief,[94] and at least two circuits require that footnotes not limited to citations or direct quotations be double-spaced like the text.[95] An experienced appellate practitioner reported to me that the Fifth Circuit recently rejected a brief based on the substance of the footnotes.[96] The brief was stricken, not because it would have been overlength had the footnote material been double-spaced and placed in the text, but rather because the clerk's office simply declared there was too much material in the footnotes beyond basic citations.

3. Cover and Binding of Brief

The extraordinary detail of the local appellate rules extends beyond the contents of the brief to the cover and the binding. The Second Circuit requires that the appeal numbers on the cover be in large print.[97] The Federal Circuit, in contrast with the practice everywhere else, requires that the title of the document (that is, "Brief for Appellant") be displayed at the very top of the cover.[98] The Tenth Circuit directs that a statement as to whether oral argument is requested be placed on the cover.[99] None of these

93. *See* Letter from Michael E. Gans, Clerk of United States Court of Appeals for the Eighth Circuit, to Counsel (Mar. 3, 1995) (entitled "Notice to Counsel Concerning the Use of Proportional Spacing in the Preparation of Briefs") (on file with the *University of Colorado Law Review*).

94. *See* 3D CIR. R. 32.2(a); 5TH CIR. R. 32.2; 8TH CIR. R. 28A(a).

95. *See* 11TH CIR. R. 32-4; FED. CIR. R. 32(a). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 32 that specifically permits single-spaced quotations, headings, and footnotes *See* 1996 Proposed Amendments, *supra* note 39, at 106, 165 F.R D. at 234.

96. Here and elsewhere in this Article I draw upon reports regularly made to me by experienced federal appellate practitioners, both in the public and private sector, concerning practice in the various circuits, as well as my own substantial experience litigating in ten of the thirteen federal circuits.

97. *See* 2D CIR. R. 32(c).

98. *See* FED. CIR. R. 32(e)(1). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 32 that specifically directs that the number of the case is to be centered at the top of the cover of the brief and appendix. *See* 1996 Proposed Amendments, *supra* note 39, at 105, 165 F.R.D at 233

99 *See* 10TH CIR. R 28 2(e).

requirements are imposed by FRAP 32(a),[100] and thus they are inconsistent with the federal rules "since Rule 32(a) clearly intends to regulate the content of brief covers."[101]

For brief binding, the Fifth and Federal Circuits by rule require special binding that permits a brief to lie flat when open.[102] The Ninth Circuit is only slightly more lenient; it allows binding that "permits the document to lie reasonably flat when open."[103] Some courts prohibit certain types of binding,[104] while other courts require that any metal fastener, including staples, be covered.[105]

4. Addendum to Brief

Under FRAP 28(f), a party is directed to reproduce documents such as pertinent statutes, rules, and regulations in the brief, an addendum to the brief, or a pamphlet.[106] The federal rules require nothing further by way of attachment to the back of the brief. The D.C. Circuit has adopted a rule paralleling the FRAP 28(f) requirement, but then complicates the simple federal provision by directing that any statutory addendum be "introduced by a table of contents" and "be separated from the body of the brief (and from any other addendum) by a distinctly colored separation page."[107]

Other circuits have not restrained themselves in expanding the number and nature of required addenda to the brief. The Third Circuit requires that a certificate of membership in that circuit's bar be attached to the brief.[108] The Sixth and Seventh Circuits require that an addendum to the brief include further information or certification about the preparation of the record appendix.[109] Several circuits require that the decision of the court

100. *See* FED. R. APP P. 32(a).

101 Report of the Local Rules Project, *supra* note 18, at 58-59.

102. *See* 5TH CIR. R. 32 3; FED. CIR. R. 32(b). The Judicial Conference's Advisory Committee on Appellate Rules has proposed an amendment to FRAP 32 that would adopt such a standard at the national level. *See* 1996 Proposed Amendments, *supra* note 39, at 106, 165 F R.D. at 234.

103. 9TH CIR. R. 32(f).

104. *See* 11TH CIR. R. 32-3.

105. *See* 3D CIR. R. 32.1(a); FED. CIR. R. 32(b).

106. *See* FED. R. APP. P. 28(f)

107. D C. CIR. R. 28(a)(5)

108. *See* 3D CIR. R. 28.3(d).

109. *See* 6TH CIR R. 10(d), 10(m), 11(b); 7TH CIR R. 30(c).

or administrative agency from which the appeal is taken or other record material be attached to the brief.[110]

The location and numbering of an addenda directive within a particular circuit's set of local rules may be quite different from that in another circuit, hindering the very discovery of such requirements. Some circuits provide for record addenda to the brief through local rules that supplement the requirements for appellate briefs under FRAP 28.[111] At least one circuit imposes its addendum requirement through a local rule numbered to correspond with FRAP 30, which governs the record appendix.[112] The Sixth Circuit has created its own rule-numbering system that is entirely divorced from the organization of the federal rules.[113]

D. Timing for Filing Briefs

The courts of appeals vary widely both in their receptivity to motions for extensions of time for filing briefs and in the manner by which the court reveals its attitude toward such extensions. Indeed, in many circuits it is more difficult to obtain even a short extension of the time within which to file a brief than it is in the Supreme Court. Several circuits by rule have indicated reluctance to allow extensions, vying with one another for superlatives to describe the rare situation that would justify an extension. For example, the D.C. Circuit states that motions to extend the time limits are "disfavor[ed]" and "will be granted only for extraordinarily compelling reasons."[114] The Sixth Circuit provides that such motions are "not favor[ed]" and "will be granted only in the

110. *See* 1ST CIR. R. 28.2; 3D CIR. R 28 1(a)(1)(iii); 7TH CIR R. 30(a); 8TH CIR R. 28A(I)(7), 30A(d); 10TH CIR. R. 28 2(d); FED CIR. R 28(a)(11) The Third Circuit both requires attachment of record material as a brief addendum and then modifies the preparation of the separate record appendix by commanding that materials included in the addendum not be reproduced in the appendix. *See* 3D CIR. R. 28 1(a)(1)(iii); *see also* 1ST CIR. R. 28.2 (providing that material included in the addendum to the brief "need not be reproduced in the appendix also"). By contrast, the Federal Circuit adopts what the court candidly calls a "duplicative requirement," mandating that the decision below both be attached to the brief and included in the appendix. *See* FED. CIR. R. 30(c)(1) (explaining that inclusion of the decision appealed from is a duplicative requirement of the addendum to the initial brief of the appellant)

111. *See, e.g.*, 1ST CIR. R. 28.2; 3D CIR. R. 28.1(a)(1)(iii); 10TH CIR. R. 28 2(d); FED. CIR R. 28(a)(11).

112. *See* 7TH CIR. R. 30(a).

113 *See, e.g.*, 6TH CIR. R. 10(d), (m) (addendum to brief).

114 D.C. CIR R. 28(f).

most extraordinary circumstances."[115] The Tenth Circuit "discourages" the filing of extension motions and will grant them only for "extraordinary and compelling circumstances."[116] The First Circuit through an "Information Sheet" distributed to counsel, rather than by rule, states that "[m]otions for an extension of time for filing of briefs are disfavored by the court and will be granted only upon a showing of extenuating circumstances."[117]

The Fifth Circuit recently adopted a rule that addresses this question in exquisite detail. The rule sets a time period for filing an extension motion; outlines "levels" of extensions with correspondingly higher standards for longer extension requests; and states that "generalities" (such as the statement that "counsel is too busy") are insufficient justifications for extensions.[118] The Seventh Circuit has a similarly detailed rule, stating that extension motions are not favored and describing the exceptional circumstances that may merit consideration.[119] Moreover, the Seventh and Federal Circuits require that every motion for an extension of time be supported by an affidavit,[120] notwithstanding that the motion itself is signed by the attorney with personal knowledge of the reasons why he or she cannot complete a brief by the due date and who is bound to speak truthfully as an officer of the court.[121]

In terms of conflict with the federal rules, the Eighth Circuit's approach is particularly interesting. FRAP 26(b) says that the court "for good cause shown may upon motion enlarge the

115. 6TH CIR. R. 10(k).

116. 10TH CIR R. 28.3.

117. Information Sheet from Office of the Clerk, United States Court of Appeals for the First Circuit (on file with the *University of Colorado Law Review*)

118. *See* 5TH CIR R. 31 4.1-31.4.4. This new local rule on request for extensions in the Fifth Circuit was adopted effective January 9, 1996. *See* Amendments to 5th Circuit Local Rules, United States Court of Appeals for the Fifth Circuit, *published in* 71 F.3d No. 3 (advance sheet No. 5) CLXXV (Jan 26, 1996) (on file with the *University of Colorado Law Review*) (including text of new 5th Cir. R. 31.4.1-31.4.4).

119. *See* 7TH CIR R. 26.

120. *See id.*; FED. CIR. R. 26(c) (requiring that the "extraordinary circumstances" justifying an extension be "described in an accompanying affidavit or unsworn declaration under penalty of perjury pursuant to 28 U.S.C. § 1746").

121. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3 3(a)(1) (1995) ("A lawyer shall not knowingly . . . make a false statement of material fact or law to a tribunal . . . ."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(A)(5) (1983) ("In his representation of a client, a lawyer shall not . . . [k]nowingly make a false statement of law or fact.")

time" for taking an action.[122] The Eighth Circuit requires that "[a]ll papers must be filed within the time period allowed by the rules" and that extensions of time for briefs "will not be granted except for good cause."[123] In sum, the Eighth Circuit rule simply restates FRAP 26(b) in a negative manner. The committee comment to the local rule suggests that the purpose of this restatement is to indicate that motions for extensions of time are disfavored.[124] Thus, the Eighth Circuit has taken an express provision in the federal rule and reordered the language to change the emphasis and thereby alter the underlying policy.

In effect, the various circuits have replaced the simple "good cause" standard of the federal rule with heightened standards of their own creation. "Good cause" means a "substantial reason"[125]—not "extraordinarily compelling reasons," "extraordinary and compelling circumstances," or "extenuating circumstances." In sum, by substituting a heightened standard, these circuit rules cannot be characterized as mere elaboration upon the federal rule.[126]

By contrast, the Ninth Circuit is reasonable and accommodating, authorizing its clerk to grant an extension of no more than 14 days upon an oral request by telephone.[127] Although prior notice of the request must be given to opposing counsel, the clerk's power to grant a telephonic request for good cause is not conditioned on the consent of the opposing party.[128] A diligent attorney seeking a briefing extension due to unanticipated difficulties in completing the brief or problems in the reproduction generally needs no more than a few days extension. The Ninth Circuit's approach facilitates this reality with no significant delay in the ultimate disposition of the appeal.

122. FED. R. APP. P. 26(b).
123. 8TH CIR. R. 26A.
124. *See id.*
125. *See* BLACK'S LAW DICTIONARY 692 (6th ed. 1990).
126. *See* Report of the Local Rules Project, *supra* note 18, at 41-42 (stating that, to the extent that local rules "apply a different, and perhaps more stringent standard [to permit an enlargement of time], they are inconsistent with Rule 26(b)")
127. *See* 9TH CIR. R 31-2.2(a); *see also* 5TH CIR. R 31.4.3 (allowing unopposed requests for extensions for up to 30 days to be granted by telephone)
128. *See* 9TH CIR. R. 31-2.2(a).

E. Record Appendix

Even for experienced appellate practitioners, one of the most time-consuming and technically detailed areas of appellate practice in any court involves the preparation and filing of a record appendix as governed by FRAP 30.[129] Accordingly, it seems vital that the federal judiciary determine uniformly the most appropriate manner for presenting the record to the appellate courts. Unfortunately, the wide variation among the circuits concerning the record appendix engenders considerable confusion. Some circuits generally do follow the FRAP approach of a joint appendix for reproducing important portions of the record for the appellate court.[130] Other courts follow a simple variation on that approach by allowing each party to file excerpts of record.[131] However, some of these circuits then complicate this streamlined process with detailed requirements for the contents, length, and format of the excerpts of record.[132]

Unfortunately, a few circuits make an already burdensome process more difficult by the nature of the specific local rules they have adopted. The First, Seventh, and Eighth Circuits provide for a joint appendix, but then also require an addendum to the brief that includes the key portions of the record that ordinarily would be included in the appendix.[133] The Federal Circuit has extraordinarily detailed instructions concerning how the appendix is to be arranged, when it is to be created, and what documents are or are not to be included within it.[134] In addition, by limiting certain contents of the appendix to those items actually referenced in the brief,[135] the Federal Circuit effectively mandates a deferred appendix in nearly every case. Because the parties cannot know for certain which record documents in fact will be cited until the briefs have actually been written, counsel in the

129. *See* FED R. APP. P. 30.
130. *See, e.g.*, D.C. CIR. R. 30; 2D CIR. R. 30; 3D CIR. R. 30 3; 4TH CIR R. 30(c)
131. *See, e.g.*, 5TH CIR. R. 30; 9TH CIR. R. 30-1; 11TH CIR. R 30-1.
132. *See, e.g.*, 5TH CIR. R. 30.1.4 (specifying mandatory contents of excerpts of record), 30.1.5 (outlining optional contents of excerpts of record), 30.1.7 (detailing form for excerpts of limit on optional contents of excerpts of record), 30.1 6 (placing a page record, including table of contents, tabs, and bindings); 10TH CIR. R. 10.3, 30.1 (specifying required contents of appendix, items that should be excluded, and the order and form of the appendix).
133. *See* 1ST CIR. R. 28.2; 7TH CIR. R. 30(a); 8TH CIR. R. 28A(i)(7), 30A(d).
134. *See* FED. CIR. R. 30.
135. *See id* 30(a)(2).

Federal Circuit must defer finalization of the appendix until completion of briefing. The Federal Circuit allows an exception when the designated appendix materials are fewer than 100 pages, in which case the appendix must include all designated materials *and* must be attached to the initial brief, making for a single voluminous document that, with tables, argument, and appendix, can be as much as 170 pages in length.[136]

On this same subject, the Third Circuit declares that use of a deferred appendix is not favored,[137] while the Sixth Circuit has proposed a rule expressly mandating a deferred appendix.[138] Under the proposed Sixth Circuit procedure, each party would initially file a "proof" brief with references directly to the pages of the actual record; the contents of the appendix would then be finalized based upon references to the record in the briefs, and lastly the parties would file a "final" brief adding references to the appropriate pages of the appendix.[139] Although FRAP 30(c),[140] which authorizes the deferred appendix procedure, allows the circuits to adopt this approach "by rule for classes of cases,"[141] the rule does not contemplate universal application to all cases.[142]

136. *See id.* 30(d).

137. *See* 3D CIR. R. 30.4.

138. *See* Notice of Proposed Amendments to the Rules of the Sixth Circuit, United States Court of Appeals for the Sixth Circuit, *published in* 61 F.3d No. 1 (advance sheet No. 36), CLXIII (Sept. 4, 1995) (on file with the *University of Colorado Law Review*).

139. *See id.* (proposed amendments to 6TH CIR. R. 10 and 11).

140. FED. R. APP. P. 30(c).

141. *Id*

142. The specific provision in FRAP 31(a) permitting variation of the time for serving and filing briefs by local rule "for all cases" indicates that the limited permission of FRAP 30(c) for variation by local rule only in "classes of cases" should be read narrowly. *Compare* FED. R. APP. P. 30(c) (allowing court to adopt deferred appendix procedure "by rule for classes of cases") *with* FED. R. APP. P. 30(f) (allowing court to dispense with the requirement of an appendix "by rule applicable to all cases, or to classes of cases"). In sum, the federal rulemakers apparently contemplated adoption of the deferred appendix only when justified for a particular class of cases, absent case-by-case application by court order.

III. THE BALKANIZATION OF FEDERAL APPELLATE PRACTICE

A. *The Dissolution of the Federal Appellate Judicial System*

The Rules Enabling Act[143] "was designed to foster a uniform system of procedure throughout the federal system, supplemented but not altered, by local rules to take care of local problems."[144] Instead of adhering to the simple and uniform standards of the FRAP, the circuit courts of appeals have adopted an ever-expanding and diverse catalogue of local rules. As a consequence, appellate practice is becoming "ever more disuniform and complex."[145] At the same time, the "unitary nature of the federal judicial system," which was "the raison d'être for the establishment of the federal courts,"[146] is being incrementally, but ever surely, destroyed.

The acceleration of local appellate practice, and the absence of any forceful effort to slow the growth of divergent rules, has fostered a culture of variation among the federal circuits. In effect, every circuit has constituted itself as an autonomous Advisory Committee on the Appellate Rules, openly considering innovative procedures and creative variations upon the federal rules. Rather than taking suggestions for procedural reform directly to the Judicial Conference's Advisory Committee on the Appellate Rules for possible incorporation into the FRAP, each circuit freely plays its own procedural tune, largely heedless of the singularly unmusical cacophony emanating from the appellate courts as a whole.

143. 28 U.S.C. §§ 2071-2077 (1994).

144. G. Heileman Brewing Co. v. Joseph Oat Corp , 871 F.2d 648, 665 (7th Cir. 1989) (en banc) (Ripple, J., dissenting).

145. *Cf.* Tobias, *supra* note 1, at 1393 (discussing the effect of the proliferation of local rules in the federal district courts).

146. *Cf.* Dolores K. Sloviter, *The Judiciary Needs Judicious Growth*, NAT'L L.J., June 28, 1993, at 17, 17 (Chief Judge, U.S. Court of Appeals, Third Circuit) (describing Second Circuit Judge Jon O. Newman's argument that expansion of the size of the federal judiciary may "destroy the unitary nature of the federal judicial system," and further observing that this was the historical "raison d'être for the establishment of the federal courts"). *See also* Carrington, *supra* note 3, at 934 (stating that the federal courts of appeals were created to be "a functioning part of a unified judicial system designed to enforce national law evenhandedly across the continent").

What little coordination does exist occurs after the fact, when an innovation adopted by an individual circuit is subsequently embraced by the Judicial Conference as an amendment to a federal rule. The courts of appeals rarely defer local experimentation in favor of efforts to achieve national rule reform. As a consequence, the federal rules and the national rulemakers do not lead, but follow. Rulemaking energy is being harnessed and applied primarily at the circuit conference level, with the result that each circuit moves in its own wandering orbit, only loosely tethered by minimal gravity to the federal rules.

B. Deleterious Effects on Appellate Justice

The adding of layer upon layer of local rules impairs the quality and increases the cost of appellate justice. Indeed, in terms of litigation costs, the burden of complying with local appellate rules may be disproportionately greater than the burden of complying with local district court rules. In the context of a district court proceeding, the additional time and expense of complying with local variations of the rules may be relatively minimal in comparison to the total amount of time necessarily devoted to trial litigation. By contrast, precisely because an appeal proceeds on a faster schedule and generally demands less attorney time within that compressed period, each hour of attorney time added by the need to discover, understand, and comply with idiosyncratic local rules meaningfully inflates the expense of an appeal. When an appellate attorney "bids on" an appeal by predicting the cost to the client, but then an additional five or ten hours of attorney time is required to find, interpret, and follow local circuit rules, the enhanced expense attributable to local circuit rules compliance is not at all negligible in the context of the overall expense statement for legal services.[147]

Moreover, when the rules to be followed for such basic tasks as preparing a brief or filing a motion are excessively varied, complex, and detailed, the inevitable result is that more mistakes are made by counsel. If an attorney is practicing in a circuit other than his home circuit, the idiosyncratic variations of a circuit's

147. I am indebted to Edward Mansfield, presently of Belin, Harris, Lamson & McCormick in Des Moines, based on his extensive inter-circuit appellate experience, for this observation.

local rules become an obstacle course, or more accurately, a minefield, through which the practitioner is unlikely to traverse without some misstep along the way. In turn, more time is demanded of the court's staff in identifying errors and of counsel in correcting errors. As the Chicago Council of Lawyers commented in their evaluation of the Seventh Circuit, "[h]arsh application of a multitude of rules governing minor areas of practice involves the court and litigants in expensive detours away from the ultimate resolution of the merits. This increases delay and expense as litigants seek to correct mistakes."[148]

Technical rules, such as those governing the cover and binding of an appellate brief or the tables of contents and authorities, are those which counsel are most likely to overlook when putting the substantive document into final form as the filing deadline approaches. Even a diligent practitioner may run afoul of such eccentric requirements as the Eleventh Circuit's demand that the tables of contents and authorities, headings, and signature block of the brief be double-spaced;[149] the Federal Circuit's rule that the title of the brief be displayed at the very top of the cover;[150] the Sixth Circuit's requirement that the designation of contents for the appendix be included as an addendum to the brief;[151] or the D.C. and Eleventh Circuits' direction that asterisks be added to the table of authorities to denominate cases primarily relied upon.[152] Although such mistakes may not affect the timeliness of the document, and thus not cause a party to lose rights,[153] the document still must be

148. *See* Chicago Council of Lawyers, *Evaluation of the United States Court of Appeals for the Seventh Circuit*, 43 DEPAUL L. REV. 673, 695 (1994) [hereinafter *Evaluation of the Seventh Circuit*].

149. By local rule, the Eleventh Circuit provides:

> Only the cover page, the certificate of service, and direct quotes in the text of a brief and in footnotes may be single-spaced. All other typed matter must be double-spaced, including the Table of Contents, the Table of Citations, and headings within the numbered pages of the brief. The court may reject or require recomposition of brief for failure to comply.

11TH CIR. R. 32-4. Read literally, the rule appears to preclude single-spacing even footnotes that contain only citations. By all reports from practitioners, the Eleventh Circuit does indeed reject briefs that vary from this requirement in the slightest, such as by single-spacing the table of contents and signature block.

150. *See* FED. CIR. R. 32(e)(1).

151. *See* 6TH CIR. R. 10(d), (m), 11(b).

152. *See* D.C. CIR. R. 28(a)(2); 11TH CIR. R. 28-2(e).

153. Under FRAP 47 as recently amended, a local "requirement of form" may not be enforced "in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement." FED. R. APP. P. 47(a)(2). However, while the

corrected and re-submitted. The efficient, inexpensive, and equitable disposition of appeals is not thereby promoted.

Because there are fewer appellate circuits than trial districts in the federal system—thirteen circuits as opposed to 94 districts[154]—the harm caused by fragmentation of federal appellate practice is more diffuse than that occasioned by the proliferation of district court local rules. Many litigators practice in more than one federal district, while fewer practice in more than one circuit. But the deleterious effects of circuit level variation are nonetheless substantial. Several major cities and metropolitan areas border upon or overlap more than one circuit: Washington, D.C. comprises the geographical venue of the District of Columbia Circuit and is surrounded by states within the Fourth Circuit; New York City falls within the Second Circuit and neighbors the Third Circuit; and Kansas City lies at the dividing line between the Eighth and Tenth Circuits. Even outside of those "border towns," "[l]awyers increasingly practice in a nationwide market for legal services."[155]

The effect of the proliferation of local rules upon the unity of the federal appellate system is perhaps most acutely illustrated by the advent of the United States Court of Appeals for the Federal Circuit. Because the Federal Circuit has nationwide appellate jurisdiction over certain types of cases, including patent cases and claims for monetary relief against the federal government,[156] it draws practice by lawyers who may otherwise practice primarily in one of the regional circuits. These lawyers are thus required to expend significant attorney time in learning how to prosecute or defend an appeal differently in the Federal Circuit after becoming accustomed to the details of the local rules in a regional circuit.[157]

court clerk must initially accept a non-conforming document for filing to preserve timeliness, the party may still be required to correct the document before the appeal proceeds. *See infra* Part V.A.1 (discussing effect of amendments to FRAP 47).

154. *See* DANIEL J. MEADOR, AMERICAN COURTS 23, 24-25 (1991).

155. Chemerinsky & Friedman, *supra* note 2, at 783.

156. *See* 28 U.S.C. § 1295 (1994).

157. David Hricik, of Baker & Botts, in Houston, and a member of the American Bar Association subcommittee study, *see supra* note *, emphasized to the subcommittee that the advent of the Federal Circuit furthers the need for a unified set of appellate rules: "Too much lawyer time is lost determining how to do an appeal 'differently' for the Federal Circuit." Letter from David Hricik to Sharon Freytag, Chair, Subcommittee on Local Rules, Appellate Practice Committee, ABA Section of Litigation (Aug. 10, 1993) (on file with the *University of Colorado Law Review*).

Similarly, the United States Court of Appeals for the District of Columbia Circuit is, in many respects, a national court.[158] Much of its docket has a uniquely national importance because of its location in the nation's capital.[159] Moreover, Congress has authorized, and in some cases required, that certain claims involving the federal government be brought in Washington, D.C., or be appealed to the D.C. Circuit.[160] Thus, as with the Federal Circuit, attorneys from around the nation may be called upon to advocate a matter within the D.C. Circuit, and thus be obliged to develop familiarity with its peculiar rules of practice. Adherence to the FRAP would affirm the truth that the Federal and D.C. Circuits are part of a single intermediate appellate court system.

The widening variation in circuit local rules is felt most regularly by nationwide institutional entities, most notably federal government agencies and departments, but also some public interest organizations.[161] Presumably the federal government and its Department of Justice, which has responsibility for a national litigation practice, are most capable of adapting to divergence among the circuits. However, even the Department of Justice is significantly inhibited in the efficient representation of the public by the proliferation of local circuit rules.[162] Although

158 *See generally* Carl Tobias, *The D.C. Circuit as a National Court*, 48 U. MIAMI L. REV. 159 (1993) (evaluating the merits of relying on national pools of potential judges for the D.C. Circuit judicial selection).

159. *See id.* at 174.

160. *See, e.g.*, 15 U.S.C. § 2060(a) (1994) (providing for review of consumer product safety rules in the D.C. Circuit or circuit where the plaintiff resides); 42 U.S.C. § 7607(b) (1994) (restricting review of certain administrative orders under the Clean Air Act to the D.C. Circuit); 47 U.S.C. § 402(b) (1994) (restricting review of Federal Communications Commission's licensing decision to the D.C. Circuit).

161. *See* Tobias, *supra* note 1, at 1423 (observing that district court disuniformity "complicates the efforts of lawyers with national practices, such as federal government attorneys, to participate in lawsuits in districts that follow procedures with which they are not completely familiar," and that these problems are also "acute for public interest litigants, such as the Sierra Club and the NAACP, and public interest lawyers"). For certain public interest organizations, such as the American Civil Liberties Union, the conduct of most litigation by state chapters or affiliates whose lawyers primarily practice in a single circuit significantly alleviates the problem of unfamiliarity with strange local procedures. However, even the association by national public interest organizations of local counsel is no guarantee against error, both because the proliferation of arcane local rules trips up even attorneys practicing in their home circuit, *see infra* notes 234-35 and accompanying text, and because the pressures of time deadlines may limit the opportunity for full consultation with local counsel in every instance.

162 The following description of the Justice Department's experience with local circuit rules is based upon my experience as an appellate attorney in the

in theory the United States Attorney in each district might advise Department of Justice lawyers on local circuit procedure, a large volume of civil appeals are handled out of Washington, D.C., with little or no involvement by a local United States Attorney's office. It is not practical or efficient for an appellate attorney operating out of Main Justice in Washington, D.C., to have each brief reviewed by an Assistant United States Attorney, located in another region of the country, for compliance with local circuit rules before timely filing of the document. Despite diligent efforts to remain abreast of the constantly changing rules in each of the thirteen circuits, even the most conscientious of appellate attorneys in the Department of Justice eventually sees a brief or motion "bounced" by a clerk's office because it inadvertently deviates from a technical local rule.

Although nationwide institutions most frequently experience the divergence between circuits in procedure, the impact of the proliferation of local rules falls most heavily upon the neophyte practitioner who rarely, or perhaps never before, has handled a federal appeal. An unsophisticated lawyer may naively, but understandably, believe that the FRAP govern federal appellate practice and therefore fail to uncover conflicting or further complicating local procedural twists. Something is plainly awry when a lawyer may not justifiably stand confidently upon the most obvious and natural authority for federal practice, that is, the *federal* rules, adopted by the Supreme Court after public comment and full deliberation by the Judicial Conference.

C. *Difficulty and Confusion in Finding and Applying Local Rules*

The proliferation of local rules among the circuits has meant a dramatic expansion in the number of rules to be discovered and followed.[163] Even when circuit practice directives are combined in a set of local rules that are numbered to correspond with the federal rule,[164] the myriad of circuit rules and their increasing

Department's Civil Division for three years, my work in preparing a report for the Division on the Department's problems with the proliferation of local appellate rules, and interviews with numerous Department appellate attorneys in the past two years.

163. *See* Tobias, *supra* note 8, at 1589 ("Federal court judges, lawyers, and litigants confront a bewildering array of civil procedures, many of which conflict or are difficult to discover, comprehend, and satisfy.").

164. The Judicial Conference's Local Rules Project, in its report on local

complexity hinder full comprehension and multiply the opportunities for innocent error. Attempts first to discover and then to follow local rules require inordinate expenditures of attorney time on relatively minor matters. The risks of error and the consequent harm to litigants rise exponentially with the number of rules to be applied. As Professor Carl Tobias has stated: "Increased complexity is evidenced by the growing number of procedures, many of which have become more complicated, impose onerous obligations, or are obscure or otherwise difficult to find. This complexity has deleterious ramifications for all judges, lawyers, and litigants, but especially for counsel and parties with limited resources."[165]

Perhaps no greater evidence of the discord among the courts of appeals exists than the growing market for practitioner handbooks tailored to the individual practice of each of the

appellate rules, recommended the adoption of a uniform numbering system for circuit rules based upon the FRAP. *See* Report of the Local Rules Project, *supra* note 18, at 2 of accompanying letter. As recently amended, FRAP 47 requires that local rules "conform to any uniform numbering system prescribed by the Judicial Conference of the United States." FED. R. APP. P. 47(a)(1). Moreover, the amended Rule 47 mandates that any "generally applicable direction to a party or a lawyer regarding practice before a court shall be in a local rule rather than an internal operating procedure or standing order." *Id.* Some circuits renumbered their rules in response to the Local Rules Project's suggestion. *See, e.g.*, Proposed Rules, United States Court of Appeals for the District of Columbia Circuit, Explanation of New Proposed D.C. Circuit Rules, *published in* 979 F.2d No. 1 (advance sheet No. 3) CXXXVI, CXXXVIII (Jan. 18, 1993) (on file with the *University of Colorado Law Review*) (stating that, in response to the local rules study, "the primary change proposed is the renumbering and revision of the [c]ourt's local rules so that they correlate to FRAP"). In compliance with FRAP 47, the remainder of the circuits are renumbering their local rules or moving procedural directions from internal operating procedures to local rules. *See, e.g.*, Notice of Proposed Amendments to Local Rules and Internal Operating Procedures, United States Court of Appeals for the Fourth Circuit, *published in* 67 F.3d No. 2 (advance sheet No. 47) CLVII, CLVII (Nov. 20, 1995) (stating that the court was amending its local rules and internal operating procedures "to comply with the anticipated change to Rule 47"); Notice of Proposed Revisions to Local Rules, United States Court of Appeals for the Fifth Circuit, *published in* 66 F 3d No. 2 (advance sheet No. 45) CLXXIX, CLXXIX (Nov. 6, 1995) (explaining changes to local rules as "result[ing] from the amendment to Fed. R. App. P. 47"). As of the date this article was completed, the Sixth Circuit alone persisted in maintaining local rules that are not numbered in correspondence to the federal rules. *See* Notice of Proposed Amendments to the Rules of the Sixth Circuit, United States Court of Appeals for the Sixth Circuit, *published in* 61 F 3d No. 1 (advance sheet No. 36) CLXIII (Sept. 4, 1995) (describing proposed amendments approved by the court on June 28, 1995, which continue the prior local rule numbering system).

165. *See* Tobias, *supra* note 1, at 1422 (footnote omitted) (discussing complexity created by diversity of local district court rules).

circuits. Practice manuals—some with multiple volumes—have been or shortly will be published to guide lawyers representing clients in eleven of the thirteen circuits.[166] What a sad commentary upon the disunity of federal appellate practice that a handbook upon the federal rules is no longer adequate and that a particularized treatise upon the peculiar requirements of each circuit has become an essential resource for effective practice.[167]

In the meantime, the expansion of local rules seems unabated. The frequency of alterations in local rules further adds to confusion and makes it troublesome just to keep abreast of modifications and revisions.[168] Even a cursory review of the advance sheets of the *Federal Reporter* shows that, at nearly any point in time, some circuit is considering yet another wave of changes in local rules. The constant and unsettled state of change makes it ever more difficult for appellate practitioners to remain current on local rules. In terms of procedural requirements, many of the individual circuits are constantly moving targets.

As a further illustration of the difficulties that may be encountered when an attorney outside of a circuit seeks to ascertain the nature of a court's local rules, I had a trying time in obtaining current copies of the local rules of each circuit. Although nine of the thirteen circuits promptly responded to my written request to the clerk's office for a copy of the local rules and other information, four circuits had failed to answer after four months. Three circuits then responded to a second letter, generally with an apology for the delay. The District of Columbia Circuit, despite repeated written requests to the clerk's office,

166. *See* Appellate Practice Committee, A.B.A. Section Litig., *A Bibliography of Appellate Practice Books—A Working Draft*, APPELLATE PRAC. J. & UPDATE, Summer 1995, at 5, 8 (listing federal practice handbooks for every circuit except the First and Federal Circuits).

167. *Cf.* Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1042 (1982) ("To the average lawyer it is Sanskrit; to the experienced federal practitioner it is monopoly; *to the author of text books on federal practice it is a golden harvest.*") (emphasis added) (quoting *Report of the Committee on Uniform Judicial Procedure*, 46 A.B.A. REP. 461, 466 (1921), which described the disuniformity of federal procedures that prevailed prior to the adoption of the Federal Rules of Civil Procedure).

168. *See* Wright, *supra* note 4, at 9-10 (observing that even a scholar devoting a lifetime to study in the field of procedure finds it difficult to know which rule is in effect at a particular time because of the frequency of amendments to the federal rules).

never responded to any letter and never provided a copy of the court's rules,[169] even though I noted in my letters that I was a member of the court's bar.

D. *Increased Problems in Interpretation and Application of Procedural Rules*

The proliferation in number and variety of circuit rules further adds to disunity and confusion by generating additional occasions for interpretation and application of procedural rules—and for error by the court and its staff. As Professor John B. Oakley has written, "Unduly complex rules of procedure not only increase the cost of training, compliance, and enforcement, but also increase the likelihood of mistaken and, hence, unfair application."[170]

For example, the Seventh Circuit by local rule requires the appellant to file a jurisdictional docketing statement within seven days of filing the notice of appeal,[171] a requirement not imposed by the federal rules. As reported to me by an experienced federal appellate practitioner, the Seventh Circuit recently granted permission for an interlocutory appeal in a case pursuant to 28 U.S.C. § 1292(b). Since the court of appeals by order had expressly invoked appellate jurisdiction, the attorney for the appellant naturally did not file a jurisdictional statement. The Seventh Circuit clerk's office then issued an order to show cause why the appeal should not be dismissed for failure to file a jurisdictional statement. Although counsel explained the

169. For purposes of this article, the rules of the D.C. Circuit are taken from West's United States Code Annotated Supplement to Title 28 for 1996, as updated by announcements in the advance sheets of the *Federal Reporter*. Local circuit rules are also available on Westlaw.

170. John B. Oakley, *An Open Letter on Reforming the Process of Revising the Federal Rules*, 55 MONT. L. REV. 435, 445 (1994).

171. *See* 7TH CIR. R. 3(c)(1). Until recently, and at the time this event occurred, the Seventh Circuit's rule required the filing of a "jurisdictional statement." *See* 7TH CIR. R. 3(c) (1994) (on file with the *University of Colorado Law Review*). Under the current rule, the required document is variously referred to as a "docketing statement" and a "jurisdictional docketing statement." *See* 7TH CIR. R. 3(c)(1). Although the mandated content of the document has been expanded to include some additional information, the focus remains an explanation of appellate jurisdiction. *See id.* ("The jurisdictional docketing statement must comply with the requirements of Circuit Rule 28(b)."); 28(b) (setting out the required content of a jurisdictional statement in an appellant's brief).

situation and pointed out the inapplicability of the local rule,[172] the clerk's office insisted upon the filing of the document. Thus, a patently inapplicable rule was rigidly applied to an inapposite situation, while counsel was threatened with sanctions for violation and made to incur additional expense in compliance.

Similarly, as reported to me by another experienced federal appellate practitioner, an attorney filed a petition for rehearing and suggestion for rehearing en banc, with relevant record documents attached to the petition. The attorney was directed by the Third Circuit clerk's office to file a motion for leave to attach those documents. When counsel asked the clerk's office which rule required such permission, he was cited to the Third Circuit's local rule governing petitions for rehearing, which states that the panel's opinion is a required attachment.[173] According to the clerk, the rule implies that no other attachments are permitted absent leave granted upon motion. However, the plain language of the rule precludes this interpretation. The Third Circuit's rule states that the petition "shall *include*" the panel's decision;[174] "include" is a non-exclusive term that communicates that the possibility of other attachments is anticipated. In the end, however, the attorney was obliged either to go through the motions of filing a motion, which likely would be granted, or file a new petition for rehearing without the attachment. Both counsel and the court were forced to expend resources in a meaningless formality occasioned by the erroneous interpretation of a technical rule.

IV. THE PROPER ROLE OF LOCAL CIRCUIT RULES

In view of the disarray and confusion which accompany the expansion of diverse local rules, a restoration of the primacy of the federal rules and discouragement of the upsurge in circuit

172 The Seventh Circuit's rule did not apply by its own terms, as a permissive appeal under Section 1292(b) does not involve the filing of a notice of appeal, which is the event that triggers the docketing statement requirement under the local rule. *See* 7TH CIR. R. 3(c)(1) (providing that a jurisdictional statement must be filed either "with the clerk of the district court at the time of the filing of the notice of appeal or with the clerk of this court within seven days of filing the notice of appeal").

173. *See* 3D CIR. R. 35.2 ("A petition seeking either panel rehearing or rehearing in banc shall include as an exhibit a copy of the panel's Judgment, Order, and Opinion, if any, as to which rehearing is sought.")

174. *Id.* (emphasis added).

procedural divergence should be the order of the day. However, it is appropriate to consider when local rules may be warranted. As developed below, the routine apologies for local rules—such as the need to respond to uniquely local concerns[175] or to supplement the general provisions of the federal rules[176]—are slender reeds upon which to rest the substantial weight of widespread circuit experimentation. In any event, these rationales justify procedural variation under only the most narrow of circumstances and only when the federal rules either expressly contemplate local variation or are entirely silent on a subject. Rather than unilaterally implementing new ideas through circuit governance, circuit judges should urge their colleagues and attorneys nationwide to support incorporation of positive innovations into the FRAP. In the end, ensuring a high level of national uniformity and avoiding burdensome inter-circuit procedural conflicts may require development of a preclearance process whereby the Judicial Conference must affirmatively approve circuit rules.[177]

A. *Responding to Uniquely Local Concerns*

There are matters of genuinely local concern that properly may be subject to regulation by local circuit rules. However, "local concern" should be understood narrowly to mean unique circumstances that arise because of the physical size, geographical location, or caseload of the court—not a different philosophical attitude held by the judges in a circuit about adjudication or litigation. To the extent that a procedural issue implicates a value judgment about the rights and responsibilities of litigants and their counsel, the matter should be governed by a uniform federal rule.[178] Nor should individual circuits be permitted to add to the burdens upon counsel, as when they dictate additional elements that must be included in a brief. Such directives do not legitimately reflect genuinely local exigencies and instead clutter appellate practice with additional technicalities while generating conflicts between the circuits.

Purported differences in the nature or type of litigation among the circuits may not legitimately be invoked to justify local

175. *See infra* Part IV.A.

176. *See infra* Part IV.B.

177. *See infra* Part V.A.3.

178. *See infra* Part IV.B.

disparity in appellate procedures. Although circuits may have the discretion under the rules to vary procedures on a case-by-case basis when dealing with particularly complex appellate litigation, the federal rules are designed to be "trans-substantive," meaning that procedural rights do not vary by the subject matter of the litigation. Rulemaking tailored to the specific type of substantive claim raised or defense made would offend the objective of procedural neutrality. As Professor Paul D. Carrington says, "[J]udicially-made rules directing courts to proceed differently according to the substantive nature of the rights enforced is an idea that has been wisely rejected in the past and must be rejected for the present and for the future."[179]

In any event, the nature of appellate litigation among the circuits is unlikely to vary substantially or in a manner conducive to specially designed procedures. And very few local rules can plausibly be defended as responsive to local concerns about the prevailing subject matter of appeals heard within that circuit.[180] The few exceptions may actually prove the opposite point that local variation is not justified based upon a category of litigation. For example, the D.C. Circuit has adopted a special rule requiring the appellate brief to include a glossary of abbreviations used in the document.[181] The local rule was adopted in view of the substantial number of administrative appeals, heard by the D.C. Circuit, that feature an "alphabet soup" of abbreviations for agencies, departments, statutes, and regulations. However, potentially confusing abbreviations or short references are not unique to administrative appeals. They also arise frequently in complex commercial litigation, in cases involving medical terminology, and in lawsuits raising science and technology issues. Moreover, regional circuits also hear administrative appeals with regularity. If the requirement of a glossary of

179. Paul D Carrington, *Making Rules to Dispose of Manifestly Unfounded Assertions: An Exorcism of the Bogy of Non-Trans-Substantive Rules of Civil Procedure*, 137 U. PA. L. REV. 2067, 2068 (1989).

180. *See* Carrington, *supra* note 3, at 945-46 (stating that "the primary task of each federal court is essentially the same in all districts, and the differences among them seldom suggest reasons for material differences in the procedure employed in different districts," and further observing that a review of sets of local district rules shows that the differences among them "seldom, if ever, reflect variations in local conditions" but rather reflect "differences in the styles and values of particular groups of judges")

181. *See* D.C. CIR. R. 28(a)(3).

abbreviation is justified as a procedural innovation, the merit of the rule is not limited to a single circuit or a single area of litigation.

1. Local Rules Relating to Size or Location of Court

As an example of a response to truly local concerns, circuit-by-circuit variances on the number of copies of motions, briefs, or petitions to be filed are unavoidable, given the different number of judges in and the varying geographic area of each circuit.[182] Nonetheless, when a national rule on a particular point might not be adequately universal in application and local variation is desirable, the individual federal rule should be drafted to indicate the propriety of adjustment by local rule on that particular point. For example, FRAP 31(b) expressly recognizes the need for local variation, providing that "[t]wenty-five copies of each brief must be filed with the clerk . . . unless the court requires the filing or service of a different number by local rule or by order in a particular case."[183]

2. Local Rules Relating to Case Management Based upon Particular Court Caseload

Because each court must manage its own caseload, and this burden varies from circuit to circuit, circuits may need some latitude in establishing procedures designed to control that

182. FRAP 25(e) provides generally that "[w]henever these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case." FED. R. APP. P. 25(e). The Advisory Committee comments to the rule explain:

> The number of copies of any document that a court of appeals needs varies depending upon the way in which the court conducts business. The internal operation of the courts of appeals necessarily varies from circuit to circuit because of differences in the number of judges, the geographic area included within the circuit, and other such factors. Uniformity could be achieved only by setting the number of copies artificially high so that parties in all circuits file enough copies to satisfy the needs of the court requiring the greatest number. Rather than do that, the Committee decided to make it clear that local rules may require a greater or lesser number of copies and that, if the circumstances of a particular case indicate the need for a different number of copies in that case, the court may so order.

Notes of Advisory Committee on Rules, 1994 Amendment to Federal Rule of Appellate Procedure 25(e), 28 U.S.C. app. 612 (1994).

183. FED. R. APP. P. 31(b).

caseload.[184] Again, however, as with other local procedures, circuit rules governing case management must be grounded in truly unique local concerns, not contrasting philosophies about the litigation and disposition of disputes. Moreover, as with rules relating to size or location of the circuit, the governing federal rule should expressly indicate whether local supplementation is contemplated.

As an example of legitimate local case management, each circuit must be able to devise and implement an individualized settlement conference program. Settlement programs are not as easily susceptible to detailed national regulation by federal rules. In some circuits, the time and cost of routinely referring civil cases to settlement conferences may not be justified, while other circuits may wish to investigate the possibility of settlement in most categories of civil appeals. Nevertheless, general national guidelines should be developed because experience with various approaches in the circuits reveals that the settlement process may be applied in a manner that unduly burdens appellate practice. FRAP 33,[185] which governs appeal or settlement conferences, should be revised to provide further direction on the purposes and appropriate methods of a settlement conference. Such an amendment could largely leave settlement programs to development by local rule but should mandate that cases be screened to exclude appeals not suitable for settlement discussion[186] and that telephonic conferences ordinarily be

184 *See* Robel, *supra* note 6, at 1483-84 ("The spectrum of local conditions, ranging from congested and overworked urban courts to the relative quiet of rural courts, offers the most defensible reason for local variation"), Roberts, *supra* note 17, at 549 ("Although the federal rules establish a coherent, workable, and reasonably complete procedural system to resolve civil litigation, some aspects of case management almost certainly are governed better by local regulations than by national ones"). *But see* Chemerinsky & Friedman, *supra* note 2, at 785 (arguing that differences in caseloads do not justify different treatment by varying local procedural rules but instead demand congressional action through more judges or curtailed jurisdiction to lift the caseload burden).

185. FED. R. APP. P. 33. At present, FRAP 33 requires no evaluation of which cases are suitable for settlement conference and contains no explicit protections for counsel from abusive conduct by settlement commissioners or undue burdens.

186 *See* BAKER, *supra* note 74, at 138 (concluding that obtaining the full potential of circuit settlement conferences requires "developing a profile of the appeal with a high probability of settlement," so that "[s]carce resources and extra efforts could then be spent more judiciously than in an approach that treated all appeals as fungible")

permitted when out-of-town counsel are involved.[187] In addition, government attorneys participating in a settlement conference should not be required to possess settlement authority when statutes or regulations reserve that authority to higher officials.[188]

As an example of a commendable case management approach, but one that nonetheless should be formally approved through the federal rules, the D.C. Circuit is uniquely prompt and efficient in the scheduling of cases for briefing, argument, and submission for decision. Shortly after an appeal is docketed, the court establishes a briefing schedule and simultaneously announces both the date and panel of judges for the oral argument. The D.C. Circuit is understandably reluctant to grant even a short extension of time for filing a brief,[189] because any extension reduces the time allowed to the pre-assigned judges to prepare for the pre-scheduled oral argument.[190] Nevertheless, the court's strict and unfavorable attitude toward extensions cannot be

187. The Ninth Circuit, for example, uses the docketing statement filed by counsel to determine whether a case is suitable for a prebriefing conference. Moreover, the court's plan provides that initial conferences will generally be held by telephone with counsel only. *See* Memorandum from the United States Court of Appeals for the Ninth Circuit to counsel in civil appeals and petitions for review regarding procedures governing the Prebriefing Conference Program (on file with the *University of Colorado Law Review*).

188. Under published regulations, any settlement of a federal government case has to be approved by specified Department of Justice officials, up to and including the Deputy Attorney General, depending upon the nature of the case or amount of money involved. *See* 28 C.F.R. §§ 0.160-.172 (1995). *See generally* URBAN A. LESTER & MICHAEL F. NOONE, LITIGATION WITH THE FEDERAL GOVERNMENT 21-41 (3d ed. 1994) (discussing settlement of government appeals). Accordingly, the individual government attorney advocating the case in court generally will not have full settlement authority and, except in extraordinary circumstances, the court staff member directing the settlement program should not demand that the department official with settlement authority personally appear at a settlement conference. *See In re* Stone, 986 F.2d 898, 903-05 (5th Cir. 1993) (reversing, as abuse of discretion, a district court standing order routinely requiring a representative of the federal government with ultimate settlement authority to appear at all settlement conferences, recognizing that "the government is in a special category" both in terms of its "need for centralized decisionmaking" and because it is a party to a great number of cases on a nationwide basis).

189. *See* D.C. CIR. R. 28(f)(1) (stating that the court "disfavors" motions to extend time limits and will grant them "only for extraordinarily compelling reasons").

190. Nevertheless, the court should set briefing and argument schedules with a few days flexibility to allow routine short extensions of time when counsel demonstrates that unanticipated problems have arisen in production of the brief, such as the need to complete the table of authorities or difficulties in printing.

squared with the less discouraging standard of FRAP 26(b), which allows enlargement of time "for good cause shown."[191]

The D.C. Circuit, by taking affirmative action to expeditiously hear each case after docketing, can thereby justify its negative attitude toward briefing extensions that interfere with its approach. However, the common adoption of an "extraordinary circumstances" standard for briefing extensions by other circuits should not readily be accepted.[192] There is nothing more annoying to counsel, or embarrassing to a court, than for the court to deny or reduce a motion for extension and then leave counsel waiting many months after completion of briefing before the court sets the case for oral argument. At the very least, FRAP 26(b), which allows extensions of time for "good cause," should be read *in pari materia* with FRAP 31(a), which allows a circuit by local rule to shorten the periods prescribed for filing briefs only if the court "is prepared to consider cases on the merits promptly after briefs are filed."[193] As concretely manifested by its scheduling of oral argument at the same time the briefing schedule is set, the D.C. Circuit plainly is so prepared. Most other circuits cannot make the same guarantee.

Accordingly, because it conflicts with FRAP 26(b)'s provision for extension of briefing time on the relatively low standard of "good cause,"[194] even such a progressive case management technique as the D.C. Circuit's advance scheduling of oral argument is questionable because it was adopted unilaterally. Instead, such an innovation should be implemented only pursuant to appropriately narrow accommodation and express provision in the FRAP. In that manner, the supremacy of the federal rules would be established, local innovation would be reviewed prior to implementation by the Judicial Conference for consistency with uniform standards, and exceptions to the federal

191. FED. R. APP. P. 26(b).

192. *See supra* Part II.D (discussing the diversity of local circuit rules on requests for extension of briefing time).

193 FED R. APP. P. 31(a). The Judicial Conference's Advisory Committee on Federal Rules has proposed minor stylistic amendments to FRAP 31(a), which would emphasize that a shortened period for filing briefs may be required only by a court of appeals that is regularly prompt in considering cases. The proposal would permit a local rule to shorten the time period for brief filing only in a circuit that "*routinely* considers cases on the merits promptly after the briefs are filed." 1996 Proposed Amendments, *supra* note 39, at 102, 165 F.R.D. at 230 (emphasis added to indicate proposed revision)

194 *See supra* Part II.D

procedures would be strictly defined. The D.C. Circuit's salutary scheduling approach could be approved through an amendment to FRAP 26(b) providing: "a motion for an enlargement of time to file a brief is disfavored once the date for oral argument has been set by court order."

B. Supplementation of the Federal Rules

The greatest danger to the primacy of the FRAP lies in the common suggestion that local circuits may *supplement* the federal rules with interstitial directives. Supplementation easily evolves into substitution. Moreover, even when local rules are truly supplemental—and do not overlap in any meaningful way with the federal rules—their adoption by individual circuits reduces the incentive to seek similar revision of the nationally-applicable procedures.[195] Moreover, every supplemental rule adds to the "bewildering array" of procedures faced by judges, lawyers, and litigants, which makes it difficult to "discover, comprehend, and satisfy" procedural requirements.[196]

Nonetheless, within strictly defined and narrow parameters, supplementation of the federal rules may expand procedural opportunities for both court and counsel and allow some local experimentation at little expense to national uniformity. The FRAP should be understood to preempt the entire field upon which they play. That is, if the federal rules speak to an aspect of procedure, then they should be recognized as the exclusive provision governing that point. Supplementation should be allowed only in those areas where the federal rules are silent on a general subject or expressly contemplate elaboration through local rules. To be sure, a measure of uncertainty necessarily remains as to where the boundaries of the field lie and how closely a local rule may approach a matter addressed by the federal rules without trespassing. Still, a clear statement about the preeminence of the FRAP and a strong presumption against

195. *See* Tobias, *supra* note 1, at 1426 ("As [the procedural] system becomes increasingly local and disuniform, there may even be less perceived need for national rule revision.").

196. *See* Tobias, *supra* note 8, at 1589 ("Federal court judges, lawyers, and litigants confront a bewildering array of civil procedures, many of which conflict or are difficult to discover, comprehend, and satisfy.")

local rule interference would go a long way toward eliminating complications created by circuit rulemaking.[197]

In fact, relatively few of the FRAP admit to local variation and then only for narrow purposes.[198] Most commonly, a federal rule allows circuits by local rule to provide for filing a different number of copies of documents; almost never do the federal rules permit the circuits to augment the burdens of appellate practice.[199] Most importantly, by the plain language of the federal rules, the restrained authorization of local rulemaking on certain defined points excludes the possibility of local variation where not expressly permitted.[200]

197. *See* Chemerinsky & Friedman, *supra* note 2, at 788 (taking "the general position that although there might be some narrow compass for interstitial local rules, such rules still should be the exception").

198. *See* FED. R. APP P 5(c) (allowing local rule to set number of copies for petition for permission to appeal under 28 U S C. § 1292(b) (1994)), 5 1(c) (allowing local rule to set number of copies for petition for permission to appeal under 28 U S C § 636(c)(4) (1994)), 6(b)(2)(iii) (allowing designation by local rule of parts of the record that need not be transmitted by the clerk of the district court and allowing local rule to provide for transmission of a certified copy of the docket entries in lieu of the record), 10(b)(1) (allowing local rule to except counsel from duty to order trial transcript), 11(b)(e) (allowing local rule for same purposes as under FRAP 6(b)(2)(iii) as described above), 21(d) (allowing local rule to set number of copies for petition for a writ of mandamus), 25(a) (allowing local rule to permit filing of documents by facsimile or other electronic means), 25(e) (allowing local rule to set number of copies for documents), 26.1 (allowing local rule to require filing of a corporate disclosure statement earlier than in the brief and to set the number of copies of the corporate disclosure statement), 27(d) (allowing local rule to set number of copies for motions), 28(g) (allowing local rule to set the permissible length of briefs), 30(a) (allowing local rule to set number of copies for the appendix), 30(b) (mandating local rule to provide for sanctions for "unreasonably and vexatiously increasing the costs of litigation through the inclusion of unnecessary material in the appendix"), 30(c) (allowing local rule to provide for use of deferred appendix in "classes of cases"), 30(f) (allowing local rule to dispense with appendix in all cases or classes of cases), 31(a) (allowing local rule to shorten the time period for filing briefs if the court is prepared to consider the case on the merits "promptly after briefs are filed"), 31(b) (allowing local rule to set number of copies for the appendix), 34(a) (allowing court by local rule to permit a panel of judges to unanimously agree to dispense with oral argument in a case), 35(d) (allowing local rule to set number of copies for suggestions for hearing or rehearing en banc), 39(c) (mandating local rule to fix the maximum rate at which costs of printing or producing briefs, appendices, and records are taxable as costs), 40(a) (allowing local rule to shorten or enlarge the time to file a petition for rehearing), 40(b) (allowing local rule to set number of copies for petitions for rehearing), 45(a) (allowing local rule to provide for clerk's office to be open on Saturdays or certain legal holidays), 46(a) (allowing local rule to set fee for admission to practice before a court of appeals)

199 *See id.*

200 *See* Report of the Local Rules Project, *supra* note 18, at 45 ("When the Advisory Committee has intended that a court make . . . a regulation by local rule, it has clearly stated that intent"); *see also* Roberts, *supra* note 17, at 553 ("Local rules should be permitted when they are expressly required or permitted to be made by statute or federal rule, and when regulation is accomplished better at the local than at the national level.")

Thus, for example, the individual circuits are ousted by the federal rules from interposing new requirements about the content of, form for, addenda to, or covers for appellate briefs. The federal rules expressly and comprehensively address those subjects; they do not allow any departure from the national standard by local rules.[201] Local rules on these points do not supplement, but conflict, with the federal rules. As discussed earlier,[202] the local rules of the various circuits probably vary more on the content and format of briefs than on any other point. Because the preparation of an appellate brief lies at the heart of appellate practice, diversity and disarray in the standards and expectations for the content and format of briefs are unacceptable.

Moreover, local rules should not be contemplated when the federal rules "implement value choices of consequence to the participants in a lawsuit."[203] For example, the maximum length fixed for an appellate brief reflects a value choice between the due process rights of a party to make a full and complete presentation of a case to the court and the practical concerns of the court about the burdens placed on judges who must read the briefs. The proper balance between the advocacy rights of litigants and the efficiency concerns of the courts of appeals should be struck at the national level, because it is a matter of general importance. The courts of appeals today frequently refuse to consider arguments

201 *See* FED. R. APP P. 28, 32; *see also* Report of the Local Rules Project, *supra* note 18, at 47 ("If the Advisory Committee had intended that additional areas be discussed in the briefs, it could easily have amended Appellate Rule 28 to include these items. Further, such variations among the courts may unduly confuse practitioners.").

202 *See supra* Part II.C.

203 *See* Robel, *supra* note 13, at 59 (arguing that a unified federal system is generally preferable and that "most procedural rules implement value choices of consequence to the participants in a lawsuit"); *see also* Miner v. Atlass, 363 U.S. 641, 648 (1960) (striking down a local rule that adopted a procedure that had been deliberately omitted from the federal rules, holding that the omission "must be taken as an advertent declination of the opportunity to institute" the procedure), Chemerinsky & Friedman, *supra* note 2, at 788 (stating that a rule cannot be considered "interstitial" if it differs in fundamental policy from the federal rules); Levin, *supra* note 17, at 1569 (stating that local rules "were to operate in the interstices, providing a little 'play in the joints,' without significant impact on the national scheme").

that are not addressed at some length in the briefs and decide cases on grounds beyond those considered by the trial court, thus requiring parties to anticipate and address issues that may not have been central below.[204] Accordingly, the permissible length of an appellate brief should not vary from one circuit to the next.

Admittedly, while providing generally for principal briefs of fifty pages and reply briefs of twenty-five pages, FRAP 28(g) expressly allows the circuits to adopt different limits by local rule.[205] While this federal rule at least alerts the federal practitioner to the possibility of deviation in a circuit by local rule, the door to circuit variation on brief length may not be open very far. The Advisory Committee comments explain that FRAP 28(g) was made subject to local rule "to permit the courts of appeals to require that typewritten briefs be typed in larger type and permit a correspondingly *larger number of pages*."[206] Thus, circuit rules reducing the permissible length of briefs stand contrary to the purpose of the local rule allowance in FRAP 28(g).[207] Moreover, the Judicial Conference's Advisory Committee on Appellate Rules has proposed deletion of FRAP 28(g) and the substitution of detailed rules on length of briefs in a rewritten FRAP 32—with no allowance for variation by local circuit rule.[208]

By contrast, as an example of legitimate supplementation, several circuits have adopted rules authorizing summary disposition, on motion of the court or a party, in the extraordinary case where the appeal presents no substantial question.[209] By providing for summary affirmance or reversal, a matter not addressed by the federal rules, a circuit promotes expeditious resolution of appeals without imposing additional procedural

204. *See Evaluation of the Seventh Circuit*, *supra* note 148, at 703 (criticizing the Seventh Circuit's stringent use of page limitations, even in complicated or multiple party cases, notwithstanding that the court "has frequently stated that it will not consider arguments that have not been discussed at some length in a brief" and that the court "sometimes decides cases on grounds not invoked by the trial court," thus requiring parties "to brief issues that may not have been central below").

205. *See* FED. R. APP. P. 28(g) (establishing page limitations for briefs "[e]xcept . . . as specified by local rule of the court of appeals")

206. 28 U.S.C. app. at 616 advisory committee's note (1994) (1979 Amendment to Federal Rule of Appellate Procedure 28) (emphasis added).

207. *See supra* Part II.C.2.

208. *See* 1996 Proposed Amendments, *supra* note 39, at 90, 107, 165 F.R.D. at 218, 235

209. *See* 1ST CIR. R. 27.1; 3D CIR. R. 27.4; 4TH CIR R. 27(g), 5TH CIR. R 42.2; 8TH CIR R. 47A (allowing summary disposition on motion of court and motion by party to dismiss for lack of jurisdiction); 9TH CIR. R 3-6

burdens upon counsel. Rather than uprooting existing procedures set forth in the FRAP, these courts have planted a new procedure in an open field. Even here, however, the preferable alternative would be cooperative laboring in the vineyard of the federal rules by grafting this new shoot onto the national procedural branch.

C. *Simplifying or Streamlining the Process*

Finally, individual circuits should not be precluded from adopting local rules that simplify or streamline the appellate process—provided that compliance with the national standard is not penalized.[210] Regardless of the local rules, compliance with the FRAP should always satisfy a party's obligation to the court. However, if a circuit, by local rule, has adopted a streamlined or simplified procedure, a party's adherence to that procedure may also satisfy a party's obligation to the court. In other words, a local rule enunciating a simplified procedure must be understood, and should be expressed as, an *alternative* to the federal rules.

For example, FRAP 30 establishes a complex procedure for preparing the record appendix that counsel must file with the court of appeals.[211] However, some circuits permit a much simpler process of allowing the parties to file "record excepts" with the court.[212] Justice would not be served by precluding circuits from accommodating parties through more efficient alternatives, as long as parties would not be sanctioned if they chose to follow the more burdensome federal rule.[213] Even here, however, it would be disappointing should the motivation for national rule reform be dissipated through seriatim, and inevita-

210. I am indebted to Kenneth Servay, presently at Chaffe, McCall, Phillips, Toler & Sarpy of New Orleans, for suggesting this rationale for legitimate local rulemaking to our American Bar Association subcommittee study. *See* Letter from Kenneth J. Servay to Kathleen McCree Lewis 1 (Jan 5, 1994) ("I propose amending Fed R. App 47 to establish the uniform Federal Rules of Appellate Procedure as the national standard that precludes courts from adopting requirements that are more onerous tha[n] allowed by the Federal Rules, but nevertheless, that allows the circuits to modify the national rules to simplify or streamline practice in the circuit, *so long as compliance with the national standard is not penalized*") (on file with the *University of Colorado Law Review*).

211. *See* FED. R. APP. P. 30.

212. *See supra* Part II.E.

213. Again, I recognize Kenneth Servay for offering the "record excerpt" example of efficient local rulemaking that simplifies appellate practice. *See* Letter from Kenneth J. Servay to Kathleen McCree Lewis, *supra* note 209, at 1-2.

bly conflicting, adoption of innovations in individual circuits. In any event, circuits by local rule should not be permitted to unilaterally adopt procedures that are more onerous than those established by the uniform FRAP.

D. Conclusion

Having defined the proper and narrow role of local rules, and then compared those standards to the proliferating local rules described previously, it is beyond peradventure that most circuit rules fail to pass muster. As Professor Lauren Robel observes:

> Local court tinkering with the Federal Rules is rarely inspired by the disutility of a Rule under local conditions. Rather, it is inspired by a belief that the rulemakers got it wrong. This position should be viewed with suspicion, both because there is a method of securing rule changes that respects national concerns and because deviations from that method are notoriously difficult to challenge.[214]

The vast majority of local circuit rules fall into this category—local "tinkering" with the national rules—rather than than that of responses to unique local situations. As a consequence, most local rulemaking reflects an attitude of circuit autonomy and promotes the disintegration of a unitary federal appellate system. This form of local experimentation is illegitimate and inconsistent with both the spirit and the letter of the FRAP.

V. RECOMMENDATIONS TO RESTORE A UNIFIED SYSTEM OF FEDERAL APPELLATE PRACTICE

A. Action by the Judicial Conference

For better or worse, the focal point of federal court rulemaking today is the Judicial Conference of the United States. The Supreme Court, although statutorily endowed with the power to prescribe procedural rules,[215] has adopted a deferential attitude toward the recommendations of the Judicial Conference. Most

214. Robel, *supra* note 6, at 1484.

215. *See* 28 U.S.C. § 2072(a) (1994) ("The Supreme Court shall have the power to prescribe general rules of practice and procedure . . . for cases in the United States district courts . . and courts of appeals ").

recently, when the Court approved controversial rules in 1993 regarding discovery[216] and sanctions, Chief Justice Rehnquist distanced the Court from the substance of the amendments in the language of his letter to Congress:[217] "While the Court is satisfied that the required procedures have been observed, this transmittal does not necessarily indicate that the Court itself would have proposed these amendments in the form submitted."[218] Justice White published a separate statement explaining that the Judicial Conference and its committees, rather than the Court itself, drafts and proposes the rules, and that the Court has "hardly ever refused to transmit the rules submitted by the Judicial Conference."[219] He emphasized that the Court has assumed "a much more limited [role,]" "transmit[ting] the Judicial Conference's recommendations without change and without careful study, as long as there is no suggestion that the committee system has not operated with integrity."[220]

Thus, the best hope for restoration of a unitary federal judicial system resides with the Judicial Conference. Because the Judicial Conference represents members of the federal judiciary from across the nation, and from each of the thirteen federal appellate circuits, that body possesses the broader vision necessary to sustain and reinvigorate a national regime of procedure.

216. *See supra* notes 9-16 and accompanying text (discussing 1993 amendments to discovery rules respecting mandatory disclosure).

217. *See* Oakley, *supra* note 170, at 436 (describing the Court's action as "submitting these amendments to Congress with one arm outstretched and the other arm held to its nose").

218. Letter from William H. Rehnquist, Chief Justice of the United States Supreme Court, to Thomas S Foley, Speaker of the House of Representatives (Apr. 22, 1993), *reprinted in* 146 F.R.D. 403 (1993)

219 Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 501-02 (1993) (Statement of White, J).

220. *Id.* at 505-06; *see also* Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U L. REV. 1655, 1674-75 (1995) (stating that "[o]n most occasions, the Court has deferred to the Judicial Conference and has prescribed without change proposed rules amendments submitted by the Judicial Conference," although the Court has deferred a couple of rule proposals and approved others only over dissents during the 1990s); Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH L. REV. 455, 466 (1993) (finding little evidence that the Supreme Court has ever effectively participated in civil rulemaking). *But see* Amendments to the Federal Rules of Civil Procedure, 146 F R.D 501, 513 (1993) (Scalia, J., dissenting) (arguing that "categories of revision" of the rules that "rise to the level of principle and purpose" should be subject to careful review by the Court).

1. The Limited Progress of the 1995 Amendments to FRAP 47

The recent amendments to FRAP 47 proposed by the Judicial Conference and adopted by the Supreme Court in 1995[221] are an encouraging step in the right direction—but only a step. FRAP 47, as amended, (1) reaffirms that local appellate rules must be consistent with the federal rules, as well as with federal statutes; (2) requires renumbering of local rules to conform with a uniform numbering system; (3) precludes enforcement of a local rule "imposing a requirement of form in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement"; and (4) prohibits imposition of sanctions for failure to comply with a requirement that is not included in the local rules, unless the party or attorney has actual notice of the requirement.[222] Thus, the amended federal rule makes identification of pertinent rules somewhat easier by requiring circuit rules to follow the same format as the FRAP and alleviates injustice by preventing dismissal of an appeal or refusal to accept a brief as timely filed because of errors in form.

Although these amendments are an encouraging first step, their effect is likely to be limited. The amendments to FRAP 47 do not directly prevent circuits from imposing and enforcing technical and burdensome local requirements. To be sure, the amended rule expressly bars local rules that are inconsistent with the federal rules.[223] However, the very same directive was included in the prior rule (and, not incidentally, it is commanded in the Rules Enabling Act[224] itself), but the circuits have not fully honored it. Thus, despite renewal of this longstanding preclusion in the recent amendment to FRAP 47, the thirteen circuits are

221. Amendments to Federal Rules of Appellate Procedure, 161 F.R.D 163, 175-76 (1995) (announcing amendments to FRAP 47 to be effective on December 1, 1995).

222. *See* FED. R. APP. P. 47.

223. *See id.* 47(a)(1) ("A local rule shall be consistent with—but not duplicative of—Acts of Congress and rules adopted under 28 U.S.C. § 2072 . . . .").

224. 28 U S.C. § 2071(a) (1994) (authorizing courts to prescribe rules which "shall be consistent with Acts of Congress and rules of practice and procedure prescribed under section 2072," which authorizes the Supreme Court to prescribe general rules of practice and procedure).

unlikely to be restrained from their continuous generation of conflicting local rules.[225]

Moreover, the new protection against loss of rights resulting from enforcement of local requirements of form[226] prevents only the worst injustices but does nothing to lift the burden of those local requirements. Although a circuit court clerk must initially accept the filing of a non-conforming document to preserve timeliness,[227] the party may still be required to revise the document before the appeal is allowed to proceed. For example, the Third Circuit by local rule provides that, while a document that does not comply with the FRAP or local rules will be filed, the clerk shall notify the party of "the need to promptly correct the deficiency."[228] If the party fails or declines to revise the document, the Third Circuit local rule authorizes the court, in its discretion, to "impose sanctions as it may deem appropriate, including but not limited to the dismissal of the appeal, striking of the document, imposition of costs or disciplinary sanctions upon counsel."[229]

Finally, it remains to be seen which local variations on appellate practice will be regarded as mere "requirements of form," as opposed to more substantive rules that a court may enforce without opportunity for correction, even to the point of denying a party the right to file a brief or the ultimate sanction of dismissal of the appeal. The advisory committee comments to the FRAP 47 amendments state:

> The proscription . . . is narrowly drawn—covering only violations that are not willful and only those involving local rules directed to matters of form. It does not limit the court's power to impose substantive penalties upon a party if it or its attorney stubbornly or repeatedly violates a local rule, even one involving merely a matter of form. Nor does it affect the

225. *See supra* Part II.

226. *See* FED. R. APP. P. 47(a)(2) ("A local rule imposing a requirement of form shall not be enforced in a manner that causes a party to lose rights because of a nonwillful failure to comply with the requirement.").

227. *See* FED. R. APP. P. 25(a)(4) ("The clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices ").

228. 3D CIR R. 107.3.

229. *Id.*

court's power to enforce local rules that involve more than mere matters of form.[230]

Thus, once an attorney is made aware of a local requirement, however technical or burdensome it may be, FRAP 47 does not excuse full compliance. The complications of local practice remain unaltered.

2. Further Revision of FRAP 47

If meaningful progress toward reunification of the federal appellate system is to be achieved, the 1995 amendments to FRAP 47 must be regarded as merely a first step. Repeated prohibitions on inconsistent local rules have not hindered the centrifugal tendency toward procedural autonomy among the circuits. Therefore, FRAP 47 should be revised to preclude, with even greater explicitness and elaboration, circuit adoption of local rules that conflict with the letter or spirit of the federal rules.[231] Unless a particular federal rule specifically contemplates supplementation, a federal procedural directive should be understood as exclusively occupying the field and allowing no localized deviation.[232] Local rules that impose more burdensome or onerous practice requirements, especially the confusing multiplication of technical mandates, should be definitively rejected. Nothing in a federal rule should preclude circuits from establishing alternative procedures that simplify or streamline the process, provided that compliance with the requirements of the FRAP shall satisfy a party's obligations to the court.[233]

Moreover, the circuits should be required to stand still once in awhile so that practitioners may come up to speed on the latest revisions of local practice rules.[234] Compliance with the myriad

230 Amendments to Federal Rules of Appellate Procedure, 161 F.R.D. 163, 176 (1995) (advisory committee comments on amendments to FRAP 47)

231. *See supra* Part IV.

232 *See supra* Part IV.B.

233. *See supra* Part IV.C.

234. *See* Letter from Thomas F. Strubbe, Clerk, United States Court of Appeals for the Seventh Circuit, to Sharon N. Freytag, Chair, Subcommittee on Local Rules, Appellate Practice Committee, ABA Section of Litigation (July 1, 1994) ("The frequent changing of rules, be they local or national, adds much uncertainty to practice before this, or any court; that, of necessity, creates problems regarding the education of the bar and enforcement of the unfamiliar new rules.") (on file with the *University of Colorado Law Review*).

of local rules is made even more difficult by the dizzying frequency of amendment.[235] Even for attorneys practicing in their "home" circuit, the proliferation of local rules and the constancy of changes to them create stumbling blocks to practice and result in errors of non-compliance with new revisions. More than one appellate attorney has related the frustration felt when he or she has been unable to follow the form of a brief filed in a circuit in a recent case because of further evolution in the local rules during even a short intervening period.

FRAP 47 should be amended to allow each circuit to modify its local rules only once a year in the absence of exigent circumstances, with any changes to become effective on January 1 of the following year.[236] However, allowance of annual rule changes should not be understood as an encouragement to revise procedure with regularity on a yearly basis.[237]

3. The Power to Veto Circuit Rules

Although little known, and seldom invoked, the Judicial Conference has the statutory power to modify or abrogate any rule prescribed by a circuit.[238] In sum, the Judicial Conference may veto local appellate rules. On only one occasion, however, has the Conference been requested to overturn a circuit rule. In March 1994, the attorneys general of five states asked the Judicial Conference to set aside the Ninth Circuit's local rule governing death penalty appeals as inconsistent with federal law.[239] Rather than formally exercising its power of abrogation, the Judicial Conference, through its Committee on Practice and Procedure, diplomatically expressed the sense that there was an inconsistency between the circuit rule and federal law and then

235 *See supra* Part III.C.

236. *See* Report of the Local Rules Project, *supra* note 18, at 79 (recommending that FRAP 47 be amended "to provide that local rule amendments and additions be made effective on only specified dates (*e.g.*, January 1 of each year only or January 1 and July 1 of each year)").

237. *See* Letter from Thomas F Strubbe to Sharon N. Freytag, *supra* note 234, at 1-2 ("I particularly applaud your effort to have Rule 47 amended to provide that each circuit may modify its local rules no more than once a year in the absence of exigent circumstances. I have more-or-less sold our court on this principle . . . .").

238. *See* 28 U.S.C. § 2071(c)(2) (1994) ("Any . . . rule prescribed by a court other than the Supreme Court . . . shall remain in effect unless modified or abrogated by the Judicial Conference.").

239. *See* McCabe, *supra* note 219, at 1690 n.182.

effectively remanded the matter to the Ninth Circuit by inviting it to reconsider the local rule.[240]

The Judicial Conference should vigorously and unapologetically exercise its statutory power, with the announced purpose of restoring the federal rules to their proper primary status and reducing the disarray in local circuit rules. The *Proposed Long Range Plan for the Federal Courts,* adopted by a committee of the Judicial Conference, recommends that the Conference invoke its oversight powers and reduce the number of local rules.[241] If the Judicial Conference fails to act *sua sponte,* then a credible entity, like the United States Department of Justice, should file a formal protest to start the ball rolling. As a good start, all circuit rules purporting to supplement FRAP 28, which prescribes the contents, length, references within, and addenda to appellate briefs,[242] are ripe for challenge. With the sole exception of its provision on the length of briefs,[243] FRAP 28 makes no allowance for variation by local rule.[244] Not only would the veto of the vast range of circuit rules setting idiosyncratic requirements for briefs set a strong precedent, but in one fell swoop a substantial amount of the clutter in federal appellate practice would be swept away.

Finally, to further ensure a national vision for appellate procedure, the Rules Enabling Act should be amended to transform the Judicial Conference's negative veto power into a positive power of approval. Deviant local rules would be discouraged if the circuits were barred from implementing any local rule without preclearance by the Judicial Conference.[245] The Conference would be directed to pass upon requests for local rulemaking only after a serious screening for compatibility with the federal rules and national appellate practice.[246]

240 *See* Committee on Rules of Practice and Procedure, Judicial Conference of the United States, Minutes of the Meeting of January 11-13, 1995, 1995 WL 811896, at *11-12; *see also* Carrington, *supra* note 3, at 978 (explaining that "the Judicial Conference has questioned a circuit rule adopted by a U.S. Court of Appeals and induced that court willingly to modify its rule to bring it into line with the Rules Enabling Act"). The Ninth Circuit issued an interim or draft rule as suggested by the Judicial Conference committee and has not yet adopted a final rule on death penalty appeal procedure *See* 9th Cir. R. 22-1 to 22-6 and accompanying court comment.

241. *See* Committee on Long Range Planning, Judicial Conference of the United States, Long Range Plan for the Federal Courts recommendation 29, at 59 (1995); *see also* McCabe, *supra* note 219, at 1690-91.

242. *See* FED. R. APP. P. 28.

243. *See id.* 28(g) (setting the length of briefs "[e]xcept . . . as specified by local rule of the court of appeals").

244. *See* Report of the Local Rules Project, *supra* note 18, at 47 ("If the Advisory Committee had intended that additional areas be discussed in the briefs, it could easily have amended Appellate Rule 28 to include these items.").

245. *See* Chemerinsky & Friedman, *supra* note 2, at 792 (arguing that local rules should not be permitted to go into effect without approval of a central authority, that should be an adjunct to and under the control of the Judicial Conference)

246. Together with amendment of the Rules Enabling Act to confer preclearance power upon the Judicial Conference, Congress should appropriate sufficient funding to support and staff a local rules screening committee that would report to the Conference. The minimal additional funding required is amply justified by the importance of the problem of proliferation of local rules, a problem the Congress recognized and sought to address in the Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4650 (1988) (codified at 28 U.S.C. §§ 2071-74 (1994)). *See also infra* Part V.C.

247. Should the Court determine to play a more active role in the rulemaking process, the disintegrating effect of local rules upon the fundamental procedural unity of the federal courts would constitute one of those matters of "principle and purpose" that Justice Scalia, joined by two other members of the Court, has argued justify the attention and review of the Court. *See* Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 501, 513 (1993) (Scalia, J., dissenting). A directive from the Court to the Judicial Conference to further review the proliferation of local rules, at the district and circuit court level, and consider appropriate responsive revision of the federal rules would certainly ensure that the subject was placed high on the Conference's agenda.

248. *See, e.g.,* Hanna v. Plumer, 380 U.S. 460 (1965) (upholding validity of Federal Rule of Civil Procedure 4); Sibbach v. Wilson & Co., 312 U.S. 1 (1941) (upholding validity of Federal Rule of Civil Procedure 35(a)).

249. *See, e.g.,* Frazier v. Heebe, 482 U.S. 641 (1987) (striking down local district court rule barring admission of nonresident attorneys to the court's bar); Colgrove v. Battin, 413 U.S. 149 (1973) (upholding validity of local district court rule authorizing six-member juries in civil cases); Miner v. Atlass, 363 U.S. 641 (1960) (striking down local district court rule providing for discovery by deposition in admiralty case when the federal admiralty rules did not then provide for depositions for the purpose of discovery).

B. Action by the Supreme Court

Although the Supreme Court apparently has taken a "hands-off" approach to the initiation, drafting, and oversight of federal procedural rules,[247] it always retains the power of adjudication. Thus, the Supreme Court may be called upon to evaluate the validity of procedural rules in the context of a particular case.[248] Indeed, the Supreme Court has considered several cases involving challenges to the validity of local district court rules.[249] Similarly, the courts of appeals evaluate district court procedures in the context of cases on appeal and not infrequently reject local district court rules as contrary to federal

rules.[250] Not surprisingly, however, the courts of appeals have not subjected their own circuit rules to the same scrutiny for consistency with the FRAP.[251]

A court of appeals, removed from the parochialism of individual district practices, is better situated than a district court to compare a local district court innovation to the corresponding federal procedural standard. Likewise, the Supreme Court, as the only truly national tribunal, may best appreciate both the value of uniform federal appellate practice and the fragility of the federal rules should local circuit rules further proliferate. If the Supreme Court invalidated a circuit rule as inconsistent with the corresponding federal rule, that precedential decision would prompt each circuit to reexamine its practices and encourage the Judicial Conference to exercise greater vigor in its statutory duty of oversight of local court rules.

There are, however, two obstacles to obtaining a Supreme Court disposition on this point. First, a case must arise in which a local circuit rule plays a sufficiently predominate role and has a significantly adverse effect as to prompt a party to seek further review. That prospect is uncertain. Unless an obstreperous and foolish attorney willfully refuses to follow a local rule, thereby invoking the ultimate sanction of dismissal, the complications created by local circuit rules will likely be resolved through correction of procedural errors before the conclusion of the proceedings in the court of appeals.[252] Local rules add to expense and, through diffusion of attorney resources, weaken the quality of advocacy, but seldom serve as the pivot upon which the result on the merits turns.[253] The best prospect for a case presenting the

250. *See, e.g.*, Partee v. Buch, 28 F.3d 636, 637-38 (7th Cir. 1994); United States v. Hess, 982 F.2d 181, 185 (6th Cir. 1992); Brown v Crawford Cty., 960 F 2d 1002, 1006-10 (11th Cir. 1992), Holloway v. Lockhart, 813 F.2d 874, 880 (8th Cir. 1987).

251 *But see* United States v. Samuels, 808 F.2d 1298, 1299 (8th Cir. 1987) (separate statement of Lay, C.J., on order denying motion for rehearing en banc) (suggesting that Eighth Circuit's rule allowing a judge to request hearing or rehearing en banc is inconsistent with FRAP 35(b), which provides only for a "party" to seek hearing or rehearing en banc)

252. *See* Levin, *supra* note 17, at 1576 (arguing that appellate review is not a realistic option to challenge local rules as inconsistent with the federal rules and asking "[w]hat litigant, what litigator, would willingly suffer an adverse final judgment by flouting a rule promulgated by the majority of judges of the court in which the case is being tried, no matter how clear the inconsistency may appear").

253. *See* Roberts, *supra* note 17, at 553 ("The impact of the rules on individual litigants is usually too glancing to warrant appeal, and so they remain unchallenged."). *But see* Mortell v. Mortell Co , 887 F.2d 1322, 1327 (7th Cir. 1989)

issue would be one where the counsel suffered a monetary sanction for non-compliance with a circuit rule,[254] although the generally minimal amount of such sanctions would rarely justify further appeal in and of itself.

Second, even if such a case were to arise, the Supreme Court must agree to hear it. Ordinarily, an arcane dispute over the application of a local circuit rule would be unlikely to attract the attention of the justices. Moreover, even if a local circuit rule became a key point of contention in a case, appellate counsel must have expressly raised the specific issue of the rule's validity in order to preserve that issue for Supreme Court review. However, if a well-presented petition for review educated the Court about the threat that local rule proliferation poses to the unitary federal judicial system and the general deleterious effects on appellate practice, the Court might find such a case to be "certworthy."

The Supreme Court's attention to the impact of local circuit rules was obtained in one recent case, where the impact was upon the Court itself. In *Austin v. United States*,[255] the Court granted the application of an attorney, appointed as counsel to a criminal defendant, to withdraw without filing a petition for certiorari on grounds that he believed were frivolous.[256] The Court recognized that a Fourth Circuit local rule required appointed counsel to file a petition for a writ of certiorari at the request of a defendant, notwithstanding the Supreme Court's contrary rule sanctioning counsel for filing frivolous petitions.[257] The Court expressed concern that counsel might feel "encouraged or perhaps bound" by the circuit rule to file petitions that rest on frivolous claims, and that such circuit rules "may explain, in part, the dramatically increased number of petitions for certiorari on direct appeal from

(holding that the filing of a false certificate of compliance with local circuit rule, which requires attachment to brief of opinion or oral statement by lower court supporting the judgment under review, was sufficient reason to affirm without reaching the merits of the appellant's claim).

254. *See, e.g.*, Faras v. Hodel, 845 F.2d 202, 204-05 (9th Cir. 1988) (approving $250 sanction for failure to file a timely civil appeals docketing statement as required under local circuit rule); Kalombo v. Hughes Market, Inc., 886 F.2d 258, 259-60 (9th Cir. 1989) (imposing sanction against counsel for failure to comply with circuit rules regarding contents of the brief and excerpts of record, as well as for filing a frivolous appeal).

255. 115 S. Ct. 380 (1994) (per curiam).

256. *See id.* at 380.

257. *See id.* at 380-81.

federal courts of appeals filed by persons *in forma pauperis*."[258] For this reason, the Court directed the circuits to reexamine their rules to ensure that they do not conflict with the Supreme Court's rules.[259] Thus, under certain circumstances, the Court will consider challenges to the validity of circuit rules and reject procedures that conflict with the rules it has promulgated.

Nevertheless, while a Supreme Court precedent could be a powerful unifying action, the contingencies necessary to achieve Supreme Court review remain uncertain in the near future. Thus, it would be unwise to wait, possibly in vain, for the ideal opportunity to arise for Supreme Court consideration.

C. *Action by Congress*

As the role of the Supreme Court in procedural rulemaking declines,[260] the role of Congress has increased, but not without controversy. Congressional action threatens to politicize the process,[261] submerges the greater expertise of judges in civil rulemaking,[262] and provokes the objection that congressional intervention in court procedures constitutes an unconstitutional intrusion upon the prerogatives of the independent Judicial Branch.[263]

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258 *Id* at 381.

259 *See id.*

260. *See supra* Part V.A.

261. *See* Linda S. Mullenix, *Unconstitutional Rulemaking: The Civil Justice Reform Act and Separation of Powers*, 77 MINN. L. REV. 1283, 1287 (1993) (arguing that the Civil Justice Reform Act "will irretrievably politicize federal procedural rulemaking"); Paul D. Carrington, *The New Order in Judicial Rulemaking*, 75 JUDICATURE 161, 164 (1991) ("[C]ivil justice in the federal courts today is more vulnerable than it has ever been to impositions by factional interests.").

262. *See* Walker, *supra* note 219, at 459-60 (arguing that "the merits of judicial rulemaking far outweigh the demerits, largely because trial and appellate judges typically bring great expertise to the task").

263. *See* Carrington, *supra* note 3, at 966-75 (concluding "that Congress lacks constitutional authority to disable the Supreme Court from performing its constitutional responsibilities for the direction of 'inferior' courts to ensure their fidelity to law," including a core of authority to ensure each district court does not become a law unto itself with respect to matters that are procedural"); Mullenix, *supra* note 261, at 1297-98 (arguing that Congress acts unconstitutionally when it involv[es] itself deeply in the internal operations of the federal judiciary," including establishing a process for implementing procedural rules that is "controlled by forces other than the established decision makers within the federal court system"); Mullenix, *supra* note 17, at 382 (arguing that the Civil Justice Reform Act's supervision of rulemaking constitutionally "impairs the ability of the federal courts to control their internal processes and the conduct of civil litigation"). *But see* Robel, *supra* note 6, at 1480 (arguing that the Supreme "Court's implied rulemaking authority, although generally recognized, should be subservient to Congress' except where the Court exercises its power in defense of judicial authority or integrity"); Martin H. Redish, *Federal Judicial Independence*, 46 MERCER L. REV. 697, 724-25 (1995) (concluding that congressional involvement in the prescription of procedural rules does not violate constitutional protection of separation of powers).

Moreover, Congress's recent forays into this area have been schizophrenic. In 1988, Congress enacted the Judicial Improvements and Access to Justice Act[264] precisely to address the proliferation of local rules.[265] The Act requires each federal court, other than the Supreme Court, to appoint an advisory committee to review that court's rules and further empowers the judicial councils of the circuits and the Judicial Conference to modify or abrogate local court rules.[266] However, just two years later, Congress enacted the Civil Justice Reform Act of 1990,[267] which, by directing each district court to develop its own civil justice reform plan for reducing litigation expense and delay,[268] initiated an unprecedented level of experimentation and confusion at the local district court level. Thus, Congress has been an uncertain friend of federal court uniformity and an unstable supporter of procedural unity.[269]

Nevertheless, resort to Congress may be necessary in the event that the Judicial Conference declines to take firm and active measures to suppress the chaos in federal appellate procedure. Congress could be an indispensable provocateur in a new revolution to unify federal practice. Indeed, even introduction and committee consideration of legislation, short of actual

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264 *See* Pub. L No. 100-702, 102 Stat. 4642 (1988) (codified at 28 U.S C. §§ 2071-74).

265. *See generally* McCabe, *supra* note 219, at 1662-63; Tobias, *supra* note 8, at 1599-1601.

266. *See* 28 U.S.C. §§ 2071(b), (c), 2077(b) (1994).

267. *See* Pub L No. 101-650, 104 Stat. 5089 (1990) (codified at 28 U.S.C. §§ 471-82).

268. *See* 28 U S.C. §§ 471-82 (1994).

269. *See* McCabe, *supra* note 219, at 1664 ("Ironically, while Congress attempted to promote national uniformity and limit the proliferation of local court rules in 1988, it took an entirely different approach just two years later in enacting the Civil Justice Reform Act of 1990."); Tobias, *supra* note 8, at 1623-27 (observing that, when Congress enacted the Judicial Improvements Act in 1988, "Congress accurately perceived local procedural proliferation to be a major problem that was contributing significantly to the erosion of uniformity, simplicity, and trans-substantivity in federal civil procedure; facilitating expanded judicial discretion; and increasing the cost of and delay in litigation," but when Congress enacted the Civil Justice Reform Act in 1990, it "encouraged local procedural innovation" to address the problem of cost and delay and thereby "effectively suspended efforts to reduce local procedural proliferation").

enactment, might motivate the courts to act and thus avoid preemption by Congress.

If Congress has authority to act in the area of judicial procedure, its power is at its greatest when it acts to ensure that the federal courts that Congress has created maintain a *federal* orientation.[270] Congress surely has an interest in preserving a unitary federal judicial system, especially if judicial entities prove incapable of or timid in controlling individual hyperactive elements that disrupt national uniformity and procedural simplicity. By mandating the primacy of the federal rules adopted by the Judiciary itself through its national decision-making bodies, Congress would not usurp the Judiciary's inherent powers or alter the allocation of rulemaking authority between the Legislative and Judicial Branches.[271] If the Judicial Conference fails to amend FRAP 47 to resoundingly reject spurious local innovation or to veto discordant local circuit rules to preserve federal uniformity, then Congress should consider legislative reform. The Rules Enabling Act could be amended to even more explicitly prohibit local tinkering with the federal rules that are adopted in conformity with that Act.

D. Circuit Self-Restraint

The least promising, but most readily available, mechanism for control of local rule proliferation and restoration of federal unity is self-restraint by the individual circuits in withholding adoption of new local rules and vigor in reexamining existing procedural practices. Indeed, this process is not only available, it is statutorily mandated. Under the Judicial Improvements Act of 1988,[272] Congress "imposed a continuing duty on the [circuit] councils to scrutinize the local procedures that existed . . . and all procedures subsequently adopted."[273] However, as is always true,

270. *See* Chemerinsky & Friedman, *supra* note 2, at 784 ("The premise of the federal courts is that they reflect one court system doing the nation's business.").

271. *See* Mullenix, *supra* note 261, at 1331-32 (concluding that the Judicial Improvements Act of 1988, which revised the procedures of the rulemaking process, did not "alter[ ] the constitutional allocation of rulemaking authority between the legislative and judicial branches").

272. *See* Pub. L. No. 100-702, 102 Stat. 4642 (1988) (codified at 28 U.S.C. §§ 2071-78).

273. Tobias, *supra* note 8, at 1601 (describing, in particular, provisions of 28 U.S.C. § 2071(c)). *But see* Carl Tobias, *Suggestions for Circuit Court Review of Local Procedures*, 52 WASH. & LEE L. REV. 359, 362 (1995) ("Unfortunately, very few circuit judicial councils in the twelve United States Circuit Courts of Appeal have fully implemented the requirements relating to appellate court oversight that are found in the [federal rules and the Judicial Improvements Act].").

reliance upon self-policing of behavior is sufficiently doubtful as to counsel hesitation and skepticism. As has been true at the district court level, local rules committees comprised of judges and practitioners from within a single circuit are "probably less concerned about maintaining national uniformity than about accommodating the needs of local federal judges, attorneys, and parties."[274] The difficulty of overcoming parochialism, in the absence of a strong national oversight process, cannot be underestimated.[275] The current state of affairs is ample evidence that the courts of appeals have been unable to see past the borders of their individual circuits to coordinate federal appellate practice.

Perhaps such pessimism is not warranted. With the light shed upon the problem of proliferation of local circuit rules in this and other recent studies, circuit councils[276] may be more poignantly aware of the disarray that has resulted and view the matter from a broader perspective that reaches beyond their own circuits. The balkanization of federal appellate practice has grown incrementally. Thus circuit judges and members of circuit councils may only now begin to appreciate the cumulative and national effects of local experimentation. If the individual circuits should be motivated to join the cause of unification (and even if not so motivated, accept their statutory duty), their mission is to ensure the consistency of their local rules with the FRAP and to prune their rules in the national interest of uniformity and simplicity.[277] Local rules that deviate from or expand upon the

274. Tobias, *supra* note 8, at 1606 (discussing local rules committees in the district courts).

275. *See* Tobias, *supra* note 273, at 364 (observing that "numerous district judges are very protective of their prerogatives to adopt and apply local procedures").

276. The "circuit council" is the governing body within a circuit. *See* 28 U.S.C. § 332 (1994). The chief judge of the circuit chairs the circuit council, which is composed of an equal number of circuit and district judges. *See id.* § 332(a)(1). The circuit council "is the chief administrative agency within a circuit, [although] responsibility for court administration within a circuit is shared to a degree with the court of appeals and the various district courts in the circuit." William W. Schwarzer, *The Federal Judicial Center and the Administration of Justice in the Federal Courts*, 28 U.C. DAVIS L. REV. 1129, 1149 (1995).

277. *See* Tobias, *supra* note 8, at 1632 (arguing that as part of the local procedural revision process, "the major priority should be instituting processes for reviewing all local procedures, abrogating those measures that are unnecessary or inconsistent, limiting the number of local procedures and including as many as possible in local rules, and reducing each local procedure to writing").

federal rules, that do not simplify or streamline appellate practice, or that do not pertain to matters of uniquely local concern narrowly defined, should be eliminated. Moreover, each circuit should designate a rules officer to whom questions by counsel concerning local rules would be referred for an authoritative answer.

In this regard, the First Circuit stands as a model of the possible. The First Circuit notably has found little need to supplement the federal rules with respect to briefing, properly finding the FRAP quite adequate for efficient and just disposition of appellate litigation. Unfortunately, even the First Circuit has been tempted by the prevailing culture of variation. Thus it has departed to a limited degree from the briefing requirements of FRAP 28[278] in its adoption of a specific rule on citation of authorities[279] and a requirement that an addendum of the district court's judgment and certain other district court documents be attached to the brief.[280] However, these minor failings should not detract from the significance of the First Circuit's general and successful reliance upon the federal rules as sufficient unto the day.

VI. CONCLUSION

The rationale behind local supplementation of the federal rules is to permit each court of appeals to address individual concerns unique to that circuit, but in a manner consistent with the policies embodied in the federal rules. As Professor Shirley A. Wiegand has said, local rules are authorized for the purpose of "address[ing] a problem or situation unique to a particular locale."[281] Each circuit should not be allowed to go its own way and devise its own procedures for federal appellate practice based, not upon local exigencies, but rather upon its autonomous views of the wisest or most efficient procedures.

That a procedural innovation may be a good one does not mean that an individual circuit should unilaterally adopt it. If the judges of a particular circuit believe they have devised a

278. FED. R. APP. P. 28.
279. *See* 1ST CIR R. 28.1.
280. *See id.* 28.2.
281. Shirley A. Wiegand, *A New Light Bulb or the Work of the Devil? A Current Assessment of Summary Jury Trials*, 69 OR. L. REV. 87, 109 (1990) (discussing district court local rules).

better mousetrap, they should submit their invention to be patented by the Judicial Conference and the Supreme Court. If the idea is indeed a good one, the appropriate process for a federal court system is for the idea to be proposed, debated, carefully formulated, and adopted as an amendment to the *federal* rules. The uniformity of the federal court system is destroyed when individual elements of the system unilaterally revise the process to their own preferred specifications.

The pendulum has swung heavily away from national uniformity and too far in the direction of local experimentation with little coordination among the circuits. Rule 1 of the Federal Rules of Civil Procedure explicates the purpose of all rules of procedure: "to secure the just, speedy, and inexpensive determination of every action."[282] Today, that procedural goal can best be achieved in the United States Courts of Appeals by the revitalization of the FRAP as the unitary and primary regime governing federal appellate practice.

282. FED. R. CIV. P. 1.

IV-G

MEMORANDUM

DATE: February 20, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-41

The Acting Solicitor General has requested that the Federal Rules of Appellate Procedure be amended to provide that the time to appeal an order granting or denying an application for a writ of error *coram nobis* should be as provided in Rule 4(a) (which governs appeals in civil cases) rather than as provided in Rule 4(b) (which governs appeals in criminal cases). Attached is a letter from the Acting Solicitor General, a draft amendment to Rule 4(a), and a draft Advisory Committee Note. The Acting Solicitor General describes the reasons for his request in his letter, but some additional background may nevertheless be helpful:

At common law, a litigant could apply for a writ of error *coram nobis* to set aside a civil or criminal judgment — even a very old civil or criminal judgment — on account of errors of fact that were "material to the validity and regularity of the legal proceeding" that had produced the judgment. *United States v. Mayer*, 235 U.S. 55, 67-68 (1914). Thus, a person against whom a civil judgment had been entered could seek a writ of error *coram nobis*, even if she had long ago satisfied that judgment. Or a person who had been convicted of a crime could seek a writ of error *coram nobis*, even if he had long ago served his full sentence and been released from prison.

In 1946, Fed. R. Civ. P. 60(b) was amended to expressly "abolish[]" writs of error *coram nobis* in civil cases. Two years later, Congress enacted 28 U.S.C. § 2255, the purpose of which

(according to the legislative history) was to "restate[], clarif[y] and simplif[y] the procedure in the nature of the ancient writ of error *coram nobis.*" Thus, the writ of error *coram nobis* appeared to be dead: In civil cases, it had been abolished by Fed. R. Civ. P. 60(b), and in criminal cases, it seemed to have been subsumed within § 2255.

In 1953, however, the Supreme Court held, 5-4, that litigants could continue to seek a writ of error *coram nobis* in federal court in at least one narrow circumstance. According to the Court, a person who had been convicted of a crime, served his full sentence, and been released from custody, could later seek a writ of error *coram nobis* to set aside that conviction if he was continuing to suffer some legal disadvantage on account of it. *United States v. Morgan*, 346 U.S. 502 (1954).[1] The Court found that authority to issue a writ of error *coram nobis* in this circumstance was extended to the federal courts by the All Writs Act, 28 U.S.C. § 1651(a), and abolished by neither Fed. R. Civ. P. 60(a) nor § 2255. The Court reasoned that because an application for a writ of error *coram nobis* in this circumstance "is a step in the *criminal* case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate *civil* proceeding," Rule 60(b) of the Federal Rules of *Civil* Procedure was not intended to abolish it. *Morgan*, 346 U.S. at 505 n.4 (emphasis added). Moreover, although an application for a writ of error *coram nobis* in this circumstance "is of the same general character as [a motion] under 28 U.S.C. § 2255," *id.* at 506 n.4, it is not brought by "[a] prisoner *in custody*," 28 U.S.C. § 2255 (emphasis added), and thus not directly addressed by the statute. Notwithstanding

[1]Often these cases arise, as in *Morgan* itself, when the applicant has been convicted of a subsequent state or federal crime and, because of his or her prior federal conviction, sentenced under a repeat offender statute.

the legislative history to the contrary, the Court refused to hold that § 2255 occupied "the entire field of remedies in the nature of *coram nobis* in federal courts." *Morgan*, 346 U.S. at 510.

In dissent, Justice Minton made three major points. First, authority to issue writs of error *coram nobis* had not been granted in the All Writs Act, as such writs were neither "necessary [n]or appropriate in aid of [the federal court's] jurisdiction[]" nor "agreeable to the usages and principles of law." *Id.*, 346 U.S. at 514-17 (Minton, J., dissenting). Second, because proceedings to obtain writs of error *coram nobis* "are generally considered to be civil in nature," *id.* at 517, Fed. R. Civ. P. 60(b) abolished the writ, leaving the applicant to the remedies expressly provided in Fed. R. Civ. P. 60(b) for attacking final judgments. *Id.* at 517-18. And third, even if the majority was correct that "Rule 60(b) is . . . inapplicable because *coram nobis* may be sought by a motion in the criminal case rather than in a separate, independent proceeding," *id.* at 518, the writ of error *coram nobis* was nevertheless "superceded" by § 2255, *id.* at 518-19. Congress had, in § 2255, provided a "comprehensive procedure for collateral attacks on federal criminal judgments," and yet had chosen not to "extend the remedy there provided to persons not in federal custody under the judgment attacked." *Id.* at 519. That being the case, the Court should "not feel free to do so." *Id.*

The views of the present members of the Supreme Court may be closer to Justice Minton's than to those of the *Morgan* majority. In *Carlisle v. United States*, 517 U.S. 416 (1996), Justice Scalia, writing for a seven Justice majority, pointed out that "'[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute. Where a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling,'" *id.* at ___ (quoting *Pennsylvania Bureau of Correction v. United States*

Marshals Service, 474 U.S. 34, 43 (1985)). Justice Scalia asserted that in light of Fed. R. Crim. P. 29(c) — which specifically sets forth the circumstances under which a motion for a judgment of acquittal can be brought after the jury is discharged (and which was amended and broadened in 1966) — "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate.'" *Id.* at ___ (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)).

In short, there is some reason to doubt the continued validity of the writ of error *coram nobis*. In civil cases, the writ has been expressly abolished; in criminal cases, the Supreme Court has stated that it is "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate'" *Id.* Because *Morgan* has not been expressly overturned, though, applications for the writ continue to be brought, those applications continue to be granted or denied by district courts, and the grants and denials of those applications continue to be appealed. And therein lies the reason for the attached amendment to Rule 4(a).

The courts of appeals are badly split on the question of whether the grant or denial of a writ of error *coram nobis* must be appealed within the time provided by Rule 4(a) (which applies to appeals in civil cases) or Rule 4(b) (which applies to appeals in criminal cases). As explained above, writs of error *coram nobis* are neither "fish nor fowl." The Supreme Court has said both that applying for the writ is "a step in the criminal case" and that it is "of the same general character as [seeking relief] under 28 U.S.C. § 2255." *Morgan*, 346 U.S. at 505-06 n.4. (Section 2255 actions are considered civil in nature.) Given these mixed signals, it is perhaps not surprising that the courts of appeals cannot agree whether appeals from orders disposing of applications for writs of error *coram nobis* should be treated as civil appeals under Rule 4(a) or as

criminal appeals under Rule 4(b). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (applying the time limitations of Rule 4(b)).

The Acting Solicitor General has asked that Rule 4 be amended to specify that the time limitations of Rule 4(a), and not those of Rule 4(b), should apply to appeals from orders granting or denying applications for writs of error *coram nobis*. The justifications for his request are described in his letter. The Acting Solicitor General further requests that the Advisory Committee Note accompanying this amendment make clear that the Advisory Committee takes no position on whether the writ is still available. Rather, the Advisory Committee should do nothing more than provide that *if* the writ is still available, the time limitations of Rule 4(a) apply to appeals of district court orders granting or denying the writ.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

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

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

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

Advisory Committee Note

Subdivision 4(a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations in Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the

conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

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

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

97-41

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

Washington, D.C. 20530

SEP 26 1997

97-AP-H

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

Re: Appellate Rules Committee: Proposal to Amend FRAP 4 Concerning Time for Filing Notice of Appeal from an Order Entered on a Motion for a Writ of Coram Nobis

Dear Judge Logan:

The Department of Justice recommends that Federal Rule of Appellate Procedure 4 be revised to provide that the time for appeal from an order entered on a motion for a writ of coram nobis should be as provided by FRAP 4(a) (concerning appeals from orders in civil cases). We would appreciate it if you could place this matter on the Advisory Committee's docket and schedule the matter for discussion at an appropriate time.

A. Background

The writ of coram nobis was traditionally available to "bring before the court factual errors 'material to the validity and regularity of" a civil or criminal trial. Carlisle v. United States, 116 S. Ct. 1460, 1467 (1996) (citation omitted). Congress abolished the writ in civil cases in a 1946 amendment to Federal Rule of Civil Procedure 60(b). See Fed. R. Civ. P. 60(b). At that time, Congress also enacted 28 U.S.C. 2255, which authorizes a prisoner to collaterally attack a criminal sentence if he is in custody.

Several years later, the Supreme Court, by a 5-4 vote, held that the writ of coram nobis is still available in criminal cases. See United States v. Morgan, 346 U.S. 502 (1954). The majority concluded that courts have jurisdiction to issue coram nobis relief under the All-Writs Act, 28 U.S.C. 1651, 346 U.S. at 506, and that Federal Rule of Civil Procedure 60(b) did not abolish coram nobis relief in criminal cases because in that context it "is a step in the criminal case and not, like habeas corpus where relief is sought in a separate case and record, the beginning of a separate civil proceeding," id. at 505 n.4. The majority also explained that the writ of coram nobis is "of the same

general character as one under 28 U.S.C. 2255," ibid., presumably in that both types of relief involve collateral attacks on a criminal sentence.

In Carlisle v. United States, 116 S. Ct. 1460 (1996), the Court appeared to call into question whether coram nobis relief should continue to be available in criminal cases. The Court held that coram nobis relief would not have been available to the plaintiff in Carlisle because, among other reasons, "'[t]he All Writs Act is a residual source of authority to issue writs that are not otherwise covered by statute,'" id. at 1467 (citation omitted), and because "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate.'" Id. at 1468 (quoting United States v. Smith, 331 U.S. 469, 475 n.4 (1947)).

B. Time for Filing an Appeal From an Order Seeking A Writ of Coram Nobis

The circuits are divided on whether the filing of a notice of appeal from the district court's grant or denial of a writ of coram nobis is governed by the time period applicable to civil or criminal appeals.

- The Second, Fifth, and Seventh Circuits have concluded that the time limit for civil appeals applies to coram nobis appeals. See United States v. Craig, 907 F.2d 653 (7th Cir.), amended, 919 F.2d 57, cert. denied, 500 U.S. 917 (1990); United States v. Cooper, 876 F.2d 1192 (5th Cir. 1989); United States v. Keogh, 391 F.2d 138 (2d Cir. 1968).

- The Eighth and Ninth Circuits have concluded that the time limit for criminal appeals applies to coram nobis appeals. Yasui v. United States, 772 F.2d 1496 (9th Cir. 1985); United States v. Mills, 430 F.2d 526 (8th Cir. 1970).

A notice of appeal in a civil case in which the United States is a party must be filed within 60 days after entry of judgment, or 14 days after another party files a notice of appeal. FRAP 4(a). In a criminal case, a defendant must file a notice of appeal within ten (10) days after entry of judgment or the filing of a notice of appeal by the government. The government's notice of appeal in a criminal case is due 30 days after entry of judgment or the filing of a notice of appeal by any defendant. FRAP 4(b).

B. Analysis

As the above discussion shows, whether coram nobis relief is best characterized as criminal or civil, and whether there are any modern-day circumstances in which coram nobis relief is properly available, are matters of continuing controversy. The Committee need not resolve those issues, however, in order to clarify when a notice of appeal is due from an order seeking a writ of coram nobis, and eliminate the circuit division noted above.

The Rules Enabling Act, 28 U.S.C. 2071, et seq., authorizes the Supreme Court to adopt rules of practice and procedure for the federal courts unless Congress disapproves those rules. The due date of a notice of appeal clearly is a procedural matter, and the Committee does not have to decide whether a writ of coram nobis is criminal or civil to prescribe when a notice of appeal in that kind of a proceeding is due. Rather, all the Committee has to do is decide what the most logical filing period should be.

We believe it makes sense to treat an appeal from an order seeking a writ of coram nobis as due when a notice of appeal in a civil case would be due (60 days from entry of judgment when the United States is a party). Several reasons support that view.

1. In United States v. Morgan, the Supreme Court explained that a writ of coram nobis is "of the same general character as one under 28 U.S.C. 2255." 346 U.S. at 505 n.4. A notice of appeal from an order in a Section 2255 proceeding is governed by the deadline for filing a civil appeal. See Rules Governing Section 2255 Proceedings For The United States District Courts, Rule 11 ("The time for appeal from an order entered on a motion for relief made pursuant to these rules is as provided in Rule 4(a) of the Federal Rules of Appellate Procedure."). Thus, it is logical to provide the same filing deadline for a notice of appeal from an order on a motion seeking a writ of coram nobis as a request for relief under Section 2255.

2. FRAP 4(b) provides a shorter time limit for filing a notice of appeal in a criminal case than a civil case because there is a strong public interest in the prompt adjudication of an appeal that involves the potential for imposing a criminal sentence. A request for a writ of coram nobis, however, does not involve that interest. Statutory authority for a prisoner to seek relief from a conviction while he or she is still in custody is provided by 28 U.S.C. 2255. Thus, coram nobis relief is potentially available under the All Writs Act only when a prisoner has completed serving his or her sentence. In that context, there is no general need to require expedited proceedings on appeal.

C. Conclusion and Recommendation

For the reasons stated above, we recommend that the Committee amend FRAP 4 to provide that the time for filing a notice of appeal from an order entered on a motion for a writ of coram nobis is the same as the time for filing a notice of appeal in a civil case. One way to implement that recommendation would be to add the following subsection (C) to Rule 4(a)(1) as it is presented in the Preliminary Draft of Proposed Revision of the Federal Rules of Appellate Procedure Using Guidelines for Drafting and Editing Court Rules (April 1996):

> (C) The time for filing a notice of appeal from an order entered on a motion for a writ of coram nobis is as provided in Rule 4(a) of these rules.

We also recommend that the Committee prepare a Committee Note explaining that the Committee is not attempting to resolve whether there can ever be a "'situation in a federal criminal case today where [a writ of coram nobis] would be necessary or appropriate.'" Carlisle v. United States, 116 S. Ct. 1460, 1468 (1996) (citation omitted). The Committee Note should explain that the amendment is intended for the sole purpose of eliminating the current conflict among the circuits regarding when a notice of appeal from an order seeking a writ of coram nobis is due.

Thank you for your assistance in this matter.

Sincerely,

Seth P. Waxman
Acting Solicitor General

cc: Patrick J. Shiltz
Reporter, Advisory Committee
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Notre Dame Law School
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Douglas N. Letter
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V-A

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New Orleans, Louisiana
March 11, 1998

To: Advisory Committee Chairs
Advisory Committee Reporters

From: Gene W. Lafittte

Re: Comments on Proposed Rules via the Internet

Attached is a copy of a memorandum to me from John Rabiej, dated October 31, 1997, concerning the capability of the Rules Committee Support Office to receive public comments on proposed rule changes directly on the Internet via e-mail. You will note that in the memorandum Mr. Rabiej mentioned arguments in favor of electronic comments, and arguments against comments via e-mail. Judge Stotler requested that the Technology Subcommittee of the Standing Rules Committee consider the proposal and provide its recommendations to the Advisory Committees for consideration at their Spring, 1998 meetings. It is contemplated that the Advisory Committees could then respond to the Subcommittee with their views, and the Subcommittee, with the benefit of those responses, will then make a final recommendation to the Standing Committee when the matter is submitted for decision at its meeting in June. The Technology Subcommittee has considered the issue, and this is to report its recommendations at this point.

The Technology Subcommittee takes the view that the use of e-mail to submit comments should be permitted, at least on a trial basis, in order to make the rule-making process as open and accessible as possible. Our recommendation is that e-mail comments be allowed for a trial period of two years, without any requirement that the e-mail comments be summarized by reporters. We suggest that at the end of the trial period the use of e-mail comments be reviewed to determined whether they should be a permanent part of the rule-making process. We also suggest that, if feasible, the Rules Support Office continue to acknowledge each comment, by e-mail, and that the Support Office make available on the Internet a generic explanation of action of the Advisory Committees in response to comments received.

If you have any questions or comments concerning the Technology Subcommittee recommendation, please feel free to call.

GWL:ed
Attachment to all recipients

cc: The Honorable Alicemarie H. Stotler
Liaison Members to Technology Subcommittee
Professor Daniel R. Coquillette
Mr. John K. Rabiej

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR.
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

October 31, 1997

MEMORANDUM TO GENE W. LAFITTE

SUBJECT: *Receipt of Comments on the Internet*

The proposed amendments to the federal rules, which were published for comment on August 15, 1997, are located on the Judiciary's Home Page on the Internet <http://www.uscourts.gov>. My office now has the capability to receive public comments on the proposed amendments directly on the Internet via E-mail. An E-mail address can be established at my office and we could receive all electronic comments, reproduce them, and circulate hard copies to each committee member.

Although we considered receiving comments electronically, a final decision was deferred. We need now to reach a consensus among our advisory rules committees on this issue. As we earlier discussed, your subcommittee could review this matter and report back to their respective committees the subcommittee's conclusions and recommendations. Hopefully the advisory rules committees will be able to agree on the subcommittee's proposals so that we can present the Standing Rules Committee with a uniform recommendation.

We have identified several arguments for and against the proposal, which may help the subcommittee's deliberations.

Arguments in Favor of Electronic Comments

- Electronic submission of comments would be consistent with the rules committees' policy of reaching out to the bar and public and informing them of proposed rules changes and encouraging public input.

- Electronic submission of comments meets recommendation No. 5 of the Standing

Committee's Self-Study Plan, which recommends to the Administrative Office that: "Electronic technologies should be used to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees." The text of the plan includes a specific recommendation that "Persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee."

Arguments Against Electronic Comments

- Comments via E-mail are less likely to be as well thought out as comments submitted in writing, and many may not be serious.

- Under the Judicial Conference rulemaking procedures, each reporter must "prepare a summary of the written comments received and the testimony presented at the public hearings." Summarizing all Internet comments may be burdensome. Online comments may be viewed as non-written comments, or a clear disclaimer could be included on the Internet Home Page stating that all electronic comments will be circulated to each committee member, but will not be included in the summary of comments. But such treatment may perceived as establishing a "second-class" category of comments.

- Although not required by the Judicial Conference rulemaking procedures, my office has acknowledged each comment and followed it up with a communication explaining the advisory committee's response. Continuing to respond to each electronic comment would probably be impossible, but we could provide a generic explanation of the committee's actions and place it on the Internet.

John K. Rabiej

V-B

MEMORANDUM

DATE: March 8, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-14

As you undoubtedly recall, the Standing Committee has been concerned for some time about the wide variety of local rules governing attorney conduct in the federal courts. At its January 1998 meeting, the Standing Committee referred several questions to each of the Advisory Committees. Those questions are described in a February 11, 1998 memorandum from Prof. Daniel Coquillette, the Reporter to the Standing Committee, to the Chairs and Reporters of the Advisory Committees. A copy of Prof. Coquillette's memorandum is attached.

Based upon Prof. Coquillette's memorandum, the January 1998 Standing Committee meeting, and a separate meeting between Prof. Coquillette and the Reporters to the Advisory Committees that was held immediately after the January 1998 Standing Committee meeting, it appears to me that this Advisory Committee is being asked to respond to at least the following questions:

> **Question No. 1:** As an original matter, would this Committee seek to amend Rule 46 even if action were not being taken to address the problem of conflicting standards of attorney conduct in the trial courts?

The Federal Rules of Appellate Procedure already *contains* a uniform national standard governing attorney conduct; indeed, it is the only set of rules that does so. Rule 46(b)(1)(B) provides that a member of the bar of a court of appeals may be suspended or disbarred if he or she

"is guilty of conduct unbecoming a member of the court's bar." Prof. Coquillette has expressed the view that this "conduct unbecoming" standard is "notoriously vague," even after the Supreme Court's application of the standard in *In re Snyder*, 472 U.S. 634 (1985) (a copy of which is attached). However, he concedes that, as a practical matter, the "conduct unbecoming" standard has created few problems in the courts of appeals. Rule 46 has been invoked only rarely, and generally only to punish conduct that is so flagrant as to qualify as "conduct unbecoming" under *anyone's* definition of the term.

> **Question No. 2:** If the FRCP and FRCrP are amended to adopt one or more of the proposed Federal Rules of Attorney Conduct, would this Committee be willing to amend Rule 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts?

Everyone concedes that the problem of conflicting standards of attorney conduct is primarily a problem for the district courts, and should be addressed primarily by the Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules. And everyone seems to agree that this Advisory Committee should take a "wait and see" approach. Nevertheless, if the members of this Committee are strongly disinclined to amend Rule 46 to replace the "conduct unbecoming" standard with whatever approach is eventually adopted for the district courts, we probably ought to give the Standing Committee advance warning of that disinclination.

> **Question No. 3:** If this Committee is inclined to amend Rule 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts, are the amendment to Rule 46 and the Advisory Committee Note drafted by Prof. Coquillette acceptable?

Prof. Coquillette has drafted an amendment to Rule 46 and an Advisory Committee Note, and he has asked that his work "be reviewed for technical errors and drafting suggestions" by this Committee.

Question No. 4: Which of the four approaches being considered by the Standing Committee should be adopted for the district courts?

As Prof. Coquillette's memo describes, the Standing Committee is considering four options for addressing this problem in the district courts. The options for reform, ranked from most sweeping to least sweeping, are as follows:

Option One is to adopt the ten "Federal Rules of Attorney Conduct" that have been drafted by Prof. Coquillette. Pursuant to the first of the ten rules, any conduct not addressed by any of the other nine rules would be governed by the rules of the state in which the district court sits. The nine "substantive" rules are essentially revised versions of nine of the Model Rules of Professional Conduct. Most of the revisions are stylistic and were done under the guidance of Bryan Garner. But a couple of the revisions are substantive and controversial (*see, e.g.*, the Notes to Rule 2 and Rule 10). Prof. Coquillette explained that, in deciding which of the Model Rules would be selected for inclusion in the Federal Rules, he attempted to chose those Model Rules that addressed "core" behavior — that is, behavior that had a direct connection to court proceedings.

Option Two is to adopt only *some* of the proposed Federal Rules of Attorney Conduct. Again, pursuant to the first of the rules, any conduct that is not addressed by whichever of the other rules that are adopted would be governed by the rules of the state in which the district court sits. If the Standing Committee takes this approach, it is clear that Federal Rule 10 will be the leading candidate for inclusion. Rule 10 attempts to resolve a longstanding conflict between the Department of Justice and the state courts over the interpretation and enforcement of Model Rule 4.2. For background on that dispute, I have attached a copy of *O'Keefe v. McDonnell Douglas*

Corp., 132 F.3d. 1252 (8th Cir. 1998). The conflict over Model Rule 4.2 was the subject of much of the Standing Committee's discussion of the attorney conduct issue and seems to be providing a substantial part of the impetus for adopting uniform rules of attorney conduct.

Option Three is to adopt only the first of the ten Federal Rules of Attorney Conduct. Under this option — the "dynamic conformity" approach — all attorney conduct would be governed by the rules of the state in which the district court sits. (There would be a "choice of law" provision that would determine which state's rules would govern attorney conduct in the appellate courts.) The Department of Justice opposes this option, in large part because it does not solve the Department's problem with Model Rule 4.2.

Option Four is to do nothing. My impression is that both Judge Stotler and Prof. Coquillette strongly oppose this option.

> **Question No. 5:** Who should have primary responsibility for drafting the Federal Rules of Attorney Conduct?

This question, which is only briefly mentioned by Prof. Coquillette in his memo, was the subject of much comment at the Standing Committee meeting itself and especially at the separate meeting of the Reporters. Prof. Coquillette was of the view that work on the Federal Rules of Attorney Conduct should be done by the Advisory Committees or by an ad hoc committee comprised of members of each of the Advisory Committees. The Reporters disagreed, arguing that the members of the Advisory Committees were not selected for their expertise on rules of professional responsibility and already have plenty of work to do in the areas that *are* within their expertise. The Reporters pointed out that neither they nor the members of their Committees were likely to know, for example, whether Model Rules should be added to the nine selected by Prof.

Coquillette, or whether some of the nine Model Rules selected by Prof. Coquillette should be eliminated, or whether Mr. Garner, in restylizing the nine rules that Prof. Coquillette selected, may have inadvertently changed terms of art or created new ambiguities. Several of the Reporters suggested that work on this project should be done by a separate committee that would be comprised of persons who were experts on regulating attorney conduct and who could work closely with the ABA's "Ethics 2000" Project (which is likely to propose revisions to the Model Rules).

> **Question No. 6**: Should the Federal Rules of Attorney Conduct be promulgated as a "stand alone" set of rules or as an appendix to the FRCP and/or the FRCrP?

This question relates closely to the prior question. There was some support expressed at the Standing Committee meeting for the notion that the Federal Rules of Attorney Conduct should stand independently — like the FRCP or the FRCrP or the FRAP — rather than as an appendix to another set of rules. If this approach was followed, the FRCP and the FRCrP would not have to be amended, but the FRAP would still have to be amended to delete the "conduct unbecoming" standard in Rule 46(b)(1)(B).

> **Question No. 7:** Does the Standing Committee have authority under the Rules Enabling Act to promulgate rules governing attorney conduct?

One issue that is not mentioned in Prof. Coquillette's materials but that concerned me and the other Reporters is whether it is appropriate to use the Rules Enabling Act process to promulgate a set of rules governing attorney conduct. Almost surely, rules governing some types of conduct — particularly conduct that occurs in court, in front of the judge — would be considered "procedural" and thus within the power of the Supreme Court under 28 U.S.C. § 2072. Just as surely, though, some types of conduct — particularly conduct that occurs outside

of court and that has little or no impact on court proceedings — would be outside of the Rules Enabling Act process. It seems likely that whomever is charged with recommending Federal Rules of Attorney Conduct to the Standing Committee will have difficult lines to draw.

> **Question No. 8:** Does the Committee wish to suggest any revisions to the ten Federal Rules of Attorney Conduct that Prof. Coquillette has drafted?

Finally, Prof. Coquillette has asked the Advisory Committees to review the Federal Rules of Attorney Conduct that he has drafted, not "to redraft the rules," but merely "to point out to the Standing Committee where improvements can be made."

TO: Chairs and Reporters, Advisory Committees

FROM: Daniel R. Coquillette
Reporter, Standing Committee

CC: Hon. Alicemarie Stotler, Chair
Standing Committee

DATE: February 11, 1998

RE: Federal Rules of Attorney Conduct

I. Introduction

The Standing Committee is charged by 28 U.S.C. § 2073 (b) "to maintain consistency" among the federal rules and "otherwise promote the interest of justice." Attorney conduct in the federal courts is now governed by literally hundreds of local rules, many of which are inconsistent with each other and with the rules of the relevant state courts. Our studies show a genuine and persistent problem, at least in district and bankruptcy courts. Whether the Congress will subscribe to any additional national rules is an issue to be met in the future, but federal rules regulating attorney conduct already exist in abundance. Moreover, the ABA, through its "Ethics 2000" Project, has expressed initial concern about the relationship between state and federal rules governing attorney conduct, a concern also shared by the Department of Justice and the Conference of Chief Justices, although these three entities may have very different views about appropriate solutions.

II. Status

As you know, the Standing Committee voted at its January 8-9, 1998 meeting to refer the draft Federal Rules of Attorney Conduct to the Advisory Committees for comment. At the suggestion of the Honorable Alicemarie Stotler, Chair, I am writing to indicate what help is expected from the Advisory Committees.

With this memo, you should receive two additional items for circulation to your Committees: 1) a memorandum from me to the Standing Committee of December 1, 1997, describing the fundamental options before the Committees (hereafter "Options Memo") and 2) a draft set of Federal Rules of Attorney Conduct, slightly amended for technical reasons from the set distributed with the Standing Committee Agenda in January (hereafter the "Draft Rules").

You will also recall a discussion about whether such Federal Rules of Attorney Conduct, if adopted through the Rules Enabling Act, would be best enacted as a free

standing set of federal rules, or included as an appendix to the Federal Rules of Civil Procedure. The advice of your committees is being sought on this issue. To aid discussion, a draft of possible amendments to Fed. R. Civ. P. 83 (1) and Fed. R. App. P. 46 is included. In addition, the "Options Memo" includes a possible amendment to Fed. R. Crim. P. 57 (d), at page 3.

Finally, every member of your Committees should have received a copy of the Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (September, 1997). These Working Papers include seven extensive studies prepared by me and by the Federal Judicial Center over a four year period, including studies specially focused on Courts of Appeals (Study V, June 20, 1997) and on Bankruptcy Cases (Study VI, June 20, 1997). The "Options Memo" and the "Draft Rules" are cross-referenced throughout to these Working Papers.

III. What is Expected of the Advisory Committees?

The Standing Committee has been reviewing four different options, and has not yet decided which one to pursue. See Options Memo, pages 1-2. One option is to do nothing. A second is to adopt a single uniform federal rule that adopts the current rules of the relevant state courts as the federal rule in the district courts, with a "choice of law" rule for courts of appeals. This, the so-called "dynamic conformity" option, could be achieved by just adopting Rule 1 of the draft Federal Rules of Attorney Conduct. A third option is to apply state standards to all but a "core" of federal rules narrowly drafted to cover only attorney conduct before federal judges or closely related to federal proceedings. (This could be achieved by adopting all ten of the draft Federal Rules of Attorney Conduct.) A fourth option would be to have even fewer "core" federal rules, and adopt only some of the ten draft rules.

The Standing Committee seeks the advice of your Committees on these fundamental options, set out in the "Options Memo." Further, the Standing Committee requests your Committees to examine the "Draft Rules" in light of the special expertise of your Committee. The purpose is not to ask you to redraft these rules yourself, but rather to point out to the Standing Committee where improvements can be made. My task will then be to coordinate the suggestions from all of the Advisory Committees into new drafts and proposals to be considered at the June, 1998 Standing Committee Meeting.

It is expected that certain Advisory Committees will have much less to do than others. In particular, as Study V (1997) of the Working Papers demonstrates, there are almost no attorney conduct cases in the Courts of Appeals, even though the Courts of Appeals have many inconsistent local rules. Apparently, there is no particular problem with attorney conduct at that level. Thus, the Chair and Reporter of the Appellate Advisory Committee have already suggested that they "wait and see" what is decided

for the district and bankruptcy courts, where the problems are much more serious. This is perfectly reasonable.

Bankruptcy proceedings also present a special situation, as Study VI (1997) of the Working Papers demonstrates. There is much to be said for at least considering separate rules governing attorneys in bankruptcy cases, both because of the importance of the Bankruptcy Code, particularly § 327 (11 U.S.C. § 327 (a)), and because bankruptcy cases can present very different issues for public policy and efficiency. See Study VI (June 20, 1997), Working Papers, 294-332. The Bankruptcy Advisory Committee may prefer to focus on developing their own solutions to balkanized local rules in bankruptcy proceedings, rather than comment extensively on the "Draft Rules" included in the memorandum.

The Evidence Advisory Committee also has a relatively specialized frame of reference. Thus, the Standing Committee will be looking to the Civil and Criminal Rules Advisory Committees for the bulk of the assistance. I will be attending all three of these meetings, and will be available to help in any way.

IV. Specific Requests to Individual Committees

In addition to the general advice sought above, there are some specific areas where specialized help would be welcome.

A. Civil Rules Advisory Committee

Should Fed. R. Civ. P. 83 (c) be amended as proposed by the "Draft Rules," or should the Federal Rules of Attorney Conduct be adopted as a new "free standing" set of federal rules? Are there additional changes in the Fed. R. Civ. P. that should be considered in either case? What if the decision is to adopt only Rule 1 of the "Draft Rules," the so-called state "dynamic conformity" approach? Should that one rule be incorporated within the Fed. R. Civ. P., and, if so, where?

B. Criminal Rules Advisory Committee

Should Fed. R. Crim. P. 57 (d) be amended as suggested by Professor Schlueter at pages 2-3 of the "Options Memo"? Does the Committee have comments on "Draft Rule 10," which is based on the most recent discussion draft of a revised ABA Model Rule 4.2, resulting from extensive negotiation between the Conference of Chief Justices and the Department of Justice? Are there other Draft Rules which should get special attention because of their application in criminal matters? Finally, should any new Federal Rules of Attorney Conduct be "free standing," or incorporated within the Fed. R. Civ. P. as an appendix to Fed. R. Civ. P. 83, or as an appendix to Fed. R. Crim. P. 57 (d), or both? What if only Draft Rule 1 is adopted, the so-called state "dynamic conformity" approach?

C. Appellate Rules Advisory Committee

It is understood that this Committee may take a "wait and see" approach on the fundamental policy issues, as discussed above. Nevertheless, it would be appreciated if the proposed new draft of Fed. R. App. P. 46 be reviewed for technical errors and drafting suggestions.

D. Evidence Rules Advisory Committee

I am already indebted to Professor Capra for several most useful suggestions. It is understood that the expertise of this Advisory Committee is not directly involved with these proposals, although suggestions relating to unwanted or unforeseen effects by the Draft Rules on evidentiary privileges or other evidence matters would be gratefully received.

E. Bankruptcy Rules Advisory Committee

As suggested before, the Bankruptcy Committee may wish to consider a separate system of rules governing bankruptcy proceeding. Such a system is discussed at length in Study VI (June 20, 1997), Working Papers, 294-332. The Federal Judicial Center has volunteered to assist by conducting an empirical study of bankruptcy proceedings similar to that completed for district courts generally last June. See Study VII (June, 1997), Working Papers, 335-410.

Two specific questions remain. First, Study VI indicates that most bankruptcy proceedings are, at least technically, governed by the local rules of the relevant district courts, although those rules are often ignored. Should any adoption of a Federal Rules of Attorney Conduct replacing such district court local rules await resolution of the problems in bankruptcy proceedings? Second, bankruptcy policy is currently under review in a number of forums. Will these reviews impact rules governing attorney conduct?

V. Next Steps

At the meeting on June 18-19 in Santa Fe, the Standing Committee will consider all suggestions and criticism from the Advisory Committees. It may then issue the Federal Rules of Attorney Conduct for public comment, which does not imply ultimate approval, or it may amend the Draft Rules and resubmit them to the Advisory Committees for further work. It could also hold the Draft Rules and await a coordinated package of rules governing attorney conduct in bankruptcy procedures, or input from the ABA's "Ethics 2000" Project (chaired by Chief Justice Norman Veasey), or both.

In any case, the Standing Committee is most grateful for all the help it has already received from you and your Committees, and greatly appreciates your further efforts and suggestions.

TO: Standing Committee

FROM: Daniel R. Coquillette, Reporter

DATE: December 1, 1997

RE: Federal Rules of Attorney Conduct

1. Charge

At our last meeting, I was asked by the Committee to draft uniform federal rules that would supersede the complex thicket of local rules now governing attorney conduct in the federal courts. This follows two invitational conferences of experts, on January 9-10, 1996 in Los Angeles and on June 18-19, 1996 in Washington, which focused on this problem. There were also seven special reports, five by this reporter and two by Marie Leary of the Federal Judicial Center. These are now available printed together as Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), hereafter "Working Papers." (I strongly recommend that you keep this useful volume at hand in reviewing what follows. If you need an extra copy, please call.)

In drafting the attached rules, I had important assistance from Bryan A. Garner, John K. Rabiej, and Alan N. Resnick, Reporter to the Bankruptcy Advisory Committee. I am most grateful. Errors are my own.

These rules are now being reviewed by the Style Sub-Committee, under the regular procedures. If the Standing Committee approves of a version of this draft, the rules will be sent next to the relevant advisory committees for review at their spring meetings. The final draft would then come back to this Committee at its June meeting for a vote on publication.

2. Basic Structure

I have attached just one "rule system," but it does, in fact, offer the Committee four options:

1. To accept the complete package, which establishes a narrow core of uniform federal rules, the ten "The Federal Rules of Attorney Conduct." All other matters would be governed by current state standards, the so-called "dynamic conformity" model;

2. To adopt only some of the ten proposed uniform Federal Rules of Attorney Conduct, i.e. only the conflict of interest rules;

3. To accept only the new uniform rule that establishes a state standard, with no core of uniform federal standards at all. (This would mean adopting only Rule 1 of the Federal Rules of Attorney Conduct);

4. To adopt none of the above, and leave the matter to the present system of local rules.

There is one option I have not included. Based on my extensive studies and discussions with the Advisory Committees on Appellate Rules and Bankruptcy Rules, I would strongly recommend that district courts and appeals courts be treated alike, and that bankruptcy courts, and other special courts, be treated separately. See Working Papers, supra, 235-292 (appeals courts); 293-334 (bankruptcy courts). Thus, these proposed new rules cover just district courts and appeals courts.

3. New Fed. R. Civ. P. 83 (c)

At the moment, attorney conduct in the district courts is governed by local rules promulgated pursuant to Fed. R. Civ. P. 83. It is thus logical to start there. I have drafted a new subdivision (c) which would provide that the standards of attorney conduct in the district courts are established by the ten Federal Rules of Attorney Conduct, together with other uniform rules. (Such as Fed. R. Civ. P. 11.) This supersedes the existing local rules. The ten Federal Rules of Attorney Conduct are incorporated by Rule 83 (c) as Fed. R. Civ. P. Appendix 1, just as the Appendix of Forms is incorporated by Rule 84. Like the Appendix of Forms, the Federal Rules of Attorney Conduct would go through the full Rules Enabling Act process established by 28 U.S.C. § 2072 (b).

There is also a practical advantage with this structure. On being admitted to the bar of a federal district court or appeals court, a lawyer would be handed a small pamphlet containing the ten Federal Rules of Attorney Conduct. These rules would always govern where relevant. Otherwise, Rule 1 of the Federal Rules of Attorney Conduct directs the attorney to the current standards for the state where the district court is located or, as in the case of a court of appeals, to a choice of law rule selecting the appropriate state standard.

It has been suggested by the Reporter to the Criminal Rules Advisory Committee, Professor David Schlueter, that a parallel change should be made to the Federal Rules of Criminal Procedure. This would assure that identical rules should govern civil and criminal proceedings-- a fundamental assumption of the ABA Model Rules. (There are certain exceptions. See ABA Model Rule 3.8: "Special Responsibilities of a Prosecutor") Professor Schlueter suggests that:

> "A possible candidate for that new provision might be existing Rule 57, Rules by District Courts, which in some respects already parallels Civil Rule 83. I would recommend that the new language already proposed for

Civil Rule 83 simply be added to what would become a new subdivision (d) in Criminal Rule 57, as follows:

Rule 57. Rules by District Courts

* * * * *

(d) ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. §§ 2072 and 2075."

As Professor Schlueter correctly observes, this would be a matter for the Advisory Committee on Criminal Rules.

4. New Fed. R. App. P. 46

Of course, the courts of appeals already have a uniform rule governing attorney conduct, Fed. R. App. P. 46. This rule establishes the notoriously vague "conduct unbecoming a member of the bar" standard. After In re Snyder, 472 U.S. 634 (1985), courts of appeals have adopted many different local rules to give Rule 46 some specificity of content. See Working Papers 239-240, and cases cited. (In re Snyder is set out in full at Working Papers 265-271.) Thus the advantages of uniformity have been lost.

The new Fed. R. App. P. 46 would adopt the Federal Rules of Attorney Conduct, except for matters arising before other courts. There the standards of the other court will be applied. (Of course, under the new Fed. R. Civ. P. 83 (c) district courts will also follow the Federal Rules of Attorney Conduct, but not necessarily bankruptcy courts.) Under Rule 1 of the Federal Rules of Attorney Conduct, the appeals court will have a choice of law rule selecting an appropriate state standard, unless the conduct falls within the ambit of the other Federal Rules of Attorney Conduct. See Fed. R. Attny. Conduct 1 (a) (2).

There are in fact very few cases involving attorney conduct in the courts of appeals, and most of those involve matters arising in the district courts. There is every reason to amend Fed. R. App. P. 46 to track the district court rule. See Working Papers, supra, 237-247.

5. The Federal Rules of Attorney Conduct (Fed. R. Attny. Conduct)

Eight of the ten Federal Rules of Attorney Conduct closely follow the substance of the ABA Model Rules, which have already been adopted in the majority of state and federal courts. (Some stylistic changes have been made by Bryan Garner to conform these rules with the Guidelines for Drafting and Editing Court Rules (1996). See Working Papers, supra, 45-77. The exceptions are Rule 1 and Rule 10. Rule 1 sets up

the "dynamic conformity" with state standards, and is closely modeled on Model Local Rule 4 of the Federal Rules of Disciplinary Enforcement, first recommended by the Committee on Court Administration and Case Management in 1978. It also contains a choice of law rule, which closely follows ABA Model Rule 8.5.

Rule 10 is based on the most recent negotiations between the Department of Justice and the Conference of Chief Justices relating to "Communication with Persons Represented By Counsel," Tentative Working Draft, July 1, 1997. It is different from ABA Model Rule 4.2. Nearly 12% of all controversies between 1990 and 1996 in federal court relating to attorney conduct concerned communications with represented parties. See Working Papers, supra, 201-205.

Four of the other rules relate solely to conflict of interest standards. See Rules 3, 4, 5 and 6, tracking ABA Model Rules 1.7, 1.8, 1.9 and 1.10. These rules together account for 44% of all attorney conduct controversies in the federal courts. See Working Papers, supra, 100-102, 107-116, 189-210. They are also closely cross-referenced to each other. The Committee may wish to add provisions to Rule 6 permitting some "screening." Otherwise state standards will apply, which usually limit any screening to former public officers or employees. See ABA Model Rule 1.11.

Three of the remaining rules concern the related subjects of confidentiality, candor toward the tribunal, and truthfulness in statements to others. See Rules 2, 7, and 9, tracking ABA Model Rules 1.6, 3.3, and 4.1. These rules are also cross-referenced to each other. While there rules together account for only 6% of all attorney conduct controversies in federal courts, they all relate to issues that are central to the judicial process. See Roger C. Cramton, Memorandum to Participants of the Special Conference, 2 (Jan. 8, 1996).

The last rule, Rule 8, is the "Lawyer as Witness" rule. It tracks ABA Rule 3.7, and cross-references Rules 3 and 5. This rule accounts for a surprising share of federal court attorney controversies between 1990 and 1996-- over 9.5%. See Working Papers, 203. It is also an issue which directly confronts the tribunal.

Altogether, Rules 2-10 account for nearly 72% of the attorney conduct issues raised in federal courts from 1990-1996. See Working Papers, supra, 201-205. This leaves only 28% of the issues previously governed by local rules for determination by reference to state standards under Rule 1. Of course, since many of the state standards are also based on the ABA Model Rules, the actual uniformity would be even greater.

6. Conclusion

The Standing Committee is mandated by Congress to "maintain consistency and otherwise promote the interest of justice." 28 U.S.C. § 2073 (b). These rule changes replace nearly one hundred differing local rules with a single set of ten rules. These follow the standards already adopted in a majority of state and federal courts. The new rules are also limited to matters particularly concerning the federal courts and, indeed,

account for nearly 72% of all federal attorney controversies from 1990-1996. For all the rest, Rule 1 refers the court to dynamic conformity with appropriate state standards. If you have any questions, do not hesitate to call me at 617-552-8650 or FAX 617-576-1933.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 46. Attorneys

(a) Admission to the Bar.

(1) Eligibility. An attorney is eligible for admission to the bar of a court of appeals if that attorney is of good moral and professional character and has been admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals, or a United States district court (including the district courts for Guam, the Northern Mariana Islands, and the Virgin Islands).

(2) Application. An applicant must file an application for admission, on a court-approved form that contains the applicant's personal statement showing eligibility for membership. The applicant must subscribe to the following oath or affirmation:

> "I,_____, do solemnly swear [or affirm] that I will conduct myself as an attorney and counselor of this court, uprightly and according to law; and that I will support the Constitution of the United States."

(3) Admission Procedures. On written or oral motion of a member of the court's bar, the court will act on the application. An applicant may be admitted by oral motion in open court. But unless the court orders otherwise, an applicant need not appear before the court to be admitted. Upon admission, an applicant must pay the clerk the fee prescribed by local rule or court order.

(b) Suspension or Disbarment.

(1) Standard. A member of the court's bar is subject to suspension or disbarment by the court if the member:

(A) has been suspended or disbarred from practice in any other court; or

(B) has failed to comply with the court's standards governing attorney conduct. ~~is guilty of conduct unbecoming a member of the court's bar~~.

(2) Procedure. The member must be given an opportunity to show good cause, within the time prescribed by the court, why the member should not be suspended or disbarred.

(3) Order. The court must enter an appropriate order after the member responds and a hearing (if requested) is held, or after the time prescribed for a response expires, if no response is made.

(c) Discipline. A court of appeals may discipline an attorney who practices before it ~~for conduct unbecoming a member of the bar or~~ for *violating* ~~failure to comply with~~ *the court's standards governing attorney conduct or any of these rules.* ~~any court rule~~. First, however, the court must afford the attorney reasonable notice, an opportunity to show cause to the contrary, and, if requested, a hearing.

(d) Attorney Conduct. *The court's standards governing attorney conduct are as follows:*

(1) Proceedings Before District or Other Court. The standards of attorney conduct of a district or other court govern any act or omission of an attorney connected with proceedings before that court; and

(2) *Any Other Act or Omission by Attorney. The standards of the Federal Rules of Attorney Conduct, together with other rules adopted under 28 U.S.C. § 2072, govern any other act or omission by an attorney.*

NOTE

The changes to Fed. R. App. P. 46(b) (1) (B) and (c) eliminate the vague "conduct unbecoming" text and replace it with the more specific standards of the new section (d). This permanently resolves the concerns about ambiguity voiced by the Supreme Court in In re Snyder, 472 U.S. 634, 645 (1985). See also Matter of Hendrix, 986 F. 2d. 195, 201 (7th Cir. 1993) and In re Bithony, 486 F. 2d 319, 324 (1st Cir. 1973). See the full discussion in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 235-247. (Hereafter, "Working Papers.")

The new Section (d) eliminates the many inconsistent local standards that have previously governed attorney conduct issues in the courts of appeals. See the extensive studies in Working Papers, supra, 10, 73-77, 235-247, 289-291. Section (d) (1) requires that the court of appeal look to the standards of the relevant district or other court when considering an attorney's act or omission before such courts. Otherwise, the court should look to the new Federal Rules of Attorney Conduct, set out as Fed. R. Civ. P. Appendix 1. The standards of all district courts will also be established by the Federal Rules of Attorney Conduct under the new Fed. R. Civ. P. 83(c), but bankruptcy proceedings may be governed by different standards due to the Bankruptcy Code, particularly 11 U.S.C. § 327 (a). See discussion in Working Papers, supra, 293-333.

It should be noted that, by adopting the Federal Rules of Attorney Conduct, the new Fed. R. App. P. 46 (d) incorporates a choice of law rule, Rule 1 (a) of the Federal Rules of Attorney Conduct, closely modeled after Rule 8.5 (b) (1) of the ABA Model Rules.

FEDERAL RULES OF CIVIL PROCEDURE

(Addition of a new Fed. R. Civ. P. 83(c))

RULE 83: RULES BY DISTRICT COURTS

(c) *ATTORNEY CONDUCT. The standards of attorney conduct in the district courts are established by the Federal Rules of Attorney Conduct, enacted as an Appendix to these rules, together with other rules adopted under 28 U.S.C. § 2072.*

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, D.R. Coquillette, *Report on Local Rules Regulating Attorney Conduct in the Federal Courts,* 1-3 (July 5, 1995) (Appendices I and II charted the many different 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 D.R. Coquillette, *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). See also D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), which contains the reports cited above, among others. (Hereafter, "Working Papers.")

The new part (c) leaves unchanged other uniform federal rules that already govern attorney conduct. See, for example, Fed. R. Civ. P. 11, 26(g), 30(d), and 37(b).

The proposed new Fed. R. App. P. 46 would also institute the Federal Rules of Attorney Conduct in the courts of appeals, but bankruptcy proceedings are not included due to special policy concerns and the provisions of the Bankruptcy Code, especially § 327. See 11 U.S.C. § 327(a). See D.R. Coquillette, Study of Recent Bankruptcy Cases (1990-1996) Involving Rules of Attorney Conduct, May 11, 1997, set out in Working Papers, supra, 293-333.

Appendix

Federal Rules of Attorney Conduct

RULE 1. GENERAL RULE

(a) **Standards for Attorney Conduct.** Except as provided by subdivision (c) of this rule, or a rule adopted in accordance with 28 U.S.C. §§ 2072, or a rule of the Federal Rules of Attorney Conduct, the standards for attorney conduct for United States district courts and courts of appeals are as follows:

(1) **Conduct in Proceedings Before District Court.** For conduct in connection with a case or proceeding pending in a district court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the standards to be applied must be the standards of attorney conduct currently adopted by the state authority responsible for adopting rules of attorney conduct of the state in which the district court sits; and

(2) **All Other Conduct.** For any other act or omission by an attorney admitted to practice before a district court or court of appeals, 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; but 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) **Violation as Misconduct.** If an attorney violates these rules — whether individually or in concert with others, and whether or not the violation occurred in the course of the attorney-client relationship — the violation constitutes misconduct and is grounds for discipline.

(b) **Sanctions.** For misconduct defined in the Federal Rules of Attorney Conduct, for good cause shown, and after notice and opportunity to be heard, an attorney admitted to practice before a district court or court of appeals may be disbarred, suspended, reprimanded, or subjected to any other disciplinary action that the court deems appropriate. The same misconduct may also subject an attorney to the disciplinary authority of the state or states where the attorney is admitted to practice.

(c) **Applicability.** Rules 2-10 of the Federal Rules of Attorney Conduct apply only in a case or proceeding pending in a United States district court or court of appeals. Rule 1(a) and (b) and Rules 2-10 of the Federal Rules of Attorney Conduct do not apply in a case or proceeding pending in the district court within the jurisdiction conferred by 28 U.S.C. §§ 1334 or 158, or in a case or proceeding referred to a bankruptcy judge under 28 U.S.C. § 157(a), unless otherwise provided by the Federal Rules of Bankruptcy Procedure or by local bankruptcy rules promulgated in accordance with F.R. Bankr. P. 9029.

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 D.R. Coquillette, *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), republished in D.R. Coquillette, M. Leary, Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct (1997), 1-95. (Hereafter, "Working Papers.")

The words "case or proceeding pending before" a court mean any matter which is actually before such a court, or is certain to be before such a court.

The Federal Rules of Attorney Conduct were not designed to govern bankruptcy cases and proceedings. The Committee on Rules of Practice and Procedure recognizes that there may be situations in which standards for attorney conduct in bankruptcy cases and proceedings should or must differ in some respects from standards applicable in other federal cases. First, there are statutory provisions that govern aspects of attorney conduct in bankruptcy cases, but have no

application in other federal litigation. The Bankruptcy Code contains several provisions that govern attorney conduct, such as the requirement that an attorney for a trustee or committee be "disinterested," limitations on compensation, and a prohibition against sharing compensation. See 11 U.S.C. §§ 327-331, 504. Second, the Federal Rules of Bankruptcy Procedure contain several rules governing aspects of attorney conduct, such as Rule 2014 on disclosures of relationships with parties in interest.

Rule 1(c) renders the Federal Rules of Attorney Conduct generally inapplicable in bankruptcy cases and proceedings. It is anticipated that the Advisory Committee on Bankruptcy Rules will consider formulating additional standards for attorney conduct applicable in bankruptcy cases and proceedings if, by local bankruptcy rule, the attorney conduct standards of the district court are made applicable.

RULE 2. CONFIDENTIALITY OF INFORMATION

(a) A lawyer must 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, for disclosures required by law or court order, 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 another's financial interests or property; 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 almost in its entirety. There is 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 ABA Model Rule 1.6 only permits such disclosure in the cases of criminal acts "likely to result in imminent death or substantial bodily harm.") 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, and follows the trend in the most recent state adoption of the Model Rules, such as in Massachusetts, effective Jan. 1, 1998. See Roger C. Cramton, *Memorandum to Participants of the Special Study Conference, 2* (Jan. 8, 1996). In addition, an exception for disclosures "required by law or court order" has been added. See ABA Code of Professional Responsibility DR-4-101 (C) (2). 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.

Small stylistic changes have been made in all of the ABA Model Rules, even those adopted without substantive changes. For example, in Rule 2 the ABA Model Rule 1.6 (a) uses "shall," and the Federal Rule 2(a) uses "must." This is to comport with uniform federal drafting guidelines. See Bryan A. Garner, Guidelines for Drafting and Editing Court Rules (1997), 29.

While the "Comments" published with the ABA Model Rules have not been formally adopted, even for those federal rules that closely follow the ABA models, they are useful as "guides to interpretation." See ABA Model Rules, "Preamble," Sec. 21, in Model Rules of Professional Conduct (1998 ed.), 8.

RULE 3. CONFLICT OF INTEREST: GENERAL RULE

(a) A lawyer must not represent a client if that representation 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 must not represent a client if that representation 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 must 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, with small stylistic changes. 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). See Working Papers, supra, 100-102, 107-116, 189-210.

This Rule, and Rules 5, 6 and 8, do not prevent a trial judge from disqualifying an attorney when necessary to protect the integrity of a judicial proceeding, despite client consent to the representation. See Wheat v. United States, 486 U.S. 153 (1988).

RULE 4. CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer must 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 that 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.

(b) A lawyer must not use information relating to representation of a client to the client's disadvantage unless the client consents after consultation, except as permitted or required by Federal Rules of Attorney Conduct 2 or 7.

(c) A lawyer must 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) Until the representation of a client ends, a lawyer must 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 must 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 the client's behalf.

(f) A lawyer must 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 attorney-client relationship; and

(3) information relating to the representation of a client is protected as required by Federal Rules of Attorney Conduct 2, 7, and 9.

(g) A lawyer who represents two or more clients must not participate in making aggregate settlement of claims of or against the clients, or in a criminal case an aggregated agreement on 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 must 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. Nor may a lawyer settle a claim for such liability with an unrepresented person or former client without first advising that person in writing to seek independent representation.

(i) A lawyer related to another lawyer as parent, child, sibling, or spouse must not represent a client whose interests in that matter are directly adverse to a person whom the lawyer knows is represented by the other lawyer unless the client consents after a consultation about the relationship.

(j) A lawyer must not acquire a proprietary interest in a claim or in the subject matter of litigation that the lawyer is conducting for a 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 small stylistic changes and 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). See Working Papers, supra, 100-102, 107-116. 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. See Working Papers, supra, 115-116, 199-200, 205-210.

RULE 5. CONFLICT OF INTEREST: FORMER CLIENT

(a) A lawyer who has formerly represented a client in a matter must not later represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the former client's interests unless the former client consents after consultation.

(b) (1) Except as noted in (b)(2), a lawyer must not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer was formerly associated had previously represented a client:

(A) whose interests are materially adverse to that person; and

(B) about whom the lawyer had acquired information protected by Federal Rules of Attorney Conduct 2 and 5(c), that is material to the matter.

(2) The former client may, after consultation, consent to the type of representation described in (b)(1).

(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 must not later:

(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 the substance of 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. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 6. IMPUTED DISQUALIFICATION: GENERAL RULE

(a) While lawyers are associated in a firm, they must not 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 later 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 that is both protected by Federal Rules of Attorney Conduct 2 and 5(c), and 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 small stylistic changes and 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). See Working Papers, supra, 189-210. DR 5-105(D) is the corresponding provision of the ABA Code of Professional Responsibility. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 7. CANDOR TOWARD THE TRIBUNAL

(a) A lawyer must 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 client's position 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 must 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 must inform the tribunal of all known material facts that will enable the tribunal to make an informed decision, even if the facts are adverse.

NOTE

This rule adopts ABA Model Rule of Professional Conduct 3.3 in its entirety except for small stylistic changes and 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). The rule is also needed in continuing Federal Rules of Attorney Conduct Rule 2 and 4, where it is cross-cited. DR 7-102 and DR 7-106(B) are the corresponding provisions of

the ABA Code of Professional Responsibility. See Working Papers, supra, 100-102, 107-116, 189-210.

RULE 8. LAWYER AS WITNESS

(a) A lawyer must 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) the lawyer's disqualification 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 small stylistic changes and a cross reference to these rules. Between 1990-1995, 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). See Working Papers, supra, 100-102, 107-116, 189-210. This trend dropped to five percent between July 1, 1995 and March 23, 1996, id., 196, but the 1990-1996 culminated totals are still high at 49 cases, or more than nine percent. Id., 203. 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. See Working Papers, supra, 115-116, 199-200, 209-210.

RULE 9. TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer must 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 small stylistic change and a cross reference to these rules. This rule is rarely invoked in federal court proceedings, but it is a central rule of conduct. See Working Papers, supra, 203. See Roger C. Cramton, Memorandum to Participants of the Special Study Conference (Jan. 8, 1996). It is also needed in applying Rule 2, supra, where it is cross-cited. The corresponding provision of the ABA Model Code of Professional Responsibility is DR 7-102. See Working Papers, supra, pp. 116, 210.

RULE 10. COMMUNICATIONS WITH PERSONS REPRESENTED BY COUNSEL

(a) **General Rule.** A lawyer who is representing a client in a matter must 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 to do so by:

(1) constitutional law, statute, or an agency regulation having the force of law;

(2) a decision or a rule of a court of competent jurisdiction;

(3) a prior written authorization by a court of competent jurisdiction obtained by the lawyer in good faith; or

(4) paragraph (b) of this rule.

(b) **Rules Relating to Government Lawyers Engaged in Civil or Criminal Law Enforcement.** A government lawyer engaged in a criminal or civil law enforcement matter, or a person acting under the lawyer's direction, may communicate with a person known by the government lawyer to be represented by a lawyer in the matter if:

(1) the communication occurs prior to the person's having been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication relates to the investigation of criminal activity or other unlawful conduct; or

(2) the communication occurs after the represented person has been arrested, charged in a criminal case, or named as a defendant in a civil law enforcement proceeding brought by the governmental agency that seeks to engage in the communication, and the communication is:

(A) made in the course of any investigation of additional, different, or ongoing criminal activity or other unlawful conduct; or

(B) made to protect against a risk of death or bodily harm that the government lawyer reasonably believes may occur; or

(C) made at the time of the arrest of the represented person and after he or she is advised of his or her rights to remain silent and to counsel and voluntarily and knowingly waives those rights; or

(D) initiated by the represented person, either directly or through an intermediary, if prior to the communication the represented person has given a written or recorded voluntary and informed waiver of counsel for that communication.

(c) Organizations as Represented Persons.

(1) When the represented "person" is an organization, an individual is "represented" by counsel for the organization if the individual is not seperately represented with respect to the subject matter of the communication, and

(A) with respect to a communication by a government lawyer in a civil or criminal law enforcement matter, is known by the government lawyer to be a current member of the control group of the represented organization; or

(B) with respect to a communication by a lawyer in any other matter, is known by the lawyer to be

(i) a current member of the control group of the represented organization; or

(ii) a representative of the organization whose acts or omissions in the matter may be imputed to the organization under applicable law; or

(iii) a representative of the organization whose statements under applicable rules of evidence would have the effect of binding

the organization with respect to proof of the matter.

(2) The term "control group" means the following persons (A) the chief executive officer, chief operating officer, chief financial officer, and chief legal officer of the organization; and (B) to the extent not encompassed by the foregoing, the chair of the organization's governing body, president, treasurer, and secretary, and a vice-president or vice-chair who is in charge of a principal business unit, division, or function (such as salaries, administration, or finance) or performs a major policy making function for the organization; and (C) any other current employee or official who is known to be participating as a principal decision maker in the determination of the organization's legal position in the matter.

(d) **Limitations on Communications.** When communicating with a represented person pursuant to this Rule, a lawyer must not:

(1) inquire about information regarding litigation strategy or legal arguments for counsel, or seek to induce the person to forego representation or disregard the advice of the person's counsel; or

(2) engage in negotiations of a plea agreement, settlement, statutory or non-statutory immunity agreement, or other disposition of actual or potential criminal charges or civil enforcement claims, or sentences or penalties with respect to the matter in which the person is represented by counsel unless such negotiations are permitted by paragraph (a) or (b) (2) (D).

NOTE

This rule is based on the tentative outcome of negotiations between the Department of Justice and the Conference of Chief Justices, "Discussion Draft, December 19, 1997," with the addition of some technical stylistic changes. As such, it differs from the comparable ABA rule, ABA Model Rule 4.2, in many respects. See ABA Formal Opinion 97-408 (1997); ABA Formal Opinion 95-396 (1995) and ABA Informal Opinion 1377 (1997). This rule, as negotiated, has an extensive "Comment." See "Discussion Draft, December 19, 1997," "Comment," pp. 1-6.

The Conference of Chief Justices considered this "Discussion Draft" at its regular Midwinter Meeting on January 25-29, 1998. At the request of officials of the American Bar Association and others, the Conference postponed the matter to its next meeting, scheduled for August 2-6, 1998. See Memorandum of February 6, 1998 from Chief Justice Thomas R. Phillips, President, Conference of Chief Justices. Obviously, if the Conference of Chief Justices, the Department of Justice, and the American Bar Association can agree on a draft rule, it will be the presumptive candidate for the final version of Rule 10.

From 1990-1995, 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). See Working Papers, supra, 99-211. This trend increased between July 1, 1995 and March 23, 1996, to sixteen percent. Id., 196. 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. See id., 115-116, 199-200, 209-210.

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,

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[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.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 97-2261

The United States of America ex rel. Daniel G. O'Keefe,	*	
Plaintiff - Appellant,	*	
v.	*	Appeal from the United States District Court for the Eastern District of Missouri.
McDonnell Douglas Corporation,	*	
Defendant - Appellee.	*	
The Conference of Chief Justices,	*	
Amicus Curiae.	*	

Submitted: September 8, 1997
Filed: January 6, 1998

Before HANSEN, JOHN R. GIBSON, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

HANSEN, Circuit Judge.

The United States of America appeals the district court's[1] protective order preventing government attorneys from engaging in ex parte communications with current employees of the defendant, McDonnell Douglas Corporation (McDonnell Douglas). The government also appeals restrictions placed upon its investigation of former employees. We affirm.

I.

This action arose as a qui tam action brought by Daniel O'Keefe under the False Claims Act, 31 U.S.C. §§ 3729-33, alleging mischarging of labor hours by employees of McDonnell Douglas Corporation (McDonnell Douglas) while working on United States military contracts. The United States subsequently intervened in the suit pursuant to 31 U.S.C. § 3730(b)(4) and (c). On behalf of the United States, the Department of Justice (DOJ) began its pretrial investigation. In particular, investigative agents of the DOJ began making ex parte contacts with various present and former lower-level employees of McDonnell Douglas without the consent of McDonnell Douglas's counsel.

McDonnell Douglas brought a motion for a protective order preventing such contacts, arguing that such ex parte contacts were barred by Missouri Supreme Court Rule 4-4.2. Missouri Supreme Court Rule 4-4.2 provides, "[i]n 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 in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." The official comment explains that where the opposing party is an organization, Rule 4-4.2 bars ex parte communications with "persons having the managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that

[1]The Honorable George F. Gunn, Jr., United States District Judge for the Eastern District of Missouri.

matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." This comment was adopted by the Supreme Court of Missouri in State ex rel. Pitts v. Roberts, 857 S.W.2d 200, 202 (Mo. 1993) (en banc). The Supreme Court of Missouri's ethical rules have in turn been adopted by the United States District Court for the Eastern District of Missouri. See E.D. Mo. L.R. 12.02 ("The Code of Professional Responsibility adopted by this Court is the Code of Professional Responsibility adopted by the Supreme Court of Missouri, as amended from time to time, except as may otherwise be provided by this Court's Rules of Disciplinary Enforcement.").

The government argues that a protective order was not warranted because the ex parte contacts it engaged in are expressly authorized by 28 C.F.R. § 77.10(a), a rule promulgated by the Attorney General of the United States. This rule provides as follows:

> A communication with a current employee of an organization that qualifies as a represented party or represented person shall be considered to be a communication with the organization for purposes of this part only if the employee is a controlling individual. A "controlling individual" is a current high level employee who is known by the government to be participating as a decision maker in the determination of the organization's legal position in the proceeding or investigation of the subject matter.

28 C.F.R. § 77.10(a). The Government argues that section 77.10(a) supersedes the local rules of the Eastern District of Missouri. In the alternative, the government argues that, in light of section 77.10(a), the disputed ex parte contacts by DOJ attorneys were "authorized by law," and thus fell under the express exception to Rule 4-4.2 which states that ex parte contacts are permissible if "authorized by law." McDonnell Douglas responds to both arguments by asserting that the Attorney General lacked the

statutory authority to issue 28 C.F.R. § 77.10(a), and that this provision is therefore invalid and of no effect.

The district court concluded that section 77.10(a) fell beyond the limits of the Attorney General's statutory authority. Accordingly, it granted the protective order in part, finding that the government's ex parte contacts with current McDonnell Douglas employees violated Missouri Supreme Court Rule 4-4.2 as adopted by the Eastern District of Missouri. It ordered the government to cease such contacts and to provide discovery of information obtained from those contacts already made. The court also imposed conditions on ex parte contacts with former McDonnell Douglas employees. At the government's request, we stayed that portion of the district court's order that requires the government to provide discovery of information obtained from its ex parte contacts.

II.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); see also Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it."). The government claims that 5 U.S.C. § 301 and various sections of Title 28 of the United States Code grant the Attorney General the authority to promulgate 28 C.F.R. § 77.10(a). We address each assertion in turn.

A. The Housekeeping Statute

The government relies primarily on 5 U.S.C. § 301 (1994). Section 301, better known as the "Housekeeping Statute," was passed in 1789 "to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file government documents." H.R. Rep. No. 85-1461

(1958), reprinted in 1958 U.S.C.C.A.N. 3352. The current version of the Housekeeping Statute provides as follows:

> The head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availability of records to the public.

5 U.S.C. § 301 (1994).

The government's argument that the Housekeeping Statute authorizes the Attorney General's promulgation of 28 C.F.R. § 77.10(a) contradicts the plain meaning of the statute and the jurisprudence of the Supreme Court. In Chrysler Corp. v. Brown, 441 U.S. 281, 310 (1979), the Supreme Court examined the Housekeeping Statute and held that it *does not* provide statutory authority for substantive regulations. After a brief historical analysis of the provision, the Court wrote:

> Given this long and relatively uncontroversial history, and the terms of the statute itself, it seems to be simply a grant of authority to the agency to regulate its own affairs. . . . It is indeed a "housekeeping statute," authorizing what the APA terms "rules of agency organization, procedure or practice" as opposed to "substantive rules."

Id. at 309-10. In so ruling, the Court noted that Congress had looked carefully at the statute in 1958, that the Special Subcommittee on Government Information had "unanimously agreed that [§ 301] originally was adopted in 1789 to provide for the day-to-day office housekeeping in the Government departments," and that attempts to construe it as something more was "misuse" which "twisted" the statute. Chrysler Corp., 441 U.S. at 310 n.41 (quoting H.R. Rep. No. 85-1461 at 7 (1958)) (alterations in original).

In recent years, several agencies have unsuccessfully attempted to find statutory authority for substantive regulations in the Housekeeping Statute. See In re Bankers Trust Co., 61 F.3d 465, 470 (6th Cir. 1995) (Federal Reserve Board regulation requiring subpoenaed party to refuse production of confidential FRB information, contrary to Federal Rule of Civil Procedure 34, was not authorized by the Housekeeping Statute and "exceed[ed] the congressional delegation of authority"), cert. dismissed, 116 S. Ct. 1711 (1996); Exxon Shipping Co. v. United States Dep't of Interior, 34 F.3d 774, 776-78 (9th Cir. 1994) (Housekeeping Statute did not authorize regulations allowing agency to withhold deposition testimony of federal employees); In re Cincinnati Radiation Litig., 874 F. Supp. 796, 826-27 (S.D. Ohio 1995) (Housekeeping Statute did not authorize 1953 Defense Department directive on the use of human volunteers in experimental research); McElya v. Sterling Med. Inc., 129 F.R.D. 510, 514 (W.D. Tenn. 1990) (Housekeeping Statute did not give Department of Navy authority to create general discovery privilege for persons under its jurisdiction). The government's argument in the case at bar is simply one more attempt to twist this simple administrative statute into an authorization for the promulgation of substantive rules.

The government cites three cases in support of its reading of the Housekeeping Statute. These are Boske v. Comingore, 177 U.S. 459 (1900), United States ex rel. Touhy v. Ragen, 340 U.S. 462 (1951), and Georgia v. United States, 411 U.S. 526 (1973). None of these cases controls the case at bar.

Touhy and Boske both involve regulations which dealt exclusively with internal administrative procedure. The regulations at issue in Touhy established which agency employees would produce documents in response to a subpoena duces tecum. 340 U.S. at 467-68. Similarly, the regulations at issue in Boske established which IRS officials would have control over certain IRS records. 177 U.S. at 469-70. In contrast, the regulations in the case at bar are not limited to issues of internal agency procedures.

Rather, they purport to exempt the DOJ from the requirements of state and local federal ethical rules which bind all other litigants.

Additionally, both Boske and Touhy were decided prior to the 1958 amendment to section 301, which expresses a clear congressional mandate that agencies cannot promulgate regulations exempting themselves from their duty to make information available to the public. See NLRB v. Capitol Fish Co., 294 F.2d 868, 875 (5th Cir. 1961) (Since 1958, it has been clear that the Housekeeping Statute "cannot be construed to establish authority in the executive departments to determine whether certain papers and records are privileged."). Boske reflects a particularly antiquated view of administrative rule making authority. See Guardians Ass'n v. Civil Serv. Comm'n, 463 U.S. 582, 614-15 n.2 (1983) (O'Connor, J., concurring) ("cases since Boske articulating the limitations applicable to agency rule making power indicate that the scope of agency discretion is indeed narrower than the language of Boske would suggest").

Finally, the Georgia case is not on point. In Georgia, the Court held that the Housekeeping Statute provided "ample legislative authority" for regulations promulgated by the Attorney General. 411 U.S. at 536. However, the regulations at issue in Georgia did not expand the agency's power. Rather, they merely established procedures for the use of power delegated to the Attorney General by the Voting Rights Act of 1965. Id. Georgia therefore provides no support for the government's contention that the Housekeeping Statute authorized the substantive regulation at issue here.

B. Title 28

The government relies additionally on various sections of Title 28 of the United States Code (sections 509, 510, 515(a), 516, 519, 533, and 547) which, it argues, collectively authorize 28 C.F.R. § 77.10(a). We reject this contention because none

of these is any more than a general enabling statute, see United States v. Lopez, 4 F.3d 1455, 1461 (9th Cir. 1993) (rejecting claim that §§ 509, 515, 516, 533, and 547 authorized similar DOJ policy), and because no reviewing court could "reasonably . . . conclude that the grant of authority contemplates the regulations issued." See Chrysler Corp., 441 U.S. at 308. Sections 509, 510, 515(a), 516, 519, and 533 define the duties of the Attorney General, grant her the power to appoint inferior officers and to delegate power to these officers, and provide that these officers shall answer to her.[2]

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[2]These sections provide as follows:

> All functions of other officers of the Department of Justice and all functions of agencies and employees of the Department of Justice are vested in the Attorney General except the functions
> (1) vested by subchapter II of chapter 5 of title 5 in administrative law judges employed by the Department of Justice;
> (2) of the Federal Prison Industries, Inc.; and
> (3) of the Board of Directors and officers of the Federal Prison Industries, Inc.

28 U.S.C. § 509.

> The Attorney General may from time to time make such provisions as he considers appropriate authorizing the performance by any other officer, employee, or agency of the Department of Justice of any function of the Attorney General.

28 U.S.C. § 510.

> The Attorney General or any other officer of the Department of Justice, or any attorney specially appointed by the Attorney General under law, may, when specifically directed by the Attorney General, conduct any kind of legal proceeding, civil or criminal, including grand jury proceedings and proceedings before committing magistrates, which United States attorneys are authorized by law to conduct, whether or not he is a resident of the district in which the proceeding is brought.

28 U.S.C. § 515(a).

Section 547 simply defines the role of United States Attorneys who, although appointed by the President and removable by him, are nonetheless directed by the Attorney General in the discharge of their duties pursuant to section 519.[3] The district court

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> Except as otherwise provided by law, the conduct of litigation in which the United States, an agency, or officer thereof is a party, or is interested, and securing evidence therefor, is reserved to officers of the Department of Justice, under the direction of the Attorney General.

28 U.S.C. § 516.

> Except as otherwise authorized by law, the Attorney General shall supervise all litigation to which the United States, an agency, or officer thereof is a party, and shall direct all United States attorneys, assistant United States attorneys, and special attorneys appointed under section 543 of this title in the discharge of their respective duties.

28 U.S.C. § 519.

> The Attorney General may appoint officials—
>
> (1) to detect and prosecute crimes against the United States;
>
> (2) to assist in protection of the person of the President; and
>
> (3) to conduct such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General.
>
> This section does not limit the authority of departments and agencies to investigate crimes against the United States when investigative jurisdiction has been assigned by law to such departments and agencies.

28 U.S.C. § 533.

[3]Section 547 provides:

> Except as otherwise provided by law, each United States attorney, within his district, shall—
>
> (1) prosecute for all offenses against the United States;
>
> (2) prosecute or defend, for the Government, all civil actions, suits or

correctly concluded that nothing in any of these sections expressly or impliedly gives the Attorney General the authority to exempt lawyers representing the United States from the local rules of ethics which bind all other lawyers appearing in that court of the United States.

III.

An agency's promulgation of rules without valid statutory authority implicates core notions of the separation of powers, and we are required by Congress to set these regulations aside. 5 U.S.C. § 706(2)(C) (1994) ("The reviewing courts shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . ."); see also Chrysler Corp., 441 U.S. at 308 (regulation must be struck down unless reviewing court is "reasonably [] able to conclude that the grant of authority contemplates the regulations issued"); Transohio Sav. Bank v. Director, Office of Thrift Supervision, 967 F.2d 598, 621 (D.C. Cir. 1992) ("Agency actions beyond delegated authority are 'ultra vires,' and courts must invalidate them.").

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proceedings in which the United States is concerned;
(3) appear in behalf of the defendants in all civil actions, suits or proceedings pending in his district against collectors, or other officers of the revenue or customs for any act done by them or for the recovery of any money exacted by or paid to these officers, and by them paid into the Treasury;
(4) institute and prosecute proceedings for the collection of fines, penalties, and forfeitures incurred for violation of any revenue law, unless satisfied on investigation that justice does not require the proceedings; and
(5) make such reports as the Attorney General may direct.

28 U.S.C. § 547.

Because we cannot reasonably conclude that the grants of authority in the statutory provisions cited by the government contemplate the issuance of anything resembling 28 C.F.R. § 77.10(a), we find this regulation to be invalid. Accordingly, we reject the government's argument that its ex parte contacts are "authorized by law" and therefore satisfy Rule 4-4.2. Moreover, because invalid promulgations of the Attorney General can neither preempt nor supersede the local federal rules for the Eastern District of Missouri, we reject the government's supersession/preemption argument as well.[4] Because the government's position has no remaining legs on which to stand, we lift the stay and affirm the order of the district court.

IV.

The district court determined that Missouri Supreme Court Rule 4-4.2 does not require the DOJ to obtain the consent of McDonnell Douglas's counsel before initiating ex parte contacts with McDonnell Douglas's *former* employees, unless such former employees are currently represented by counsel. However, it ordered the government to keep a list of the names of the former employees it interviews and the dates on which it interviews them. The court further ordered the government to preserve all statements, notes, and answers to questions obtained as a result of these contacts, and to make

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[4]The preemption issue, which consumes a major portion of the government's brief, is a non-issue in this case. At issue in this case is whether attorneys representing the United States must abide by the ethical standards imposed by the local rules of a United States District Court when conducting the government's litigation in that court. A federal regulation cannot preempt federal law, because "Supremacy Clause considerations do not come into play when a court balances competing federal rules." City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1178-79 n.14 (8th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); see United States v. Klubock, 832 F.2d 649, 651 (1st Cir. 1987) (finding preemption doctrine inapplicable to federal court rule which incorporates state ethics rules), aff'd en banc, 832 F.2d 664, 667 (1st Cir. 1987).

these documents available to McDonnell Douglas for review upon request, subject to work-product limitations.

The government appeals the imposition of these conditions upon its investigation of the former employees. We review discovery matters only for "gross abuse of discretion resulting in fundamental unfairness in the trial of the case." Prow v. Medtronic, Inc., 770 F.2d 117, 122 (8th Cir 1985). Since the district court created safeguards to protect government attorney work-product from discovery, and since the non-privileged information would be subject to normal discovery in any case, we find no gross abuse of discretion.

V.

For the reasons stated above, we lift the stay and affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

V-C

MEMORANDUM

DATE: March 12, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 91-17

Item No. 91-17 has been on the Committee's study agenda for seven years (almost four years longer than the next oldest agenda item). The issue to which it relates — the practice of the courts of appeals of designating some of their opinions as "unpublished" or "non-precedential" — has been around much longer. In 1964, the Judicial Conference resolved "[t]hat the judges of the courts of appeals . . . authorize the publication of only those opinions which are of general precedential value." In 1972, the Judicial Conference asked each circuit court to adopt "an opinion publication plan." After all of the circuit courts had done so, the Judicial Conference in 1974 reported the following:

> There are in effect 11 legal laboratories accumulating experience and amending their publication plans on the basis of that experience. Because the possible rewards of such experimentation are so rich, the Conference agreed that it should not be discontinued until there is considerably more experience under the diverse circuit plans. . . . [F]urther experimentation may well lead to the amendment of the diverse circuit plans and . . . eventually a somewhat more or less common plan might evolve.

In its 1990 report, the Federal Courts Study Committee recommended to the Judicial Conference that it appoint an ad hoc committee to "review policy on unpublished court opinions in light of increasing ease and decreasing cost of database access." Although the Committee stated clearly that it was not recommending "universal publication," it was nonetheless concerned

that "non-publication policies and non-citation rules present many problems." It pointed out, for example, that one of the reasons for barring the citation of unpublished opinions was "to keep those with better access to them from having an unfair advantage"; however, the Committee said, "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." The Committee's recommendation was considered and explicitly rejected by the Judicial Conference in 1990.

Notwithstanding that rejection, a few months later the Local Rules Project recommended that this Advisory Committee "consider amending Rule 36 or add[ing] another Appellate Rule to include a uniform plan for publication of opinions." The Standing Committee asked this Advisory Committee to comment on that recommendation, as well as on many others made by the Local Rules Project. In early 1992, after surveying the circuit judges, the Advisory Committee reported back to the Standing Committee. With respect to the recommendation that FRAP be amended to include a uniform plan for the publication of opinions, the Advisory Committee was split: Some members expressed reluctance to consider a proposal that had so recently and so emphatically been rejected by the Judicial Conference, while other members "believed that the change in technology has changed circumstances to such an extent that a new look at the policy would be timely." The matter has remained on the Advisory Committee's study agenda ever since.

At its September 1997 meeting, the Advisory Committee again turned its attention to Item No. 91-17 and agreed to give the matter further study. As a first step, Judge Garwood offered to survey the chief judges, to get some indication whether the Judicial Conference's views on this matter might have changed in the past eight years. (The chief judges make up half of the voting

membership of the Conference.) In January, Judge Garwood wrote to each of the 13 chief judges and invited them to respond to the following questions:

1. Should the courts of appeals continue to designate some opinions as "unpublished"?

2. If so, should FRAP be amended to specify the criteria that should be used in determining whether an opinion is designated as "unpublished"?

3. Should FRAP be amended to either mandate or forbid the submission of "unpublished" opinions to Westlaw, LEXIS, and similar services for electronic dissemination?

4. Should FRAP be amended to specify the circumstances, if any, under which "unpublished" opinions may be cited by counsel in their briefs and other submissions or by courts in their opinions and orders?

5. Should FRAP be amended to specify whether and to what extent "unpublished" opinions shall have precedential force?

All of the chief judges — save those of CA1 and CA5 — responded to Judge Garwood's letter, as did several of their colleagues. Those responses are attached. As you will see, the chief judges are almost unanimous — and, in some cases, quite vehement — in the view that this Committee should not propose rules governing the publication or citation of opinions. On March 11, Judge Garwood met with the chief judges in Washington, D.C. Again, the chief judges were adamant that the publication and citation of opinions should not be addressed in FRAP.

Judge Garwood intends to ask the Committee whether, in light of the considerable amount of effort that would have to be devoted to drafting rules on the publication or citation of opinions, and in light of the likelihood that those rules will not be approved by the Judicial Conference, it may finally be time to remove Item No. 91-17 from the Committee's study agenda. To assist the Committee in considering that question, the following are attached:

1. The letters that Judge Garwood received from the chief judges and some of their colleagues.

2. A bibliography listing 40 articles that critique the practice of issuing unpublished opinions. These articles address the practice in the federal courts and were published in major journals after 1979. I estimate that there are over 100 other articles that either address the practice in state courts or that address the practice in federal courts, but were published in minor journals or before 1980.

3. An annotated bibliography that summarizes 21 of these articles. The summaries (which were prepared by my excellent research assistant, Rosemarie Nixon) will give you a good sense of the criticisms that have been made of the current practices of the courts of appeals and the responses to those criticisms. As you will see, academics are almost as united in their support for national rulemaking as judges are united in their opposition.

4. A draft of an article on unpublished decisions by Chief Judge Boyce F. Martin, Jr. Judge Martin sent this draft to Judge Garwood in response to Judge Garwood's letter.

5. A report from the Federal Judicial Center describing the formal rules and informal practices of the courts of appeals. Judy McKenna from the FJC will attend our April meeting and provide a summary of this report.

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT
333 CONSTITUTION AVENUE, N.W.
WASHINGTON, DC 20001-2866

HARRY T. EDWARDS
CHIEF JUDGE

TELEPHONE (202) 216-7380
FACSIMILE (202) 273-0119

February 4, 1998

The Honorable William L. Garwood, Chair
Advisory Committee on the Appellate Rules
Judicial Conference of the United States
Washington, D.C. 20544

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge Garwood:

On behalf of the U.S. Court of Appeals for the D.C. Circuit, I submit the following responses to the questions posed in your letter of January 28, 1998.

(1) Should the courts of appeals continue to designate some opinions as "unpublished"?

Yes. Most members of my court feel strongly that some opinions should remain "unpublished" and be given no precedential value. If the rules are changed to require publication of *all* opinions, I would guess that we will simply issue *orders* without any explanation whatsoever in those cases in which an unpublished opinion would otherwise have issued. Surely that is not to be preferred.

(2) If so, should FRAP be amended to specify the criteria that should be used in determining whether an opinion is designated as "unpublished"?

No. As most circuits do, the D.C. Circuit has a local rule that sets forth criteria for non-publication, and the rule has worked well. We do not need FRAP to address this issue.

(3) Should FRAP be amended to either mandate or forbid the submission of "unpublished" opinions to Westlaw, LEXIS, and similar services for electronic dissemination?

No. Each circuit should be free to permit or forbid electronic dissemination of its "unpublished" opinions as it sees fit. Each court has different needs; a single FRAP rule is both unnecessary and unwise.

(4) Should FRAP be amended to specify the circumstances, if any, under which "unpublished" opinions may be cited by counsel in their briefs and other submissions or by courts in opinions and orders?

No. This is a terrible idea. Each circuit should decide how to handle this. There is little doubt in my mind that if you pursue such a course of action you will cause circuit judges to abandon writing altogether in appeals involving straightforward dispositions. In other words, no matter what FRAP says, judges will continue to issue simple "orders" disposing of cases that require nothing more than a judgment and have no precedential force beyond the case at hand. The only question then is whether you want to cause judges to stop writing short explanatory memoranda opinions in these cases by forcing them to "publish" what they write.

(5) Should FRAP be amended to specify whether and to what extent "unpublished" opinions shall have precedential force?

No, absolutely not. Each circuit is in the best position to address its own needs and to develop appropriate practices. If such a rule were adopted, the next step would be to tell judges when and how much to write in their opinions.

If I can be of any further assistance, please do not hesitate to call.

Sincerely,

Harry T. Edwards
Chief Judge

cc: Members of the U.S. Court of Appeals for the D.C. Circuit
All Circuit Chief Judges

United States Court of Appeals
SECOND CIRCUIT

(203) 782-3682

CHAMBERS OF
RALPH K WINTER
CHIEF JUDGE
U S COURTHOUSE
141 CHURCH STREET
NEW HAVEN, CT 06510

February 4, 1998

Hon. Will L. Garwood
Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United
States
Washington, D.C. 20544

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge Garwood:

Thank you for your letter of January 28, 1998, inquiring as to my views and those of my colleagues regarding unpublished opinions. I have transmitted your letter to the members of my court, and you should hear from some of them in due course. This letter states only my personal views.

I strongly believe that Courts of Appeals should be permitted to continue to designate some opinions as unpublished and not to be cited as precedent. My court presently disposes of in excess of 60% of our appeals by unpublished orders, called summary orders. These orders may be several pages long. They explain the rationale of the decision for the benefit of the Supreme Court and the parties but may not be cited in other cases as precedent.

We use summary orders only where nothing of jurisprudential value would be accomplished by publishing an opinion. We reexamine our use of such orders periodically with the benefit of comment by the organized bar. There is presently no sentiment on the court that I know of to alter our present practices.

Publishing our summary orders would add geometrically to the printed material that counsel must plow through to research a case and for no significant reason. Most of our summary orders involve frivolous pro se claims or issues that are resolved on grounds well-established in the caselaw, such as meritless sufficiency claims or challenges to discretionary rulings by district courts. To add such decisions to the printed matters to be researched might well divert counsel from the dispositive precedents of our court.

Moreover, an explanation of a decision that satisfies the needs of the Supreme Court and the parties can be drafted and

agreed upon much more quickly than one that satisfies the needs of lawyers looking for precedents. Published opinions that can be cited as precedent must contain detail that is not required in summary orders, including, for example, a full statement of the facts and procedural posture of the decision. Qualifying language that is necessary in published opinions that serve as precedents is not necessary in our summary orders. It is my view that, were a published opinion necessary in each case, we would be unable to dispose of our caseload in a timely fashion.

I also believe that the FRAP should not attempt to specify uniform standards regarding unpublished opinions. There is no correct set of standards writ in stone, and the present diversity of practice allows each court to choose those standards that it deems most appropriate. How, moreover, would the standards be enforced? Surely, we do not want even a small portion of our scarce resources devoted to motions to publish.

I realize that the organized bar has reservations about deciding cases through unpublished opinions. That is understandable because the practice seems to resemble secret decision-making. However, we have satisfied many (not all) critics by putting our orders on-line, a form of publication that dispels any notion that we are attempting to decide cases in secret. We also invite the organized bar to scrutinize our orders and bring to our attention cases where an opinion should have been published. Even studies involving all the orders issued by our court in a calendar year have not shown significant misuse of summary orders.

Also, my conversations with lawyers have suggested that, when the cost of not using unpublished opinions is explained in full, the practice is not nearly as controversial as it may seem. Given the present inclination of the Congress to scrutinize proposals for new judgeships with great care and to be very deliberate in filling vacancies, any attempt to diminish by rule the use of unpublished opinions will be entirely counter-productive for litigants. Within six weeks, over one-third of the active judgeships on my court (5 of 13) will be unfilled. Were we by rule compelled to publish opinions in any substantial number of cases that now go by summary order, chaos would follow.

I add one word based on my experience as a member of the Civil Rules Committee for five years and Chair of the Evidence Rules Committee for four. Most rules are far too long and too complex as a result of tinkering by the advisory committees. It

is no accident that the shortest, least complex, and most successful of the various rules are the Rules of Evidence, which did not have the benefit of an advisory committee for two decades.

Sincerely,

Ralph K. Winter
Chief Judge

RKW/mrd

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CHAMBERS OF
RICHARD J. CARDAMONE
CIRCUIT JUDGE

February 5, 1998

Hon. Will L. Garwood
Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E.
Washington, D.C. 20544

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge Garwood:

I concur completely in the sentiments expressed by Chief Judge Winter of our Circuit in his letter dated February 4, 1998 with regard to the above subject.

Sincerely,

Richard J. Cardamone

Richard J. Cardamone
U.S. Circuit Judge

RJC/ral

cc: RKW

United States Court of Appeals
For The Third Circuit

Chambers of
Edward R. Becker
Chief Judge

19613 United States Courthouse
Independence Mall West
Philadelphia, Pa. 19106-1782
Phone: (215) 597-9642
Fax: (215) 597-7217

February 27, 1998

Honorable Will L. Garwood
Chair, Advisory Committee on Appellate Rules
Committee on Rules of Practice and Procedure
Judicial Conference of the Untied States
Washington, DC 20544

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge ~~Garwood~~ Will:

I respond to your letter of January 28, 1998 as follows. My responses are terse because the rationales supporting them have been amplified in letter from the other Chief Judges.

1. Should the courts of appeals continue to designate some opinions as "unpublished"? **No, although they should designate some opinions as "not precedential."***

2. If so, should FRAP be amended to specify the criteria that should be used in determining whether an opinion is designated as "unpublished"? **No, the criteria for determining when an opinion should be legended "not precedential" should be a matter for the respective Courts of Appeals.**

3. Should FRAP be amended to either mandate or forbid the submission of "unpublished" opinions to Westlaw, LEXIS, and similar services for electronic dissemination? **No.**

4. Should FRAP be amended to specify the circumstances, if any, under which "unpublished" opinions may be cited by counsel in their briefs and other submissions or by courts in their opinions and orders? **No. That should be a matter for the Court of Appeals IOP's, if at all.**

---

*. My Court just this past week voted to abandon the "not for publication" legend as anachronistic.

5. Should FRAP be amended to specify whether and to what extent "unpublished" opinions shall have precedential force? **No. That should be a matter for the Court of Appeals IOP's.**

Sincerely,

Edward R. Becker

ERB:pmk

2/17/98

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

DOLORES K. SLOVITER
CIRCUIT JUDGE

18614 UNITED STATES COURTHOUSE
INDEPENDENCE MALL WEST
PHILADELPHIA, PA. 19106

February 12, 1998

Hon. William L. Garwood, Chair
Advisory Committee on the Appellate Rules
Judicial Conference of the United States
Washington, D.C. 20544

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge Garwood:

Your letter of January 28, 1998 reached me right before the transition of chief judgeship in the Third Circuit. However, as I was chief judge at the time the letter was sent, I assume you will accept my comments on the above issue. As it is, I agree wholeheartedly with the comments expressed by Chief Judge Harry T. Edwards in his letter of February 4, 1998.

Sincerely,

Dolores K. Sloviter

DKS/mv

cc: All Circuit Chief Judges

o:\administ\garwood.wp6

United States Court of Appeals
For The Fourth Circuit
255 West Main Street, Room 230
Charlottesville, Virginia 22902

J. Harvie Wilkinson III
Chief Judge

Telephone: (804) 296-7063
Facsimile: (804) 293-6920

February 3, 1998

Honorable Will L. Garwood
Chair, Advisory Committee on Appellate Rules
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge Garwood:

Thanks so much for your good letter of January 28.

With all respect, there might be some advantage simply in leaving the subject alone. The criteria for publication can never be but so precise. The circuits all operate under a system which differentiates between cases which really do possess precedential value and those whose interest is chiefly for the immediate parties involved. This strikes a fair balance. Taking up the question seems to me to involve a lot of potential headaches without the prospect for much real gain.

Warmest regards.

Sincerely,

J. Harvie Wilkinson III

91-17

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHAMBERS OF
BOYCE F. MARTIN, JR.
CHIEF CIRCUIT JUDGE

March 2, 1998

TELEPHONE
(502) 582-5082
FACSIMILE
(502) 582-6630

Honorable Will R. Garwood
United States Circuit Judge
300 Homer Thornberry Judicial Bldg.
903 San Jacinto Boulevard
Austin, TX 78701

Dear Judge Garwood:

Thank you for your January 28 letter soliciting my opinion regarding "unpublished" opinions and whether there is a need to amend the Federal Rules of Appellate Procedure ("FRAP") to address such opinions. I wrote to my colleagues on the Sixth Circuit, and received responses from some of them. Most of the judges on the Sixth Circuit believe -- as do I -- that there is no need to amend FRAP to define criteria for, or regulate the use or precedential value of, "unpublished" opinions. My sense is that such issues can be better addressed through the local rules of each circuit.

Coincidentally, I have been working with one of my law clerks on an essay to be submitted to the Ohio State Law Journal. It addresses some of the same issues as your survey. I have included an initial draft for you to read if you wish. It may provide a deeper insight into my support of "unpublished" opinions.

In response to your questions:

1. Should the courts of appeals continue to designate some opinions as "unpublished"?

Yes. A large number of cases that come to the circuit courts can be decided by direct application of established law. Although the parties in such cases deserve explanations of our decisions, publication of the opinions would be of little, if any, jurisprudential value. With very few exceptions, unless a case addresses a new issue, resolves a conflict within the circuit, or more clearly defines an ambiguous earlier holding, its publication does little more than divert scarce judicial resources, reiterate previous conclusions, and muddle an already complicated and complex body of law. Designating some opinions as "unpublished" -- and assigning them lesser precedential value -- enables us to provide litigants with a written record of our reasoning in their cases while furthering our attempts to maintain a clear, cohesive body of established law.

One of my colleagues provided another reason for not publishing opinions in some cases involving state law, especially diversity cases. His concern was that state courts should establish the precedent in state law matters, and that federal courts should attempt to follow the state court's precedent, rather than setting their own.

2. If so, should FRAP be amended to specify the criteria that should be used in determining whether an opinion is designated as "unpublished"?

No. Like most other circuits, the Sixth Circuit has already established criteria by which we decide which cases are published (6th Cir. R. 24(a)). For the most part, the judges on any given panel come easily to a consensus regarding publication. National uniformity is not necessary in this area, and I think we should continue to allow each individual circuit to set its own criteria.

3. Should FRAP be amended to either mandate or forbid the submission of "unpublished" opinions to Westlaw, LEXIS, and similar services for electronic dissemination?

Absolutely not. All opinions, whether published or not, are in the public record. I see no basis for the federal rules to dictate which public records private reporting services may reprint or publish.

4. Should FRAP be amended to specify the circumstances, if any, under which "unpublished" opinions may be cited by counsel in their briefs and other submissions or by courts in their opinions and orders?

No. With regard to citation by counsel, I believe each attorney must decide for herself what sources she wishes to rely on in building and supporting her argument. Individual circuits can -- and should -- notify attorneys that "unpublished" opinions have little if any precedential value. Once the attorneys have that notice, they should not be forbidden from citing "unpublished" opinions. Although many judges and law clerks probably skim over and disregard such cites as having almost no value, we as a court do not deprive attorneys their prerogative to include them in their briefs. We do not need courts dictating what attorneys cite in their briefs, and we certainly do not need a federal rule doing so.

I believe even more strongly that there should not be a federal rule governing what cases a court is allowed to rely on in its decision-making. The principles governing the weight a court should give a certain case are legal principles such as stare decisis, federalism, and supremacy. Although a court can decide for itself how much weight it wants its judges to give its own published versus "unpublished" opinions, I do not believe that an advisory committee or Congress should set such guidelines.

5. Should FRAP be amended to specify whether and to what extent "unpublished" opinions shall have precedential force?

As I mentioned in my answer to number 4, I think that the only entity that can decide for a court how much weight to give a certain case is that court itself. Circuits should decide for themselves how much precedential value -- if any -- they wish to grant "unpublished" opinions.

I hope that the answers to these questions prove helpful. Please let me know if you have any questions about my responses, or if I can be of any other service to the committee.

Very truly yours,

Boyce F. Martin, Jr.

sc

Enclosure

cc: All Chief Circuit Judges

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
OHIO - MICHIGAN - KENTUCKY - TENNESSEE

CHAMBERS OF
ROBERT B. KRUPANSKY
U.S. Circuit Judge

TELEPHONE
(216) 522-4288

February 25, 1998

Honorable Boyce F. Martin, Jr.
Chief U. S. Circuit Judge
209 Gene Snyder U.S. Courthouse
601 West Broadway
Louisville, KY 40202

Re: **FRAP - Unpublished Opinions**

Dear Judge Martin:

In response to your inquiry concerning Judge Garwood's questionnaire seeking comments relating to proposed amendments to the Federal Rules of Appellate Procedure, I would subscribe to the conclusions submitted by Chief Judge Richard S. Arnold of the Eighth Circuit.

Article III courts speak through their opinions. The judicial system of this country is committed to follow legal precedents announced by the Supreme Court of the United States, and the various courts of appeals absent precedential pronouncements of the high Court. Departure from existing legal precedents announced by the Supreme Court or the various circuit courts within their respective jurisdictions is not permitted, except under circumstances where existing precedent within a given circuit is overruled *en banc*, or by the Supreme Court. Accordingly, any opinion issued by a court, whether published or unpublished, is a legal precedential pronouncement of that court. To deny the public, the bar, and the lower courts reliance upon, and/or to forbid citation of a published or unpublished opinion of a court as precedent is, as Judge Arnold suggests, unconstitutional.

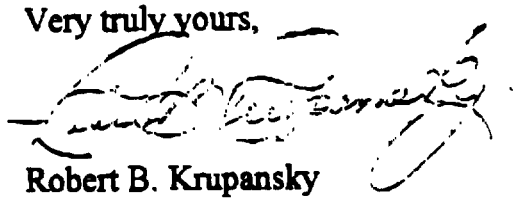
All opinions should be available to the public (including publishers), the bar, and lower courts, for publication.

To summarize my answers to the proffered questions numbered:

1. all opinions should be published;
2. no;
3. no;
4. see initial statement of position;
5. all opinions have precedential status.

Your consideration of these comments is appreciated.

Very truly yours,



Robert B. Krupansky

RBK/slm

cc: Hon. William L. Garwood
Hon. Richard S. Arnold

United States Court of Appeals
For the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
Richard A. Posner
Chief Judge

Tel 312-435-5806
Fax 312-435-7545

February 9, 1998

Hon. Will L. Garwood
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Garwood:

Thank you for your letter of the twenty-eighth soliciting my views with regard to unpublished opinions.

1 & 5. I do think it is useful—very useful—to have a category of unpublished opinions, provided it is understood that such opinions cannot be cited as authority (they should of course be citable for other purposes, such as res judicata, vexatious litigation, judicial estoppel). Every court has many routine cases that can be disposed of without need for an opinion that, because citable as authority, must be very carefully researched and written. If the opinions in these routine cases were citable as authority, the judges and their staffs would have to spend a lot of additional time on these opinions to no real end.

2. I do not think written criteria for when to publish an opinion are useful or even feasible. I think it should be left to the judgment of the panel.

3. I wouldn't either require or forbid electronic dissemination. The unpublished opinions contain information that may be useful to lawyers, and as I indicated in my first paragraph citable by them in their briefs for some purposes although not as authority. Unpublished opinions are not secret opinions, and to prevent their being disseminated by what is now the most efficient means would not make a lot of sense.

4. An amendment to the appellate rules to indicate when such opinions can be cited (see my first paragraph) might be useful.

I hope these comments despite their brevity have some utility to your committee.

Sincerely,

Richard A. Posner

UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

CHAMBERS OF
RICHARD S. ARNOLD
CHIEF JUDGE
UNITED STATES COURTHOUSE
600 WEST CAPITOL AVENUE, ROOM 208
LITTLE ROCK, ARKANSAS 72201

February 6, 1998

The Hon. Will L. Garwood
Chairman, Advisory Committee on Appellate Rules
300 Homer Thornberry Judicial Building
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge Garwood:

Thanks for your letter of January 28, 1998. The subject is important, and I appreciate being given a chance to comment.

What follows represents only my own particular opinion - perhaps I should say peculiar. I do not believe it represents the views of a majority of the judges on my Court. I have sent your letter to each of them, and they will express their own opinion if they wish.

Here are my answers:

1. Should the courts of appeals continue to designate some opinions as "unpublished"?

I take it that "unpublished" means that an opinion is not sent to one or more legal publishers. (All opinions are "public" in the sense that they are available to the public upon application for a copy in person, and, in the case of most circuits, including the Eighth, by computer.) If this is what the word "unpublished" means, the question is not of crucial importance. The real issue is whether opinions can be cited to the court that issued them.

In my view, no opinion should be designated as "unpublished." All opinions should be widely available to anyone, including legal publishers.

2. If so, should FRAP be amended to specify the criteria that should be used in determining whether an opinion is designated as "unpublished"?

Since I have answered no to the first question, I do not need to answer this question. I would like to observe, though, that the subject is one on which national uniformity is unnecessary. Each court should have autonomy in this respect, if the category of "unpublished" opinions is to continue to exist.

3. Should FRAP be amended to either mandate or forbid the submission of "unpublished" opinions to Westlaw, LEXIS, and similar services for electronic dissemination?

Under no circumstances should any type of dissemination of opinions be forbidden. In fact, I doubt the power of any governmental authority, with the exception of a court itself, to adopt such a measure.

4. Should FRAP be amended to specify the circumstances, if any, under which "unpublished" opinions may be cited by counsel in their briefs and other submissions or by courts in their opinions and orders?

All opinions, whether sent to legal publishers or not, are precedent. Rules to the contrary are unconstitutional, because they fail to appreciate the basic nature of the judicial process. Article III invests courts with "the judicial power of the United States." "Judicial" power, unlike other kinds of governmental power, is exercised according to reason. Departure from past decisions is not permitted except in those limited circumstances when overruling of a case is justified. For a court to say that it is at liberty to disregard a past decision is to assert a power other than judicial. Still less may a court properly say that it may not be reminded of its own decisions.

A rule purporting to tell a court what it may cite would be void, in my view.

5. Should FRAP be amended to specify whether and to what extent "unpublished" opinions shall have precedential force?

No. As already stated, my view is that all opinions have precedential force. Rules to the contrary are unconstitutional. If

there are to be rules on such a subject, they should be left to each individual court.

As you can see, this is not a subject upon which I am reticent. Probably I am in a minority - a fact which, I am afraid, serves only to make me more adamant. As I told Senator Grassley's Subcommittee last year, the practice of issuing opinions that have no precedential effect is an abomination.

You are kind to solicit our views. Thank you for listening.

Respectfully yours,

Richard S. Arnold

Richard S. Arnold

RSA/bf

United States Court of Appeals
Eighth Circuit
1114 Market Street
St. Louis, Missouri 63101

Chambers of
Theodore McMillian
Circuit Judge

February 25, 1998

The Hon. Will L. Garwood
Chairman, Advisory Committee on Appellate Rules
300 Homer Thornberry Judicial Building
903 San Jacinto Boulevard
Austin, TX 78701

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge Garwood:

You received a letter dated February 6, 1998, from my chief Judge Richard Sheppard Arnold. Although not all members of my court endorse Judge Arnold's view on unpublished opinions, I adopt and share his views entirely. Judge Richard S. Arnold's views are mine.

Sincerely,

T McMillian

Theodore McMillian
Circuit Judge cg

TM/cg

cc: Chief Judge Richard S. Arnold

MYRON H. BRIGHT
UNITED STATES SENIOR CIRCUIT JUDGE

POST OFFICE BOX 2707
FARGO, NORTH DAKOTA 58108

FAX: (701) 239-5287

March 2, 1998

The Hon. Will L. Garwood
Chairman, Advisory Committee on Appellate Rules
300 Homer Thornberry Judicial Building
903 San Jacinto Blvd.
Austin, TX 78701

Dear Judge Garwood:

I respond to your inquiry of January 28, 1998 whether FRAP should address unpublished opinions.

1. Should the courts of appeals continue to designate some opinions as "unpublished"? Yes.

2. If so, should FRAP be amended to specify the criteria that should be used in determining whether an opinion is designated as "unpublished"? Yes. The criteria should be quite general.

3. Should FRAP be amended to either mandate or forbid the submission of "unpublished" opinions to Westlaw, LEXIS, and similar services for electronic dissemination? No.

4. Should FRAP be amended to specify the circumstances, if any, under which "unpublished" opinions may be cited by counsel in their briefs and other submissions or by courts in their opinions and orders? No.

5. Should FRAP be amended to specify whether and to what extent "unpublished" opinions shall have precedential force? No, leave that to each circuit's rules.

Sincerely,

Myron H. Bright

United States Courts
For The Ninth Circuit
BRUCE R. THOMPSON U.S. COURTHOUSE & FEDERAL BLDG.
400 S. VIRGINIA STREET, STE 708
RENO, NEVADA 89501

PROCTER HUG, JR.
Chief Judge

PH: (702) 686-5949
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March 2, 1998

The Honorable William L. Garwood, Chair
Advisory Committee on the Appellate Rules
Judicial Conference of the United States
Washington D.C. 20544

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge Garwood:

I raised the questions posed in your January 28, 1998, letter with our Court Executive Committee. Our committee also had before it Chief Judge Harry Edwards' February 4, 1998 response.

I write to let you know that our Executive Committee concurs in the conclusions reached by the D.C. Circuit.

Thank you for the opportunity to respond.

Yours sincerely,

PROCTER HUG, JR.
Chief Judge

PH:ms

cc: Chief Circuit Judges

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
4-562 UNITED STATES COURTHOUSE
TULSA, OKLAHOMA 74103 3877

CHAMBERS OF
STEPHANIE K. SEYMOUR
CHIEF JUDGE

TELEPHONE
(918) 581-7416
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March 2, 1998

Honorable William L. Garwood, Chair
Advisory Committee on Appellate Rules
Judicial Conference of the United States
Washington, DC 20544

Dear Judge Garwood:

I am responding to your letter of January 28 asking for the views of the judges on the 10th Circuit regarding unpublished opinions. I faxed your letter to my colleagues and this response incorporates their views as well as my own.

1. The judges in this circuit unanimously believe that we should be permitted to designate some dispositions as unpublished. Unpublished dispositions enable us to decide more expeditiously the easier cases that do not appear to set precedent, thereby enabling us to handle a heavier caseload without sacrificing the time we need to devote to the more complicated cases.

2. Our judges are not against a FRAP rule so long as it only states general, nonbinding guidelines and the ultimate decision to publish or not is left to the panel writing the opinion. We are increasingly being cited to unpublished dispositions from other circuits and it might be helpful to know there are some uniform standards that we all look to in making the decision whether to publish.

3. None of our judges believe there should be a FRAP rule either mandating or forbidding the submission of unpublished opinions to Westlaw, LEXIS, or similar services for electronic submission.

4. You ask whether FRAP should be amended to specify the circumstances, if

any, under which unpublished opinions may be cited to the court by counsel. The 10th Circuit currently has a local rule disfavoring the citation of an unpublished decision but permitting it if it has persuasive value with respect to an issue that has not been addressed in a published opinion. The rule states as follows:

> " Unpublished orders and judgments of this court are not binding precedents, except under the doctrines of law of the case, res judicata, and collateral estoppel. Citation of unpublished orders and judgments is not favored. Nevertheless, an unpublished decision may be cited if it has persuasive value with respect to a material issue that has not been addressed in a published opinion and it would assist the court in its disposition. A copy of the decision must be attached to the brief or other document in which it is cited, or, if cited in oral argument, provided to the court and all other parties."

10th Cir. R. 36.3. We have found this rule to be a helpful compromise to the no citation rule we previously had. We would not favor a FRAP rule forbidding the citation of unpublished dispositions, but we would not object to a FRAP rule similar to our local rule 36.3, which would allow each circuit to give whatever value it chooses to unpublished dispositions from their own or other circuits.

I should add that three of our judges believe strongly that all dispositions of the court, whether published or not, constitute precedent and should be citable. Their views are set out in a dissenting opinion from our original no citation rule, authored by Judge William Holloway, which can be found at 955 F.2d 36 (10th Cir. 1992).

5. Finally, you ask whether FRAP should be amended to specify whether and to what extent unpublished dispositions should have precedential force. As I have stated, the majority of our judges believe such dispositions should not be precedential but may be considered persuasive by a subsequent panel. Of course, as our local rule specifies, a prior decision may be binding under the doctrines of law of the case, res judicata, and collateral estoppel. We would have no objection to a FRAP rule so stating.

In my judgment, these are useful questions to consider, and we appreciate

the opportunity to comment. Moreover, I have been very interested in the responses from other circuits. If FRAP is amended, it is apparent to me that a great deal of flexibility needs to be written into whatever rule is adopted.

Sincerely,

Stephanie K. Seymour

SKS:js

cc: Chief Circuit Judges

UNITED STATES COURT OF APPEALS
Eleventh Circuit

JOSEPH W. HATCHETT
Chief Judge

February 17, 1998

Post Office Box 10429
Tallahassee, Florida 32302

The Honorable Will L. Garwood
Chairman, Advisory Committee on Appellate Rules
300 Homer Thornberry Judicial Building
903 San Jacinto Boulevard
Austin, TX 78701

Re: Whether FRAP Should Address Unpublished Opinions.

Dear Judge Garwood:

I have sent your letter to all of the judges of the Eleventh Circuit Court of Appeals, and they will express their individual views on the question of whether FRAP should address unpublished opinions.

Personally, I agree completely with Chief Judge Harry T. Edwards's responses in his letter of February 4, 1998.

Best wishes!

Sincerely,

Joseph W. Hatchett

JWH:lb

cc: All Judges w/attach.
All Chief Circuit Judges

United States Court of Appeals
For The Eleventh Circuit
15 LEE STREET
MONTGOMERY, ALABAMA 36104

TELEPHONE (334) 223-7132
FAX (334) 223-7676

ED CARNES
CIRCUIT JUDGE

February 19, 1998

Honorable Will L. Garwood
Chairman
Advisory Committee on Appellate Rules
300 Homer Thornberry Judicial Building
903 San Jacinto Boulevard
Austin, TX 78701

Re: Unpublished Opinions in FRAP

Dear Judge Garwood:

Chief Judge Hatchett has distributed your letter to the members of our Court, and I would like to take this opportunity to state my views on the issue.

Like Chief Judge Hatchett, I am in complete agreement with the views of Chief Judge Edwards. Amending FRAP to address unpublished opinions and attempting to force a uniform practice upon the circuits in this area would be a terrible idea.

Sincerely,

Ed Carnes

ED CARNES
United States Circuit Judge

EC:bb

91-17

RECEIVED
3/3/98

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

50 SPRING STREET, S.W.
ATLANTA, GEORGIA 30303-3147

J.L. EDMONDSON
CIRCUIT JUDGE

23 February 1998

The Honorable William L. Garwood, Chair
Advisory Committee on the Appellate Rules
Judicial Conference of the United States
Washington, D.C. 20544

Re: Whether FRAP Should Address Unpublished Opinions

Dear Judge Garwood:

I am writing to say that I firmly believe that the courts of appeals should continue to designate many opinions as "unpublished." The availability of this practice greatly enhances judicial efficiency and the creation of cohesive bodies of law.

I also believe that it is best to allow each circuit to decide what opinions must be published. The nature of the cases heard by each of the circuits is not the same. So, allowing considerable autonomy is desirable.

Each circuit should decide for itself whether or not unpublished opinions should be submitted for electronic dissemination and whether or not unpublished opinions will have binding precedential value. I do not oppose electronic dissemination of unpublished opinions; we are not trying to keep secrets. I do oppose treating unpublished opinions as binding precedents; the chief reason we can more quickly decide cases with unpublished opinions is because we do not need to polish them in the same way that we would need to do if they were to be binding.

I appreciate the opportunity to comment on this important subject. And I close my remarks by stressing that the matter of unpublished opinions should remain the business of each individual circuit.

Sincerely,

Larry Edmondson

J. L. Edmondson

JLE:mb

c: Active Eleventh Circuit Judges

United States Court of Appeals
Eleventh Circuit

Stanley F. Birch, Jr.
Circuit Judge

56 Forsyth Street, N.W.
Atlanta, Georgia 30303
TEL. 404-331-4313
FTS 841-4313

February 20, 1998

Honorable Will L. Garwood
Chairman
Advisory Committee on Appellate Rules
300 Homer Thornberry Judicial Building
903 San Jacinto Boulevard
Austin, TX 78701

Re: Unpublished Opinions in FRAP

Dear Judge Garwood:

Chief Judge Hatchett has distributed your letter to the members of our court, and I would like to take this opportunity to state my views on the issue.

Like Chief Judge Hatchett, I am in complete agreement with the views of Chief Judge Edwards. I also commend the reasoning of Chief Judge Winter to your committee. Amending FRAP to address unpublished opinions and attempting to force a uniform practice upon the circuits in this area would be very imprudent.

Cordially yours,

Stanley F. Birch, Jr.
United States Circuit Judge

United States Court of Appeals
for the Federal Circuit
Washington, D.C. 20439

Chambers of
Haldane Robert Mayer
Chief Judge

February 25, 1998

Dear Judge Garwood:

Re: Whether FRAP Should Address Unpublished Opinions

This is in response to your letter asking for the views of this court with regard to amending the Federal Rules of Appellate Procedure to address issues surrounding unpublished opinions.

Before responding to your specific questions, it is the general view in this court that this is a matter better suited to local rule and practice than to a FRAP rule. Our court has developed policies, procedures, and rules in this area tailored to the way we conduct our business. Other courts with different policies and procedures have adopted rules that reflect their approach to the matter. A binding FRAP rule would limit these individual approaches that address each court's needs.

The following sets forth the five questions asked by the Advisory Committee and the response of the United States Court of Appeals for the Federal Circuit.

Advisory Committee Question (1). -- Should the courts of appeals continue to designate some opinions as "unpublished"?

Federal Circuit Response to Question (1). -- Yes, the courts of appeals should continue to be allowed to designate some opinions as "unpublished" if they choose. Preliminarily, please note that the Federal Circuit some years ago dropped the labels "published" and "unpublished" and determined to designate its opinions as either "precedential" or "nonprecedential." These latter designations were adopted because of the confusion generated by the label "unpublished." All the opinions of the court, whether precedential or nonprecedential, are published in the sense that they are printed on paper and are available to the public. Many are also published by commercial services.

Paragraphs 1, 2, and 3 of the court's Internal Operating Procedure (IOP) # 10 set forth the rationale of the court's policy to issue some decisions as precedential and some as nonprecedential. The paragraphs state:

> 1. The current workload of the appellate courts precludes preparation of precedential opinions in all cases. Unnecessary precedential dispositions, with concomitant full opinions, only impede the rendering of decisions and the preparation of precedential opinions in cases which merit the effort.
>
> 2. The purpose of precedential disposition is to inform the bar and interested persons other than the parties. The parties can be sufficiently and fully informed of the court's reasoning in a nonprecedential opinion or in a judgment without opinion under Fed. Cir. R. 36.

> 3. Disposition by nonprecedential opinion or order does not mean that the case is considered unimportant, but only that a precedential opinion would not add significantly to the body of law or would otherwise fail to meet a criterion in paragraph 4. Nonprecedential dispositions should not unnecessarily state the facts or tell the parties what they argued, or what they otherwise already know. It is sufficient to tell the losing party why its arguments were not persuasive. Nonprecedential opinions are supplied to the parties and made available to the public. The results reached in cases disposed of by nonprecedential opinions or Rule 36 judgments are reported periodically in tables in West's Federal Reporter.

Advisory Committee Question (2). -- If courts should continue to designate some opinions as "unpublished," should FRAP be amended to specify the criteria that should be used in determining whether an opinion is designated as "unpublished"?

Federal Circuit Response to Question (2). -- The Federal Circuit does not advocate amending FRAP. Each court should be allowed to decide for itself whether it should develop formal criteria and how such criteria should be disseminated. The Federal Circuit has specified the criteria it uses and these criteria are published in paragraph 4 of IOP # 10:

> 4. The court's policy is to limit precedent to dispositions meeting one or more of these criteria: (a) the case is a test case; (b) an issue of first impression is treated; (c) a new rule of law is established; (d) an existing rule of law is criticized, clarified, altered, or modified; (e) an existing rule of law is applied to facts significantly different from those to which that rule has previously been applied; (f) an actual or apparent conflict in or with past holdings of this court or other courts is created, resolved, or continued; (g) a legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved; (h) a significantly new factual situation, likely to be of interest to a wide spectrum of persons other than the parties to a case, is set forth; (i) a new interpretation of a Supreme Court decision, or of a statute is set forth; (j) a new constitutional or statutory issue is treated; (k) a previously overlooked rule of law is treated; (l) procedural errors, or errors in the conduct of the judicial process, are corrected, whether by remand with instruction or otherwise; (m) the case has been returned by the Supreme Court for disposition by action of this court other than ministerial obedience to directions of the Court; and (n) a panel desires to adopt as precedent in this court an opinion of a lower tribunal, in whole or in part.

Advisory Committee Question (3). -- Should FRAP be amended to either mandate or forbid the submission of "unpublished" opinions to Westlaw, LEXIS, and similar services for electronic dissemination?

Federal Circuit Response to Question (3). – The Federal Circuit does not advocate amending FRAP. In the event that FRAP is amended, it should be silent concerning this matter. As mentioned before, the Federal Circuit changed its published/unpublished designation to precedential/nonprecedential to reflect the reality that "unpublished" opinions were indeed "published" on paper and available to the public. Aside from the problems of trying to "forbid" electronic services from disseminating opinions, it is not a concern of the court whether they do so as long as

the parties and public recognize that an "unpublished" opinion has no precedential value. The court's opinions are a matter of public record. Any person walking into the clerk's office may obtain a copy of an opinion and the electronic services merely serve to provide that same service to a wider audience.

Advisory Committee Question (4). -- Should FRAP be amended to specify the circumstances, if any, under which "unpublished" opinions may be cited by counsel in their briefs and other submissions or by courts in their opinions and orders?

Federal Circuit Response to Question (4). -- The Federal Circuit does not advocate amending FRAP. Each court should be allowed to decide for itself the circumstances under which nonprecedential opinions may be cited. Fed. Cir. R. 47.6(b) sets forth this circuit's policy:

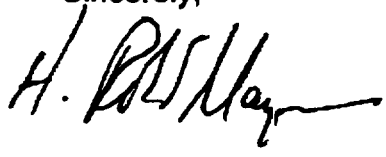
> (b) Nonprecedential opinions and orders. -- Opinions and orders which are designated as not citable as precedent are those unanimously determined by the panel at the time of their issuance as not adding significantly to the body of law. Opinions and orders so designated shall not be employed or cited as precedent. This rule does not preclude assertion of issues of claim preclusion, issue preclusion, judicial estoppel, law of the case, or the like based on a decision of the court rendered in a nonprecedential opinion or order.

Advisory Committee Question (5). -- Should FRAP be amended to specify whether and to what extent "unpublished" opinions shall have precedential force?

Federal Circuit Response to Question (5). -- The Federal Circuit does not advocate amending FRAP. Each court should be allowed to decide the parameters of this matter for itself. Fed. Cir. R. 47.6(b), set forth above, makes clear that in the Federal Circuit "unpublished" opinions never have precedential force. Use of the precedential/nonprecedential designations rather than published/unpublished designations helps in clarifying this issue.

Thank you for giving me the opportunity to respond to these issues.

Sincerely,



cc: Circuit Chief Judges

The Honorable Will L. Garwood
Chair of Advisory Committee on Appellate Rules
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Partial Bibliography of Articles Published Since 1980 in Major Journals About Selective Publication of Judicial Opinions by Federal Courts

Patrick J. Schiltz

Edward A. Adams, *Increased Use of Unpublished Rulings Faulted*, N.Y. L.J., Aug. 2, 1994, at 1

Burton M. Atkins, *Communication of Appellate Decisions: A Multivariate Model for Understanding the Selection of Cases for Publication*, 24 LAW & SOC'Y REV. 1171 (1990)

Burton M. Atkins, *Selective Reporting and the Communication of Legal Rights in England*, 76 JUDICATURE 58 (1992)

Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913 (1995)

Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1 (1989)

Francine Biscardi, *The Historical Development of the Law Concerning Judicial Report Publication*, 85 LAW LIBR. J. 531 (1993)

Erica U. Bodwell, *Published and Unpublished Federal Circuit Patent Decisions: A Comparison*, 30 IDEA 233 (1990)

Susan W. Brenner, *On Publication and Precedent: An Inquiry Into the Ethnomethodology of Case Reporting in the American Legal System*, 39 DEPAUL L. REV. 461 (1990)

Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757 (1995)

Gerald T. Dunne, *The Unreported Opinion: An Appeal to the Banking Bar*, 99 BANKING L.J. 387 (1982)

Daniel N. Hoffman, *Nonpublication of Federal Appellate Court Opinions*, 6 JUST. SYS. J. 405 (1981)

Peter J. Honigsberg & James A. Dikel, *Unfairness in Access to and Citation of Unpublished Federal Court Decisions*, 18 GOLDEN GATE U. L. REV. 277 (1988)

Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691 (1995)

Paul Marcotte, *Unpublished but Influential*, A.B.A. J., Jan. 1991, at 26

Julius J. Marke, *Unpublished and Uncitable Court Decisions*, N.Y. L.J., Mar. 26, 1991, at 4

Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REF. 119 (1994)

Thomas B. Marvell & Carlisle E. Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J.L. REF. 415 (1988)

Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385 (1990)

Richard L. Neumeier, *Unpublished Opinions: Their Threat to the Appellate System*, BRIEF, Spring 1988, at 22

Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986)

James W. Paulsen & Gregory S. Coleman, *Civil Procedure*, 26 TEX. TECH. L. REV. 397, 436-45 (1995)

George C. Pratt, *Foreward: Summary Orders in the Second Circuit under Rule 0.23*, 51 BROOK. L. REV. 479 (1985)

Report of Joint Subcommittee on Use of Summary Orders by the United States Court of Appeals for the Second Circuit, 62 BROOK. L. REV. 785 (1996)

Richard C. Reuben, *New Cites for Sore Eyes*, A.B.A. J., June 1994, at 22

William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573 (1981)

William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REF. 623 (1988)

William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996)

John Riley, *Tenth Circuit Vacates No-Publication Order*, NAT'L L.J., Feb. 6, 1984, at 3

Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989)

Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405 (1994)

Philip Shuchman & Alan Gelfand, *The Use of Local Rule 21 in the Fifth Circuit: Can Judges Select Cases of "No Precedential Value?"*, 29 EMORY L.J. 195 (1980)

Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541 (1997)

Peter Siegelman & John J. Donohue, III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC'Y REV. 1133 (1990)

Faye A. Silas, *To Publish or Not: Courts Try Selective Approach*, A.B.A. J., June 1985, at 28

Howard Slavitt, *Selling the Integrity of the System of Precedent: Selective Publication, Depublication, and Vacatur*, 30 HARV. C.R.-C.L. L. REV. 109 (1995)

Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307 (1990)

Donald R. Songer, et al., *Nonpublication in the Eleventh Circuit: An Empirical Analysis*, 16 FLA. ST. U. L. REV. 963 (1989)

DONNA STIENSTRA, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS (Federal Judicial Center 1985)

David S. Tatel, *Some Thoughts on Unpublished Decisions*, 64 GEO. WASH. L. REV. 815 (1996)

George M. Weaver, *The Precedential Value of Unpublished Judicial Opinions*, 39 MERCER L. REV. 477 (1988)

1. Thomas E. Baker, *Intramural Reforms: How the U.S. Courts of Appeals Have Helped Themselves*, 22 FLA. ST. U. L. REV. 913 (1995).

Professor Baker discusses several reforms instituted by the federal courts of appeals to handle the expanding case load, including the practice of issuing unpublished opinions. While Professor Baker does not reject the practice of selective publication outright, he does express several concerns with the issuance of unpublished opinions. First, he argues that regardless of publication, a court must explain its reasoning and decision. As a result, writing for non-publication does not save much time. He suggests that the efficiency gain of unpublished opinions is difficult to measure and speculative. Professor Baker also refutes the argument that selective publication is justified by the increasing expense of maintaining a law library and performing legal research. He maintains that the case load problem has been around for many years, and yet, the profession has adopted mechanisms for handling the large volume of cases. Most importantly, Professor Baker argues that selective publication is inconsistent with the federal appellate tradition. He contends that the practice leads to suspicion and the appearance that judges are not doing their job diligently. It allows judges the opportunity to make arbitrary decisions and then hide them from public view. Professor Baker concludes that selective publication should be allowed but a national uniform rule should be adopted to minimize the costs of non-publication. He suggests that there should be a presumption in favor of publication, a requirement of a unanimous panel decision to not publish an opinion, and a list of objective criteria for mandatory publication.

Professor Baker argues that if a non-publication rule is accepted, a non-citation rule is the logical consequence. He acknowledges the criticism that not allowing citation to an opinion is contrary to a system based on stare decisis. However, he concludes that allowing citation to unpublished opinions would frustrate the purposes of selective publication. Judges would have to spend more time writing the opinions to make them useful to people other than the parties of the action, a black market would develop in unreported opinions, and repeat litigants would have an advantage because of their greater access to more unpublished opinions. Further, not much would be gained through allowing citation because unpublished opinions are merely applications of settled law and would add little to the existing case law.

2. Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOYOLA U. CHI. L.J. 1 (1989).

Professor Beyler performed an empirical study on the alleged benefits and costs of selective publication plans. He studied a sample of "typical" state appellate court systems and determined that selective publication had a significant impact on the productivity of appellate courts. He also found that less than 1% of the unpublished opinions reviewed utilized sloppy reasoning and only around 15% of the unpublished opinions had any significant precedential value. Based on these results, Professor Beyler concluded that the benefits of selective publication plans outweigh the costs. However, he recommended five changes to the current publication rules to improve the accuracy of the selection process: 1) an opinion should be published if it decides a new issue under a constitution, statute, ordinance or court rule, 2) courts should adopt and inform attorneys of procedures for requesting publication of an opinion that was originally unpublished, 3) courts should

allow citation of unpublished opinions to support a contention that there is an inconsistency among the decisions of the circuit, 4) courts should publish decisions which contain separate opinions, and 5) courts should publish opinions which reaffirm a principle of law that has not been applied in a long time.

3. Martha J. Dragich, *Will the Federal Courts of Appeals Perish If They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose A Greater Threat?*, 44 AM. U. L. REV. 757 (1995).

Professor Dragich argues that full, published opinions are necessary for the operation of stare decisis, help protect the legitimacy of the judicial system, and serve as the basic tools of lawyers and judges. She contends that selective publication makes it difficult to determine what the law is and allows hard decisions to be avoided or hidden in a body of law that is inaccessible to many lawyers. Consequently, selective publication exacerbates the problem of disparate resources by making some opinions, which contain useful information, effectively available only to wealthy litigants. Furthermore, Professor Dragich discusses some examples of "unpublished" opinions which actually developed new law or modified established law. She argues that judges cannot accurately determine which cases require published opinions and recommends a change in the selective publication policies. She suggests that the courts of appeals should follow a strong presumption in favor of publication, and should automatically publish any decision which reverses the lower court or in which the panel decision is not unanimous. Professor Dragich also criticizes the uncertainty surrounding the precedential status of unpublished opinions. She argues that legal researchers must search unpublished opinions to be competitive and effective advocates, regardless of the opinions' citability. Finally, Professor Dragich contends that selective publication weakens the development of law by failing to provide guidance for lawyers and lower courts. She argues that this failure undermines the values of certainty, predictability and fidelity to authority which form the basis of our legal system.

4. Peter Jan Honigsberg & James A. Dikel, *Unfairness in Access to and Citation of Unpublished Federal Court Decisions*, 18 GOLDEN GATE UNIV. L. REV. 277 (1988).

Professors Honigsberg and Dikel are primarily concerned with the problem of unequal access to unpublished opinions. They note that repeat litigants and wealthier firms have greater access to the opinions and argue that this increased access gives these litigants an advantage because unpublished opinions can influence subsequent litigation. They contend that unpublished opinions can help an attorney identify the precedent which the court finds relevant, provide guidelines for arguments in briefs or memos, and aid the lawyer in discerning trends and patterns in the court's decisions. While Professors Honigsberg and Dikel acknowledge that judges are not consistent in interpreting the standards relating to the precedential value of unpublished opinions, they suggest that attorneys should cite to unpublished opinions regardless of the circuit rule. They note that some judges have referred to unpublished opinions in later decisions, and that even in cases in which the judge did not explicitly mention the opinion, it could likely have affected the judge's reasoning. Furthermore, they report that no attorney has ever been

sanctioned for citing to an unpublished opinion, and no circuit rule explicitly provides for such sanctions.

Professors Honigsberg and Dikel recommend that the circuits publish all of their opinions. However they suggest that the courts should continue to distinguish the more important cases from the routine appeals and should limit the precedential value of the "less important cases" to merely persuasive authority.

5. Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REF. 119 (1994).

Professor Martineau evaluates the five most common criticisms of selective publication plans: 1) decrease in judicial responsibility and accountability, 2) hindrance of review by a higher court, 3) inability of judges to accurately predict which opinions do not deserve publication, 4) unequal access to unpublished opinions for repeat litigants who receive copies of the opinions as a party to the action, and 5) lack of evidence that selective publication saves judicial or litigant time or resources. Professor Martineau refutes each of these arguments and concludes that the practice of issuing unpublished opinions is beneficial and necessary in light of the increasing case load of appellate judges.

Responding to the first two criticisms, Professor Martineau argues that there are sufficient constraints in the appellate process to hold judges accountable--such as the use of panels to make decisions, peer review by members of the court, and opportunity for review by the court en banc or a higher court. Furthermore, he notes that unpublished opinions are not necessarily hidden. The opinions can be researched as part of the court's records, or a losing party can seek review by a court or complain to the media or legislature about the decision. Also, he argues that if a court wants to act irresponsibly, it can do so by manipulating or narrowing precedent in a published opinion as easily as in an unpublished one. Next, Professor Martineau defends the premise that not all appellate cases serve a "law-making" function and asserts that judges are competent to decide early in the process whether the decision will make law. Addressing the argument that repeat litigants have an unfair advantage, he suggests that any benefit received by increased access to uncitable, unpublished opinions is marginal at best. He contends that a court is most persuaded by positions supported with precedent and that arguments borrowed from unpublished opinions will not carry any more weight than the litigants own ideas. Finally, Professor Martineau discusses the ever-expanding appellate caseload and argues that reducing publication saves judicial time in writing opinions and lawyers' time spent researching. He suggests that the rules against citation of unpublished opinions should be strictly enforced and that the opinions should not be disseminated electronically. Increased access to the opinions only increases the temptation to research and use the opinions which would undermine the benefits of selective publication.

6. Thomas B. Marvell & Carlisle E. Moody, *The Effectiveness of Measures to Increase Appellate Court Efficiency and Decision Output*, 21 U. MICH. J.L. REF. 415 (1988).

Professors Marvell and Moody performed an empirical test of reform measures adopted in state appellate courts, including selective publication plans. They found that the issuance of unpublished opinions was an effective efficiency measure and had a

highly significant impact on the productivity of the courts. The study only evaluated the effectiveness of the reforms and did not make any suggestions as to whether particular measures should be adopted.

7. Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385 (1990).

In a short essay, Judge Merritt examines trends in the process of judicial decision making, including the practice of issuing unpublished opinions. He argues that selective publication has historical precedent, in that the reporters were originally selective, and he suggests that this is because many cases do not change or add anything to the law. Judge Merritt argues that most unpublished opinions are so fact-specific and clearly governed by precedent that the only use for the opinion would be to lengthen string citations in briefs. He further argues that the availability of "unpublished" opinions on LEXIS and Westlaw minimizes the costs of selective publication and promotes judicial accountability with regard to unpublished opinions.

8. Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909 (1986).

Judge Nichols defends the practice of selective publication. He explains that contrary to the critics' belief, unpublished opinions do not create a source of "secret" or "hidden" law. He argues that there is little incentive for a judge to use unpublished opinions in deciding later cases because it is sufficiently difficult as a judge to keep up with the published case law. Judges do not have the time or energy to factor unpublished, non-precedential cases into the deliberation process. Judge Nichols also rejects the argument that issuing unpublished opinions denies the public the opportunity to "check" the judges work. He notes that the public rarely gives judges feedback on opinions and argues that colleagues' criticism and comments are much more effective in holding judges to certain standards of work. Judge Nichols also supports the prohibition of citations to unpublished opinions. He argues that repeat litigants do not have an unfair advantage from their increased access to unpublished opinions because using those opinions in briefs would be pointless. He contends that judges will either not remember or recognize the arguments of their unpublished opinion or will resent the attempt to make precedential use of an opinion specifically designated as non-precedential. Finally, Judge Nichols addresses the concern that judges are unable to accurately determine which opinions should not be published. He first explains that not all opinions add something worthwhile to the law. He maintains that while there is a right to an appeal, there is not a right to overload reporters and libraries with useless, repetitive opinions. Judge Nichols acknowledges that judges occasionally make a mistake regarding whether an opinion should be published. However, he argues that this is not common and that judges are getting better at distinguishing opinions which should be published from those that should not.

9. James W. Paulsen & Gregory S. Coleman, *Civil Procedure*, 26 TEX. TECH L. REV. 397, 436-45 (1995).

In the course of a survey article, Professors Paulsen and Coleman review the 5th Circuit rule regarding selective publication and argue against the nonpublication of opinions. They suggest that the current rule allows for the development of an underground stream of precedent: judges rely on unpublished opinions to support later decisions and then order the subsequent opinions to remain unpublished as well. Professors Paulsen and Coleman also argue that the current rule does not save any research time or costs because it allows some citation to unpublished opinions. This creates an incentive for attorneys to spend the time and money researching the opinions on LEXIS, Westlaw, computer bulletin boards or Internet databases. They contend that the creation of a uniform, non-proprietary citation form would be more effective in reducing research costs because it would introduce competition into the system. Finally, Professors Paulsen and Coleman suggest that the real problem is not the number of opinions but the length of the decisions. They recommend that judges write shorter opinions and that all opinions should be published, but only after they are final (rehearing denied).

10. George C. Pratt, *Summary Orders in the Second Circuit Under Rule 0.23*, 51 BROOK. L. REV. 479 (1985).

Judge Pratt discusses the criticisms of the practice of issuing summary orders (unpublished and uncitable opinions) and the proposals for changing the rule governing publication or non-publication of opinions. Judge Pratt first notes two controversial features about the Second Circuit's practice: the prohibition of citations to summary orders, and the vagueness of the standard used to determine whether an opinion should be published. He then discusses six complaints regarding the use of summary orders: 1) the practice deprives the bar of useful information concerning how legal rules are applied to fact situations, 2) institutional litigants have an unfair advantage because they can build up files of unpublished opinions, 3) no panel of judges can tell whether an opinion will be important for the development of the law in the future, 4) the practice allows judges to "hide" decisions or avoid hard problems by addressing them only superficially or not at all, 5) the practice is inconsistent with the common law system because it prevents a substantial number of cases from becoming precedent, and 6) the practice creates a perception of secrecy which leads to distrust of the court. Judge Pratt also evaluates two proposals to change the selective publication rule. The first would allow unpublished opinions to be cited as precedent. Judge Pratt concludes that this proposal would do more harm than good because it would require judges to spend more time writing the opinions, in order to provide more detail and a sufficient factual context to make the opinion useable, without adding much to the development of the law. This would undermine the efficiency benefits of selective publication. The second proposal would treat summary orders as persuasive but not binding precedent. Judge Pratt finds this alternative more acceptable but ultimately concludes that the current practice should not be changed. He notes that summary orders often do not contain useful information regarding the scope of legal principles and that mistakes in determining the jurisprudential value of an opinion are rare. Furthermore, institutional litigants do not gain a significant advantage because the vast majority of summary orders deal with routine cases. Finally, he argues that judges' reluctance to send unpolished work to the general public is a significant concern.

Judge Pratt does acknowledge that there is some room for improvement in the practice of issuing summary orders. He argues that the standard of determining publication should be more detailed. The Second Circuit's current rule provides that the panel should issue the opinion as a summary order if no jurisprudential purpose would be served by a written opinion. Judge Pratt suggests that explaining "jurisprudential purpose" more fully would be worthwhile in guiding judges' decisions and explaining to the bar why certain decisions were not published.

11. *Report of Joint Subcommittee on Use of Summary Orders by the United States Court of Appeals for the Second Circuit*, 62 BROOK. L. REV. 785 (1996).

The Subcommittee evaluates the Second Circuit's use of summary orders and concludes that summary orders should be made publicly available through the electronic media. The Subcommittee further recommends that there should be a more detailed standard governing the publication/non-publication decision. The report identifies several criticisms of the selective publication policy: 1) lawyers feel that time invested in an appeal deserves more as an end product, 2) unpublished opinions deprive lawyers of useful information concerning the circuit's thinking in an area, 3) no panel can accurately determine if a case has future jurisprudential value, 4) even if a decision does not establish a new rule of law, the court's application of the law to a particular set of facts may be useful to future litigants, 5) summary orders create an air of secrecy over a substantial portion of the court's work, 6) repeat, institutional litigants have an unfair advantage because of greater access to unpublished opinions, and 7) the court should specify in greater detail the criteria used in making publication decisions. The Subcommittee concludes that the best way to accommodate the above criticisms and the circuit's legitimate concern with efficiency and costs is to make the "unpublished" opinions available electronically. The Subcommittee argues that this would not require any change in the court's preparation of the opinions and would make the summary orders more available to the bar, which would eliminate the perception of secrecy and provide more information to litigants.

12. William M. Richman & William L. Reynolds, *Appellate Justice Bureaucracy and Scholarship*, 21 U. MICH. J.L. REF. 623 (1988).

Professors Richman and Reynolds evaluate three mechanisms appellate courts have used to accommodate their increased case load, including the practice of selective publication. They raise several criticisms of nonpublication: 1) unpublished opinions are of a lower quality than published opinions, 2) unpublished opinions are used disproportionately for certain types of cases (civil rights, Social Security appeals, prisoner petitions, and appeals filed in forma pauperis), which gives the appearance of a double standard of justice, 3) selective publication reduces judicial accountability by decreasing the opportunity for public review and reducing the likelihood that a higher court will hear the case because of the opinion's lack of precedential impact, and 4) the nonpublication decision may be a self-fulfilling determination because once the decision is made not to publish the decision, a judge pays less attention to the law and facts at issue and may miss the opportunity to create or modify precedent. Professors Richman and Reynolds also attack the premises of the selective publication plans. They argue that there is no

evidence that any judicial time is saved by writing unpublished opinions and contend that more published cases may actually help ease the research burden by making it easier for litigants to find a case on point. Finally, Professors Richman and Reynolds dispute the contention that different kinds of appeals deserve varying amounts of judicial attention and argue that this assumption is inconsistent with the goal of equal access to justice.

13. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273 (1996).

Professors Richman and Reynolds evaluate several reforms appellate courts have instituted to deal with expanding case loads, including the practice of selective publication. They argue that published opinions serve several important functions which are undermined by the practice of issuing unpublished opinions. First, published opinions provide predictability regarding how a principle of law will be applied to different factual contexts. Second, published opinions increase certainty in the law and "harden" precedent. Professors Richman and Reynolds argue that it is more difficult for subsequent courts to ignore several cases reaching a certain outcome than it is to disregard or distinguish one unfavorable precedent. Thus, publishing all opinions would increase the strength of the legal principles applied. Third, published opinions increase judicial accountability by encouraging well reasoned decisions. If a judge is individually responsible for an opinion, he or she will have more incentive to "get it right." Furthermore, Professors Richman and Reynolds argue that selective publication diminishes the opportunity for review because a higher court will be less likely to allocate scarce judicial time to a case that does not even "make law." They also contend that unpublished opinions are likely to be lower quality opinions because careful writing helps judges identify problems in their reasoning and forces them to clarify the logic of the opinion. Finally, Professors Richman and Reynolds note that the practice of selective publication is unfair because repeat litigants have greater access to unpublished opinions and can catalogue the decisions and use them in later cases.

14. Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 MICH. L. REV. 940 (1989).

Professor Robel is primarily concerned with the advantage repeat litigants have under the current selective publication plans because of those parties increased access to unpublished opinions. She argues that the plans' incentives against using unpublished opinions--limited distribution and prohibition of citation--are ineffective. Professor Robel argues that lawyers retrieve more than the "rule of law" from a court's opinion. Lawyers use opinions to determine the development of law in a particular area, to discern trends, and to make decisions regarding settlement and litigation strategy. Furthermore, Professor Robel argues that limited distribution does not prevent the use of unpublished opinions because frequent litigants, like the government, have greater access to these opinions. The government is often a party to cases decided by unpublished opinions and can therefore maintain files of the opinions rendered in the cases. Professor Robel conducted a survey of several governmental agencies and concluded that many keep the opinions and refer to them for guidance in later litigation. Consequently, the current

selective publication plans are unfair to non-institutional litigants. Additionally, the no-citation rule does not provide much disincentive because litigants can still incorporate the reasoning into their briefs and gain other useful information from the opinion. Professor Robel also expressed concern regarding the rule of allowing motions for publication of unpublished opinions. Once again, frequent litigants have an advantage because they can attempt to manipulate the development of precedent by moving for publication of the opinions favorable to them.

Professor Robel concludes that selective publication plans are not worth the costs and argues for universal publication of the opinions as they are currently being written. This will not create any additional burdens for judges and will eliminate the unequal access problem of the current plans.

15. Bruce M. Selya, *Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age*, 55 OHIO ST. L.J. 405 (1994).

Judge Selya argues for more limited publication of appellate decisions and recommends expanding the publication ban to include electronic dissemination. He argues that if citation is permitted to the "unpublished" opinions available electronically, wealthy litigants have an unfair advantage. If citation is not allowed, electronic availability is merely an invitation to violate the rule. Judge Selya identifies four basic objections to selective publication: 1) some view publication as part of a litigant's right to full adjudication, 2) frequent litigants or others who obtain unpublished opinions have an unfair advantage, 3) the need for the public eye to police the quality of the decision, and 4) the practice suppresses precedent and judges are not able to accurately determine which opinions have no precedential value. Judge Selya rejects all of these arguments. He notes that publication has rarely been perceived as a "right" or part of our judicial heritage and that unequal access could be addressed by a strict enforcement of a no citation rule. Judge Selya also argues that the primary check on opinion quality is not public exposure but the review of colleagues, professional pride and the possibility for review. Finally, he suggests that stringent guidelines governing publication are sufficient for guarding against the suppression of worthy precedent. Judge Selya concludes that reducing the number of published opinions will give judges more time to dedicate to clarifying important legal principles in the deserving cases.

16. Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUDICATURE 307 (1990).

Professor Songer studies the assumption that unpublished decisions are only issued in frivolous appeals with no precedential value and concludes that that assumption is not supported by the evidence. He argues that a significant number of unpublished opinions seem to involve cases that are not routine, may be politically significant, and present an opportunity for the panel to exercise significant discretion in reaching a decision. Professor Songer also contends that the official criteria for publication do not actually determine which opinions are published and that the standards of the circuits are sufficiently vague to allow judges to interpret the rule as they wish.

17. Elizabeth M. Horton, Comment, *Selective Publication and the Authority of Precedent in the United States Courts of Appeals*, 42 UCLA L. REV. 1691 (1995).

Ms. Horton evaluates the practice of selective publication, its justifications, and the objections to the practice and concludes that the issuance of unpublished opinions promotes efficiency and fairness without significant costs. First, she identifies four objectives served by selective publication: 1) it saves judges time in keeping current with developments in the law by reducing the number of cases to be considered as precedent, 2) it allows appeals to be resolved more quickly, 3) it allows judges to devote more time to opinions for cases that contribute to the development of the law, and 4) it reduces publication, storage and research costs. Ms. Horton then addresses the primary objections to selective publication. She argues that the issuance of unpublished opinions does not deny lawyers and lower courts guidance or notification of inconsistencies because unpublished opinions are now available on LEXIS and Westlaw. This allows the public to learn from these opinions and police their accuracy. Additionally, electronic availability refutes the argument that repeat litigants have an unfair advantage. Ms. Horton argues that even if computer research is too expensive for some litigants, unpublished opinions are available from other sources, such as newsletters, and therefore, litigants are on equal footing regarding access to unpublished opinions. Ms. Horton rejects the argument that unpublished opinions contain sloppy reasoning or incorrect conclusions. She contends that several drafts of an opinion do not necessarily clarify or improve the rationale of the decision and that the basic legal conclusion of the opinion will not likely change as it is polished for publication. Ms. Horton argues that the fact that unpublished opinions are more common in some areas of the law does not suggest that judges give those issues inadequate consideration or that the quality of the decisions is diminished. She suggests that the high number of unpublished opinions could be reflective of high rates of frivolous appeals and not of judicial inattention. Finally, Ms. Horton argues that selective publication is not inconsistent with stare decisis because the unpublished opinions would not add precedential value to the case law. Many appeals involve the standard application of well-established law, and the loss of this "precedent" does not harm stare decisis. Ms. Horton concludes that not all cases are of equal value to the development of law and that the judicial system is best served by the practice of selective publication.

18. Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541 (1997).

Mr. Shuldberg argues that the digital availability of information affects what it means for an opinion to be "unpublished" and undermines the rationale of selective publication plans and the no-citation rules accompanying those plans. He notes that selective publication plans are based on a fear of the expanding appellate case load and the associated costs. He argues that the plans were designed to eliminate the increased costs of providing, storing and searching legal materials and to minimize the advantages of wealthy litigants by reducing the costs of legal research for everyone. Additionally, selective publication served the goal of judicial efficiency by reducing the time spent

writing opinions. Mr. Shuldberg also argues that the no-citation rules were designed to further the goals of selective publication. Allowing citation would frustrate the purpose of saving research time, and judges may feel compelled to spend more time writing opinions if the opinions could be used as precedent. Furthermore, it was believed that allowing citation would advantage attorneys who had greater time and resources or who regularly practiced in a particular court. Mr. Shuldberg evaluates these historic rationales with regard to current technology and concludes that there is no longer support for selective publication or no-citation rules. First, he argues that CD-ROMs save cost of storage space and are less expensive than the printed volumes. Furthermore, the efficiency of computer research allows lawyers to cope with the need to sort through more cases. Mr. Shuldberg also argues that more cases may clarify the law and allow lawyers to determine how often a rule has been applied and in what circumstances. Consequently, digital availability of opinions allows lawyers to obtain useful information and minimizes the concern about storage and research costs. He also contends that there is no longer a justification for the no-citation rule. Mr. Shuldberg argues that the prohibition of citations was premised on the assumption that no-citation meant no use. However, unpublished opinions are currently used in making litigation decisions and settlement negotiations, and litigants are already spending time and resources searching unpublished opinions because of the public access through on-line research services. Mr. Shuldberg concludes by arguing for electronic dissemination and for permissible citation to unpublished opinions as persuasive authority. He argues that allowing electronic access will provide a check on judicial activity, promote the appearance of fairness, and provide more useful information to litigants.

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19. Edward A. Adams, *Increased Use of Unpublished Rulings Faulted*, N.Y. L.J., Aug. 2, 1994, at 1.

Mr. Adams summarizes many of the complaints against the practice of selective publication. He notes that lawyers complain about the secrecy of the practice and the corresponding concern about judicial accountability. He also reports skepticism from the bar that a majority of appellate cases are routine matters which do not contribute anything to the law and expresses the concern that unpublished opinions provide judges with a great opportunity to hide difficult cases. Mr. Adams reports favorably on the practice in the Sixth and Tenth Circuits of allowing unpublished cases to be cited as persuasive authority. This rule provides a check on the judges' determination that a decision lacks jurisprudential value by allowing attorneys to use the opinion in future circumstances if it proves to be worthwhile.

20. Paul Marcotte, *Unpublished but Influential*, A.B.A. J., Jan. 1991, at 26.

Mr. Marcotte discusses several concerns with the practice of selective publication. First, he argues that judges use unpublished opinions to decide subsequent cases. Second, he suggests that the practice is abused by judges in order to hide embarrassing information about the litigants or send subtle messages to government agencies without revealing that information to the general public. Next, Mr. Marcotte expresses concern

about the disparity in access to the unpublished opinions among different groups of litigants. He argues that those without access to the opinions are put at a disadvantage because they cannot discern the trends in the case law as easily as litigants with greater access. Mr. Marcotte also notes that there is no uniform criteria for determining which opinions are published and which are not. He suggests that this contributes to judges making publication decisions for the wrong reasons, such as to save a firm from embarrassment, to keep controversial opinions hidden, or to decrease the chance for reversal by a higher court.

21. Richard C. Reuben, *New Cites for Sore Eyes*, A.B.A. J., Jun. 1994, at 22.

Mr. Reuben notes that the use of electronic reporting increases access to unpublished opinions. He suggests that this greater accessibility is beneficial because it promotes judicial accountability and opens the law to public scrutiny. However, Mr. Reuben also argues that the increased access creates frustration for attorneys who find cases on point but are not able to cite them under the current rules. Finally, he reports that lawyers with more limited resources sense that they are at a disadvantage because they cannot afford to research unpublished opinions.

DRAFT

IN DEFENSE OF UNPUBLISHED OPINIONS

The Honorable Boyce F Martin, Jr.*

"In my view, multiplied judicial utterances have become a menace to orderly administration of the law Much would be gained if three-fourths (maybe nine tenths) of [the opinions] published in the last twenty years were utterly destroyed Thousands of barren dissertations have brought confusion, and often contempt." Justice McReynolds. [1]

Justice McReynolds wrote those words more than 60 years ago, but his sentiments ring true today. Appellate judges continue to labor under the weight of tens of thousands of appeals every year, and our "multiplied utterances" would increase beyond all reason were we forced to publish all our opinions.

When I came on the bench in 1979, we were at Volume 602 of the F.2d. Now we're into the F.3d. The last time I checked my overburdened shelves, we were pushing past Volume 133. In 1996 alone, we went from 73 F.3d to 103 F.3d, filling more than 45,000 pages with appellate opinions. At this rate, we will go into the F.4th sometime around 2025. This Essay isn't about judges' lack of shelf space for the kudzu-like growth of Federal Reporters, but the growth is indicative of too much written material creating too little new law [2] As commentators Carrington, Meador, and Rosenberg have noted: "A large proportion of the opinions that have

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1 Justice McReynolds is quoted in Thatch v. Livingston, 56 P.2d 549, 549-50 (Cal. Dist. Ct App. 1936)

2 See also Hon. Philip Nichols, Jr., Introduction. Selective Publication of Opinions: One Judge's View, 35 Am. U. L. Rev. 909, 913 n.13 (noting rapid growth in publishing rate during his tenure on the federal appellate bench and that "[t]his was when the Judicial Conference selective publication plans had been several years in effect. Without them, one can only guess what the figure might have been.")

been coming out of American courts add essentially nothing to the corpus of the law. They are of interest and significance to the parties only. Yet they fill large quantities of pages in the printed reports."[3] Lest the 13 federal circuits become a Tower of Babel, we need a way to sift opinions for publication. Unpublished opinions act as a pressure valve in the system, a way to pan for judicial gold while throwing the less influential opinions back into the stream.

When I see that more than 6,000 U.S. circuit court opinions are published each year,[4] I am reminded of Ezra Pound's imprecation to "make it new."[5] How much novelty can there be in this flood of opinions, particularly in light of the relative homogeneity of the federal appellate docket? Roughly 10 percent of the cases on the Sixth Circuit docket are drug cases of some sort, and another 39 percent are various forms of prisoner petitions.[6] What can we add on these subjects that is new and worthwhile? Indeed, I sometimes believe that in our rush to say something original on yet another 18 U.S.C. § 924(c)[7] case, for instance, we muddle the process even more

Whereas academicians tend to see unpublished opinions as causing a variety of systemic problems,[8] judges tend to see them as a necessary, and not necessarily evil, part of the job.[9] I

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[3] Paul D. Carrington et al., Justice on Appeal 35 (1976).

[4] Hon. Richard A. Posner, The Federal Courts. Challenge and Reform 170 (1996).

[5] Ezra Pound, Make it New.

[6] Federal Judicial Caseload Statistics 25-29 (1997)

[7] A person who violates 18 U.S.C. § 924(c) receives additional prison time for using or carrying a firearm during or in relation to a drug trafficking crime or crime of violence.

[8] See Carrington et al., supra note 3, at 39-41 (rejecting nonpublication rules and recommending use of memorandum decisions instead); Martha J. Dragich, Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify

believe that the judges' general approval of the use of unpublished decisions will be reflected in the results of an informal poll currently circulating among the circuits. The Committee on Rules

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Judicial Decisions Pose a Greater Threat, 44 Am. U. L. Rev. 757, 802 (1995) ("The courts of appeals' admittedly legitimate concerns with increasing caseloads do not warrant practices that threaten the development of a coherent body of law and fundamentally alter our appellate traditions."), William L. Reynolds & William M. Richman, Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition, 81 Cornell L. Rev. 273, 281-86 (1996) [hereinafter Reynolds & Richman, Elitism] ("The costs of non-publication are not limited to reduced predictability, accountability, responsibility, and reviewability. It should come as no surprise that unpublished opinions are also dreadful in quality."); William L. Reynolds & William M. Richman, The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals, 78 Col. L. Rev. 1167, 1205 (1978) [hereinafter Reynolds & Richman, Non-Precedential Precedent] ("The case against the limited publication/no citation rules is a strong one. The premises upon which the rules are based are subject to serious question, and powerful arguments can be advanced against the entire concept."); Lauren K. Robel, The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals, 87 Mich. L. Rev. 940, 946 (1989) (". . . I argue that selective publication plans, at least in their present form, cannot be supported as a fair or just way to manage the workload of the courts."). But see William L. Reynolds & William M. Richman, Limited Publication in the Fourth and Sixth Circuits, 1979 Duke L.J. 806, 809 [hereinafter Reynolds & Richman, Limited Publication] ("Full exposure and consideration of the arguments reveal that neither the case for nor the case against limited publication is conclusive.") But see Robert J. Martineau, Restrictions on Publication and Citation of Judicial Opinions: A Reassessment, U. Mich. J.L. Ref. 119, 120 (1995) (concluding that "although there are several weaknesses in the administration of rules restricting citation and publication, the rules should not be eliminated").

[9] My Sixth Circuit colleague, and predecessor as chief judge, Gilbert Merritt, has written briefly on the issue of non-publication in another installment of the Ohio State Law Journal's "Judges on Judging" series. Judge Merritt noted that "[t]he accountability problem due to nonpublication is overstated." Hon. Gilbert S. Merritt, Judges on Judging: The Decision Making Process in Federal Courts of Appeals, 51 Ohio St. L.J. 1385, 1392-94 (1990). See also Nichols, supra note 2, at 921 ("While a considerable amount of muttering about selective publication still occurs, it appears that judges like it and feel at home with it, . . ."); Richard A. Posner, The Federal Courts: Challenge and Reform 171 ("Whether or not limited publication is good on balance—as I think it is, bearing in mind the adage about not making the best the enemy of the good—its drawbacks are serious, . . ."). But see National Classification Comm'n v. United States, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (statement by Judge Wald) (noting arguments against use of unpublished opinions and decrying lack of "uniformly enforced or practiced guidelines for making the publication decision").

of Practice and Procedure of the Judicial Conference of the United States is surveying judges on whether the rules governing the use and citation of unpublished opinions, which currently vary from circuit to circuit[10], should be standardized through inclusion in the Federal Rules of Appellate Procedure. Another question the committee is asking is whether the courts of appeals should continue to designate some opinions as unpublished. I believe we will maintain the status quo. I get the sense from colleagues in my circuit and other circuits that judges are generally happy with the system as it is.

Nonetheless, commentators continue to criticize the circuit courts for hobbling about on the crutch of the unpublished opinion. Here are some criticisms:

-loss of precedent, that unpublished opinions are, in fact, precedent but cannot be used as such;

-sloppy decisions, that judges get sloppy when they know they're writing an unpublished opinion;

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[10] See D.C. Cir. R. 28(c) (citation of unpublished dispositions), D.C. Cir. R. 36 (criteria use of published opinions); 1st Cir. R. 36.2 (criteria for, use of, and citation of published opinions); 2d Cir. R. 0.23 (dispositions in open court or by summary order); 3d Cir. I.O.P. 5.3 (not-for-publication opinions), 3d Cir. I.O.P. 5.4 (memorandum opinions); 4th Cir. R. 36(a) (published opinions), 4th Cir. R. 36(b) (unpublished dispositions), 4th Cir. R. 36(c) (citation of unpublished dispositions); 5th Cir. R. 47.5 (criteria for, precedential value of, and use of unpublished opinions), 5th Cir. R. 47.6 (affirmance without opinion); 6th Cir. R. 24 (citation of unpublished decisions and criteria for publication); 7th Cir. R. 53 (criteria for, use of, and citation of unpublished opinions); 8th Cir. R. 28A(k) (citation of unpublished opinions), 8th Cir. R. App. I (plan for publication of opinions), 9th Cir. R. 36 (criteria for publication and requests for publication), 10th Cir. R. 36.1 (unpublished orders and judgments), 10th Cir. R. 36.2 (publication criteria), 10th Cir. R. 36.3 (citation of unpublished opinions); 11th Cir. R. 36-1 (affirmance without opinion), 11th Cir. R. 36-2 (use and citation of unpublished opinions), 11th Cir. R. 36-3 (publishing unpublished opinions); Fed. Cir. R. 26, Fed. Cir. R. 47.6 (use and citation of non-precedential opinions).

-lack of uniformity, that panels cannot follow other panels when they are unaware of other panels' unpublished opinions;

-difficulty of higher court review, that the Supreme Court is far less likely to review an unpublished opinion than it is to review a published opinion;

-unfairness to litigants, that litigants deserve published opinions;

-less judicial accountability, that the unpublished opinion, particularly the per curiam, allows the judge to hide outside the public glare;

-less predictability, that any opinion provides a roadmap of the law and a sense of the direction in which the law is developing

This list is not exhaustive, and several commentators have emphasized the drawbacks of published opinions [1]

I would like to point out why I am in favor of unpublished opinions. I have already betrayed some of the reasons behind my bias, but I will attempt to flesh them out below. In the course of doing so, I hope to answer many of the critics' cavils. In Part I, I will lay out why we need unpublished opinions--namely too many cases with too little merit. In Part II, I will give some background information on the unpublished decision In Part III, I will provide my reasons for advocating the use of unpublished decisions. I will posit two main rationales for unpublished decisions, the practical-minded and the policy-driven.

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[1] For litanies of criticisms, see National Classification Comm'n v. United States, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (statement of Judge Wald); Dragich, supra note 8, at 785-800; Posner, supra note 4, at 165-68; Martineau, supra note 8, at 128 45; Reynolds & Richman, Elitism, supra note 8, at 281-86; Reynolds & Richman, Non-Precedential Precedent, supra note 8, at 1189 1194.

Finally, in Part IV, I will discuss limited citation I believe that limited citation goes hand in hand with the use of unpublished opinions Limited citation also answers the chief concern of those who denigrate the unpublished opinion and claim that judges are creating a type of "secret law."[12] I believe this characterization overstates the case As Judge Nichols, now deceased, once wrote, "hard as it is for academia to believe, the nonprecedent is really not a precedent."[13] I agree. In order to maintain the non-precedential status of unpublished opinions, though, I believe the Sixth Circuit should tighten its rules on citation of unpublished opinions.

I.

I respect the views of those who decry the increasing prevalence of unpublished opinions, but I would posit that the alternatives are either worse or unworkable. The alternatives basically come down to changing the input to United States Courts of Appeals or changing the output from them. Aside from the Antiterrorism and Effective Death Penalty Act and Prison Litigation Reform Act,[14] most Congressional statutes seem to increase the caseload of the federal courts [15]

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[12] See Dragich, supra note 8, at 785-91 (discussing "a secret body of law" and citing to National Classification Comm'n, 765 F.2d at 173)

[13] See Nichols, supra note 2, at 914.

[14] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996), Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801-10, 110 Stat. 1321 (1996).

[15] See, e.g., The Violence Against Women Act, S. Rep No. 103-138, (codified at 18 U.S.C. § 2261) See also Hon. Jon O. Newman, Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System, 56 U. Chi. L. Rev. 761, 768 (1989) ("The only effective means I see for curbing the growth of federal court caseload is a modest reallocation of jurisdiction from federal to state courts.").

The number of appeals to the circuit courts has increased steadily over the years.[16] The number of appeals per judge has grown unabatedly.[17] I can say anecdotally that when I clerked in 1963-64 for Judge Shackelford Miller, Jr., Chief Judge of the Sixth Circuit, we sat for three weeks at a time and heard three cases a day three days a week. That led to a total of 27 cases during a three-week sitting, and we sat four times a year. Now, the typical Sixth Circuit judge sits for one week at a time but hears six cases a day for four days. That adds up to 24 cases in a sitting, and the average active judge on our circuit sits eight times a year.[18] More cases means less time for each disposition and more unpublished opinions.

The size of the appeals, in terms of documents submitted to the court, also has grown. My evidence here is based on personal experience, but I think most judges would agree with me on this point. More briefs are pushing the 50-page limit,[19] and the joint appendices[20] are coming

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[16] Appeals filed have increased from 48,474 to 51,963 from 1993 to 1997, Federal Judicial Caseload Statistics, 7, but the increase is even more dramatic during a longer time span. In 1960 3,899 appeals were filed. 1960 Annual Report at 205. The increase in appeals from 1960 to today is more than 1,300 percent.

[17] In 1960 there were 3,899 appeals and 66 active court of appeals judges, which works out to 59 appeals per judge. 1960 Annual Report at 205. In 1997, 51,963 appeals were filed, and there were ?? active judges, which works out to ?? appeals per judge. 1997 Annual Report at ??.

[18] The average judge on the Sixth Circuit is scheduled to sit on 32 panels and hear 192 cases a year. In addition, the average Sixth Circuit judge sits on 110 "Rule 9" cases. These cases are disposed of without oral argument pursuant to 6th Cir. R. 9. Rule 9's result in a far higher percentage of unpublished opinions than do cases that are orally argued.

[19] Fed. R. App. P. 28(g).

[20] The Sixth Circuit requires litigants to submit a joint appendix. See 6th Cir. R. 11. Some joint appendices include more than 20 volumes and are several thousand pages long. It could be worse. Most circuits require submission of the record. I shudder to think of the labor of my peers on other circuits who must wade through these records.

in by the box-load. It is all I can do to lift these appendices, let alone read them.[21] I do not see any of these trends changing.[22] Just as more cases means more unpublished opinions, so too does more time spent wading through voluminous records and briefs mean less time for producing published opinions.

An even greater problem than the workload is the quality of the work. Although district court litigants have an appeal as of right to the courts of appeals, not all choose to avail themselves of this right. The ratio of appellants, however, has changed over time. In 1945 only one out of 40 district court cases were appealed; in 1988, one out of eight were appealed.[23] What is an optimal rate of appeal, I do not know, but I do know that too high a percentage of litigants are appealing. This is clear to me when I see litigants bring arguments that contradict settled points of law. It would require a giant leap of faith to believe that all of these appeals have merit and that the appeals now brought have the same merit as those brought at the old ratio. I am unwilling to make that leap of faith, and I am unwilling to publish opinions in all of the cases we

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[21] I learned to speed read in the Army. I would prefer not to have to send my clerks to boot camp and Officer Candidate School merely so they can slog through the volume of written material we receive.

[22] See Carrington et al., supra note 3, at 136 ("When all is considered, there is little that can be done about volume. The tide of affairs which produces litigation and appeals is largely beyond our control."); Newman, supra note 15, at 762 ("There is no reason to believe that the increase in federal court caseload will abate in the decades ahead.").

[23] See Dragich, supra note 8, at 768 n.50 (citing to Federal Courts Study Committee). See also Carrington et al., supra note 3, at 60 (noting rise in ratio of criminal appeals and noting that in some jurisdictions appeals are taken in more than 90% of criminal cases).

hear.[24] I don't have data on this, but, from my experience, prime candidates for unpublished opinions are Social Security, Black Lung, and criminal cases as well as prisoner petitions. Some cases in those areas do merit publication, but many do not. The stream of cases coming onto our docket, therefore, has become larger and more diluted in merit. In all likelihood, it will continue to do so

What about changing the output--making all our opinions published, even if it means writing shorter opinions (anathema to some of my colleagues)? What would happen if, for instance, we were forced to publish all our opinions? We would likely see an across-the-board lessening of quality, because judicial resources would be stretched even further, and we would see scores of remarkably brief and uninformative, but nonetheless "published," opinions. For the reasons I will outline below, I do not see that as either a likely or a desirable outcome

II.

A. History of the Unpublished Opinion

I do not intend to give a full history of the publication of judicial opinions,[25] but I would

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[24] See Nichols, supra note 2, at 919 ("If all the appeals filed in any intermediate federal court ought to be there, the court would have no need for a selective publication policy. The ones that should not be there create the need.").

[25] For more extensive histories of the publication of judicial opinions, see Mark D. Hinderks & Steve A. Leben, Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Cration of Unpublished Decisions in Kansas and the Tenth Circuit, 31 Washburn L.J. 155, 157 59 (1992); Martineau, supra note 8, at 121-26, Reynolds & Richman, Limited Publication, supra note 8, at 807 08; William L. Reynolds & William M. Richman, An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform, 48 U Chi. L. Rev. 573, 577 579 (1981); Donald R. Songer, Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality, 73 Jud 307, 307-08 (1990), Donna Stienstra, Unpublished Dispositions: Problems of Access and Use in the Courts of Appeals 5-14 (Federal Judicial Center 1985).

like to give some historical perspective on the publication system, particularly as it relates to my court. The present incarnation of the courts of appeals was established in 1891 through the Evarts Act,[26] and the Federal Reporter began publishing cases in 1894. When I clerked in 1963-64 for Chief Judge Miller, we were publishing nearly all our opinions. Other judges published the vast majority of their opinions as well.[27] We were on the cusp of change, though. In 1964 the Judicial Conference resolved, "That the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct."[28] According to Reynolds & Richman, "[t]he movement toward limited publication began in earnest in 1971, following a report by the Federal Judicial Center."[29] In 1973, the Federal Judicial Center recognized that "the judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision,"[30] and provided a set of recommended standards for publication.[31] Reynolds and Richman report that "by 1974, each

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[26] Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

[27] See Songer, supra note 25, at 308 ("It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small.").

[28] Reports of the Proceedings of the Judicial Conference of the United States, 11.

[29] Reynolds & Richman, Limited Publication, supra note 8, at 808.

[30] Advisory Council for Appellate Justice, FJC Research Series No. 73-2, Standards for Publication of Judicial Opinions 3 (1973).

[31] Id at 22-23.

circuit had such a plan."[32] According to Reynolds and Richman, "Viewed in historical perspective, limited publication is hardly a radical idea; until recently, case reporting has been a haphazard enterprise . . . What is new and radical is the notion that the judges themselves should be controlling access to their work by means of systematic publication plans."[33]

These days, "unpublished opinion" is almost a term of art, because all federal appeals court opinions are published in some way even if not in the official book reporters. All federal

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Rule ___
Publication of Appellate Opinions

1. Standard for Publication
   An Opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless
   a. The opinion establishes a new rule or law or alters or modifies an existing rule; or
   b The opinion involves a legal issue of continuing public interest; or
   c. The opinion criticizes existing law; or
   d The opinion resolves an apparent conflict of authority.
2. Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order an unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.
3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.
4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case at the conference on the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish
5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication. Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to the court.

[32] Reynolds & Richman, Limited Publication, supra note 8, at 808.

[33] Reynolds & Richman, supra note 25, at 575.

appeals court opinions, after all, are part of the public record. Those from the Sixth Circuit can be accessed through our web page. Indeed, unpublished opinions regularly are "published" on Westlaw and LEXIS.[34] Given the nature of legal research today, electronic publication is probably more efficacious than book publishing.[35] In addition, if a newspaper or legal journal were so inclined, it could reprint unpublished opinions and disseminate them to the world. Unpublished opinions may also show up in specialty reporters. Because these opinions are part of the public record, we cannot prevent dissemination by others. Therefore, to the extent that unpublished opinions are indeed unpublished it is merely that they are not included in the federal reporters. This has become a fine, almost meaningless, distinction in a world of electronic legal research.[36]

B. Status of Unpublished Opinions in the Sixth Circuit and Other Federal Circuits

In our circuit, we dispose of cases in a number of manners. We publish signed and per curiam opinions, and we have unpublished signed and per curiam opinions. Finally, under local Rule 19 the panel can dispose of a case in open court following oral argument if "each judge of

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[34] Professor Martineau notes that some circuits do not submit their unpublished opinions to Westlaw. According to Professor Martineau, the Second, Third, Fifth, and Eleventh circuits do not submit unpublished opinions to Westlaw. Martineau, supra note 8, at 144 n.127.

[35] This point is driven home to me daily by watching my clerks. They look bewildered when actually reading books in my chambers library and are more frequently found hunched in front of their computer screens doing research on-line. In doing their research, they give me a handful of cases photocopied from books and armloads of cases printed off the computer.

[36] See Hinderks & Leben, supra note 25, at 184 (noting that "in today's world, the unpublished decisions are functionally just as accessible as the published cases").

the panel believes that no jurisprudential purpose would be served by a written opinion."[37] We "Rule 19" a case by announcing our decision from the bench.[38]

In the Sixth Circuit, we have a presumption in favor of publishing opinions, although we have a presumption against the publication of orders.[39] Our circuit rules mandate that we consider a number of factors when determining whether to publish a decision.[40] Although some circuits have rules mandating that a decision be published if it is a reversal of a published decision

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[37] 6th Cir. R. 19

[38] Our 6th Cir. R. 19 supplements Fed. R. App. P. 36, which discusses entry of judgment. Fed. R. App. P. 36 provides for entry of judgment in all cases, including those where "a judgment is rendered without an opinion."

[39] 6th Cir. R 24(b).

[40] 6th Cir. R 24(a).
Criteria for Publication.
The following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:
i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
ii) whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;
iii) whether it discusses a legal or factual issue of continuing public interest;
iv) whether it is accompanied by a concurring or dissenting opinion;
v) whether it reverses the decision below, unless
(a) the reversal is caused by an intervening change in law or fact, or,
(b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;
vi) whether it addresses a lower court or administrative agency decision that has been published; or,
vii) whether it is a decision which has been reviewed by the United States Supreme Court.

of the district court,[41] we have no such formal rule in our circuit.[42] Whether a decision is a reversal does weigh into the calculus, and we produce a relatively low number of unpublished reversals.[43] The same is true for opinions that include dissents or concurrences.[44] It is fair to say that reversals or opinions with dissents are almost always published.[45]

We determine whether we will publish the decision when we caucus in the conference room following oral argument.[46] Opinions are published unless a majority of the panel votes

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[41] See D.C Cir R. 36(a)(2)(F); 7th Cir. R. 53(c)(1)(v).

[42] See 6th Cir. R. 24(a) (noting that reversal is factor to be considered in publication decision)

[43] In their study of the 1978-79 reporting year for the United States Courts of Appeals, Reynolds & Richman found that 12 percent of the Sixth Circuit's unpublished opinions were nonaffirmances (whereas 41 percent of published opinions were nonaffirmances). This was slightly below the national average of 14 percent. Reynolds & Richman, supra note 25, at 617.

[44] See 6th Cir R. 24(a) (noting that concurrences and dissents are factors to be considered in publication decision). The Second, Fifth, Ninth, and D.C. circuits require publication of decisions accompanied by a concurrence or dissent. See 1st Cir. R. 36.2.3 (providing for publication of opinion with dissent or concurrence unless opinion unanimous); 2d Cir. R. 0.23 (allowing summary disposition when decision unanimous); 9th Cir R. 36-2(g) (providing for publication of opinion with concurrence or dissent if "author of separate expression requests publication).

[45] In their 1978-79 study, Reynolds & Richman found that only four of the 908 unpublished opinions in the Sixth Circuit (0.4 percent) included a dissenting or concurring opinion. The national average was 0.5 percent. See Reynolds & Richman, supra note 25, at 614. These data are dated, but I suspect the numbers would be comparably low today.

[46] Occasionally, a judge will write an opinion and decide that it should be published or conversely receive an opinion from another judge that appears to merit publication. A short fax or e-mail to the other judges on the panel is usually sufficient to gain their agreement on a decision to publish. This is seldom a contentious issue.

against publication.[47] Without betraying the confidentiality of the conference room, I can say that we seldom hold a formal vote on publication. Generally, our judges are in consensus on the question of publication. If one judge strongly believes in publication, the other judges generally acquiesce to his or her wishes.[48] In my 18 years on the Sixth Circuit, having heard thousands of cases, I can say I have heard no more than a handful of true disagreements over the issue of publication. Judges on the Sixth Circuit do differ, and often vigorously, but seldom on the question of publication.

The Sixth Circuit provides no mechanism for the parties to make publication requests. Some circuits do allow the parties to request that opinions be published.[49] I believe the Sixth Circuit's approach is a strength rather than a weakness. As Professor Robel points out, allowing the parties to request publication can be a boon for frequent litigators, particularly the government.[50] According to her thesis, frequent litigators are familiar with the body of published

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[47] 6th Cir. R. 24(b). For procedures in other circuits, see 1st Cir. R. 36.2(b) (unanimous vote required for unpublished decision), 2d Cir. R. 0.23 (no discussion of procedure); 3d Cir. I.O.P. 5.3 (majority of panel for nonpublication); 4th Cir. R. 36(b) (publication if author of opinion or majority of panel believes opinion satisfies one or more standards for publication); 5th Cir. R. 47.5.2 (unanimous vote required for nonpublication); 7th Cir. R. 53(d) (majority of panel required for nonpublication), 8th Cir. R. App. I ("Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his opinions available for publication."); 9th Cir. R. 36-2 (no discussion of procedure), 10th Cir. R. 36.2 (no discussion of procedure); 11th Cir. R. 36-2 ("An opinion shall be unpublished unless a majority of the panel decides to publish it."); Fed Cir. R. 47.6 (no discussion of procedure).

[48] I should also note that my clerks play absolutely no role in the publication decision.

[49] See D.C. Cir. R. 36(d); 1st Cir. R. 36.2.4; 4th Cir. R. 36(b), 5th Cir. R. 47.5.2; 7th Cir. R. 53(d)(3); 9th Cir. R. 36-4; 11th Cir. R. 36-3, Fed. Cir. R. 47.6(c).

[50] See Robel, supra note 8, at 958.

and unpublished law on an issue and can "stack the precedential deck."[51] Although I cannot speak from experience, because our circuit does not allow such motions, my intuition is that Professor Robel overstates the case. I question whether anyone in government operates according to such a grand plan. (Anyone familiar with the U.S. government knows that it rarely acts according to a overarching plan on any issue, let alone something as complex as building a body of favorable precedent). Nonetheless, to the extent there is precedential abuse with the transformation of unpublished opinions into published opinions at the litigants' behest, our circuit avoids it.

C. Prevalence of the Unpublished Opinion

Data on numbers of unpublished opinions are hard to find. Professor Songer notes: "Fragmentary evidence suggests that the number of unpublished opinions began to escalate sharply in most circuits in the mid 1970s and that it has leveled off in the 1980s. However, it is clear that at present a majority of all final decisions by judges on the courts of appeals are unpublished and that the rate of nonpublication varies widely among circuits."[52] Professor Songer's analysis jibes with my experiences on the Sixth Circuit. Professor Beyler found in a study of data from 1987 that 80.7 percent of the Sixth Circuit's decisions were unpublished.[53]

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[51] See Robel, supra note 8, at 958. See also Reynolds & Richman, Non-Precedential Precedent, supra note 8, at 1179 (arguing that habitual litigant could make publication requests and law "would develop in a lopsided fashion").

[52] Songer, supra note 25, at 308.

[53] Keith H. Beyler, Selective Publication Rules: An Empirical Study, 21 Loy. U. Chi. L. J. 1, 7 (1989).

The average for the six circuits he studied was 62.1 percent [54] Professor Robel found that 61 percent of opinions were unpublished in 1987.[55] Professor Martha Dragich found that there were more than 10,000 unpublished opinions in 1993.[56] Suffice it to say that well more than half the decisions of the federal appeals courts are unpublished.

III.

I believe that practicality and policy are strong arguments in support of the use of unpublished opinions. On the practical side, we use unpublished opinions in order to get through our docket. Policy-wise, we need to be able to distinguish those opinions worthy of publication, and of making a meaningful contribution to our body of precedent, from those that merely apply settled law to decide a dispute between parties.

A. Practicality

I already have outlined the increasing workload of the courts of appeals, in both absolute terms and in relation to individual judges, but what relation does that have to unpublished opinions? The answer is quite simple, and was verified by Professor Beyler in his empirical study of unpublished opinions: "[S]elective publication significantly enhances the courts' productivity."[57]

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[54] Id.

[55] Robel, supra note 8, at 955 n 74

[56] Dragich, supra note 8, at 760

[57] Beyler, supra note 52, at 12. But see Reynolds & Richman, supra note 25, at 594, 596 (noting that "cases culminating in unpublished opinions are resolved more quickly" but that their data "provide no support for the hypothesis that limited publication enhances productivity").

Here, I can speak from experience. Although I believe that we bring the same standards of excellence to unpublished opinions as we do to published opinions, I would estimate that my clerks and I spend about half as much time working on the average unpublished decision.[58] We save time because unpublished decisions are, as a rule, shorter than published decisions. My unpublished decisions average three to five typewritten pages whereas my published opinions tend to run five-plus pages. (You may notice that I write unusually short appellate opinions, but I will save my thoughts on that subject for another day.)

I keep unpublished decisions short because they tend not to include extensive renditions of the facts or exhaustive discussions of the law. Unpublished decisions tend to involve straightforward points of law--if they did not, they would be published. These types of cases are fact-driven. They involve settled law and variations on the facts. I give the facts to the extent necessary and then state the law.

The relative straightforwardness of the legal questions in an unpublished opinion also saves research time. I would estimate that I spend equal amounts of time researching and writing the average published opinion. It is difficult to say for sure because the activities are intertwined. I will spend less than half as much time researching a typical unpublished opinion as I spend on a published opinion. Some legal questions are easily answered, particularly after 18 years on the federal bench. A judge sees the same questions repeatedly, and one needs not go back to the

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[58] This estimate does not take into account the occasional "monster" case that meanders across our docket. See, e.g., Sprague v. General Motors Corp., 133 F. 3d 388 (6th Cir. 1997) (en banc) (Martin, C.J., dissenting), Sprague v. General Motors Corp., 92 F.3d 1425 (6th Cir. 1996) (vacated); In re Dow Corning Corp., 86 F.3d 482 (6th Cir. 1996); Levinson v. Basic Inc., 786 F.2d 741 (6th Cir. 1986) (vacated). These cases consume an inordinate amount of my and my clerks' time. We never have a "monster" unpublished decision.

research well to answer every question. I assume my colleagues have the same experience.

I will admit that one element of the practicality argument has largely disappeared Prior to the advent of computerized research, one argument for the use of unpublished opinions was that they reduced the corpus of law found on library shelves and the amount of time needed to wade through those books.[59] Unpublished opinions still do save trees and library budgets, but bound books, as I have discussed, are no longer the primary locus of research.[60] Now, unpublished opinions are easily searched on-line. This has eased (although not eliminated) the genuine concerns about overburdened libraries running out of space and money for multiplying reporters. Although I assume that most libraries continue to purchase the federal reporter, smaller law firms need not do so. Unpublished opinions do save on library expenses, but such savings are less meaningful now that books are no longer the primary legal research tool.

Practicality is only one element of the equation, though, and I believe it is never the deciding factor in determining whether to publish any opinion. By that I mean that I never turn to my colleagues in the conference room and say, "Look, we all know we're overwhelmed by an expanding federal docket and litigants who appeal cases that have no reason to be in a federal appeals court so let's just save our time, and various libraries' money, by whipping out some unpublished opinions on today's cases " Unpublished opinions in the aggregate are a timesaver for judges and their staffs, but in individual cases the decision on whether to publish is based on

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[59] See Carrington et al , supra note 3, at 35 (noting that "library costs for private law offices and governmental libraries are thereby increased, both through the purchase price of the books and through the added expense of shelving and maintaining them").

[60] See text accompanying notes 34-36.

the merits of the case.

B. Policy

To advocate use of unpublished opinions is not to deprecate published opinions. In fact, judicious use of unpublished opinions gives greater emphasis to those that are published It separates the diamonds from the dross--and, although many on the other side of the bench would be unwilling to admit it, there is a lot of dross.[61] I am repeating myself, but not all cases are of equal merit. If we publish everything, the truly meritorious cases will be lost in a flood of opinions on minor issues We are now filling roughly 30 federal reporters a year We would probably fill twice as many if we published all our opinions. Not all cases deserve a published opinion, even if they merit a written opinion

Some have questioned whether judges correctly can distinguish between cases meriting publication and those not worthy of publication.[62] I believe that in an extremely high percentage of the cases we hear we can make this distinction. Federal appellate judges are in the best position to do that culling We are trusted sufficiently to decide a case. Why can't we be trusted enough to then make the ancillary decision whether it should be published? This goes back to the

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[61] See Carrington et al., supra note 3, at 90 ("[H]opeless appeals can clog the judicial system and cause an erosion of the process which results in less adequate justice for those appellants who do have substantial questions to raise."), Posner, supra note 4, at 166 ("Most criminal appeals have no merit and are filed only because the cost of appeal to most criminal defendants is zero ")

[62] See Reynolds & Richman, Non-Precedential Precedent, supra note 8, at 1192-94 (evidence exists that "judges cannot, at the time of writing, correctly distinguish between lawmaking and dispute-settling opinions, . . ") See also Songer, supra note 25, at 309 (noting that "several critics have questioned the ability of judges to make consistent decisions about whether a decision is non-precedential, especially when the decision on publication is often made before an opinion is written").

point I made earlier about the lack of contention regarding decisions to publish.[63] The publication decision is, quite simply, almost invariably an easy call to make. Cases either clearly merit publication, or they clearly do not. Therefore, we as judges seldom dicker over the publication issue and seldom make mistakes in dividing up the cases between published and unpublished. This is not to say that judges are infallible—our mistakes are many and often highly publicized—but the publication decision is seldom a potential pratfall for a federal appellate judge

Perhaps it is just my innate sense of neatness, but I do believe there is value in making distinctions among cases. We are creating a body of law. There is value in keeping that body cohesive and understandable, and not muddying the water with a needless torrent of published opinions.[64] We are living in the midst of an information explosion, not just in the legal realm, but across all fields. In order to navigate our way through this morass of information, we as judges need the latitude to highlight the worthwhile cases.

I do believe that we should write something in nearly all cases. Our court allows cases to be dispensed of orally from the bench in the form of our so-called "Rule 19s."[65] I am not a proponent of this and seldom engage in the practice (some appeals are so wholly meritless that they beg a Rule 19). We "Rule 19" roughly seven percent of the cases in which we hear oral

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[63] See text accompanying notes 46-48

[64] Martha J. Dragich, Once a Century: Time for a Structural Overhaul of the Federal Courts, 1996 Wis. L. Rev. 11, 33 ("[T]he vast number of decisions entered threatens coherence by creating innumerable rulings which are impossible to assimilate.")

[65] 6th Cir. R. 19. Dispositions in Open Court

In those cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition of the case may be made in open court following oral argument. .

argument.[66] I believe this percentage is higher than it should be. The overwhelming majority of our litigants deserve a cogent, written explanation of our decision, even if that opinion is unpublished. Even when we are merely rendering a decision, as opposed to "making law," the litigants deserve to know our rationale.

One argument in favor of published opinions is that they tend to buttress precedents on certain points.[67] I disagree with the premise and the practice behind that argument, however. The premise that a precedent needs to be buttressed with cites to various minor cases is faulty. When the Supreme Court or Sixth Circuit has spoken in a clear voice, I do not see the need to augment that citation with other citations. Good precedent is good precedent. One does not need to pile on the excess verbiage of string cites to random, minor cases. String cites are largely a product of judges' and clerks' experience on law journals and at law firms—tribes in which overkill is an art form. When I read a lengthy string cite in a brief or slip opinion, I often find that I have lost the gist of the argument after fighting through line after line of gobbledygook. I see no need for more published opinions in order to flesh out unneeded string cites.

IV.

I will close my defense of unpublished opinions with what may strike some as an about-face or at least a veering off course. I believe in the utility of unpublished opinions for judges, but

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[66] In 1997, out of 1,464 Sixth Circuit cases decided following oral argument, 99 were disposed of through Rule 19. Rule 19's become a smaller percentage of dispositions, though, when the total number of dispositions, which includes cases not argued orally, is considered. There were 4,523 total dispositions in the Sixth Circuit in 1997.

[67] Reynolds & Richman, Non-Precedential Precedent, supra note 8, at 1190 ("The sheer number of affirmations allows attorneys to rely on the stability of a doctrine with greater confidence.").

I do not see them playing a role for litigants. Therefore, as strongly as I believe in the production of unpublished opinions, I am just as adamantly opposed to the citation of unpublished opinions. This is the gravamen of this Essay. As I have shown above, unpublished opinions are unpublished in name only [68] What distinguishes them from published opinions are citation limits. Without such limits there is virtually no distinction between published and unpublished. If we do not discourage citations to unpublished opinions, then we are creating a type of second-class precedent This does not help anyone.

Our Circuit currently straddles the fence on the citation of unpublished opinions. According to Sixth Circuit Rule 24(c):

> Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.
>
> If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.

Although I cannot claim encyclopedic knowledge of publication practices in other circuits,[69] I am

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[68] See text accompanying notes 34-36.

[69] See D.C. Cir. R. 28(c) (unpublished opinions not precedent), 1st Cir. R. 36.2.6 (unpublished opinions only citable in related cases); 2d Cir R. 0.23 (no citation of summary dispositions), 3d Cir. I.O.P. 5.3 (making no mention of precedential value of unpublished opinions but noting that opinion is published when it has precedential value); 4th Cir R 36(c) (court will not cite unpublished opinions and citation to court disfavored except for res judicata, estoppel, and law of case); 5th Cir. R. 47.5.3 ("Unpublished opinions issued before January 1, 1996 are precedent."), 5th Cir. R. 47.5.4 ("Unpublished opinions issued on or after January 1, 1996 are not precedent."); 7th Cir. R. 53(b)(2)(iv) (unpublished opinions not precedent except for res judicata, collateral estoppel, or law of the case), 8th Cir. R. 28A(k) (unpublished opinions generally not precedent but may be cited "if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well"); 9th Cir. R. 36 1 (defining

familiar enough with their rules to say that the Sixth Circuit is more liberal than most in the amount of citation to unpublished opinions that it allows.

I would like to see Rule 24(c) tightened. According to the rule, citation to unpublished opinions is merely "disfavored." Professor Dragich calls this "an unacceptably ambiguous statement of precedential effect,"[70] and I agree. We cannot forbid litigants from citing to unpublished opinions. Litigants can cite to whatever sources they desire. We can, however, inform litigants that unpublished opinions have no precedential value and are not even the least bit persuasive.[71] We would be telling litigants that they can cite to unpublished opinions but should not--that it would be a waste of their and the court's time. These strict guidelines would, I believe, act as a de facto ban on citation to unpublished opinions except for situations of res judicata, estoppel, or law of the case. The Sixth Circuit did place strict limits on citation to unpublished opinions until 19??, when we changed our circuit rule.[72] I admit that the change in the rule has not opened the floodgates to citation of unpublished opinions. I would estimate that

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published as available for citation); 10th Cir. R. 36.3 (unpublished decisions not binding precedent but may be cited for persuasive value); 11th Cir. R. 36-2 (unpublished opinions are not binding precedent but may be cited as persuasive authority); Fed. Cir. 47.6(b) (unpublished opinions not precedential).

[70] Dragich, supra note 8, at 791.

[71] Other circuits specifically and explicitly inform litigants that unpublished opinions are of no precedential value. See D.C. Cir. R. 28(c); 5th Cir. R. 47.5.4, 8th Cir. R. 28A(k); 9th Cir. R. 36-3; 10th Cir. R. 36.3; 11th Cir. R. 36-2; Fed. Cir. R. 47.6(b)

[72] Under our old 6th Cir. R. 11: "Decisions of this court designated as not for publication should never be cited to this court or in any material prepared for this court. No such decision should be published by any publisher unless this rule is quoted at a prominent place on the first page of the decision so published."

perhaps 10 to 20 percent of the briefs we see include unpublished opinions. Nonetheless, other circuits take a hard line on citation of unpublished opinions,[73] and I believe the Sixth Circuit should do so as well.

Eliminating citation of unpublished opinions would save research time for judges and litigants. The typical search of the Sixth Circuit database on Westlaw turns up published and unpublished decisions, and the decisions are clearly marked as such. Judges and litigants could gloss over the unpublished decisions because they are of little use, and concentrate on the meaningful decisions. This solution answers, in part, Professor Dragich's criticism that "[e]ven if the argument that there is 'too much law' is credible, selective publication does not solve the problem. It does not reduce the amount of law, but actually creates an additional, less accessible body of law that must be consulted, making research more difficult and raising the cost of litigation."[74] The incentive to consult unpublished opinions would be far lower if we strongly discouraged citation for any purpose but collateral estoppel, law of the case, or res judicata.

The strict limits on citation to unpublished opinions would eradicate most of the lingering inequity in the system. The inequity comes from litigants' unequal access to unpublished opinions.[75] We already have eliminated much of the inequity by requiring parties to submit copies of unpublished opinions to which they cite.[76] This practice allows underfinanced litigants who

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[73] See Dragich, supra note 8, at 762 n.17.

[74] Dragich, supra note 8, at 787.

[75] See Posner, supra note 4, at 167 (noting that "institutional litigant has easier access to unpublished opinions").

[76] See 6th Cir. R. 24(c).

cannot afford the necessary Westlaw or LEXIS time to have access to the unpublished decisions their opponents are using

I argue for limited citation from a selfish standpoint, too. If judges are producing pseudo-published opinions (and who can argue that an opinion available electronically is not published for all intents and purposes?), it will not save us any time if those opinions are being cited back to us. We will have to prepare unpublished opinions as we do published opinions—as if they were creating precedent. On this point, I agree with the testimony of the now-deceased Judge Sprecher before the Hruska Commission Senate hearings on the revision of the federal court appellate system:

> Finally, and I think this is really the crux of the question of citation, personally I would think that if a no-citation rule did not go hand in hand with a no publication rule, I would feel that we should do away with the no-publication rule and go back to the old full publication rule, and that is because of the question of stare decisis.[77]

I am not making the argument that unpublished opinions should not be cited because they are of no precedential value—litigants see precedential value in virtually every opinion they cite even if the court does not agree.[78] In addition, there is precedential value in any opinion if only for that case. Limiting citation, however, will serve as a de facto cap on any precedential value an unpublished decision might have.

If we were strongly to discourage litigants from citing to unpublished opinions, then we as a court would have to follow our own rules and quit citing to unpublished opinions. I will admit

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[77] Commission on Revision of the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change 51 (1975).

[78] See Posner, supra note 4, at 166 ("It might seem almost as a matter of definition that *all* opinions have some actual or potential precedent.").

that I occasionally have fallen into the trap, and it is a trap, of citing to unpublished opinions.[79] I discourage my clerks from citing to unpublished opinions in their bench memoranda, but sometimes they backslide, and so do I. I would estimate that I cite to unpublished opinions in less than five percent of my opinions, but even that percentage is too high. It should be zero.

I realize that counsel will continue to use unpublished decisions, even if they do not cite to such dispositions. An unpublished opinion could point counsel in a new direction or give an otherwise overlooked cite and thereby prove advantageous. This leads to some inequity--those with the financial wherewithal to roam Westlaw and LEXIS in search of unpublished opinions will have an advantage over less-privileged litigants. In some ways, this advantage will be more insidious than that enjoyed by the litigant who merely cites to an unpublished opinion under the current rule. Now, the litigant who cites to an unpublished opinion is forced to provide a copy of the opinion to the other party and the court. The litigant who garners ideas and arguments from unpublished opinions but does not cite to them, however, need never reveal the paper trail.[80] This is a weakness in the use of unpublished opinions that no-citation rules will not eradicate. I do not believe, however, that it is sufficient to warrant the elimination of unpublished opinions. Judge

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[79] See, e.g., Sprague v. General Motors Corp., 133 F.3d 388, ?? (6th Cir. 1997) (Martin, C.J., dissenting) (en banc) (citing to Gentile v. Youngstown Steel Door Co., 1986 WL 17464 at *5 (6th Cir. Aug. 25, 1986), Strickland v. Shalala, 123 F.3d 863, 868 (6th Cir. 1997) (citing to Ohio Dep't of Human Services v. United States Dep't of Health and Human Services Admin. for Children and Families, 1997 WL 415319 (6th Cir. July 22, 1997)); Sprague v. General Motors Corp., 92 F.3d 1425, 1436 (6th Cir. 1996) (vacated)(citing to Gentile v. Youngstown Steel Door Co., 1986 WL 17464 at *5 (6th Cir. Aug. 25, 1986).

[80] See Carrington et al., supra note 3, at 37 (no-citation rule "will not prevent counsel from trying to divine the reasoning of that decision and then using it in the case at bar"); Robel, supra note 8, at 956 (noting that "'guts' of the opinion--its reasoning, citations to authority, and such--can still be effectively employed through incorporation in briefs and arguments")

Nichols refers to the fear that litigants will speak in a secret code to judges by surreptitiously quoting those judges' unpublished opinions back to them as a "hobgoblin that counsel of an 'inside' group, knowing of unpublished decisions, may quote their arguments before the court without his opponent even knowing what is going on."[81] I agree. Carrington, Meador, and Rosenberg argue that trying to make a no-citation rule effective is "like attempting to throw away a boomerang" because unpublished opinions nonetheless slip into court discourse,[82] but, as Chief Judge Posner has written, one should not "mak[e] the best the enemy of the good."[83]

Conclusion

Unpublished decisions are, as used to be said about children, best seen but not heard. We as a court will continue to produce unpublished decisions, but we do not want to hear them being cited back to us. Unpublished decisions are a necessity to our judicial system, but I agree with those commentators who seek to limit their precedential value. We do not seek to create a body of secret law, but we often feel a responsibility to explain our decisions to litigants. Unpublished opinions give us the flexibility to inform parties of our decision without adding to the clutter, and sometimes confusion, of our multitudinous array of published decisions.

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[81] Nichols, supra note 2, at 918.

[82] Carrington et al., supra note 3, at 37.

[83] Posner, supra note 4, at 171.

Report from Federal Judicial Center will be distributed separately.

V-D

MEMORANDUM

DATE: March 8, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item Nos. 97-10 & 97-28

Rule 36(a)(2) contemplates that a court of appeals can render a judgment without an opinion. Two commentators object that this practice violates due process, is unfair to litigants, creates doubts about the grounds for the court's decision, and, as a practical matter, insulates the decision from further review. The commentators ask that Rule 36 be amended to require that an opinion be issued in every case.

Judge Garwood discussed this proposal with the chief judges of the 13 courts of appeals at a meeting in Washington on March 11. Judge Garwood intends to report on that discussion and to ask the Committee whether, in light of the views of the chief judges and the likelihood that the Judicial Conference will not approve any "mandatory opinion" rule, Item Nos. 97-10 and 97-28 should be removed from the Committee's study agenda.

No materials relevant to these items have been included in the agenda book.

MEMORANDUM

DATE: March 6, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item Nos. 95-4 & 97-1

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. FRCP 6(a) and FRCrP 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, 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 and FRCrP than they are under FRAP.[1] Two commentators have asked that FRAP 26(a)(2) be amended to conform to FRCP 6(a) and FRCrP 45(a). They argue that the present difference serves no substantive purpose and creates a needless trap for unwary litigants.

If FRAP 26(a)(2) was amended so that intermediate Saturdays, Sundays, and legal holidays would not be counted when deadlines were less than 11 days — instead of less than

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[1]The bankruptcy rules treat deadlines of 7 days as do the civil and criminal rules, but deadlines of 8, 9, and 10 days as do the appellate rules. *See* FRBP 9006 ("When the period of time prescribed or allowed is less than 8 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.")

7 days — then, as a *practical* matter, all of the 7, 8, 9, and 10 day deadlines in FRAP would be extended by at least two days. There are no 8 or 9 day deadlines in FRAP, but there are several 7 and 10 day deadlines[2]:

Seven Day Deadlines

- **Rule 4(a)(6)(A):** A district court may reopen the time to file a civil appeal, but only if the motion to reopen is filed within 180 days after the judgment is entered or within 7 days after the moving party receives notice of the entry of the judgment, whichever is earlier.

- **Rule 5(b)(2):** A party may file an answer in opposition to a petition for permission to appeal within 7 days after the petition is served.

- **Rule 19:** When a court issues an opinion enforcing only part of an agency's order, the agency must file and serve a proposed judgment conforming to the opinion. Other parties must file objections to the agency's proposed judgment within 7 days.

- **Rule 27(a)(4):** A reply to a response to a motion must be filed within 7 days after service of the response to the motion.

- **Rule 29(e):** An amicus brief must be filed within 7 days after the filing of the principal brief of the party whose position is supported by the amicus (or, if the amicus is not supporting any party, within 7 days after the appellant's principal brief is filed).

- **Rule 41(b):** A court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a petition for rehearing or a motion for stay of mandate.

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[2]Rule 4(a)(4)(A)(vi) provides that if a motion for relief under FRCP 60 is filed in the district court no later than 10 days after the judgment is entered, then the time to file an appeal does not begin to run until the district court enters an order disposing of the motion. However, Rule 4(a)(4)(A)(vi) specifically provides in a parenthetical that the 10 days is to be "computed using Federal Rule of Civil Procedure 6(a)." If Rule 26(a)(2) is amended as has been proposed, then the parenthetical in Rule 4(a)(4)(A)(vi) will become superfluous, and should be deleted.

Ten Day Deadlines

- **Rule 4(a)(5)(C):** A district court may extend the time to file a notice of appeal in a civil case up to 30 days after the original deadline or up to 10 days after the order granting the extension is entered, whichever is later.

- **Rule 4(b)(1)(A):** A criminal defendant's notice of appeal must be filed within 10 days after entry of the judgment.

- **Rule 4(b)(3)(A):** If a criminal defendant makes a "tolling" motion in the district court (*e.g.*, a motion for a judgment of acquittal under FRCrP 29), the defendant's notice of appeal must be filed within 10 days after disposal of that motion.

- **Rule 4(b)(3)(A)(ii):** A motion for a new trial under FRCrP 33 that is based upon newly discovered evidence will not toll the time for filing a notice of appeal unless it is made no later than 10 days after entry of the judgment.

- **Rule 5(d)(1):** An appellant must pay all fees and post a bond within 10 days after being given permission to bring a discretionary appeal.

- **Rule 6(b)(2)(B)(i):** An appellant in a bankruptcy case must file a designation of the record within 10 days after filing the notice of appeal. **Rule 6(b)(2)(B)(ii):** The appellee's response to this designation must be filed within 10 days after it is served.

- **Rule 10(b)(1):** Within 10 days after filing a notice of appeal, the appellant must order the transcript or certify that no transcript will be ordered.

- **Rule 10(b)(3)(A):** If the appellant does not order the entire transcript, the appellant must file a designation of the record within 10 days after filing the notice of appeal. **Rule 10(b)(3)(B):** The appellee's response to this designation must be filed within 10 days after it is served. **Rule 10(b)(3)(C):** If, within 10 days after the appellee responds to the designation, the appellant does not order the additional parts of the transcript designated by the appellee, then the appellee, within 10 days, may order the parts or move the district court to force the appellant to order the parts.

- **Rule 10(c):** When no transcript is available, and the appellant prepares a statement of the evidence or proceedings, the appellee must file objections or proposed amendments to the statement within 10 days after service.

- **Rule 12(b):** The appellant's attorney must file a representation statement within 10 days after filing the notice of appeal.

- **Rule 27(a)(3)(A):** A response to a motion must be filed within 10 days.

- **Rule 30(b)(1):** In the absence of an agreement on the contents of the appendix, the appellant must serve a designation on the appellee within 10 days after the record is filed, and the appellee must respond within 10 days.

- **Rule 39(d)(2):** Objections to a bill of costs must be filed within 10 days.

Attached are draft amendments and Advisory Committee Notes to Rule 4(a)(4)(A)(vi) and Rule 26(a)(2).

Rule 26. Computing and Extending Time

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

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

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

Advisory Committee Note

Subdivision (a)(2). The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure compute time differently than the Federal Rules of Appellate Procedure. Fed. R. Civ. P. 6(a) and Fed. R. Crim. P. 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, Fed. R. App. P. 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the rules of civil and criminal procedure than they are under the rules of appellate procedure, creating a trap for unwary litigants.

No good reason for this discrepancy is apparent, and thus Rule 26(a)(2) has been amended so that, under all three sets of rules, intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days and will be counted when computing deadlines of 11 days and over.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

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

Advisory Committee Note

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

V-F

MEMORANDUM

DATE: March 6, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 95-05

In 1995, during the Advisory Committee's deliberations on the restylized rules, Judge Frank Easterbrook recommended that Rule 32 be amended to require that briefs be filed and served on digital media — that is, on computer disk. (A copy of Judge Easterbrooks's suggestion is attached.) The Advisory Committee chose not to address Judge Easterbrook's suggestion as part of the restylization project, but instead deferred it for further study.

In January, Judge Garwood informed the clerks of all of the courts of appeals that the Advisory Committee was considering amending Rule 32 to require a party that has used a computer to prepare its brief to file and serve a copy of that brief on disk. Judge Garwood asked the clerks for their views regarding this proposal. To date, 11 of the 13 clerks have responded. (Judge Garwood has not heard from the clerks of CA3 and CA9). Their responses are attached.

As you will see, the responses from the clerks vary substantially. Some clerks strongly oppose any national rulemaking on this topic, while others strongly support it. On balance, the clerks are about evenly divided. Most of the circuits do not have any experience either requiring or requesting the filing of briefs on computer disk. That seems to be changing, though, as some circuits have recently addressed electronic filing in their local rules, and others appear poised to do so. The local rules that now exist (copies of which are attached) differ in numerous respects.

Before work can profitably begin on drafting an amendment to Rule 32, the Advisory Committee will have to make tentative decisions regarding a number of questions. At Judge Garwood's request, I have sent forth many of these questions below, to help guide Committee deliberations at the April 1998 meeting.

Questions for Discussion

1. Is this a matter that should be addressed by this Advisory Committee or should the Committee instead await action by the Subcommittee on Technology?

2. If this Committee decides to act independently, should it:

a. Amend FRAP to give each court of appeals the explicit authority to *permit* briefs to be filed on disk?

b. Amend FRAP to add a national rule that *permits*, but does not *require*, briefs to be filed on disk?

c. Amend FRAP to give each court of appeals the authority to *require* briefs to be filed on disk, but impose no such requirement nationally?

d. Amend FRAP to add a national rule requiring briefs to be filed on disk, but permit each court of appeals to specify exactly how that filing should be accomplished?

e. Amend FRAP to add a national rule requiring briefs to be filed on disk, and specify exactly how that filing should be accomplished?

3. As the prior questions indicate, if this Committee decides to amend FRAP to require the filing of briefs on disk, it must decide how specifically it wants to regulate such filing. The Committee will have to consider the following questions, among others:

a. Would the brief have to be filed on computer disk, or would any kind of electronic filing suffice (*e.g.*, transmitting the brief over the Internet)?[1]

b. If the brief would have to be filed on disk, would it have to be on a particular type of disk? Would filing on a 3.5 inch floppy disk be required? Would it be permissible to file the brief on CD-ROM?

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[1]One thing the Committee may want to consider is whether it wants to require the filing of briefs on disk when electronic filing seems likely to become a reality in the next five to ten years.

c. What information would have to be on the disk's label? Case name? Docket number? Name of filing party? Description of brief? Word processing program used? Would the color of the label have to match the color of the printed brief?

d. Would parties have to use a particular operating system (*e.g.*, IBM or Macintosh) or word processing program (*e.g.*, Microsoft Word or WordPerfect 7.0) or an operating system or word processing program that was at least *compatible* with a particular operating system or word processing program?

e. Would parties also have to file the appendix on disk or CD-ROM? *Could* parties do so if they wished?

4. If filing briefs on disk was required, would parties be required to file briefs *only* on disk? Or would paper copies have to be filed as well? How many disk copies and how many paper copies?

5. Would the requirement that briefs be filed on disk extend to all parties or only to those represented by counsel?

6. Under what circumstances could a party avoid the requirement of filing its brief on disk?

a. Presumably, a party that had not prepared its disk on computer would be exempt from the requirement, but should there also be an exemption for cases involving "undue hardship" or "unusual circumstances"?

b. What procedure would a party use to assert its exemption from the requirement that its brief be filed on disk? Would the party have to bring a formal motion? Attach a certificate to the paper copy of its brief? Explain the basis of the exemption in a cover letter?

7. How would the rule be enforced? If filing on disk was required, would the clerks be authorized to return briefs that were not filed on disk?

8. Would *service* of briefs on disk also be required? If so, a number of questions would arise. For example, would the brief have to be served on disk or would electronic transmission over the Internet suffice? If the brief had to be served on disk, would it also have to be served on paper? What size and type of disk would have to be used? Would a particular word processing program have to be used? And so on.

9. Will parties have to screen any disks that are served or filed for viruses?

10. Would a party have to certify compliance with one or more of these requirements? For example, if parties are required to use WordPerfect 7.0 or to screen their disks for viruses, would they have to file a certificate of compliance with these requirements? *Compare* Rule 32(a)(7)(C).

11. Do the courts of appeals have the facilities to store the disks they would receive? To permit public access to the disks? How long are the disks likely to be "readable"? Will it be impossible to do research 30 years from now because the disks have deteriorated or the equipment needed to read them has become obsolete?

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.

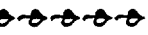
Judges who prefer or need larger type can use a computer disk to generate it (see below for a proposed new Rule 31(c)). But if the national rule is to guarantee universal acceptability, I suppose it should use the 14-point minimum for text (though not for footnotes).

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

95-5

United States Court of Appeals

District of Columbia Circuit
Washington, D.C. 20001-2866

Mark J. Langer
Clerk

February 10, 1998

General Information
(202) 216-7000

Honorable Will L. Garwood, Chair
Advisory Committee on Appellate Rules
U.S. Court of Appeals for the
Fifth Circuit
300 Homer Thornberry Judicial Bldg.
903 San Jacinto Boulevard
Austin, Texas 78701

Dear Judge Garwood:

Thank you for your letter inquiring about a proposed amendment to Federal Rule of Appellate Procedure 32 that would require the filing of a copy of the brief on disk in addition to the paper copies currently required.

The D.C. Circuit does not have a local rule requiring or encouraging the filing of briefs in electronic format. It does not appear necessary, or wise, to adopt such a requirement on a national level. For now, each Circuit should continue to decide whether requiring the submission of briefs on a disk makes sense for that Circuit. In the event that a national rule is proposed, I strongly urge that it be permissive instead of mandatory, and that it allow for local variation to ensure that Courts could prescribe specific formats.

Please do not hesitate to contact me if I can be of further assistance in any way.

Sincerely

Mark J. Langer
Clerk

95-5

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PHOEBE MORSE
CLERK

1606 JOHN W. McCORMACK
POST OFFICE AND COURTHOUSE
BOSTON, MA 02109
(617) 223-9057

February 9, 1998

Will Garwood, Esquire
Committee on Rules of Practice
and Procedure
Judicial Conference of the United States
Washington, DC 20544

Dear Mr. Garwood:

Thank you for your letter of January 30, 1998.

I have enclosed a copy of our final Local Rule 31.1. As you will see, although the First Circuit does require one copy of the brief to be filed on disk, the Court does not require that disks be served on other parties.

If you have any questions, please feel free to call me.

Very truly yours,

Phoebe D. Morse

Phoebe D. Morse, Clerk

PDM/mam
Enclosure

95-5

OFFICE OF THE CLERK
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PHOEBE MORSE
CLERK

1606 JOHN W. McCORMACK
POST OFFICE AND COURTHOUSE
BOSTON, MA 02109
(617) 223-9057

December 30, 1997

NOTICE OF ADOPTION OF LOCAL RULE 31.1

Pursuant to 28 U.S.C. Section 2071, the United States Court of Appeals for the First Circuit adopts Local Rule 31.1

Local Rule 31.1 - Computer Generated Briefs.

(a) Where a party is represented by counsel, one copy of its brief must be submitted on a computer readable disk and shall be filed at the time the party's paper brief is filed. The brief on disk must be accompanied by nine paper copies of the brief. The disk shall contain the entire brief exclusive of non-computer generated appendices. The label of the disk shall include the case name and docket number and identify the brief being filed (i.e., appellant's brief, appellee's brief, appellant's reply brief, etc.) and the word processing format utilized.

(b) The brief must be on a 3 1/2" disk in either DOS WordPerfect or WordPerfect for Windows. 5.1 or greater.

(c) One copy of the disk, along with a paper copy of the brief, may be served on each party separately represented by counsel. The certificate of service shall indicate service of the brief in both paper and electronic format.

(d) A party may be relieved from filing and service under this rule by submitting a motion, within fourteen days after the date of the notice establishing the party's initial briefing schedule, certifying that compliance with the rule would impose undue hardship, that the text of the brief is not available on disk, or that other unusual circumstances preclude compliance with this rule. The requirements of this rule shall not apply to parties appearing pro se. Briefs tendered by counsel after January 1, 1998 without a computer disk copy or court-approved waiver of the requirements of this rule may be rejected by the clerk's office.

Phoebe Morse

Phoebe Morse, Clerk

95-5

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE - ROOM 1702
NEW YORK, N.Y. 10007

GEORGE LANGE III
CLERK

February 9, 1998

Honorable Will L. Garwood, U.S.C.J.
Chair, Advisory Committee on the Appellate Rules
Judicial Conference of the United States
Washington, D.C. 20544

Re: Submission of Briefs on Disk

Dear Judge Garwood:

These are my comments on the proposed amendment to FRAP 32 contemplated by the Advisory Committee described in your letter of January 30, 1998. In general, the amendment appears to be compatible with the Second Circuit's recent efforts in this area.

On October 7, 1997, this Court entered an Administrative Order allowing and encouraging the submission of briefs and appendices in electronic format in addition to the required number of paper copies. That order was amended on January 30, 1998, to specify technical standards. Copies of both orders are enclosed for your information.

Currently, our Rules Committee is considering adding a proposed Second Circuit Rule 31, which would require all counsel to submit to the Court one copy of the brief on disk in addition to the required number of paper copies, or alternatively, a companion CD-ROM version of the brief in addition to the paper copies. Pro se litigants would be exempt. Counseled parties would be permitted to move within 14 days of the initial scheduling order for relief from the disk requirement on the grounds of undue hardship, unavailability of the text on computer disk, or other unusual circumstances. Because the rule has not yet been approved or published, we lack experience administering it.

In general I believe the proposed amendment would be a welcome addition to FRAP, paving the way toward less reliance on paper in the future, although I would also favor a permissive *vice* mandatory rule, at the discretion of each Circuit.

Sincerely,

George Lange III, Clerk

Enclosure

95-5

ADMINISTRATIVE ORDER 98-2

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN THE MATTER OF COMPANION ELECTRONIC BRIEFS AND APPENDICES

Pursuant to Court resolution, and effective immediately, the submission of briefs and appendices in electronic format, such as interactive CD-ROM, as companions to printed briefs and appendices filed in accordance with the Rules, is both allowed and encouraged, subject to the conditions below. This supersedes Administrative of October 7, 1997 on same subject.

1. All parties have consented to filing the companion brief and/or appendix or a motion to file has been granted;

2. The companion brief and appendix is identical in content to the printed version, except that each may also provide electronic links (also known as hyperlinks) to the complete text of any authorities cited therein, and to any document or other material constituting the record on appeal, whether the original of such authority, record or material is itself in printed or electronic format;

3. No less than four diskettes of the CD-ROM brief and appendix are filed with the Clerk's office within 30 days after the appellee's printed brief is filed, or within 30 days after the appellant's printed reply brief is filed, if applicable, but no later than 30 days before scheduled oral argument (firm date);

4. A certificate of service is filed that details the minimum equipment needed for viewing, the software used to scan for viruses, and all necessary copyright authorizations;

5. The CD-ROM format is ISO 9660 Level 2 (Joliet extensions permitted) with a 2X target speed - hyperlinks are formatted in HTML 3.0 or PDF and searchable by Netscape 3.x - embedded graphics are JPEG or GIF - video is MPEG - audio is WAV (see attached explanation of terms); and

6. Appellants and appellees in the same case, or any of them, may jointly submit companion briefs on the same CD-ROM, diskette or other electronic format.

All companion briefs and appendices will be made available for viewing by litigants, counsel and the public at specially designated areas within the Clerk's office.

RALPH K. WINTER
Chief Judge

Signed: New York, New York
January 30, 1998

95-5

Terminology Explained

Web Browser - This is a program designed to read HTML files and display them as text and graphics on your screen. Currently, the two most popular browsers are Netscape Navigator and Microsoft Internet Explorer. The court is currently licenced to use Netscape Navigator.

All pages that are displayed are read-only. A user can not modify the information on the screen.

Browser software can also be enhanced by the use of plug-ins. Plug-ins are small programs that are designed to display a certain type of format or may be used for a specialized purpose. Plug-ins run within the browser program.

HTML - HTML stands for Hypertext Markup Language. It is a simple programing language based on the use of tags to give attributes to embedded text and graphics. These tags are then read by a Browser program that interprets the tags and displays the result on the users screen. For instance if you wanted to bold a piece of text, you would use <B>insert text here</B>. The current revision of this language is 3.0. Each revision adds new functionality to the language such as tables, split screens and other formatting options. Browser programs are also updated to interpret newer revisions of HTML.

In addition to the basic HTML 3.0 language, there are extensions to the language that are Browser specific. For instance there may be a special tag that will only be read by Microsoft Internet Explorer but not by Netscape Navigator.

Hyperlink - By clicking on a hyperlink, the user is led to another document that is pertinent to the referencing page. For instance, when quoting a citation, the user can click on a hyperlink and be presented with the text of the citation.

PDF - Portable Document Format. Allows a user to distribute a document electronically by keeping the look and feel of the original document. PDF files are compact, and can be viewed by anyone with a free Acrobat Reader. These documents are also read-only in nature and can not be altered.

Graphics - JPEG, (pronounced "jay-peg"), stands for Joint Photographic Experts Group. JPEG was designed for compressing either full-color or gray-scale images of natural, real-world scenes. It works well on photographs, naturalistic artwork, and similar material but not so well on lettering, simple cartoons, or line drawings. GIF, a format made popular by CompuServe, is better suited to line drawings and lettering. Both formats are supported natively by web browsers and do not require additional software.

Video - MPEG, (pronounced "m-peg"), is a software compression and decompression standard for distributing full motion video. While it rhymes with JPEG, in actuality, the two have nothing in common. While there are several video standards available, MPEG is the most widely used and is supported by Windows 95.

Audio - The WAV format which was popularized by Creative Labs, the manufacturers of the

Soundblaster Audio card is considered an audio standard. WAV files are supported natively by Windows 95 and provide cd quality audio depending upon sound card capabilities. Much like the audio and graphics standards, the WAV standard provides a way to compress an audio signal deliver it to a target audience with the assurance that it will decompress exactly as recorded.

CD-ROM Speed - CD -ROM speed governs the rate at which data can be transferred from the target disk to the computer. Each increment provides a step up in performance. The lowest speed that is currently used is 2X. Newer systems commonly come with 16X or greater drives. While CD-ROM drives are increasing in speed every couple of months, CD-ROM recorders are generally restricted to generating CD-ROM'S reliably at speeds no greater than 4X. In order to facilitate stability and readability of briefs, CD-ROM's should be created at 2X speed.

CD-ROM Format - In the early days of CD-Rom publishing, each developer used a different, incompatible file format. The High Sierra Group, which was an ad hoc committee of CD-ROM developers, created the High Sierra Format which in turn became ISO 9660. ISO 9660 defines the logical file format for a published CD-ROM. The file format can be further subdivided into three levels. Level one requires that each file be recorded as a continuos stream of data with a naming convention similar to the DOS 8.3 format. Level two retains the streaming requirements of level one, but relaxes the naming conventions. Level three has no requirements and leaves it up to each individual vendor to implement a publishing convention.

In addition to the ISO 9660 specifications, the High Sierra Group created three extensions known as Joliet, Rock Ridge Interchange Protocol and Apple extensions. These extensions were created to deal with Microsoft Windows 95 , Unix and its variants, and the Apple Operating System.

Security of the CD-ROM Brief

The CD-ROM format lends itself to being very secure. CD-ROM's by nature are a read only medium. Because of this, changes to the original document can not be saved to the CD-ROM. . Since the ISO 9660 specification calls for a CD-ROM disk to created sequentially, the only way to alter a CD-ROM would be to publish a new one. In addition, the newly fabricated CD-ROM would have to replace the copy of the one submitted to the court in order to complete the alteration of the original document. Since we are also requiring the party to continue to submit a written brief, we still have a reference point in the event we suspect an alteration of the CD-ROM.

While nothing is 100% secure, it would require someone to go to great lengths to alter a brief and would probably require help from a court employee to make the switch.

95-5

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
1100 EAST MAIN STREET
RICHMOND, VIRGINIA 23219

Patricia S. Connor
CLERK

TELEPHONE
(804)771-2213

February 9, 1998

Honorable Will L. Garwood
Chair, Advisory Committee on the Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Submission of Briefs on Disk

Dear Judge Garwood:

Thank you for your letter inquiring about a proposed amendment to FRAP 32 to require the filing of a copy of the brief on disk in addition to the paper copies currently required.

The Fourth Circuit does not have a local rule requiring a copy of the brief on disk and does not have any immediate plans to adopt such a rule. In my view, the preference of some courts to have copies of briefs on disk can be adequately addressed through their local rules, and amendment of the FRAP rule is not necessary at this time.

Please let me know if I can provide any additional information.

Respectfully,

Patricia S. Connor

cc: Honorable J. Harvie Wilkinson III
Honorable Diana Gribbon Motz

95-5

RECEIVED 2/23/98

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

February 20, 1998

Honorable Will Garwood
Chairman, Appellate Rules
Advisory Committee
Committee on Rules of Practice and Procedure
Judicial Conference of the United States
Washington D.C. 20544

Dear Judge Garwood:

This responds to your request for views concerning a proposed change to the Federal Rules of Appellate Procedure to require the filing of briefs in both paper and computer disk form.

I have discussed this issue with both our Chief Judge and Rules Proctor. We all agree that such a Federal Rule change would be beneficial and that a national, rather than local, standard should be set. Regardless, we plan to present to our court this summer a local rule requiring the filing of briefs on a computer disk.

I know you have received some direct responses from the clerks of the D.C., Fourth, and Eleventh Circuits. I have also received cc:mail responses from the Second and Tenth Circuits and have been asked to pass their comments on to you. The Second Circuit is considering a change to its local rules, and generally supports a change to the Federal Rules. The Tenth Circuit is not currently considering a local rule change but their clerk favors a change to the Federal Rule.

If I can be of any assistance in providing you with additional information, please let me know.

Sincerely,

Charles R. Fulbruge III
Clerk of Court

95-5

RECEIVED 2/19/98

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

LEONARD GREEN
CLERK

TELEPHONE
(513) 684-2953
FTS 684-2953

February 11, 1998

Hon. Will L. Garwood
Chair, Advisory Committee on Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Submission of Briefs on Disk

Dear Judge Garwood:

Thank you for your letter concerning a possible proposed amendment to FRAP 32 to require the filing of briefs on computer disk in addition to the paper copies, and the opportunity to respond.

The Sixth Circuit has no rule requiring that a computer disk be filed when the brief has been computer-generated, nor has it discussed such a requirement. It is my own view that such a requirement is best addressed through a local rule, and that, unless and until there is a demonstrated need for a national rule, no amendment to FRAP 32 is necessary.

I would be pleased to provide any additional information which you or the committee feel would be helpful.

Very truly yours,

Leonard Green, Clerk

cc: Chief Judge Boyce F. Martin, Jr.

538 U.S. POST OFFICE & COURTHOUSE BUILDING
CINCINNATI, OHIO 45202-3988

95-5

United States Court of Appeals
For The Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Gino J. Agnello
Clerk
312-435-5850

February 11, 1998

Honorable Will L. Garwood
Chair, Advisory Committee on the Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Submission of Briefs on Disk

Dear Judge Garwood:

As you know, the Seventh Circuit has a local rule requiring a copy of the brief on disk (Rule 34(e)). Although only a small number of judges are using the electronic version at this time, it has been useful for them. In addition, the clerk's office has learned a great deal from the experience. However, the disk submission procedure imposes organizational, distribution and storage problems which should be considered. Much like paper, submission of "media"- be it floppy disk or cd rom - eventually involves traditional procedures. Disk submission provides only a partial solution to the problem of collecting and distributing information.

I would encourage courts to promulgate local rules to address this issue and begin to develop ideas and procedures to handle information electronically. However, I would suggest that a FRAP amendment wait until a more complete answer like electronic filing appears.

Please let me know if I can provide any additional information.

Respectfully,

Gino J. Agnello
Clerk

95-5

United States Court of Appeals
For the Eighth Circuit
U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Michael E. Gans
Clerk of Court

VOICE (314) 539-3600
ABBS (800) 652-8671
http://www.wulaw.wustl.edu/8th.cir

February 2, 1998

Mr. Will Garwood
Chair, Advisory Committee on the Appellate Rules
Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544

Re: Submission of Briefs on Disk

Dear Mr. Garwood:

Thank you for your letter of January 30, 1998 concerning the proposal to require parties to include a diskette with their paper brief. For almost four years, the Eighth Circuit has asked parties to provide a diskette of their briefs on a voluntary basis. However, as in many voluntary programs, compliance has been a problem; we probably receive the diskette in less than one-third of the cases.

We have also experimented with electronic brief filing, permitting parties in litigation involving the Telecommunications Act of 1996 to file their briefs by posting them to our bulletin board. Our experience with this program is that parties welcome these opportunities and are eager to cooperate with the court.

We have a number of potential uses for the diskettes, including the creation of a pending issues database, so I am strongly in favor of the proposed rule.

Please let me know if I can provide any additional information or be of any further assistance to you in this matter.

Sincerely,

Michael Gans

Michael E. Gans
Clerk of Court

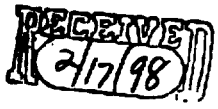
95-5

United States Court of Appeals for the Tenth Circuit

OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Patrick J. Fisher, Jr.
Clerk of Court

Elisabeth A. Shumaker
Chief Deputy Clerk



February 9, 1998

Hon. Will L. Garwood
United States Circuit Judge
Chair, Advisory Committee on the Appellate Rules
Committee on Rules of Practice and Procedure
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Judge Garwood:

Thank you for your letter of January 30, 1998. I have responded to Mr. Fulbruge by electronic mail. The court has not adopted a rule regarding filing of briefs on disk. Though I have not polled the court, I very much favor such a rule. We are often required to make additional copies of briefs. If we have the disk, we can send the file to the printer rather than pull a copy of the brief apart to copy it. In the not too distant future, we anticipate electronic filing and having the use of an electronic copy now would help us prepare and learn how to use the electronic file.

Just as an anecdote, the public file in the Oklahoma City Bombing Trial (McVeigh) is eleven linear feet. There is no way a clerk is going to take such a record home to work on over the weekend. PubNETics, a local electronic publisher, has furnished the entire record on a compact disk. The whole disk is text searchable. A clerk could slip that disk in a pocket to carry home.

Very truly yours,

Patrick Fisher
Clerk of Court

95-5

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Thomas K. Kahn
Clerk

February 11, 1998

Hon. Will L. Garwood
Chair, Advisory Committee on the Appellate Rules
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Re: Submission of Briefs on Disk

Dear Judge Garwood:

Thank you for your letter of January 30, 1998, requesting my views on a proposed amendment to FRAP 32 that would require a party who has prepared a brief on computer to file and serve a copy of that brief on disk as well as on paper. At the present time, this court does not have such a rule or requirement, and although there has been discussion at the staff level, there are no immediate plans to adopt such a rule. However, on behalf of several of our judges we have routinely requested counsel who are scheduled to orally argue an appeal before those judges to voluntarily provide a copy of their briefs on disk. In those instances, compliance has been very good.

In my view, it would be preferable to simply have a FRAP rule which explicitly permits courts of appeals to adopt a local rule on that subject, similar to the approach followed in FRAP 25(a)(2)(D). If a court is not going to make use of briefs on disks, there seems little justification for requiring their filing.

I appreciate the opportunity you have given me to express my views. Please let me know if I can be of any further assistance.

Sincerely,

Thomas K. Kahn
Clerk

95-5

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

RECEIVED
3/2/98

JAN HORBALY
CLERK

TELEPHONE: 633-6550
AREA CODE 202

February 26, 1998

Will Garwood, Esq.
Chair, Advisory Committee on Appellate Rules
c/o Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Dear Mr. Garwood:

As you requested in your January 30, 1998, letter, I am providing my views on a proposed amendment to FRAP 32 that would require a party who has prepared its brief on computer to file a copy of that brief on disk, as well as on paper.

While this Court does not currently have any rule regarding the submission of briefs on disks, I enthusiastically support the proposition. Any rule should address the following issues:

- Any rule should complement the Proposed Judiciary Standards on Electronic Filing.
- There should be a certification that the disk is virus-free.
- Eight copies of the disk should be provided. [One for each judge and law clerk (6) and one for the public to access and one for the permanent file.]
- The disk label should be color-coded to match cover of the brief and include contents and software involved.

If this Circuit can be of any further assistance, please contact me.

Sincerely,

JanHorbaly

Jan Horbaly
Clerk

V-G

MEMORANDUM

DATE: March 11, 1998

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 95-08

Item No. 95-08 was placed on the Committee's study agenda by Mr. Munford, who is concerned that, read literally, Rule 4(a)(7) might repeal the collateral order doctrine. Rule 4(a)(1)(A) permits an appeal in a civil case to be filed "within 30 days after the judgment or order appealed from is entered." Rule 4(a)(7), in turn, provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Under the terms of FRCP 58, a judgment is required to "be set forth on a separate document" — that is, on a document separate from any memorandum, opinion, or other document that describes the reasons for the entry of the judgment. Mr. Munford's concern is that, because collateral orders are generally not "set forth on a separate document" (but rather set forth in a document that describes the reasons for their issuance), they are not "entered in compliance with Rule[] 58" — and, because they are not "entered in compliance with Rule[] 58," they cannot be appealed under Rule 4(a)(1)(A).

At our September 1997 meeting, members of the Committee questioned whether the potential problem raised by Mr. Munford was in fact being experienced in practice. Mr. Munford agreed to look into the matter further and, if he deemed it appropriate, to draft an amendment to Rule 4 for the Committee to consider at a future meeting.

Subsequent to the September 1997 meeting, Judge Garwood asked Mr. Munford to examine a closely related question involving the application of Rule 4(a)(7) to orders that grant or deny the post-trial motions listed in Rule 4(a)(4)(A). Under Rule 4(a)(4)(A), the time to file an appeal is tolled upon the filing of any of several post-trial motions, including a motion for judgment under FRCP 50(b), a motion to amend or make additional factual findings under FRCP 52(b), a motion for attorney's fees under Rule 54 (if the district court extends the time to appeal under Rule 58), a motion to alter or amend the judgment under Rule 59, a motion for a new trial under Rule 59, and a motion for relief from the judgment under Rule 60 (if the motion is filed within 10 days after entry of judgment). But orders granting or denying these post-trial motions are not usually "entered in compliance with Rule[] 58" for purposes of Rule 4(a)(7) because they are not usually "set forth on a separate document." In theory, then, orders disposing of the post-trial motions listed in Rule 4(a)(4)(A) could be appealed months or even years after they are entered.

Attached are a letter from Mr. Munford summarizing his research into these two issues and amendments to Rules 4(a)(4) and (a)(7) that have been drafted by Mr. Munford. Also attached for background information are *Cooper v. Town of East Hampton*, 83 F.3d 31 (2d Cir. 1996), and *Fiore v. Washington County Community Mental Health Center*, 960 F.2d 229 (1st Cir. 1992) (en banc).

95-8

PHELPS DUNBAR, L.L.P.
COUNSELLORS AT LAW

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1 LIME STREET
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FACSIMILE 011-44-171-929-0046
TELEX 987321

Luther T. Munford
Partner
Resident in Mississippi
Direct (601) 360-9364

February 27, 1998

Professor Patrick J. Schiltz
Notre Dame Law School
Notre Dame, IN 46556

Re: Item 95-8 Fed.R.App.P. 4(a)(7)

Dear Pat:

Fed R. App. P. 4(a)(7) provides:

> A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

Cf. 28 U.S.C.A. § 2107(c) (appeal must be taken within 30 days after "entry"). This is the way the rule has read since 1979, although from 1979 to 1991, this provision was Rule 4(a)(6) rather than 4(a)(7). Fed. R. Civ. P. 58 in turn provides:

> Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a).

Item 95-8 on our agenda was prompted by a concern that the application of these rules might have caused some trouble in collateral order cases. Collateral orders are appealable but they are usually found in documents that state reasons for their issuance and so they do not normally satisfy Rule 58. *See, e.g.*, *Carson v. Block*, 790 F.2d 562, 564 (7th Cir.) *cert. denied*

479 U.S. 1017, (1986) ("the essence of a 'collateral' order is the absence of a final judgment on a separate document") (Easterbrook, J.). The concern was that literal application of Rule 4(a)(7) might interpose a technical bar to appellate jurisdiction over collateral order appeals in cases otherwise appropriate for the exercise of that jurisdiction. At the last committee meeting, I was asked to look into this problem to determine whether it is a real problem as opposed to just a theoretical one.

Subsequently, Judge Garwood asked me to expand the inquiry somewhat to look at a related question, i.e., the application of Rule 4(a)(7) to orders granting or denying the post-judgment motions listed in Fed. R. App. P. 4(a)(4).

With the help of my firm, I have looked for cases in which these issues have been discussed. While that search has not been exhaustive, and the committee may well want you to examine these questions further, I believe that we have learned enough to enable us to provide at least a broad outline of the relevant questions, and some preliminary answers.

Briefly, the circuits appear to have uniformly applied Rule 4(a)(7) to collateral orders and other interlocutory but appealable orders. On the other hand, the circuits are badly split concerning the application of Rule 4(a)(7) to decisions on orders listed in Rule 4(a)(4). At least one circuit has specifically asked this committee for guidance. The circuits are also divided as to whether a one-way waiver doctrine can be applied so as to use Rule 58 to preserve the right to appeal and not to defeat it. In my view, the committee should endeavor to give the guidance requested by amending Rule 4(a) in certain respects more fully set out below.

1. Rule 4(a)(7) and interlocutory orders.

The courts of appeal have read Rule 4(a)(7) literally and applied it to a wide variety of interlocutory orders. *See, e.g.*, *Cooper v. Town of East Hampton*, 83 F.3d 31, 33-36 (2d Cir. 1996) (Rule 54(b) judgment) (Newman, C. J.); *Theriot v. ASW Well Service, Inc.*, 951 F.2d 84, 87-88 (5th Cir. 1992) (§ 1292(a)(3) admiralty appeal); *Beukema's Petroleum Co. v. Admiral Petroleum Co.*, 613 F.2d 626, 627 (6th Cir. 1979) (preliminary injunction appeal under § 1292(a)(1)). Chief Judge Newman's treatment of the subject in *Cooper* addresses a number of arguments that could be made to the contrary and refutes them convincingly. One problem that should be addressed by the civil rules committee is that Fed. R. Civ. P. 58 is not entirely clear because the separate document rule is buried in text that appears to apply only to judgments at the end of a case.

2. Rule 4(a)(7) and Rule 4(a)(4) orders.

Rule 4(a)(7) quoted above states that a "judgment or order" is "entered" only when entered in compliance with Rule 58. On the other hand, Fed. R. App. P. 4(a)(4) states that when one of the specified post-judgment motions is filed "the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding." Orders denying these motions typically state reasons and in many cases do not comply with Rule 58.

To complicate things further, Rule 4(a)(4) can be read to say that when a district court grants such a motion and amends a judgment, the time to appeal runs not from the date of the entry of the separate judgment under Rule 58 but from the date of the order granting relief. It says:

> A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding.

For these reasons, the literal text of Rule 4(a)(7) is at war not only with the general practice of district courts in ruling on post-judgment motions, but with the language of Rule 4(a)(4). The result is widely disparate case law. *See* Cagan, *Rule 58 of the Federal Rules of Civil Procedure: An Appealing Alternative*, 21 Stetson L. Rev. 311, 316-23 (1992) (collecting cases); C. Wright & A. Miller, *Federal Practice and Procedure* § 3950.2 (1996) ("case law is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions").

At present, the circuits seem to have adopted at least three different interpretations:

Rule 58 always applies. In *Fiore v. Washington County Community Mental Health Center*, 960 F.2d 229 (1st Cir. 1992) (en banc), the court saved an otherwise untimely appeal by holding that the district court's failure to comply with Rule 58 in denying a post-judgment motion meant that a losing party could later ask for a Rule 58 judgment that would trigger the normal appeal period. The First Circuit recognized that its approach was "at odds with some authority from other circuits," 960 F.2d at 233 n.8, and that its decision created the possibility that its decision might cause "long dormant cases" to be revived years later. *Id.* at 236. For this reason, it added an "Appendix" to the opinion which in effect promulgated a circuit local rule that cuts off the right to request a Rule 58 judgment at any time later than three months after the last decision on a post-judgment order. *But see Pack v. Burns Intern. Sec. Service*, 130 F.3d 1071, 1073 (D.C. Cir. 1997) (refusing to adopt three-month rule); *Rubin v. Schottenstein, Zox & Dunn*,

110 F.3d 1247, 1253 n.4 (6th Cir. 1997) *vacated and reh'g en banc granted,* 120 F.3d 603 (6th Cir. 1997) (same).

A copy of the *Fiore* appendix is attached as Exhibit "1" to this letter. The First Circuit added that if "a more effective and convenient governance of appeals from denial of appeal of post-judgment motions can be devised" that it was the job of the "appropriate Rules Committees of the Judicial Conference of the United States" to do so. *Id.* at 236. *See also Hard v. Burlington Northern R.R. Co.*, 870 F.2d 1454, 1458 (9th Cir. 1989) (denial of post-judgment motion must comply with Rule 58); *Baker v. Mercedes Benz of North America*, 114 F.3d 57, 60 n.12 (5th Cir. 1997) (dictum); Wright & Miller, *supra*, at § 3950.2 (discussing *Fiore* and *Hard).*

Rule 58 does not apply when motion is denied. Some circuits have drawn a practical distinction between orders granting post-trial motions and orders denying post-trial motions. Where a post-trial motion is granted, then the parties would logically expect a new and separate judgment to be entered. That is not the case, however, where such a motion is denied. For example, in *Marre v. United States*, 38 F.3d 823, 825 (5th Cir. 1994), the Fifth Circuit refused to dismiss an appeal taken from the denial of the post-judgment motion "in a written minute entry that was entered on the docket." It said:

> While Rule 58 clearly requires the entry of a separate, written order, courts generally distinguish between the *granting* of a post-trial motion and the *denial* of a post-trial motion. When the court grants a post-trial Rule 59 motion, it affects the judgment, and its new ruling becomes the final judgment. As such, Rule 58 requires a written order. By contrast, the denial of a post-trial motion leaves the pre-existing judgment unaffected. Thus, there is no need to issue a new judgment.

Id. See also Chambers v. American Trans Air, Inc., 990 F.2d 317, 318 (7th Cir. 1993) ("[t]here is no requirement in this circuit that the order denying the motion comply with Rule 58"); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1232 (9th Cir. 1989) (Rule 58 does not apply to order denying post-judgment motion because there is no "risk of confusion" with respect to such an order).

Rule 58 never applies. In *Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir. 1991) *cert. denied*, 502 U.S. 1049 (1992), the district court denied a motion for a new trial on the condition that the defendant consent to a remittitur. The defendant filed a consent to the remittitur. The district court later denied the defendant's motion for reconsideration. Three months later, while the parties were disputing the effectiveness of an appeal that was taken too

early under former Rule 4(a)(4), the defendant asked the district court to enter a separate judgment under Rule 58. The district court did so. Noting a conflict among the circuits, the Eleventh Circuit held that Rule 58 could not be used in this manner to save an appeal. Specifically, it held Rule 58 does not apply whenever a district court "amends, remits or in any way alters a judgment that has already been entered once in accordance with Rule 58." *Id.* at 1561. The court expressed a fear that a contrary rule would revive the litigation "long considered dead by the litigants" and that a distinction between granting and denying a post-judgment motion was not "logical." *Id.* at 1560. *See also Ellison v. Conoco, Inc.*, 950 F.2d 1196, 1202 (5th Cir. 1992) *cert. denied*, 509 U.S. 907 (1993) (notice filed after order granting jnov but before entry of Rule 58 judgment was valid notice of appeal because it was after entry of "disposition").

3. Effect of noncompliance with Rule 58.

The circuit courts are also not uniform in their treatment of interlocutory appeals that are taken without compliance with Rule 58. Judge Easterbrook, writing for the en banc Seventh Circuit in *Otis v. City of Chicago*, 29 F.3d 1159 would apply a waiver doctrine strongly balanced in favor of appellate jurisdiction. Reasoning from *U.S. v. Indrelunas*, 411 U.S. 216, 93 S.Ct. 1562 (1973) and *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117 (1978) his opinion would waive compliance with Rule 58 if a loser in the district court files an otherwise timely appeal from an interlocutory order, but would apply Rule 58 to allow the loser who fails to take such an appeal to appeal at a later date after a Rule 58 judgment is entered. *Otis* states:

> If the loser appeals at once, the case proceeds without a pointless remand; if she waits until the formal judgment, she is secure against forfeiture.

Id. at 1167. In the Seventh Circuit, at least, a party "safely may defer the appeal until Judgment Day if that is how long it takes to enter the document" and "[v]ictorious litigants wishing to write *finis* to the case would do well to ensure that the district court adheres to Rule 58." *Id.* at 1167.

Other authorities similarly support a one-way waiver doctrine, i.e., waiver to permit an appeal but not to defeat one. *See Shalala v. Schaefer,* 509 U.S. 292, 113 S.Ct. 2625, 2632, n.6 (1993) ("relevant rules and statutes impose the burden of that error on the party seeking to assert an untimeliness defense"); *Amoco Oil Co. v. Jim Heilig Oil & Gas, Inc.*, 479 U.S. 966, 107 S.Ct. 468, 471 (1986) (Blackmun J. dissenting from denial of certiorari) ("the separate-document requirement must be applied mechanically in order to *protect* a party's right of appeal" and not "to *defeat* its appeal"); Zachary, *Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements*, 40 N.Y.L. Sch. L. Rev. 409, 433 (1996).

This approach stands in sharp contrast with *Wright, supra,* and decisions in the Fifth Circuit holding that an appellee may defeat jurisdiction by contending that no Rule 58 judgment has been entered. *See Silver Star Enterprises, Inc. v. M/V Saramacca*, 19 F.3d 1008, 1012 (5th Cir. 1994) (affirming order to sell vessel but refusing to review earlier decision denying motion to dismiss for lack of jurisdiction over a foreign sovereign on grounds that decision was not entered in compliance with Rule 58); *Theriot v. ASW Well Service, Inc.*, 951 F.2d 84, 88 (5th Cir. 1992) (Rule 58 not waived if the appellee moves to dismiss the appeal); *Interfirst Bank Dallas v. FDIC*, 808 F.2d 1105, 1108 (5th Cir. 1987) (Rule 58 cannot be used to cure procedural error in failing to appeal from judgment that did not comply with rule).

4. Recommendation.

There are real problems in the administration of Fed. R. App. P. 7 that this committee should address. Specifically, we need to eliminate traps and, if we leave one open, we need to flag it as clearly as possible and make sure it's a "Havahart."

My recommendation would be that the committee first see if it can agree on the following principles:

1. The time limit for an appeal should not begin to run on any judgment or order until the district court complies with Rule 58, except that an order denying a post-judgment motion specified in Rule 4(a)(4) need not comply with Rule 58. Carving out denial orders from the requirements of Rule 58 would conform the language of the rule to actual practice. Also, carving out denials would moot most of the concern about reviving long-dead controversies and would eliminate the need for the artificial three-month period adopted by the First Circuit in *Fiore*. Most orders are denial orders. Orders that grant relief from a judgment are either new trial orders, which are not appealable anyway, or orders that amend the judgment, which logically should call for the entry of a new judgment.

If endorsed, this principle would seem to require an amendment to Rule 4(a)(4) so it would state that if an appellant intends to challenge "an alteration or amendment of the judgment" then the time should be measured from "entry of the altered or amended judgment," not from the entry of the order disposing of the motion.

Another possibility would be to carve out *all* orders denying relief sought on motions from Rule 58. This would capture other orders such as denials of summary judgment which may be appealable as collateral orders but would not ordinarily be entered under Rule 58. One problem with such an approach, however, would be that the class of orders covered would not be as clearly defined as with the Rule 4(a)(4) alternative. It is very important to have the class of orders clearly

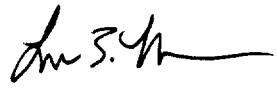
defined, because if Rule 58 does not apply, the appeal must be taken within 30 days from the entry of the order even if no Rule 58 judgment is entered.

2. **The failure of the district court to enter a Rule 58 judgment where one is required should not be grounds for dismissing an appeal.** The whole point of the "separate document" rule is to preserve the right to appeal. As noted above, however, some courts have limited the *Mallis* waiver doctrine to its facts and have allowed appellees to defeat appellate jurisdiction on the ground that the appellee, unlike the appellee in *Mallis*, did not do anything to waive Rule 58 requirements. The Seventh Circuit's approach is better. If an appellee wants to cut off the time period for appeal, the appellee can do so by requesting a Rule 58 judgment. Absent such a request, the appellee should be deemed to have waived any right to insist on a Rule 58 judgment.

Under this approach, either party is entitled to ask the district court to enter a Rule 58 judgment. Until the district court does so, the limit on the appeal time does not begin to run. If the appellant takes an appeal where there is no Rule 58 judgment, the appellate court will either apply waiver doctrine or else retain jurisdiction and instruct the district court to enter a separate judgment. See *Zachary, supra*, 40 N.Y.L. Sch. L. Rev. at 430-433. On the other hand, entry of a judgment or order pursuant to Rule 58 will always begin the time for the appeal clock to run.

Attached as Exhibit "2" to this letter is a copy of Rules 4(a)(4) and (7) as they will become effective this December if the Supreme Court and the Congress approve the style revisions. Indicated on the exhibit are changes which I believe would accomplish the purposes outlined above.

Very truly yours,



Luther T. Munford

LTM:szr
cc: Judge William L. Garwood
Judge Frank H. Easterbrook
Professor Carol Ann Mooney

Draft Amendments to
Federal Rules of Appellate Procedure 4(a)(4) and 4(a)(7)

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

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry either of the order disposing of the last such remaining motions or of the judgment altered or amended in response to such a motion, whichever comes later.

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

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

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

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

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

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

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment -- but before it disposes of any motion listed in Rule 4(a)(4)(A) -- the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered or the judgment altered or amended in response to such a motion is entered, whichever comes later.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal --

in compliance with Rule 3(c) -- within the time prescribed by this Rule measured from the entry either of the order disposing of the last such remaining motion or of the judgment altered or amended in response to such a motion, whichever comes later.

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

. . .

(7) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, except that compliance with Rule 58 is not required when an order denies all relief sought by a motion or motions [under Rule 4(a)(4)]. The failure of any order or judgment that must be entered in compliance with Rule 58 to comply with Rule 58 will not invalidate an otherwise timely appeal from that order or judgment.

whether the plaintiff's case fits the *Varity* mold from the perspective of either pleadings or proof.

We affirm the dismissal of the complaint insofar as it purports to state claims based on the common law or on state law, and we remand the case to the district court with an express direction that it permit the plaintiff to file an amended complaint limited to his claim(s) under ERISA. The parties shall bear their own costs.

Robert D. COOPER, Plaintiff–Appellee,

v.

TOWN OF EAST HAMPTON, East Hampton Town Board, Supervisor Stanton Barbour Bullock (a/k/a Tony Bullock), individually and in his official capacity as Town Supervisor, Councilperson Nancy H. McCaffrey, individually and in her official capacity as a member of the Town Board, and Councilperson Catherine Lester, individually and in her official capacity as a member of the Town Board, Defendants–Appellants.

No. 96–7120.

United States Court of Appeals, Second Circuit.

Argued Feb. 20, 1996.

Decided April 22, 1996.

Town board member sued town, alleging that town was required to provide for member's legal defense in state court defamation action. The United States District Court for the Eastern District of New York, John Gleeson, J., entered written order ("Declaratory Judgment Order") which directed entry of judgment pursuant to Rule 54(b), stating that town was required to reimburse board member for any defense costs incurred during pending state court action, 1995 WL 789296. However, nearly four months elapsed before separate judgment was entered. During interim, court orally issued second order directing town to disburse $50,000 from its escrow account to board member and his attorney. Town appealed from both orders, and also moved for stay of those orders pending adjudication of appeals. Board member cross-moved to dismiss both appeals for lack of appellate jurisdiction. The Court of Appeals, Jon O. Newman, Chief Judge, held that: (1) in issue of first impression, 30–day appellate clock on declaratory judgment order commenced not when that order was certified for appeal, but when separate document embodying that order was entered, and (2) district court's orders would not be stayed pending appeal.

Motion for stay denied, cross-motion to dismiss denied, motion to dismiss appeal referred.

1. Federal Civil Procedure ⇐2626

Rule providing that every judgment shall be set forth on separate document, and that judgment is effective only when so set forth, applies to all judgments, including partial judgments certified for interlocutory appeal. Fed.Rules Civ.Proc.Rules 54(b), 58, 28 U.S.C.A.

2. Declaratory Judgment ⇐392.1

Thirty-day clock in which defendants were required to file their notice of appeal from trial court's declaratory judgment order began to run not when that order was certified for interlocutory appeal, but rather, when "partial judgment" was subsequently entered, embodied in separate document; declaratory judgment order was neither separate from any judicial opinion nor labeled as "judgment," and in contrast, subsequent document was clearly labeled "partial judgment," and it stated, "[I]t is ORDERED and ADJUDGED that judgment is hereby entered for the plaintiff * * * ." Fed.Rules Civ.Proc.Rules 54(b), 58, 28 U.S.C.A.

3. Federal Courts ⇐585.1

District court's order directing town to disburse $50,000 from escrow account to pay for legal fees that town board member in-

curred in defending defamation action was interlocutory in nature, and thus, unappealable. 28 U.S.C.A. § 1292(b); Fed.Rules Civ. Proc.Rule 54(b), 28 U.S.C.A.

4. Federal Courts ⇐684

In deciding whether to stay district court's actions, Court of Appeals will consider four factors: (1) whether movant will suffer irreparable injury absent stay; (2) whether opposing party will suffer substantial injury if stay is granted; (3) whether movant has shown substantial possibility, although less than likelihood, of success on appeal; and (4) public interests that may be affected.

5. Federal Courts ⇐686

Court of Appeals would not stay, pending appeal, district court's orders stating that town was required to reimburse town board member for any defense costs incurred during pending state court defamation action against him, and directing town to disburse $50,000 from its escrow account to board member and his attorney; it appeared that, should town prevail on appeal, board member's assets would be sufficient to reimburse attorney fees, but in contrast, board member would suffer substantial harm if stay were issued, as he was currently expending his own funds in order to maintain legal defense in state court.

Motion to stay Rule 54(b) partial judgment and a disbursement of funds order of the District Court for the Eastern District of New York (John Gleeson, Judge), and cross-motion to dismiss appeals of judgment and order as untimely.

Patricia Weiss, Sag Harbor, NY, argued for plaintiff-appellee.

Vincent R. Fontana, Wilson, Elser, Moskowitz, Edelman & Dicker, New York City, argued for defendants-appellants.

Before: NEWMAN, Chief Judge, KEARSE, Circuit Judge, and WEXLER,* District Judge.

JON O. NEWMAN, Chief Judge:

This cross-motion to dismiss for lack of a timely notice of appeal presents the narrow issue of whether the separate document requirement of Rule 58 of the Federal Rules of Civil Procedure applies to an order directing the entry of judgment under Rule 54(b). The issue appears not to have previously arisen. The matter comes to us in connection with a motion by defendants-appellants Town of East Hampton (the "Town"), East Hampton Town Board (the "Board"), and other individual members of the Board for a stay pending appeal of the February 9, 1996, judgment of the United States District Court for the Eastern District of New York (John Gleeson, Judge). Plaintiff-appellee Robert Cooper cross-moves to dismiss defendants' appeal for lack of appellate jurisdiction. Because we conclude that Rule 58 is applicable to Rule 54(b) orders, we deny the cross-motion to dismiss the appeal. We also deny the appellants' motion for a stay.

Background

Plaintiff Robert Cooper is one of five elected members of the Board. In late 1993, at an executive meeting of the Board, Cooper spoke on behalf of several citizens who had complained to him that the Town police seemed to be targeting "blacks and poor whites" for arrest and sometimes physical abuse. He requested that the Board appoint an independent investigator to look into these charges of police misconduct, but the Board declined to initiate an investigation.

Several weeks later, a local newspaper interviewed Cooper about the citizens' complaints and about his call for an independent investigation. A subsequent newspaper article quoted Cooper as criticizing the Town Police Chief, Thomas Scott. Scott sued Cooper for defamation in New York state court. That suit remains pending.

Cooper requested the Board to provide for his legal defense in the state court action, claiming that he was being sued for acts or omissions that occurred while he was acting

* Honorable Leonard D. Wexler, of the United States District Court for the Eastern District of New York, sitting by designation.

within the scope of his public employment. The Board refused to provide any legal representation or indemnification to Cooper, despite the opinion of the Town Attorney that, under East Hampton Town Code § 20–6, the Town was obliged to do so. Cooper subsequently retained his own attorney, Patricia Weiss.

Cooper filed a complaint in the Eastern District of New York, alleging, in addition to federal constitutional claims, a pendent claim that the Town and the Board were required to provide for his legal defense under local law. Thereafter, the District Court ordered the Town to begin placing attorney's fees in escrow for Cooper and his attorney. On a motion by Cooper for partial summary judgment on his claim for representation under local law, the District Court orally ruled on September 29, 1995, in favor of Cooper, granting him partial summary judgment against the Town and the Board.

On October 18, 1995, the District Court entered a written order (the "Declaratory Judgment Order"), which directed the entry of judgment, pursuant to Fed.R.Civ.P. 54(b), since a final decision had been rendered on at least one claim of at least one party and there was no just reason for delay. That order stated that the Town and the Board were required to reimburse Cooper for any defense costs incurred during the pending state court action. *See Cooper v. Town of East Hampton*, No. 94–CV–2446, 1995 WL 789296 (E.D.N.Y. Oct. 18, 1995). Under normal circumstances, the Clerk of the Court would have immediately entered a "judgment" on a separate document, pursuant to Fed.R.Civ.P. 58; however, in this case, for reasons not apparent from the record, nearly four months elapsed before a judgment (the "Partial Judgment") was entered on February 9, 1996.

Meanwhile, on January 26, 1996, the District Court orally issued a second order (the "Disbursement Order"), which directed the Town and the Board to disburse $50,000 from its escrow account to Cooper and his attorney by February 2, 1996. After the District Court refused to stay its Disbursement Order on February 1, 1996, defendants filed two notices of appeal seeking review in this Court of the Declaratory Judgment Order and the Disbursement Order. Defendants now move for a stay of both orders pending the adjudication of their appeals. Cooper cross-moves to dismiss both appeals for lack of appellate jurisdiction.

Discussion

I. Cross–Motion to Dismiss

We first consider Cooper's cross-motion to dismiss both appeals. As to the appeal from the Declaratory Judgment Order, Cooper argues that this Court lacks appellate jurisdiction because defendants failed to file a timely notice of appeal. As to the appeal from the Disbursement Order, Cooper argues that this appeal is interlocutory and that the Disbursement Order is unappealable under either Rule 54(b) or 28 U.S.C. § 1292(b) (1994). We consider each appeal separately.

A. The Declaratory Judgment Order

[1, 2] Cooper argues that the Declaratory Judgment Order appeal is untimely because the Order was certified for appeal on October 18, 1995, and the notice of appeal was not filed until February 2, 1996, beyond the allowable period of thirty days. *See* Fed. R.App.P. 4(a)(1) (1995). Defendants respond that their notice of appeal was timely because the thirty-day clock did not begin to run until February 9, 1996, when the "Partial Judgment" was entered, embodied in a separate document pursuant to Rule 58.

Rule 58 states: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a)." Fed.R.Civ.P. 58 (1995). We have held that "[t]he time for appeal does not start running until this separate document is entered." *Kanematsu–Gosho, Ltd. v. M/T Messiniaki Aigli*, 805 F.2d 47, 48 (2d Cir.1986); *see RR Village Association, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1200–01 (2d Cir.1987); *see also Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 84 (2d Cir.1993). The reason for adhering to the formalism of the separate document requirement is to avoid confusion as to when the clock starts for the purpose of an appeal. Fed.R.Civ.P. 58 advi-

sory committee's note (1963 amendment); *see Bankers Trust Co. v. Mallis*, 435 U.S. 381, 384–85, 98 S.Ct. 1117, 1119–20, 55 L.Ed.2d 357 (1978); *United States v. Indrelunas*, 411 U.S. 216, 219–22, 93 S.Ct. 1562, 1563–65, 36 L.Ed.2d 202 (1973); *RR Village Association*, 826 F.2d at 1201; *Kanematsu-Gosho*, 805 F.2d at 48–49.

Cooper argues that the Declaratory Judgment Order of October 18, 1995, constitutes a Rule 58 "judgment" and that the thirty-day clock started on that date. In considering whether a document constitutes a Rule 58 judgment, however, we have consistently required that such a document must be "separate from any judicial memorandum or opinion" and "must be labeled a 'judgment.'" *Axel Johnson*, 6 F.3d at 84; *see Kanematsu-Gosho*, 805 F.2d at 49. These mechanistic requirements, while seemingly trivial, are necessary to the goal of promoting clarity. Litigants must be able to determine when a judgment is a judgment for the purpose of appeal, lest a party unknowingly lose its right to seek appellate review. *See* 6A James Wm. Moore *et al.*, Moore's Federal Practice ¶ 58.02.1[2] (2d ed. 1996).

In this case, the Declaratory Judgment Order is neither separate from any judicial opinion nor is it labeled a judgment. Rather, it appears in the form of a seven-page document, captioned "ORDER AND CERTIFICATION PURSUANT TO FED.R.CIV.P. 54(b)," which contains a recitation of the procedural background and a discussion of the reasons for the District Court's decision to "direct the entry of judgment." Thus, the Declaratory Judgment Order does not satisfy either of the requirements of a Rule 58 judgment. In contrast, the document filed February 9, 1996, is clearly labeled a "Partial Judgment," and it states, "[I]t is ORDERED and ADJUDGED that judgment is hereby entered for the plaintiff...." Since Defendants filed their notice of appeal within thirty days after the Partial Judgment was entered, their notice of appeal was timely, and this Court has appellate jurisdiction over the appeal from the Partial Judgment.[1] *See Bankers Trust*, 435 U.S. at 385, 98 S.Ct. at 1120 ("[A] party need not file a notice of appeal until a separate judgment has been filed and entered."); *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir.1987) ("A party safely may defer the appeal until Judgment Day if that is how long it takes to enter the document.").

Cooper points out that, under certain circumstances, this Court might have entertained an appeal from the Declaratory Judgment Order without awaiting entry of a separate "judgment." *See Bankers Trust*, 435 U.S. at 386–88, 98 S.Ct. at 1121 (Rule 58 requirements may be waived). However, the fact that the Rule 58 requirement may be waived for the benefit of an appellant does not mean that the Declaratory Judgment Order is somehow transformed into a Rule 58 judgment to these appellants' disadvantage.

Cooper also directs our attention to the first sentence of Rule 58, which begins, "Subject to the provisions of Rule 54(b)...." Fed.R.Civ.P. 58.[2] This introductory phrase, Cooper contends, means that the separate document requirement of Rule 58 is not applicable to partial judgments under Rule 54(b). We conclude, however, that a common-sense reading of the text, combined with an understanding of the purposes underlying Rule 58, defeats Cooper's argument.

1. It is inconsequential that defendants filed their notice of appeal on February 2, 1996, one week *before* the Partial Judgment was entered. Rule 4(a)(2) of the Federal Rules of Appellate Procedure provides that "[a] notice of appeal filed ... before the entry of the judgment or order is treated as filed on the date of and after the entry." Fed.R.App.P. 4(a)(2) (1995); *see Sanko Steamship Co. v. Galin*, 835 F.2d 51, 53 (2d Cir.1987).

2. The first sentence of Rule 58 states:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it.

Fed.R.Civ.P. 58.

As a textual matter, there is no reason to read the introductory phrase of Rule 58 as applicable to the entirety of the rule, rather than just to the rule's first sentence. Moreover, the substance of the first sentence makes clear why the drafters thought it necessary to make only that sentence subject to Rule 54(b). The sentence sets forth the roles of the clerk and the judge in situations where (1) a jury has rendered a general verdict or a judge has determined that a party shall recover a sum certain or be denied all relief, or (2) a judge has ordered some other relief or a jury has rendered a special verdict or a general verdict accompanied by answers to interrogatories. In the former set of circumstances, the clerk is to prepare and enter the judgment "without awaiting any direction by the court." In the latter set of circumstances, the judge is to approve the form of judgment, after which the clerk is to enter the judgment. Since Rule 54(b) contemplates a partial judgment that might well provide for the relief described in the first set of circumstances, but permits such a judgment only where a judge so directs, it was obviously necessary to exclude Rule 54(b) judgments from Rule 58's provision that, in that first set of circumstances, the clerk should enter judgment without awaiting the court's direction.

However, there is no good reason for reading the introductory phrase of Rule 58's first sentence to apply to the entirety of the rule, and there is a sound reason not to do so. Reading the phrase to apply to the entire rule would run contrary to the principal purpose of Rule 58, which is to eliminate uncertainty as to when a judgment is a judgment and when the time for appeal begins. Exempting Rule 54(b) judgments from the balance of Rule 58 and specifically from the separate document requirement would reintroduce, as to decisions available for entry of judgment under Rule 54(b), the very confusion that existed before the separate document requirement was adopted.

We believe that the better reading of Rule 58 is that its separate document requirement applies to *all* judgments, including partial judgments certified under Rule 54(b). This appears to be the position taken by the leading treatises. *See* 6A James Wm. Moore *et al.*, Moore's Federal Practice ¶¶ 58.02.1[1] (2d ed. 1996); 11 Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure §§ 2783–84 (2d ed. 1995).

Cooper also attempts to draw support from Rule 54(a), which states: " 'Judgment' as used in these rules includes a decree and any order from which an appeal lies." If Rule 54(a) said "as used in this rule" instead of "as used in these rules," the argument would give us pause. But since the provision applies to "these rules," it cannot sensibly be read to override Rule 58's separate document requirement. For example, under Cooper's reading of Rule 54(a), the issuance of an "order" for a preliminary injunction, appealable under 28 U.S.C. § 1292(a)(1), would start the clock for an appeal, whether that "order" was an oral pronouncement from the bench, a written granting of a motion for an injunction, or a formal Rule 58 judgment entered as a separate document. *See Beukema's Petroleum Co. v. Admiral Petroleum Co.*, 613 F.2d 626, 627 (6th Cir.1979) (preliminary injunction order does not start time for appeal until entry of judgment complying with Rule 58). The pre-Rule 58 confusion as to when a judgment is a judgment would be replaced with new confusion as to when a prejudgment order is a judgment. Rule 54(a) simply means that all of the provisions in the Civil Rules that apply to judgments also apply to decrees and appealable orders. But it does not exempt those decrees or orders from such provisions.[3]

B. The Disbursement Order

[3] We agree with Cooper that the Disbursement Order dated January 26, 1996, is interlocutory in nature and unappealable under either Rule 54(b) or 28 U.S.C. § 1292(b)

3. As the facts of this case indicate, the context of the foregoing discussion concerns rulings made before the entry of a final judgment. We express no views as to the application of the separate document requirement of Rule 58 to post-judgment rulings. *Compare Wikoff v. Vanderveld*, 897 F.2d 232 (7th Cir.1990) (separate document required for post-judgment ruling granting motion to amend judgment), *with Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir.1991) (separate document not required for post-judgment ruling granting motion to amend judgment), *cert. denied*, 502 U.S. 1049, 112 S.Ct. 915, 116 L.Ed.2d 815 (1992).

(1994). The Disbursement Order was not certified for appeal under either provision. Therefore, we would ordinarily grant Cooper's cross-motion to dismiss the appeal. However, since we have ruled that we have appellate jurisdiction over the appeal from the Partial Judgment, and the two appeals are "inextricably intertwined," in this case, it might be proper to exercise pendent appellate jurisdiction. *See Swint v. Chambers County Commission*, — U.S. —, —, 115 S.Ct. 1203, 1212, 131 L.Ed.2d 60 (1995); *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 482 (2d Cir.1995), *cert. denied*, — U.S. —, 115 S.Ct. 2277, 132 L.Ed.2d 281 (1995). Whether discretion should be exercised to do so is a matter we believe is more appropriately to be determined by the panel that will consider the merits of the appeal.

II. Motion to Stay

We now turn to defendants' motion to stay both the Declaratory Judgment Order and the Disbursement Order pending appeal. Defendants assert that a stay is necessary in this case because otherwise they will suffer irreparable injury by having to pay over $50,000 in attorney's fees to Cooper and Weiss. Defendants also claim that there is a substantial possibility that they will succeed on appeal.

[4] In deciding whether to stay the actions of a district court, we consider four factors:

[1] whether the movant will suffer irreparable injury absent a stay;

[2] whether the opposing party will suffer substantial injury if a stay is granted;

[3] whether the movant has shown a substantial possibility, although less than a likelihood, of success on appeal; and

[4] the public interests that may be affected.

See United States v. Private Sanitation Industry Association of Nassau/Suffolk, Inc., 44 F.3d 1082, 1084 (2d Cir.1995).

[5] Concerning the first factor, we think that defendants will not suffer irreparable injury if they are required to provide attorney's fees to Cooper and Weiss in the pending state court action. Defendants claim that, should they prevail on appeal and the Partial Judgment is reversed, they will be unable to recapture those fees from Cooper. In support, counsel for defendants attests that "Cooper has shown in his prior motion papers that he is impecunious." Although Cooper admits that he might not be able to repay defendants immediately for the attorney's fees, nonetheless, Cooper asserts that he could fully compensate defendants "after selling his modest house or on some sort of repayment schedule." Thus, it appears that, should defendants prevail on appeal, Cooper's assets will be sufficient to reimburse the attorney's fees, and defendants will suffer no irreparable injury.

In contrast, Cooper will suffer substantial harm if a stay is issued and defendants are not required to provide for his attorney's fees. Cooper is currently expending his own funds in order to maintain a legal defense in state court. As counsel for Cooper attests, "Financing the costs of court-ordered depositions and three appeals has been extremely difficult for Cooper...." Defendants do not dispute that Cooper will suffer even greater financial hardship if a stay is issued. Thus, the equities weigh heavily in favor of denying a stay.

Even if we assume that defendants can show a substantial possibility of success on appeal, this factor does not override the balance of hardships outlined above. Lastly, we note that there is an important public interest to be served in ensuring the effective representation of civil litigants in Cooper's circumstances. This interest is especially significant in cases involving a defendant who has claimed the protection of the First Amendment to speak on a matter of public concern. Having considered all of the relevant factors, we conclude that a stay pending appeal is not warranted.

Conclusion

Defendants' motion for a stay pending appeal is denied. Cooper's cross-motion to dismiss the appeal from the Partial Judgment is denied, and his motion to dismiss the appeal

from the Disbursement Order is referred to the merits panel.

Johnathan JOHNSON, Plaintiff–Appellant,

v.

John SCHMIDT, Captain, Shield # 427, Clinton Myrick, Corrections Officer, Shield # 9242, Defendants–Appellees.

No. 1131, Docket 95–2670.

United States Court of Appeals, Second Circuit.

Submitted Feb. 22, 1996.

Decided April 25, 1996.

Inmate brought pro se action alleging misconduct against correction officers at state prison. The United States District Court for the Eastern District of New York, Charles R. Wolle, Chief Judge, sitting by designation, dismissed complaint after jury trial. Inmate appealed. The Court of Appeals, Jon O. Newman, Chief Judge, held that inmate did not give informed consent to use of same jury in instant action that heard inmate's other misconduct action against other prison officials immediately prior to instant action.

Reversed and remanded.

1. Jury ⇐95

Same jury may not be used for two unrelated cases brought by pro se litigant unless fully informed consent is given.

2. Federal Courts ⇐893

Jury ⇐110(7)

Inmate who brought two pro se misconduct actions against corrections officers at prison and at county detention house did not give informed consent to use of same jury for both actions, and so new trial was warranted in second action; trial judge made no inquiry to determine whether inmate understood risks of using same jury, and gave inmate no explanation of, or caution about, risks of accepting same jury for his two actions.

3. Attorney and Client ⇐62

Use of court employees as standby counsel for pro se litigant is at best dubious practice.

4. Courts ⇐55

Although court employees frequently give helpful advice to pro se litigants concerning general procedures to follow when filing complaint or motion, or taking appeal, it is beyond their appropriate role to render specific advice to litigant concerning variety of legal issues that arise in course of trial.

Appeal from the August 31, 1995, judgment of the United States District Court for the Eastern District of New York (Charles R. Wolle, Chief Judge, United States District Court for the Southern District of Iowa, sitting by designation) dismissing, after jury trial, appellant's complaint alleging misconduct by prison officials.

Johnathan Johnson, Comstock, N.Y., submitted a pro se brief.

Alan G. Krams, Asst. Corp. Counsel, New York City Law Dept., New York City, submitted a brief for appellees.

Before NEWMAN, Chief Judge, LUMBARD and KEARSE, Circuit Judges.

JON O. NEWMAN, Chief Judge:

This appeal concerns two novel aspects of trial procedure: (1) the use of the same jury to try sequentially two unrelated civil cases, and (2) the use of court employees to act as standby counsel for a *pro se* litigant. These matters come before us on an appeal by Johnathan Johnson from the August 31, 1995, judgment of the United States District Court for the Eastern District of New York (Charles R. Wolle, Chief Judge of the Southern District of Iowa, sitting by designation). The judgment, entered after a jury trial,

"fabricated a fairy tale in a lame effort to avoid the ... consequences of his criminal conduct").

[5] Torres also argues that the court rested its "perjury" conclusion, in part, upon two factors he calls improper: (1) the fact that Torres first said he would plead guilty, but spoke so inconsistently that the court felt that a trial was necessary; and (2) the fact that Torres initially gave the impression that he did not understand English but then, during trial, often spoke to counsel in English. The district court, however, did not punish Torres for his effort to plead guilty or for his ability to speak English. It simply mentioned these events, as minor factors in a list of many others, in explaining what led it to believe that Torres was not a credible person. Such matters of credibility are primarily for the trial court to decide. *Untied States v. Aymelek*, 926 F.2d 64, 68 (1st Cir.1991) (in respect to § 3C1.1 adjustments, "matters of credibility are normally for the trial court, not this court, to decide") (quoting *United States v. Wheelwright*, 918 F.2d 226, 228 (1st Cir.1990)). And we find nothing unlawful about looking to the whole of Torres' conduct in assessing credibility for sentencing purposes, *cf. Payne v. Tennessee*, — U.S. —, 111 S.Ct. 2597, 2606, 115 L.Ed.2d 720 (1991) ("sentencing authority has always been free to consider a wide range of relevant material"), at least where these factors played a rather minor role.

[6] 2. Torres argues that the court should have reduced his sentence because he was a "minor participant" in the crime. U.S.S.G. § 3B1.2(b). Torres' receipt of the money, his contacts with the drug courier, and his having handed the drugs to the agent, taken together, however, justify the district court's decision not to provide Torres the benefit of this adjustment. *See United States v. Osorio*, 929 F.2d 753, 764 (1st Cir.1991) (district court's role-in-the-offense rulings reviewed for "clear error"); *United States v. Valencia-Lucena*, 925 F.2d 506, 514 (1st Cir.1991); *United States v. Wright*, 873 F.2d 437, 444 (1st Cir.1989).

[7] 3. Torres argues that his sentence (51 months in prison) is unfairly long, for Arias, who owned the shop, received a term of only 33 months. Arias, however, unlike Torres, accepted responsibility, U.S.S.G. § 3E1.1, did not obstruct justice, U.S.S.G. § 3C1.1, and did not have a lengthy criminal record. U.S.S.G. Ch. 4, Pt. A. These factors account for the difference in sentences. Regardless, Torres' sentence was lawful under the Guidelines; that being so, the fact that a different defendant received a different sentence does not provide a basis in law for setting aside Torres' own sentence. *United States v. Wogan*, 938 F.2d 1446, 1448 (1st Cir.) (departures from the Guidelines cannot be justified simply by "a perceived need to equalize sentencing outcomes" among defendants), *cert. denied*, — U.S. —, 112 S.Ct. 441, 116 L.Ed.2d 460 (1991).

Torres' remaining arguments are without merit.

The judgment of the district court is

Affirmed.

Richard C. FIORE, Plaintiff, Appellant,

v.

WASHINGTON COUNTY COMMUNITY MENTAL HEALTH CENTER, et al., Defendants, Appellees.

Nos. 91-1027, 91-1842.

United States Court of Appeals, First Circuit.

March 30, 1992.

Father brought action against mental health care provider, alleging negligence in connection with the treatment of his daughter. The United States District Court for the District of Rhode Island, Raymond J. Pettine, Senior District Judge, granted summary judgment in favor of provider. Father subsequently filed a postjudgment

motion to vacate the summary judgment and for leave to file an amended complaint. The District Court denied father's motion by marginal notation, and father filed motion for reconsideration of that denial. The District Court denied father's motion for reconsideration by marginal notation. Father filed motion for entry of final judgment on the original denial of his postjudgment motion. The District Court declined to make entry of final judgment. Father appealed. The Court of Appeals, Coffin, Senior Circuit Judge, held that: (1) separate document requirement of Federal Rules of Civil Procedure applied to all appealable orders made on postjudgment motions; (2) marginal notation, even though affixed to photocopy of motion, did not satisfy separate document requirement; (3) father did not waive separate document requirement; and (4) father was not entitled to file amended complaint after entry of final judgment.

Reversed in part and affirmed in part.

1. Federal Courts ⇐560, 561

Denial of postjudgment motions challenging judgment are appealable separately from appeal of underlying judgment. Fed.Rules Civ.Proc.Rules 50(b), 52(b), 59(b, e), 60(b), 28 U.S.C.A.

2. Federal Civil Procedure ⇐2575

Denial of postjudgment motion based on mistake, newly discovered evidence, or fraud, for judgment notwithstanding verdict, for amended or additional findings, for new trial, or to alter or amend judgment, constitutes "judgment" subject to separate document requirement of Federal Rules of Civil Procedure. Fed.Rules Civ.Proc.Rules 50(b), 52(b), 58, 59(b, e), 60(b), 28 U.S.C.A.

See publication Words and Phrases for other judicial constructions and definitions.

3. Federal Courts ⇐829

Orders upon motions seeking relief from judgment due to mistake, newly discovered evidence, or fraud, are reviewable only for abuse of discretion. Fed.Rules Civ.Proc.Rule 60(b), 28 U.S.C.A.

4. Federal Civil Procedure ⇐2575

Marginal notation denying postjudgment motion did not satisfy separate document requirement of Federal Rules of Civil Procedure, even though notation was affixed to photocopy of motion; document originated by court and not by party, separate from any other paper filed in case, was necessary to communicate unambiguous message of finality. Fed.Rules Civ. Proc.Rule 58, 28 U.S.C.A.

5. Federal Civil Procedure ⇐2575

Appellant may be deemed to have waived separate document requirement of Federal Rules of Civil Procedure when, despite lack of separate document, appellant filed timely appeal based on date of judgment. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

6. Federal Civil Procedure ⇐2575

Absent exceptional circumstances, waiver of separate document requirement of Federal Rules of Civil Procedure will be inferred when party fails to pursue appeal within three months of court's last order in case; party wishing to pursue appeal and awaiting separate document of judgment from trial court should, within three month period, file motion for entry of judgment. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

7. Federal Civil Procedure ⇐2575

Motion for reconsideration of trial court's denial of postjudgment motion and request to Court of Appeals for extension of time to file appeal of denial of postjudgment motion, did not constitute waiver of separate document requirement of Federal Rules of Civil Procedure with regard to original denial of postjudgment motion, even though moving party did not request formal final judgment on original denial of postjudgment motion until he was ready to file appeal. Fed.Rules Civ.Proc.Rule 58, 28 U.S.C.A.

8. Federal Civil Procedure ⇐2651

Father, who was collaterally estopped from litigating fact that he had engaged in sexually inappropriate behavior toward his daughter, was not entitled to relief from summary judgment on his claim that mental health provider negligently treated

daughter by teaching her that father engaged in sexually inappropriate behavior toward her, in order to prove claim that provider's tactics constituted tortious interference with father's relationship with daughter; while new complaint eliminated assertion that father never abused daughter, it reiterated theory that provider's negligence stemmed from treatment based on inappropriate assumption that father had harmed daughter. Fed.Rules Civ.Proc. Rule 60(b), 28 U.S.C.A.

9. Federal Civil Procedure ⇐2651

Plaintiff was not entitled to reopen case following adverse entry of summary judgment to file amended complaint where plaintiff had notice long before entry of judgment that district court might enter summary judgment on grounds of collateral estoppel; plaintiff had no reason for waiting until after judgment to offer alternative approach recharacterizing his version of his negligence claim.

John W. Ranucci with whom D'Agostino & O'Donnell, Providence, R.I., were on brief, for plaintiff, appellant.

Charles J. Vucci with whom Thomas C. Plunkett, Leonard A. Kiernan, Jr., and Kiernan, Plunkett & Woodbine, Providence, R.I., were on brief, for defendants, appellees.

Gael Mahony with whom Ben T. Clements, Hill & Barlow, Boston, Mass., and David L. Shapiro, Cambridge, Mass., were on brief, amicus curiae.

Before BREYER, Chief Judge, COFFIN, Senior Circuit Judge, TORRUELLA, SELYA and CYR, Circuit Judges.

1. To assist our deliberations, we asked litigator Gael Mahony and Professor David Shapiro of Harvard University's School of Law to study the issue and prepare a joint amicus brief.

2. We limit our discussion to *denials* of post-judgment motions only because the *granting* of such a motion presumably effects a change in the original judgment and therefore more clearly requires a separate document setting out the change. *But see Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1561 (11th Cir.1991) (no separate document required when motions denied or when court "amends, remits or in any way alters a judgment that has already been entered once in accordance with Rule 58").

3. The word "Denied" was typed onto the front of the motion above the judge's signature and the date.

OPINION EN BANC

COFFIN, Senior Circuit Judge.

A panel of this court confronted a technical problem of civil procedure—how the "separate document" requirement of Fed. R.Civ.P. 58 should be applied in the context of post-judgment motions—and concluded that meticulous compliance with the rule was necessary. The full court, suspecting that a more flexible approach might exist, decided to reconsider the issue en banc. Having given careful consideration to the policies and practicalities at issue, we reaffirm the position originally adopted by the panel and advocated by amici.[1] We therefore hold that the separate document requirement applies to all appealable post-judgment orders.[2]

I.

As the panel noted, only a few facts concerning the underlying lawsuit are necessary for an understanding of the issue before us. Richard Fiore originally brought this action alleging that the Washington County Community Mental Health Center and its employees had treated his young daughter negligently by erroneously teaching her that her father had engaged in "sexually inappropriate behavior" toward her. In March 1990, the district court granted summary judgment for the defendants.

Fiore subsequently filed a motion pursuant to Fed.R.Civ.P. 60(b) to vacate the summary judgment and asking for leave to file a third amended complaint. On June 27, 1990, the district court denied the petition by means of a notation on a photocopy of Fiore's motion.[3] On July 17, Fiore filed a motion seeking reconsideration or, alternatively, explanation of the court's reason for denying the 60(b) motion. On September

21, the district court denied the motion by means of a margin notation and without discussion.

On October 22, Fiore moved the district court for entry of final judgment on the June 27 denial of his Rule 60(b) motion. He contended that that decision was not final for purposes of appellate review because the order denying his motion had not been set forth on a "separate document," as required by Rule 58 of the Federal Rules of Civil Procedure.[4] The district court issued a Memorandum and Order holding that the finality of the June 27 decision "is a matter for the First Circuit Court of Appeals to consider when and if Mr. Fiore appeals *that* decision." [5] Accordingly, the court dismissed the motion for want of jurisdiction. Fiore then filed the appeal first heard by our panel last year, and now before us again.[6]

At stake is Fiore's right to appellate review of the district court's June 27 decision. If Fiore is correct that the district court had not entered a final judgment because there was no "separate document," the time for filing an appeal of the decision would not yet have begun to run. If the judgment had become final, however, the time for appeal would have passed.

The panel concluded that the policies underlying the separate document rule require that it be applied rigidly in both the post-judgment and final judgment contexts. The ruling created some confusion, however, because of the longstanding practice of trial judges disposing of post-judgment motions with curt margin orders. A majority of the court considered the problem sufficiently troublesome to warrant en banc review and, accordingly, we withdrew the panel decision to take a second look.

II.

A. *Language of the Rules*

Rule 58 provides that "every" judgment shall be set forth in a separate document, and Rule 54(a) defines the word "judgment" to include "a decree and any order from which an appeal lies." In this circuit, it is well-established that denials of Rule 60(b) motions are appealable orders, *see, e.g., FDIC v. Ramirez Rivera*, 869 F.2d 624, 626 (1st Cir.1989); *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 27 (1st Cir.1988) ("[T]he order of denial [of a Rule 60(b) motion] meets the definition in the Federal Rules of a 'judgment'."). The language of the rules thus clearly embraces such orders, directing that they be set forth on a separate document to be effective and to trigger the time for appeal.

[1, 2] Although this case specifically involves only an order rendered under Rule 60(b), amici, *see supra* note 6, have urged us to address Rule 58's impact on post-judgment motions comprehensively and to adopt a uniform approach for all orders denying post-judgment motions under Rules 50(b), 52(b) and 59(b) and (e), as well as under Rule 60(b).[7] Because the underlying principles are closely analogous, we believe it is appropriate to do so. As with Rule 60(b) denials, we consistently have

4. Rule 58 requires that "[e]very judgment shall be set forth on a separate document," and it provides that "[a] judgment is effective only when so set forth...."

5. Before filing his Rule 60(b) motion, Fiore had filed a notice of appeal to this court from the March 20, 1990 order granting summary judgment. He twice received extensions of time for filing his brief and appendix so that, if necessary, his appeal from the Rule 60(b) decision could be consolidated with the original appeal. Fiore ultimately let the final deadline pass, however, and this court dismissed the underlying appeal for failure to prosecute under Local Rule 45. We subsequently denied Fiore's motion to recall mandate and reinstate his appeal. Thus, Fiore no longer has an appeal on the merits.

6. It has long been the view of this Circuit that district court orders refusing to enter judgments are appealable. *Willhauck v. Halpin*, 919 F.2d 788, 790 n. 3 (1st Cir.1990); *In re Forstner Chain Corp.*, 177 F.2d 572, 575–76 (1st Cir.1949).

7. Rule 60(b) permits a party to seek relief from judgment for various reasons, including mistake, newly discovered evidence or fraud. Rule 50(b) governs motions for judgment notwithstanding the verdict. Rule 52(b) governs motions for amended or additional findings. Rule 59(b) permits a motion for new trial, and 59(e) permits a motion "to alter or amend the judgment."

held that denials of other post-judgment motions challenging the judgment are appealable separately from the appeal of the underlying judgment. *See, e.g., Mariani-Giron v. Acevedo-Ruiz,* 945 F.2d 1, 3 (1st Cir.1991) (denial of Rule 59(e) motion to alter or amend judgment); *Creedon v. Loring,* 249 F.2d 714, 717 (1st Cir.1957) (denial of new trial motion may be appealed despite failure to appeal original judgment). Such orders therefore also constitute "judgments" subject to Rule 58's separate document requirement.[8]

Moreover, denials of motions made under Rules 50(b), 52(b), and 59(b) and (e) are subject to the separate document requirement as well by virtue of Rule 4(a) of the Federal Rules of Appellate Procedure. Rule 4(a)(4) provides that, when a timely motion has been made under any of those three Rules of Civil Procedure, the time to appeal the underlying judgment will run from "the entry of the order" denying or granting the motion. Subsection (7) states that, to be entered within the meaning of Rule 4(a), a judgment or order must be "entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Rule 4(a) therefore expressly imposes Rule 58's separate document requirement on denials of these motions.

B. *The Principle at Stake*

The clear mandate of the language is underscored by the policy behind the separate document rule, which we believe can be satisfied only if the provision is applied without exception to all appealable judgments. The sole purpose of the separate document requirement, enacted by a 1963 amendment to Rule 58, was "to establish a certain reference point for determining the timeliness of post-judgment motions and appeals." *Alman v. Taunton Sportswear Mfg. Corp.,* 857 F.2d 840, 843 (1st Cir.1988) (citing *Bankers Trust Co. v. Mallis,* 435 U.S. 381, 385, 98 S.Ct. 1117, 1120, 55 L.Ed.2d 357 (1978) (per curiam)). Logically, then, the rule should be applied to the specific order that starts the clock running. Without consistent application of this formality, there would be no unambiguous signal that the time for appeal has begun to run. *But see Wright v. Preferred Research,* 937 F.2d 1556, 1560–61 (11th Cir. 1991).

The need for a post-judgment "separate document" is particularly acute in the context of Rule 60(b) motions, which neither affect the finality of the original judgment nor extend the time for appealing the judgment. Because the appeal of an order denying a Rule 60(b) motion can be wholly independent of, and not linked in time to, the date of the underlying judgment, the separate document issued for that original judgment in no way informs a party of the time to appeal the motion denial. The only significant date is the date of the order denying the motion. It therefore follows that, to provide certainty about the proper time for appeal, such an order must be

8. Although our court has never held explicitly that denials of post-judgment motions under Rules 50(b) and 52(b) are final decisions appealable separately from the underlying judgment, we see no basis upon which to distinguish such orders from those rendered on motions made under Rule 59.

We recognize that this approach is at odds with some authority from other circuits, which generally allow review of orders denying post-judgment motions only as part of the appeal from the underlying judgment. *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2818, at 116 (1973) (collecting cases); 6A J. Moore, J. Lucas & G. Grotheer, Jr., *Moore's Federal Practice* ¶ 59.15[1] at 59–288 & n. 4 (1991) (collecting cases). *But see, e.g., Stephenson v. Calpine Conifers II, Ltd.,* 652 F.2d 808, 811 (9th Cir.1981), *overruled on other grounds by In Re Washington Pub. Power Supply Sys. Sec. Litig.,* 823 F.2d 1349 (9th Cir.1989) (order denying motions for relief under Rule 59(e) is appealable); *Preble v. Johnson,* 275 F.2d 275, 277 (10th Cir.1960) (denial of new trial is appealable). This rule of nonappealability has two important exceptions, however: (1) if the motion involves new matters arising after the judgment, an order denying the motion is appealable, (2) when an appeal is taken improperly from the order denying a post-judgment motion, the appeal is treated as if taken from the underlying judgment. 11 C. Wright & A. Miller § 2818, at 117–118 & nn. 45, 46 (collecting cases). Since the practical effect of these exceptions would be to permit appeals of many post-judgment orders, we see no reason to revisit our precedent generally holding such rulings to be appealable independently.

entered in accordance with Rule 58's requirements.

Although motions filed under Rules 50(b), 52(b), and 59(b) and (e) are more closely linked to the underlying judgment, the need for a separate document memorializing denials of such motions is equally apparent. Under Fed.R.App.P. 4(a), timely motions under Rules 50(b), 52(b) and 59 suspend the finality of the original judgment, and the time for appeal from both that judgment and denial of the motions runs from the entry of the order denying the motions. Thus, as in the 60(b) context, the separate document setting forth the original judgment is of no help in determining the precise date on which the time to appeal begins to run. The significant date is the date of the order denying the motion. Because Rule 58's purpose is to ensure that that date is precisely clear, the separate document requirement must apply to such orders.

We recognize that the type of uncertainty that prompted the separate document rule is less likely to occur with respect to post-judgment orders than for initial judgments. The Advisory Committee that drafted the requirement expressed particular concern about those occasions on which courts had issued opinions or memoranda containing "apparently directive or dispositive words"—such as "the plaintiff's motion for summary judgment is granted"—and then later signed formal judgments. In such circumstances, it was unclear whether the opinions or the later orders started the time running for appeals and post-judgment motions. *See* Fed.R.Civ.P. 58, Notes of Advisory Committee on Rules, 1963 Amendment. Because post-judgment motions typically will be narrowly focused and fairly specific in defining the relief sought, a brief order disposing of such motions more likely would be the court's last word on the case, and to be understood as such.

[3] Nonetheless, some risk of uncertainty always will exist. When a court denies a motion by an informal notation such as that used in this case, the parties may anticipate a memorandum explaining the court's ruling. This would be particularly true for orders on motions brought under Rule 60(b). Because such motions often will raise issues not previously addressed by the court, they may well be expected to elicit further discussion by the court. Moreover, Rule 60(b) orders are reviewable only for abuse of discretion, *Pagan v. American Airlines, Inc.*, 534 F.2d 990, 993 (1st Cir.1976), making it reasonable to assume that the court would follow a brief order with articulated reasons.

We therefore believe that consistency and clarity are better achieved by following the rules as they are written than by trying to draft a set of exceptions or by making efforts to distinguish one type of judgment or order from another. Accordingly, we accept amici's recommendation that we adopt a uniform approach applying Rule 58 to all final orders denying and, *a fortiori*, granting post-judgment motions under Rules 50(b), 52(b), 59(b) and (e), and 60(b).

C. *The Nature of a Separate Document*

[4] Even conceding the applicability of the separate document rule in the post-judgment context, one might argue that what the district court did in this case was enough. Rather than simply noting the denial on the face of the original motion, the court photocopied Fiore's document before typing the word "Denied" and affixing a signature and date onto it. The court thus produced a "separate" piece of paper—the photocopy—to add to the record.

In our view this practice does not fulfill the Rule 58 requirement. The concern noted by the Advisory Committee on Rules stems from the uncertainty that arises when a court issues a summary disposition that may or may not be followed by an explanatory memorandum. A terse marginal notation inscribed on a photocopy of the original motion is insufficient to eliminate the possibility of confusion. It is the informality and brevity of the marginal notation that causes uncertainty, and whether that notation appears on the original or a photocopy is immaterial. In our view, a document originated by the court, separate from any other paper filed in the case, is

necessary to communicate an unambiguous message of finality. *Accord United States v. Woods*, 885 F.2d 352, 353 (6th Cir.1989) (reversing marginal grant of summary judgment) ("A marginal order does not adequately notify a party that its time for appeal has begun to run, for a party may reasonably be confused as to the standing of its case when a decision is rendered in such an informal manner."). *See also Ellender v. Schweiker*, 781 F.2d 314, 317 (2d Cir.1986) (court order that was "merely endorsed on a stipulation" probably did not meet Rule 58 requirement).

Moreover, we believe that requiring a true separate document in this context is the approach most compatible with Supreme Court precedent on Rule 58. In *United States v. Indrelunas*, 411 U.S. 216, 93 S.Ct. 1562, 36 L.Ed.2d 202 (1973) (per curiam), the Court held that the requirement must be "mechanically applied," quoting Professor Moore's "cogent observation" that the provision " 'would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective ...,' " *id.* at 220–22, 93 S.Ct. at 1564–65 (quoting 6A J. Moore, *Moore's Federal Practice* ¶ 58.04[4.–2], at 58–161 (1972)). The Court's later decision in *Bankers Trust*, 435 U.S. at 381, 98 S.Ct. at 1117, relaxed the technicality of the rule only in circumstances in which the right to appeal would be aided—as when a party timely appealed, without objection from its adversary, from a judgment that technically was not final.

This precedent suggests that a less formal approach for applying Rule 58's separate document requirement should be undertaken only for the purpose of alleviating inconvenience or hardship caused to *appellants* by the rule's hypertechnicality. We do not see how a standard rule assigning finality to a marginal denial of a post-judgment motion, even if contained on a "separate" photocopy of the motion, would serve such a purpose.

In addition, a party who treated a margin order as final, filing an immediate notice of appeal from it, could find its notice rendered a nullity if the trial court issued a subsequent explanatory memorandum. *See Willhauck*, 919 F.2d at 792 ("[A] Notice of Appeal which is premature ' "simply self-destructs" ' and should be treated as a nullity.") (quoting *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S.Ct. 400, 403, 74 L.Ed.2d 225 (1982) (quoting 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 204.12[1] (1982))). Causing wheels to spin for no practical purpose is also contrary to the Supreme Court's handling of Rule 58. *See Bankers Trust*, 435 U.S. at 385, 98 S.Ct. at 1120.

Thus, for the sake of certainty and predictability—the goals of the separate document requirement—we think technical compliance with the provision is as necessary in the post-judgment context as it is in disposing of the merits. *Accord Akers v. Ohio Dept. of Liquor Control*, 902 F.2d 477, 480 (6th Cir.1990) (extending *Woods* rejection of marginal decision as final to post-judgment context). *See also* 6A J. Moore, J. Lucas & G. Grotheer, Jr., *Moore's Federal Practice* ¶ 58.05[2] at 58–63 & n. 23 (1991) (When a post-judgment motion is denied, "the better practice would be to follow the separate document requirement...."). *But see Wikoff v. Vanderveld*, 897 F.2d 232, 236 (7th Cir.1990) (a "minute order" suffices when the judge denies a request to alter judgment but is insufficient when court grants motion and amends original judgment); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231–32 (9th Cir.1989) (Rule 58 does not always require separate document in post-judgment context).[9]

9. In *City of Santa Maria*, the Ninth Circuit refused to require the district judge to issue a document separate from its nine-page order denying a Rule 59 motion. The circuit held that, unlike for judgments on the merits, Rule 58 did not require that there be a "separate, one sentence order" in addition to a lengthy opinion or memorandum for post-judgment motions. 886 F.2d at 1231. This decision, although at odds with our conclusion that post-judgment motions should be treated identically with judgments on the merits, is not necessarily inconsistent with our holding that a photocopy of a marginal notation is insufficient. It is not at all clear that

We do not expect that strict application of Rule 58 will result in a significantly heavier burden for district courts that until now have created a separate document by typing their disposition on a photocopy of the original motion. Technology makes a true separate document easy to produce. Presumably, the district court has saved (or easily could save) the computer file with the case heading from its final judgment document, and it will take minimal effort to make appropriate revisions for the post-judgment context. *See Carter v. Beverly Hills Savings and Loan Ass'n*, 884 F.2d 1186, 1191 (9th Cir.1989) ("[I]t is very simple to comply with Rule 58. A judgment or an order signed by the judge or clerk that is a separate document and labeled as a judgment or order would clearly comply.").

Moreover, under Rule 58(1), it is primarily the responsibility of the clerk, not the court, to prepare the separate document. Under that subsection, when a party is awarded a sum certain or costs, or when all relief is denied, "the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court." In other circumstances, the court's obligation is only to "promptly approve the form of judgment." *See* Fed.R.Civ.P. 58(2).

Accordingly, we conclude that a marginal notation, even when affixed to a photocopy of the motion, does not satisfy the separate document requirement.

We add that if a more effective and convenient governance of appeals from denials of post-judgment motions can be devised, the responsibility for considering change would lie with the appropriate Rules Committees of the Judicial Conference of the United States.

the 9th Circuit would hold that a marginal notation would satisfy the "separate document" requirement.

10. An appellant may be deemed to have waived the requirement when, despite the lack of a separate document, it filed a timely appeal based on the date of the judgment.

11. We see no conflict between this conclusion and Supreme Court precedent suggesting that Rule 58's technical requirements should be relaxed only to assist an appeal, not to foreclose one. *See supra* at 235. Allowing a party to use the separate document requirement to delay indefinitely an appeal would not serve Rule 58's purpose of protecting against mistakenly ill-timed appeals. The three-month period generally should ensure that a failure to appeal was a matter of choice, not confusion, and any further delay in finality would serve no one's interest.

III.

[5, 6] If we were to hold without qualification that a judgment is not final until the court issues a separate document, we would open up the possibility that long dormant cases could be revived years after the parties had considered them to be over. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560 (11th Cir.1991). We hasten to shut off that prospect. It is well-established that parties may waive technical application of the separate document requirement. *See Bankers Trust*, 435 U.S. at 387–88, 98 S.Ct. at 1121–22; *Willhauck*, 919 F.2d at 792.[10] We believe it appropriate, absent exceptional circumstances, to infer waiver where a party fails to act within three months of the court's last order in the case. When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties.[11]

IV.

[7] Our preceding discussion makes it clear that the district court's June 27 denial of Fiore's 60(b) motion technically was not final. Defendants argue that Fiore nevertheless is foreclosed from filing an appeal because his request for a separate document came too late, after he already had waived the Rule 58 requirement. According to defendants, waiver occurred when

Fiore filed a motion for reconsideration of the June 27 decision and asked this court for an extension of time to file an appeal covering that decision.

We disagree that these actions amounted to waiver. Both the Supreme Court and our own court have emphasized that the separate document requirement "should always be interpreted 'to prevent loss of the right to appeal, not to facilitate loss,'" *Willhauck*, 919 F.2d at 792 (quoting *Bankers Trust*, 435 U.S. at 386, 98 S.Ct. at 1121). *See also* 6A *Moore's Federal Practice* ¶ 58.02.1[2], at 58–20; *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 (D.C.Cir. 1990); *Matter of Seiscom Delta, Inc.*, 857 F.2d 279, 283 (5th Cir.1988). Consistent with this principle, we have held more than once that a party's decision to move forward with a case in a manner suggesting satisfaction with a non-final judgment does not preclude the party from later contesting the finality of that judgment. *See Willhauck*, 919 F.2d at 792; *Alman*, 857 F.2d at 845. *See also Indrelunas*, 411 U.S. at 221, 93 S.Ct. at 1564 (government's earlier appeal does not foreclose its argument that there had been no appealable judgment).

This case presents an even stronger basis for rejecting waiver than did our previous decisions. The appellants in both *Willhauck* and *Alman* actually had filed appeals, unsuccessful on other grounds, of the decisions they subsequently argued were not final. In this case, however, Fiore never filed an appeal of the judgment he claims lacks finality. Neither of the actions assertedly demonstrating waiver—his motion for reconsideration and his request to this court for an extension of time to appeal—show acquiescence with the non-final decision. The motion for reconsideration presumably was designed to eliminate the need for appeal of the Rule 60(b) judgment, while the request for an extension of time was intended to protect his right to consolidate appeals, if necessary. The fact that he did not request a formal final judgment until he was ready to seek review in this court in no way demonstrates an intent to waive the protections of the requirement. *Accord Hughes v. Halifax County School Bd.*, 823 F.2d 832, 836 (4th Cir.1987) (rejecting waiver argument where party "filed a motion for entry of judgment, clearly indicating that he did not view the district court's order as its final judgment").

The district court therefore was obliged to enter final judgment on the June 27 decision pursuant to Rules 58 and 79(a), as it did following the panel decision.[12] We, in turn, must now confront Fiore's appeal on the merits.

V.

[8] The district court granted summary judgment for defendants in March 1990 based on the doctrine of collateral estoppel, ruling that Fiore could not relitigate the fact that he had engaged in sexually inappropriate behavior toward his daughter, Katie.[13] Because the court viewed Fiore's negligence claim as premised solely on the defendants' having improperly taught Katie that he abused her, the court concluded that the claim was without foundation.

Fiore's Rule 60(b) motion proposed a new complaint that would bypass the issue of his conduct toward Katie. While deleting reference to his innocence, the complaint would add a paragraph alleging that defendants' tactics permanently alienated Katie from him and thus "constituted a tortious and unjustifiable interference with [their] relationship." *See* ¶ 22 of (proposed) Third Amended Complaint (filed June 15, 1990). He offered in support of his motion the newly obtained opinion of a psychologist, who Fiore claimed would testify that defendants' treatment of Katie was negligent regardless of whether he had engaged in sexually inappropriate behavior towards her.

12. Following the district court's issuance of the separate document, Fiore appealed the denial of the Rule 60(b) motion to this court. We consolidated that appeal with the en banc review of the procedural question.

13. In the course of trying the Fiores' divorce action, a Connecticut court had determined that Fiore had, in fact, engaged in such behavior.

This was the motion the court originally denied by means of a margin order. The district court's later explanation stated, in pertinent part, as follows:

> First of all, I note that June 27, 1990 was not the first time that I denied plaintiff's motion to file a third amended complaint. I already addressed the issue when I granted the defendants' motion for summary judgment on March 19, 1990. Accordingly, I stand by the reasons articulated in my Memorandum and Order of March 19, 1990.

Fiore argues that, whatever the merit of his 60(b) motion, it was an abuse of discretion for the court to reject it based on the prior reasoning since the motion was specifically drafted to remedy the collateral estoppel problem identified in the earlier order.

We acknowledge that the district court's brief reference to its earlier reasoning appears facially non-responsive to Fiore's motion. Our comparison of the proposed amended complaint with the earlier version persuades us, however, that the court acted within its discretion in denying the motion. The new matter that Fiore sought to introduce focused on the therapeutic approach chosen to treat Katie, which involved efforts by defendants to elicit angry feelings from her toward her father. In ¶ 22, Fiore challenged this approach as "inappropriate, ineffective and damaging," and complained that it "taught the child to hate the plaintiff thus permanently alienating her from [him]."

In the next paragraph, however, Fiore retained the allegation from the earlier complaint that "defendants negligently taught Katie that the plaintiff had sexually abused her." *Compare* ¶ 23 of (proposed) Third Amended Complaint (filed June 15, 1990) *with* ¶ 25 of (proposed) Third Amended Complaint (filed Feb. 5, 1990). Thus, while the new complaint eliminated the explicit assertion that Fiore had never abused his daughter, *see* ¶ 23 of Third Amended Complaint (filed Feb. 5, 1990), it nevertheless reiterated the theory that defendants' negligence stemmed from their treating the child based on the inappropriate assumption that Fiore had harmed her. This theory was precisely what the district court had rejected on collateral estoppel grounds, and why the court undoubtedly felt that it could rest on its earlier rationale in rejecting the Rule 60(b) motion.

The new complaint did focus more specifically on the type of therapy used to treat Katie, and the allegations in ¶ 22 could be construed to assert that defendants' improper technique caused a degree of alienation between himself and Katie unwarranted by his sexually abusive behavior toward her. We cannot fault the district court for failing to adopt this interpretation of the new complaint, however, in light of the language in ¶ 23 continuing to link defendants' negligence to their having taught Katie that plaintiff sexually abused her.

[9] Moreover, we doubt that the district court would—or should—have reopened the case under Rule 60(b) to permit Fiore to pursue such a claim. Defendants' motion for summary judgment had been based, in part, on the doctrine of collateral estoppel. Fiore therefore had notice long before the case reached final judgment that the district court might rule on that ground. Hence, there was no reason for waiting until after the judgment to offer, as an alternative approach, the expert opinion and recharacterized version of the negligence claim. In such circumstances, we see no basis for disturbing the finality of the judgment.

We therefore affirm the district court's denial of Fiore's Rule 60(b) motion.

The judgment in No. 91-1027 is reversed, and the judgment in No. 91-1842 is affirmed. No costs.

APPENDIX

SEPARATE DOCUMENTS ON POST-JUDGMENT MOTIONS

Recognizing the practical importance of routinely faithful compliance with the rules as we have interpreted them—on the part of judges, magistrate judges and clerical personnel—we highlight the following:

APPENDIX—Continued

1. Any order denying (as well as granting) post-judgment motions under Rules 50(b), 52(b), 59(b) and (e), and 60(b) of the Federal Rules of Civil Procedure must be set forth on a "separate document."

2. A "separate document" is a document originated by the court, not a party, separate from any other paper filed in the case. A marginal note on a copy of a motion, for example, will not suffice. Normally, under Rule 58(1), clerks should draft the document for the judge's approval.

3. If a party appeals a judgment that complies with the requirements of Rule 58 *except* that for a separate document

a. within a period that would make the appeal timely if judgment had been entered on a "separate document," we will not dismiss the appeal for lack of such a document but will deem the appellant to have waived his right to it.

b. after the period in subparagraph (a) but within three months of the final action in the case, as set forth in subparagraph (a), we will deem appellant to have waived the right to a "separate document." If, however, no appeal has been filed, the party will be free to argue that judgment has not yet been "entered" as Rule 58 requires, and that the time to file an appeal therefore has not yet begun to run. If, before appealing, the party files a motion to set forth the judgment on a "separate document," the district court should do so.

c. more than three months after the last action in the case, we shall, absent exceptional circumstances, deem the party to have waived his right to a judgment entered on a separate document. Such an appeal therefore will be dismissed as untimely.

Charles M. THIBEAULT, Plaintiff, Appellant,

v.

SQUARE D COMPANY, Defendant, Appellee.

No. 91-2026.

United States Court of Appeals, First Circuit.

Argued Feb. 5, 1992.

Decided March 30, 1992.

Plaintiff whose arm was crushed by punch press brought product liability suit against manufacturer of foot switch for press. The United States District Court for the District of Massachusetts, William G. Young, J., entered summary judgment in favor of manufacturer, and plaintiff appealed. The Court of Appeals, Selya, Circuit Judge, held that: (1) District Court acted permissibly in electing to hear and determine summary judgment motion at final pretrial conference, and (2) District Court did not abuse its discretion in precluding expert testimony proffered by plaintiff as sanction for plaintiff's tardiness in supplementing interrogatory answers and for changing case concept on eve of trial.

Affirmed.

1. Federal Civil Procedure ⇐2553

Summary judgment in product liability case was not premature, notwithstanding plaintiff's claim that he was afforded insufficient time for discovery, where case had been pending for well over two and one-half years.

2. Federal Courts ⇐768, 792

Court of Appeals reviews district court's decisions concerning pretrial matters, such as docket control and case management with a deferential mien; appellant carries burden of showing an abuse of discretion, and the burden is a heavy one.

V-H-I

United States Court of Appeals for the Tenth Circuit

OFFICE OF THE CLERK
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Patrick J. Fisher, Jr.
Clerk of Court

Elisabeth A. Shumaker
Chief Deputy Clerk

September 15, 1997

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the
United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

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I have set them out below exactly as they were approved.

RULE PROPOSALS AND CHANGES

A. Simplify caption process or clarify Federal Rule of Appellate Procedure 12

97-32

Discussion: Federal Rule of Appellate Procedure 12 requires the appellate court to docket a case ". . . under the title given to the action in the district court, with the appellant identified as such . . . ." The rule makes the entry of case opening data tedious, difficult, and time-consuming when the district court captions are long, and the case has multiple crass,

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Better Practice: Amend Rule 12 to require the appellate caption to specify only participants in the appeal (appellants and appellees).

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C. Updated docket entries and copies of post-judgment orders

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97-34

appealability, IFP, appointment of counsel, and any other post-judgment order, to the appellate court within a specified period of time.

Better Practice: Amend Fed. R. App. P. 3(d) to set time periods for forwarding updated docket entries to the appellate court.

Better Practice: Adopt a local rule requiring the district court to forward copies of post-judgment orders or rulings within a specified time after entry on the docket.

D. Captions in complex cases

Discussion: It is difficult and time consuming to docket appeals in complex cases, such as class actions, multidistrict litigation, and complex bankruptcy cases, because district courts, bankruptcy courts, and bankruptcy appellate panels (BAP) do not follow uniform procedures and/or do not list all parties on their docket sheets. The deputy clerk must contact the district court, bankruptcy court, or BAP to obtain information about parties before docketing the appeal.

Future Practice: Establish a nationwide standard for district court, bankruptcy court, and bankruptcy appellate panel captioning of class actions, multidistrict litigation, and complex bankruptcy cases so that all parties are listed on the docket sheet or party list. May require a rule change.

E. Federal Rule of Appellate Procedure 25. Filing or rejection of defective documents

Discussion: Revised Federal Rule of Appellate Procedure 25 states that "the clerk must not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or by any local rules or practices." This rule divests the clerk of authority formerly delegated by the court to enforce local rules with respect to defective documents.

Better Practice: Return to the former version of Rule 25, which enabled the clerk to reject defective documents.

Better Practice: Adopt a local rule which provides that when a document does not comply with the rules, the clerk shall nonetheless file the document but notify the party of the defect. Either a judge, a panel, or the clerk (by delegated authority) can strike the document if the defect is not timely cured.

V-H-4

United States Court of Appeals for the Tenth Circuit

OFFICE OF THE CLERK
Byron White United States Courthouse
1823 Stout Street
Denver, Colorado 80257
(303) 844-3157

Patrick J. Fisher, Jr.
Clerk of Court

Elisabeth A. Shumaker
Chief Deputy Clerk

September 15, 1997

Peter G. McCabe
Secretary, Committee on Rules of
Practice and Procedure
Administrative Office of the
United States Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, D.C. 20544

Dear Mr. McCabe:

The Methods Analysis Program (MAP) was created by the Judicial Conference Committee on Judicial Resources and the Economy Subcommittee of its Committee on the Budget to provide the federal courts with suggestions for practices and approaches that might enable them to accomplish work with reduced resources, and to foster the implementation of more efficient and effective practices in court operations. I have enclosed an explanatory brochure prepared by the Administrative Office's Staffing Requirements and Analysis Branch (SRAB).

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appealability, IFP, appointment of counsel, and any other post-judgment order, to the appellate court within a specified period of time.

Better Practice: Amend Fed. R. App. P. 3(d) to set time periods for forwarding updated docket entries to the appellate court.

Better Practice: Adopt a local rule requiring the district court to forward copies of post-judgment orders or rulings within a specified time after entry on the docket.

D. Captions in complex cases

Discussion: It is difficult and time consuming to docket appeals in complex cases, such as class actions, multidistrict litigation, and complex bankruptcy cases, because district courts, bankruptcy courts, and bankruptcy appellate panels (BAP) do not follow uniform procedures and/or do not list all parties on their docket sheets. The deputy clerk must contact the district court, bankruptcy court, or BAP to obtain information about parties before docketing the appeal. 97-35

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V-H-5

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V-H-6

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F. Continuation of CJA counsel on appeal

Discussion: Some criminal plans and/or local rules state that counsel who represented the client in the district court, whether retained or appointed, will continue on appeal until relieved by the appellate court. Continuing counsel through the appeal is efficient because counsel is already familiar with the case, and will be able to prepare briefs and argument more quickly for less money. Further, this will prevent the appellant from being abandoned on appeal.

97-37

Better Practice: Implement a Federal Rule of Appellate Procedure or local rule to continue counsel on appeal until/unless relieved by the appellate court.

Better Practice: Implement a Federal Rule of Appellate Procedure or a local rule requiring counsel to protect the client's right to appeal by filing a timely notice of appeal if the client wishes to proceed.

Better Practice: Implement a Federal Rule of Appellate Procedure or a local rule requiring counsel to present any motion to withdraw to the appellate court and to take all steps to perfect the appeal until/unless the motion is granted.

G. Counsel's obligation to represent criminal defendant through filing of notice of appeal (applies to both retained and CJA-appointed counsel)

Discussion: Many lawyers abandon criminal defendants after sentencing, believing they have fulfilled their duty. District courts sometimes grant motions to withdraw prior to the filing of notices of appeal. This results in the filing of pro se notices of appeal, untimely appeals, and the loss of appeal rights. Those who appeal pro se must be guided in the procedure for filing for pauper status. This often causes delay in the processing of criminal appeals.

Better Practice: Adopt a Federal Rule of Appellate Procedure or a local rule stating that counsel is responsible for continuing representation of the defendant until relieved by the court of appeals; district court should not permit withdrawal of counsel before filing a notice of appeal absent extraordinary circumstances.

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H. Service of petition on respondent in agency cases

Discussion: In agency cases, the rules require the petitioner to serve a copy of the petition for review on all parties who participated in the proceedings before the agency other than the respondents, and file with the appellate clerk a list of those so served. Consequently, the service list does not include the names and addresses of the agency respondents to be served by the clerk. This makes case opening and serving the respondents difficult for the appellate court.

97-39

The Federal Rules of Appellate Procedure or local rules should require the petitioner to file a service list which includes not only the names of the parties in the agency proceedings, but also the names and addresses of the respondent to be served by the clerk. Additionally, it would be helpful to require the petitioner to attach a copy of the agency order to the petition for review.

Better Practice: Amend Federal Rule of Appellate Procedure 15 or establish a local rule to require the petitioner to file a service list which includes not only the names of the parties in the agency proceedings, but also the names and addresses of the respondent to be served by the clerk.

Better Practice: Amend the Federal Rules of Appellate Procedure or establish a local rule requiring the petitioner to attach a copy of the agency order to the petition for review.

[I. Omitted]

J. Advance notice in imminent death penalty and emergency appeals

Discussion: The appellate court must have advance notification of all actions in imminent death penalty cases which require immediate action. Counsel for the parties, the governor's office, the state attorney general's office, the United States Attorney's office, and the district courts must be in immediate contact with the appeals court when there is a change in the case status. The parties must pre-file with the appellate court copies of state court records and all filings presented to the district court.

To enable appropriate response to emergency filings, counsel should contact the clerk in advance to discuss the nature of the emergency and receive special instructions.

Better Practice: Adopt a Federal Rule of Appellate Procedure or a local rule requiring the parties to provide the appellate court with advance notice and copies of all filings in state and district court in death penalty cases.

V-H-9

United States Court of Appeals for the Tenth Circuit

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Better Practice: Adopt a Federal Rule of Appellate Procedure or a local rule requiring counsel to contact the appellate clerk's office prior to filing an emergency petition or motion. | 97-40

Please bring the recommendations to the attention of the Advisory Committee on Appellate Rules.

Very truly yours,

Patrick Fisher
Clerk of Court

copy by email w/o enclosure:

Hon. Will L. Garwood
Hon. James K . Logan
Hon. Alex Kozinski
Hon. Diana Gribbon Motz
Clerks, United States Courts of Appeals
Senior Staff Attorney, United States Courts of Appeals
Peter G. McCabe, Secretary, Committee on Rules of Practice and Procedure
Beverly Bone, Staffing Requirements and Analysis Branch

V-H-10

97-42

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-7704

97-AP-I

97-CV-N

97-CR-G

September 9, 1997

Peter F. McCabe, Secretary
Committee on Rules of Practice and Procedures
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Federal Rule of Civil Procedure 5(b)
Federal Rule of Civil Procedure 77(d)
Federal Rule of Criminal Procedure 49(c)
Federal Rule of Appellate Procedure 3(d)

Dear Mr. Pete McCabe:

Enclosed please find three copies of recommended amendments to the above-referenced rules of procedure.

Should you require additional copies of the recommendation or if I can provide any further information concerning this recommendation, please contact me.

Kind personal regards.

Sincerely,

Mike

Michael E. Kunz
Clerk of Court

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
U.S. COURTHOUSE
INDEPENDENCE MALL WEST
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
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(215) 597-7704

September 10, 1997

Peter F. McCabe, Secretary
Committee on Rules of Practice and Procedures
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Federal Rule of Civil Procedure 5(b)
Federal Rule of Civil Procedure 77(d)
Federal Rule of Criminal Procedure 49(c)
Federal Rule of Appellate Procedure 3(d)

Dear Mr. McCabe:

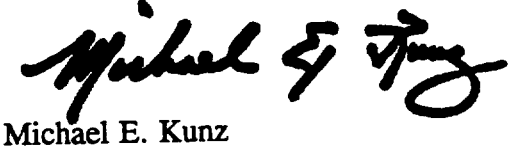
Enclosed please find recommended amendments to the above-referenced rules of procedure. This submission includes an executive summary and recommendations, the Eastern District of Pennsylvania Fax Noticing Local Pilot Program report, our February 1995 recommendation for amendment to Rules of Civil Procedure 5(b) and 77(d), and the current Eastern District of Pennsylvania Report of Automated Systems and Technological Services.

Please let me know if I can provide any additional information which may be of use to the committee in considering these amendments. I am available to appear personally to provide any additional information on this matter that the committee requires. Also, I would like to extend an invitation to any member or representative of the committee to visit our court to observe our programs.

I understand that the newly established Technology Subcommittee of the Committee on Rules of Practice and Procedures of the Judicial Conference of the United States has been charged with considering our proposed amendments to Federal Rule of Civil Procedure 5(b) and 77(d), as set forth herein. Since there have been membership changes in Judicial Conference rules advisory committees, I have included our prior submissions along with this submission to all current applicable committee members.

Thank you for your time and consideration.

Very truly yours,



Michael E. Kunz
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c: Honorable James K. Logan
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Honorable Alex Kozinski
Honorable Diana Gribbon Motz
Honorable Pascal F. Calogero, Jr.
Luther T. Munford, Esquire
Michael J. Meehan, Esquire
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Professor Carol Ann Mooney
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Honorable David F. Levi
Honorable Lee H. Rosenthal
Honorable John L. Carroll
Honorable Christine M. Durham
Professor Thomas D. Rowe, Jr.
Carol J. Hansen Posegate, Esquire
Mark O. Kasanin, Esquire
Francis H. Fox, Esquire
Phillip A. Wittmann, Esquire
Honorable Frank W. Hunger
Honorable Adrian G. Duplantier

Executive Summary and Recommendations

Fax Noticing

Based on the positive experience acquired during the United States District Court for the Eastern District of Pennsylvania's fax noticing local pilot program, we respectfully request reconsideration of our recommendation to amend Federal Rules of Civil Procedure 5(b) and 77(d) and further recommend that consideration be given to amending Federal Rule of Criminal Procedure 49(c) and Federal Rule of Appellate Procedure 3(d).

The Eastern District's program was designed to expedite case processing procedures by providing required notice of judicial opinions and orders which rule on motions or schedule judicial proceedings or trial dates, in a more timely manner via facsimile with the consent of the recipients and at considerably less cost to the federal judiciary.

The fax noticing local pilot program has been operational for 15 months. Participation in the local pilot program is voluntary and has been endorsed by the judges of this court and enthusiastically supported by members of the bar. Since May of 1996, the average monthly rate of fax noticing for all civil and criminal docketed orders and judgments is 67 percent. This rate would be even higher were it not for the considerable volume of pro se litigation filed in this district and managed by the court. In our experience, pro se litigants are less likely to have access to facsimile equipment.

This local pilot program is consistent with the philosophy of the Judicial Conference of the United States to better utilize available budgetary resources. The issue of resources is addressed in the *Long Range Plan for the Federal Courts* as follows:

"RESOURCES-human and economic-provide the means for the federal courts to carry out their mission. The near future will continue to be an era of austerity as far as federal budgets are concerned, and the judicial branch will have to do more with less. The plan contemplates that the federal courts will have to redouble previous efforts to cut red tape, streamline the budget process, add flexibility to personnel and procurement practices, decentralize decision making, and eliminate inefficient and unnecessary activities."[1]

After only 15 months of program experience, the statistics demonstrate that fax noticing produces substantial cost savings while increasing efficiency and productivity.

This local pilot program is also consistent with Judicial Conference technology goals set forth in long range plan recommendations 69 and 70 as restated below:

"Recommendation 69: Use of court related technology should be expanded to improve the ability of the federal courts to provide efficient, fair, and comprehensible service to the public."[2]

"Recommendation 70: The courts must remain current with emerging technologies and how they can be employed to improve the administration of justice generally."[3]

If approved, these proposed amendments will support the Judicial Conference vision of the role of technology in United States courts. In addition, fax noticing will equip clerks of court with a modern technological resource, which is readily available at minimal cost, to process the massive volume of work typical in clerks' offices across the country. We can identify no downside to this program.

Further, this pilot program is in keeping with Judicial Conference philosophy on the use

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[1]Long Range Plan for the Federal Courts, Judicial Conference of the United States, December 1995, p. 107.

[2]Ibid., p. 106.

[3]Ibid.

of technology in civil litigation. In *The Civil Justice Reform Act of 1990, Final Report*, the Judicial Conference acknowledged the potential savings which could be realized through the appropriate use of technology and indicated that these initiatives should be encouraged. The recommendation is set forth in Measure 8, and it reads:

> **"The Use of Electronic Technologies in the District Courts, Where Appropriate, Should be Encouraged.**
> The prudent use of modern telecommunication and other electronic technologies has the potential to save a significant amount of time and cost in civil litigation. The federal courts have been expanding the use of such technologies and are planning a number of future initiatives in this area."[4]

We respectfully renew our suggestion that Rule 5(b), which provides for service of papers by hand delivery or by mail, be amended to allow for service by litigants by facsimile or electronic means, as follows:

> "...Service upon the attorney or upon a party shall be made by mailing it to the attorney or party, or by mailing it to the attorney or party at the attorney's or party's last known address or, if no address is know, by leaving it with the clerk of the court, or sending a facsimile to the attorney or party or by utilizing electronic means consistent with any technical standards that the Judicial Conference of the United States may establish. If the judge to whom the case is assigned determines that because of economic disadvantage by a party that service by means other than personal hand delivery or mailing would not be in the interest of justice, he may enter a scheduling order mandating that service may only be made by hand delivery or mailing. Delivery of a copy...."

In view of the overwhelming success of the program, we recommend that the first sentence of F.R.C.P. 77(d) be amended in order to permit the clerk to serve notice by facsimile or

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[4]The Civil Justice Reform Act of 1990, Final Report, The Judicial Conference of the United States, May 1997, p. 4.

electronic means, as follows:

> "...the clerk shall serve a notice of the entry by mail, facsimile or electronic means, which must be consistent with any technical standards that the Judicial Conference of the United States may establish, in the manner provided for in Rule 5...."

We also recommend that F.R.Crim.P. 49(c) be amended to permit the clerk to serve notice by facsimile or electronic means, as follows:

> "...the clerk shall mail to each party, or forward by facsimile or electronic means, consistent with any technical standards that the Judicial Conference of the United States may establish, a notice thereof...."

We further recommend that F.R.A.P. 3(d) be amended to permit the clerk to serve notice of appeal, as follows:

> "The clerk of the district court shall serve notice of the filing of a notice of appeal by mailing, or forwarding by facsimile or electronic means, consistent with any technical standards that the Judicial Conference of the United States may establish, a copy to each party's counsel...".

The proposed amendments would afford clerks of court maximum flexibility in performing the noticing task by providing two additional forms of notice, facsimile or electronic means. District courts would be authorized to implement one, both, or neither of these provisions of the rule. Facsimile or electronic noticing would not be mandated.

As predicted in the original proposal (Section 2), as a large metropolitan court, the Eastern District of Pennsylvania's overall time and cost savings are impressive in view of the substantial volume of orders processed in this district. The savings attributable to fax noticing include postage, photocopying, envelopes, and most importantly staff time associated with first class mail

noticing. In addition to cost savings, this rule change would enhance the administration of justice, both in areas of procedural fairness and in the public perception of the court as dedicated to the prompt handling of civil and criminal matters.

We recommend and strongly support these proposed amendments, because the Eastern District fax noticing local pilot program has unequivocally demonstrated that fax noticing of orders and judgments is an effective and economical alternative to notice by first class mail. A program achievement report documents our research and provides empirical information and analysis to support our findings (Section 1). Fax noticing implemented under our procedures reduces the staff time required to process orders and judgments by 40 percent. Each time counsel who is a recipient of an order or judgment opts for fax notice rather than first class mail, we realize a 72 percent cost savings. We are also impressed with the high level of attorney satisfaction and the absence of complaints concerning the program. Fax noticing represents an opportunity for the judiciary to implement a cost saving measure while providing required notice more efficiently. Our experience with this program should benefit the entire federal court system.

Clearly, fax noticing cannot categorically replace first class mail, because some parties and attorneys do not have access to fax technology. Unrepresented parties and prisoner litigants will continue to require first class mail notice, and extensive administrative attention will be required to process these cases. The administrative demands resulting from the burden of sending orders to "notice counsel" also add significantly to the workload in clerks' offices here and throughout the country. While fax noticing cannot address these issues or the substantial administrative costs of pro se litigation, it can offer a notice alternative which greatly improves administrative efficiency and reduces administrative overhead in the majority of cases. Achieving this blend is essential in the current administrative environment.

In order to adjust to the current austere budget climate, we must contain and reduce costs whenever possible, without compromising our mission. The Rules Committee should not discount the time and cost savings these proposed amendments will produce for the entire federal court system if approved. Since the Rules Enabling Act contains procedures to expedite the amendment

process, we respectfully submit that these proposed amendments merit such treatment and that authorization should be provided to establish a national pilot program in a select number of district courts.

For the reasons set forth above, we strongly recommend consideration of the proposed amendments to Federal Rule of Civil Procedure 77(d), Federal Rule of Criminal Procedure 49(c), and Federal Rule of Appellate Procedure 3(d). We also respectfully renew our request for consideration of our proposed amendment to Rule 5(b), which would permit service by electronic means.

97-42

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS

MICHAEL N. MILBY
CLERK OF COURT
P.O. BOX 61010
HOUSTON, TEXAS 77208

(713) 250-5400
Fax (713) 250-5014
www.txs.uscourts.gov

RECEIVED 10/15/97

October 10, 1997

97-AP-JV

97-CV-P

97-CR-H

Michael E. Kunz
Clerk of Court
United States District Court
Room 2609
601 Market Street
Philadelphia, PA 19106-1797

Dear Mr. Kunz:

Thank you for forwarding your recommendation for amendment to the Federal Rules of Civil, Criminal and Appellate Procedure to allow electronic noticing of orders and judgments. I certainly endorse this amendment.

As you know, the Southern District of Texas has been faxing orders and judgments in civil, criminal and bankruptcy cases since June, 1994. Our program, like yours, has been enthusiastically supported by the court and the bar. Presently, approximately 80% of all orders noticed to attorneys are faxed to their offices. Our system differs somewhat from yours in that we image the orders on high speed scanners and then electronically transmit the image to the parties via a pool of fax modems. We have reports from a database that reflect the party to whom notice was given, case and instrument number, fax number, time of fax, and duration of transmission confirming receipt. I am enclosing a copy of a video presentation we prepared explaining our system and its benefits. Please feel free to use it as supportive of the concept to electronically notice judgments and orders.

Sincerely,

Michael N. Milby

Michael N. Milby
Clerk of Court

Encl. -Tape (to Rules)

cc: Hon. Lee H. Rosenthal
Mr. Peter F. McCabe (w/encl.) ✓

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
US COURTHOUSE
601 MARKET STREET
PHILADELPHIA PA 19106-1797

MICHAEL E. KUNZ
CLERK OF COURT

CLERK'S OFFICE
ROOM 2609
TELEPHONE
(215) 597-7704

October 20, 1997

Peter F. McCabe, Secretary
Committee on Rules of Practice and Procedures
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington DC 20544

Dear Mr. McCabe:

Enclosed please find a letter from the District Clerks Advisory Group supporting the proposed amendments to F.R.Civ.P 5(b) and 77(d), F.R.Crim.P. 49(c), and F.R.A.P. 3(d) regarding the facsimile/electronic service of notice.

I respectfully request that this be furnished to the committee members who will be evaluating the proposed amendments.

Should you require any additional information concerning the recommendation for amendment, please do not hesitate to contact me.

Very truly yours,

MICHAEL E. KUNZ
Clerk of Court

97-42

Chairman
William S. Brownell, Clerk
156 Federal Street
Portland, ME 04101
207-780-3356
Fax 207-780-3773

Rodney C. Early, Clerk
304 U.S. Courthouse
Buffalo, NY 14202-3498
716-551-4211
Fax 716-551-4850

Orion Arnold, Clerk
3500 Veterans Drive
Charlotte Amalie
St. Thomas, VI 00802-6424
809-774-0640
Fax 809-774-1761

Frank G. Johns, Clerk
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Room 210
Charlotte, NC 28202
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Fax 704-344-6703

Richard T. Martin, Clerk
Russell B. Long Federal Bldg
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Baton Rouge, LA 70801-1712
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Fax 504-389-0309

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Fax 615 [illegible] 0400

Jorron Nedlisky, Clerk
362 U.S. Courthouse
Milwaukee, WI 53202
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Fax 414-297-3203

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Bismarck, ND 58502
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Fax 701-250-4259

Richard W. Wieking, Clerk
U.S. Courthouse
450 Golden Gate Avenue
P.O. Box 36060
San Francisco, CA 94102
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Fax 415-522-2176

Robert D. Dennis, Clerk
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200 N.W. Fourth Street
Oklahoma City, OK 73102-3092
405-231-4792
Fax 405-231-5307

Perry Mathis, Clerk
U.S. Courthouse, Rm 140
1729 5th Avenue North
Birmingham, AL 35203
205-731-2000
Fax 205-731-0742

FCCA President
Lance S. Wilson, Clerk
U.S. Courthouse
300 Las Vegas Blvd. South
Las Vegas, NV 89101
702-388-6071
Fax 702-388-6046

DISTRICT CLERKS ADVISORY GROUP

97-AP-K

97-CV-Q

97-CR-J

October 20, 1997

Michael E. Kunz, Clerk
United States District Court
Independence Mall West
601 Market Street
Philadelphia, PA 19106-1797

Dear Mike:

I write to advise you that the District Clerks Advisory Group met on October 15, 1997 by conference call and that we support the proposed amendments to F.R.Civ.P. 5(b) and 77(d), F.R.Crim.P. 49(c), and F.R.A.P. 3(d) regarding the facsimile service of notice to counsel. We understand that fax noticing is a process being used successfully in several districts, that it has proven to be an effective and economical procedure in court operations, and that it has been enthusiastically supported by the bar.

We appreciate the valuable work undertaken by the Eastern District of Pennsylvania during the pilot portion of this project.

Sincerely,

William S. Brownell

WSB/er

cc: George Ray, DCAD

V-H-11

November 21 1997

97-AP-L

To: Peter G. McCabe, Secretary
Committee On Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D. C., 20544

97-CV-R

From: John J. McCarthy 14163
Northern Prison
Box 665
Somers, Ct 06071

Re: Copy of New Rules For December 1, 1997
and suggestion for changes and amendments
to the Rules of Civil and Appellate Procedure;

Sir;

I am a indigent prisoner, disabled held in Solitary for over three years now. The Prison has no Legal Law Library or provides access to Law Books or Rules.

Please, if you can, send to me a copy of the new Federal Rules. I do have many Civil and Criminal cases and Appeals pending.

I have some interesting suggestions for

Rule 4 (d) F. R. Civ. P.

This rule does not indicate that there is a duty to save costs of service on the plaintiff to follow this procedure.

Recently I had a problem in a Civil case because I was proceeding in forma pauperis. The Court Ordered that if I did not comply with Rule 4 (d) supra encompassing service of an Amended Complaint, the Court would dismiss my case.

I pointed out to the Court that compliance with Rule 4 (d) is optional on part of plaintiff furthermore impinges on my discretionary response which is much sooner if I don't comply.

Rule 12 F. R. Civ. P.

The Prison Litigation Reform Act of 1996 provides a provision which allows the defendants to "waive their Response to the Complaint."

Rule 12 has not adopted this, furthermore it would appear that the Acts provision is no longer in force or effect after December 1 1996 because it is in conflict

with Rule 12 requirements. see; 28 U.S.C. 2072 (b) and 2074 (a). Congress never authorized otherwise for this Rule by Law.

Rule 56 F.R. Civ. P.

There is no provision that addresses "cross-motions" for Summary Judgment. Findings of Facts transpose as the Legal Standard shifts when the party's positions are transitioned from moving to non moving. Obviously there is incongruity in reviewing standards and confusion creating a double standard.

On a cross-motion for Summary Judgment a party should be viewed as a "moving" party at all times. see; 56 (e) supra cf. Andersen v. Liberty Lobby, Inc, 477 U.S. 242, 255 (1986) (Providing doubts and inferences to be drawn in favor of the nonmoving party)

Additionally the rule does not explicate who's motion gets reviewed first on cross-motions.

Depriving the moving party of doubts and inferences and then providing them when transitioning the partys positin as non moving affects the propriety of material facts or genuine issues.

Rule 81 F.R.Civ.P.

This rule does not explicitely include, injunctions Appellate Courts do sanction parties with injunctions. see; e.g. Rule 38, and 47(b) F.R.A.P.

Rule 22 F.R.A.P.

There is not a time period perscribed for filing a "certificate of appealability" in this rule. see; 28 U.S.C. 2253(c).

22(b) is vague and ambiguous. The second sentence does not indicate whether the district judge makes a ruling on the certificate, sua sponte, if an appeal is taken or must wait for the petitioner to seek a "formal request". 2253(c) supra provides no forum how a certificate must be sought.

The sentence states "[I]f an appeal is taken..." An appeal is taken as soon as Rule 3 or 4 are complied with. Therefore when must the certificate request be filed, before or after Notice of Appeal.

Furthermore because 2253(c) supra, and Rule

22, et seq fail to require a certificate to be sought within any specific time frame technically Rule 3 and 4 supra are inapplicable because it is not necessarily the judgment that is being appealed but rather the granting or denial of the certificate.

Yours Truly

John J. McCarthy

97-44

JUDICIAL COUNCIL OF THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

COLLINS T. FITZPATRICK
CIRCUIT EXECUTIVE
PHONE (312) 435-5803
FAX (312) 408-5095

December 9, 1997

Patrick J. Schiltz
Reporter for the Advisory Committee on Appellate Rules
Judicial Conference of the United States
University of Notre Dame Law School
Notre Dame, Indiana 46556

Dear Professor Schiltz:

Enclosed is a letter from Michael F. Dahlen identifying a problem when the district court does not stay enforcement of a judgment pending decision of a post-trial motion. The Seventh Circuit Advisory Committee on Circuit Rules did not see this problem as one that could be addressed by local rules so I am forwarding it for your committee's consideration.

Sincerely,

Collins T. Fitzpatrick

Enclosure

cc: Michael F. Dahlen
Circuit Judge Will L. Garwood

97-44

FMGR

Feirich/Mager/Green/Ryan
ATTORNEYS

December 3, 1997

Mr. Collins T. Fitzpatrick
Circuit Executive
United States Courts of Appeal
for the Seventh Circuit
219 South Dearborn
Chicago, Illinois 60604

Dear Mr. Fitzpatrick:

In representing one of our clients, we have come across an issue that we could find no specific case on point and thought we would bring it to your attention for referral to any Rules Committee. Specifically, Rule 62 governing the stay of proceedings in the District Court provides for an automatic stay for 10 days after entry of a judgment. Thereafter there is no stay unless the District court allows it. If the District Court denies a stay pending the post-trial motion we are unaware of any procedure which would allow an immediate appeal. In a case in which we were involved, the District Court denied a stay pending a ruling on the post-trial motion. The plaintiff, judgment creditor, could have simply garnished the client's bank accounts and, in effect, put the company out of business since it would not have been able to meet its payroll.

I am simply unaware of any procedure that would allow the Seventh Circuit to review the propriety of an order denying a stay pending a post-trial motion. It seems to me that there should be some avenue for seeking review, especially where there could be an abuse of discretion and the ramifications could be quite serious.

In any event, I thought I would bring this to your attention for consideration or forwarding to any committee that deals with these rules.

Thank you for your attention to this matter.

Very truly yours,

FEIRICH/MAGER/GREEN/RYAN

MICHAEL F. DAHLEN
MFD:bev

G:\BEV\SLANE\CTAPPL.COR

T. Richard Mager/Richard A. Green/John C. Ryan/Mary Lou Rouhandeh/Michael F. Dahlen/Kevin L. Mechler
John S. Rendleman, III/Pieter N. Schmidt/Gary B. Nelson
Edward Renshaw/Jeffrey S. Berkbigler/Steve Erdely, IV/Kara L. Jones/M. Yvonne Morris/David R. Tracy
John K. Feirich/John C. Feirich of Counsel
2001 West Main Street/Post Office Box 1570/Carbondale, Illinois 62903
Ph. 618-529-3000/FAX 618-529-3008/E-MAIL: fmgr@intrnet.net

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

March 20, 1998
Via Federal Express Mail

MEMORANDUM TO ADVISORY COMMITTEE ON APPELLATE RULES

SUBJECT: *Materials for April 16-17, 1998 Meeting*

Attached for your review are three items for the Appellate Rules Meeting in Washington, D.C. Please bring the materials with you to the meeting.

1. The Agenda Book.

2. Judge Hodges' letter asking the rules committees to consider the possibility of shortening the rules promulgation process. An excerpt from the Standing Rules committee's Self-Study is included.

3. The Report of the Subcommittee on Technology.

John K. Rabiej

cc: Honorable Alicemarie H. Stotler
Professor Daniel R. Coquillette
Professor Patrick J. Schiltz

JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

JUDGE WM. TERRELL HODGES
Chairman, Executive Committee

TELEPHONE:
(904) 232-1852

February 25, 1998

Honorable Alicemarie H. Stotler
United States District Court
United States Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

From time to time the Committee on Rules of Practice and Procedure has recommended that the terms of its members be extended because the Rules Enabling Act process is such a lengthy one. The Executive Committee is sympathetic to that concern and has recommended that the Chief Justice consider longer terms for members of the Standing and Advisory Rules Committees.

In discussions at the Executive Committee's February 1998 meeting, the question was raised whether the Rules Enabling Act time frames could be shortened without doing violence to the rulemaking process. The Executive Committee would appreciate the Rules Committee's consideration of this issue. If appropriate, a legislative proposal could then be made to the Judicial Conference.

I look forward to seeing you at the Judicial Conference session in March.

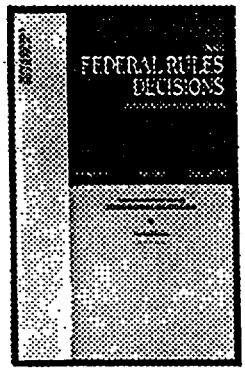
Sincerely,

Wm. Terrell Hodges

bc: Mr. Peter McCabe
Mr. John Rabiej

A SELF–STUDY OF FEDERAL JUDICIAL RULEMAKING

A Report From the Subcommittee on Long Range Planning to the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States



Reprinted from
168 Federal Rules Decisions

delegated partly to the Third Branch. The line drawn in the statutory authorization allows rules dealing with "practice and procedure" but prohibits rules that "abridge, enlarge or modify any substantive rights." [62] On the judicial side, this distinction requires careful discernment.

Congress has the power to adopt rules and procedures for the federal courts.[63] "May" does not imply "should." The wisdom behind the Rules Enabling Act procedures is deep. The Third Branch has the expertise to write rules of practice and procedure. Respect for the independence of the coordinate judicial branch, and the overarching values that independence protects, also counsels moderation in legislative promulgation or amendment of rules. Similarly with respect to legislation regulating the rulemaking process. In his year-end report for 1994, the Chief Justice wrote: "I believe that this [Rules Enabling Act] system has worked well, and that Congress should not seek to regulate the composition of the Rules Committees any more than it already has." The Judicial Conference has reached the same conclusion. See also Recommendation 1 above. And the Judicial Conference's Committee on Long Range Planning shares this understanding. See *Proposed Long Range Plan for the Federal Courts* (Mar.1995) Recommendation 30, Implementation Strategy 30a ("Rules should be developed exclusively in accordance with the time-tested and orderly process established by the Rules Enabling Act.").

The Judicial Conference has the responsibility to represent before Congress the interests of the federal courts and the citizens they serve. The Standing Committee has the responsibility to aid the Judicial Conference in performing this role. The Standing Committee should continue to monitor legislative activity and serve as a resource to the Judicial Conference to remind Congress of the values behind the Rules Enabling Act. Existing links between the Advisory Committees (and the AO) and Members of Congress and committee staffs should be maintained and, if possible, reinforced. It may be necessary to remind Congress, too, that the 1988 legislation increasing the time needed to amend a rule affects the relation between legislative and judicial branches in the way we discussed above.

F. The Rulemaking Calendar

The rulemaking cycle: Three changes in the rulemaking environment have occurred at roughly the same time. (1) The period between initial proposal and ultimate rule was extended in 1988 by increased opportunities for comment and an increased length of report-and-wait periods, so that it is now difficult to see a proposal through in fewer than three years. (2) The national rulemaking process had become more frenetic, with multiple packages pending simultaneously. Instead of five or more years between amendment cycles (the old norm), it is now common to see multiple amendments to the same rule in different phases: one pending before Congress, another pending before the Judicial Conference, a third out for public comment, and a fourth under consideration by an Advisory Commit-

62. 28 U.S.C. § 2072(a) & (b).

63. U.S. Const. art. III, § 1.

tee. (3) Meanwhile local rulemaking has burgeoned, in part, but only in part, at the instance of Congress (the Civil Justice Reform Act of 1990).

On one thing most people agree: *all* of these developments are unfortunate. It takes too long to amend a rule or create a new one, and delay not only perpetuates whatever problem occasioned the call for amendment but also invites Congress and local courts to step in. The former undermines the Rules Enabling Act process (and discards the benefits of expertise); the latter undermines national uniformity. If the Supreme Court cannot respond quickly to a problem, legislation or local rules must be the answer. That amendments to the Rules Enabling Act are themselves responsible for the extended rulemaking cycle—so that Congress is the source of the delay it bemoans—offers no succor to those who seek swift changes. At the same time, few people can be found to support the existence of multiple changes to the same rule. Professor Wright, an observer and long-time participant in the rulemaking process, has condemned the process of overlapping amendments in no uncertain terms.[64] His *cri de coeur* is one among many strong and fundamentally correct indictments. It also illustrates the intractable nature of the problem—for it is precisely the change in the length of the cycle that has made overlaps inevitable!

When rules could be amended after a year or so of effort, and when the Chairs of the Advisory Committees and Standing Committee had indefinite terms, it was easy to have discrete and well-separated packages of rules. The heads of the committees could plan a coherent program, confident that they could see it through, and that if new information called for prompt change, they could accomplish it by adding it to an existing package. No more. The increased length and formality of the rulemaking process makes it difficult for a bright idea or alteration required by legislation to "catch up" with an existing package. Meanwhile the members of the committees serve shorter terms, so that fresh blood brings fresh suggestions every year and the Chairs, to have any effect before their three-year terms expire, must act with dispatch. No wonder we see a drawn-out process in which amending cycles overlap while local rules sprout like weeds. And it is almost impossible to imagine a cure while the duration from proposal to effectiveness is longer than the terms of Chairs.

What is worse, a cure that entailed enforced separation of rules packages—say, a maximum of one package per three-year term of a Chair—would have large costs of its own. Would the package have to start life at the outset of the Chair's time? Too soon; the Chair needs time to settle in, do some deep thinking, review the data, collect the thoughts of the committee, and so on. Then would the package start late in the Chair's term? Too late; its architect would leave before shepherding the package through and accommodating the many demands for amendments that occur in the process. Meanwhile new things come up—new statutes, decisions that interpret a rule to create a trap for the unwary (the source of the overlapping proposals concerning Fed.R.App.P. 3 and 4 that Professor Wright bemoaned)—and the cost of tidiness may be that litigants forfeit their rights. Put to a choice between simplifying the life of judges and authors, and preserving the rights of litigants, the rules committees sensibly

64. Charles Alan Wright, Foreword: The Malaise of Federal Rulemaking, 14 Rev.Litigation 1 (1994).

choose the latter. That seals the fate of proposals to simplify and separate amendment packages without any escape hatch. Once we allow the escape hatch, however, messiness is inevitable.

Several recommendations above aim at relieving the stresses that have led to the current problems. We have suggested longer terms for Chairs and slower turnover of committees. We have ruminated about the possibility of abbreviating the rulemaking process by skipping one or another of the participants (either the Judicial Conference or the Supreme Court). What we now take up is the possibility of setting norms for our own work—norms rather than rules, for the reasons we have explained, but norms that if implemented will relieve some points of stress.

Let us establish biennial cycles as the norm. Rules would be issued for comment every other year—not every year, or every six months, as is possible now. Advisory Committees could be encouraged to make recommendations to the Standing Committee every year (to ease the problem of congestion for both the Advisory Committees and the Standing Committee), but proposals would be consolidated for biennial publication. All Advisory Committees could be on the same schedule, so unless some emergency intervened the bar could anticipate that, say, proposals would be sent out for public comment only in even-numbered years. Chairs with longer tenure could plan for these cycles, and it would be easier for late-occurring ideas to "catch up" without the need for separate publication.

A change in the publication cycle could be accompanied, to advantage, by a change in the Standing Committee's schedule. The summer meeting of the Standing Committee has been set by working backward from the May 1 deadline for promulgating rules and transmitting them to Congress (with a December 1 effective date). The Supreme Court can promulgate the rules by May 1 only if it receives a recommendation of the Judicial Conference the preceding fall (a recommendation at the Conference's spring meeting would leave the Court too little time). The Conference can make the necessary recommendation only if the Standing Committee acts by July, which leaves time to write and circulate the final recommendations. The summer meeting is therefore an enduring feature of the rulemaking landscape, so long as the Judicial Conference and the Court play their current roles and the statutory schedule is unchanged.

Not so the winter meeting—and not so the content of meetings. If all recommendations to the Judicial Conference are consolidated for action at the summer meeting, the second meeting of the year can be reserved for the discussion of drafts the Advisory Committees want to publish for comment. A meeting of the Standing Committee in the fall, rather than the winter, would create sufficient time to have a full comment period, a meeting of the Advisory Committee the next spring, and consideration of the final proposals at the ensuing summer meeting of the Standing Committee. This change could shave six months to a year off the rulemaking schedule, making a biennial cycle more attractive.[65]

65. The following schedule would work. In spring or summer of Year One, the Advisory Committee makes a recommendation for publication. The Standing Committee would consider the recommendation at a meeting between September 15 and 30. Publication at the beginning of November (giving the AO a month for preparation) would produce a comment period closing at the end of April in Year Two. Advisory Committees would meet toward the

As we have stressed, it will be essential to allow exceptions for true exigencies, as well as for off-year republication of proposals that deserve further comment. These should be few, however, as a longer cycle will permit more concentrated thought.

[16] **Recommendation to the Standing Committee: The Standing Committee should establish a biennial cycle as the norm in rulemaking, should limit its summer meeting to the consideration of proposals to the Judicial Conference, and should hold a fall meeting for the consideration of recommendations that drafts by sent out for public comment.**

Conclusion

The Subcommittee believes that the current rulemaking process is fundamentally sound, but improvement is both possible and desirable. Practices and procedures of the federal courts are admired and emulated by the state court systems and by the court systems of other countries. The procedure that has evolved for maintaining that system of rules deserves substantial credit for this. Nevertheless, we offer these constructive criticisms and recommendations.

Our hope for this Self-Study Report is that it will assist the Standing Committee to consider and then recommend adjustments in the federal judicial rulemaking mechanism.

Respectfully submitted,

Thomas E. Baker
Alvin R. Allison Professor
Texas Tech University School of Law
Frank H. Easterbrook
Circuit Judge
Court of Appeals for the Seventh Circuit

---

end of April, in conjunction with any oral hearings, to consider comments and make recommendations for a meeting of the Standing Committee to be held at the end of June of beginning of July. The Standing Committee would transmit any approved drafts to the Judicial Conference for consideration in the fall of Year Two. If the Conference and Supreme Court approved, the rule would take effect on December 1 of Year Three, a total time of approximately 2½ years from initial proposal to effectiveness.

Draft Amendments to
Federal Rules of Appellate Procedure 4(a)(4) and 4(a)(7)

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

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry either of the order disposing of the last such remaining motions or of the judgment altered or amended in response to such a motion, whichever comes later.

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

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

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

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

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

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

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment -- but before it disposes of any motion listed in Rule 4(a)(4)(A) -- the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered or the judgment altered or amended in response to such a motion is entered, whichever comes later.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal --

in compliance with Rule 3(c) -- within the time prescribed by this Rule measured from the entry either of the order disposing of the last such remaining motion or of the judgment altered or amended in response to such a motion, whichever comes later.

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

. . .

(7) **Entry Defined.** A judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure, except that compliance with Rule 58 is not required when an order denies all relief sought by a motion or motions [under Rule 4(a)(4)]. The failure of any order or judgment that must be entered in compliance with Rule 58 to comply with Rule 58 will not invalidate an otherwise timely appeal from that order or judgment.

Federal Judicial Center
Research Division

tel. 202-273-4086
fax 202-273-4021

memorandum

DATE: April 16, 1998

TO: Advisory Committee on Appellate Rules

FROM: Judith A. McKenna

SUBJECT: Interim Report on Opinion Publication Information
Item No. 91-17, Tab V-C

As requested by the chair and reporter of the Committee, I have compiled basic information about criteria for opinion publication in the courts of appeals, and how some of those criteria appear to operate. More detailed information can be compiled if the Committee decides to pursue this item; what follows is what was available from published rules and internal operating procedures and from national-level databases of information supplied by the courts of appeals to the Administrative Office and compiled in the Center's Integrated Database.

Professor Schiltz posed several specific questions, and I have organized the material accordingly.

1. What proportion of appeals are disposed of without opinion?

In all courts of appeals, a substantial portion of appeals (usually around 50% nationally) are disposed of in a way other than a decision on the merits (e.g., by settlement, for procedural deficiencies, for want of jurisdiction). Those cases have been omitted from the tables that follow; all percentages are of terminations on the merits.

Table 1. Opinions "Without Comment" as a Percentage of Terminations on the Merits, FY 1997

D.C	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	Nat'l
0.0	0.0	53.0	0.0	2.6	0.0	2.6	15.4	4.7	0.0	21.4	0.0	9.0

Table 1 shows the percentage of merit terminations that are disposed of in each court "without comment" *as defined by the individual court.* There seems to be broad agreement that summary orders in the nature of the one-word "Affirmed" disposition fall in this category and are coded as such. After that, uniformity ends. Although dispositions

are reported by the courts to the AO to be "reasoned" or "without comment" (as well as published/unpublished, signed/unsigned), there is no uniformity of application of the instructions regarding the defintion of a "reasoned" opinion. Although the instructions are clear (these should be opinions that expound on the applicable legal and factual elements and contain the rationale for the decision), some courts report one-paragraph "no merit" opinions as reasoned opinions. Other courts use one-word summary affirmances and characterize them, in accordance with the instructions, as "without comment" dispositions. Arguably, these are functionally equivalent, so it is not possible to reliably compare the courts of appeals on this dimension using nationally reported data. Further information could be developed on this by sampling the case types within jurisdiction and examining the relationship between reported characterizations and actual opinion type if there's continuing interest in this topic, but this was considerably beyond the scope of this quick inquiry.

2. What proportion of appeals are disposed of by *unpublished* opinion?

There have long been different traditions of publication across the circuits, but Table 2 shows that all of the courts of appeals (except D.C.) have, since 1987, even further reduced their publication rates. (Proportions of *unpublished* opinions, of course, are simply the difference between the figures in the table and 100%.) Circuit comparisons on this measure should be made only with some caution. Because the denominator is all merit terminations, the percentages are influenced by overall merit termination rates. These, in turn, are influenced by case mix (e.g., proportion of prisoner cases) and by court policy choices about whether to try to dispose of large numbers of cases procedurally or through settlement programs or to move cases quickly to a merits panel regardless of whether they might have been disposed of without three-judge panel involvement. These disparities are less pronounced if we focus on counseled cases, eliminating large numbers of cases that are of a nature unlikely to lead to a precedential opinion in any event.

Table 2. Published Opinions as a Percentage of Terminations on the Merits, Selected Years

	D.C	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	Nat'l
1987	37	61	46	30	19	41	22	65	48	38	36	39	38
...													
1993	32	62	33	18	15	24	17	47	42	18	35	17	26
...													
1997	37	51	27	16	11	22	18	48	45	18	26	14	23

3. What criteria—formal or informal—are used in deciding whether to designate an opinion as unpublished?

Tables 3 (attached to this memorandum) gives an overview of the formal criteria that courts say govern their decisions about what to publish. Although applicable circuit rules vary greatly in specificity, they do not reflect any significant inconsistency of formal criteria.

Notwithstanding relatively consistent formal criteria, publication rates differ across circuits. Without a substantially larger research project, we cannot assess whether this is overwhelmingly attributable to differences in court case mixes or to other factors. However, one way of assessing the application of the criteria and making some guesses about the operation of informal unwritten criteria is to look at publication rates in light of the nature of cases and how they are otherwise treated.

Table 4. Opinion Publication Rates in the Regional Courts of Appeals, FY 1995 through 1997

	DC	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th	Nat'l
• overall	38.9	50.8	29.7	15.5	10.4	21.7	18.6	47.1	39.7	19.2	26.5	15.1	23.6
• counseled	50.6	61.8	43.8	22.7	20.7	30.5	25.8	70.0	60.4	25.5	39.4	19.4	33.9
• pro se	5.0	5.5	5.8	1.4	0.3	5.9	1.6	7.0	3.1	3.7	5.1	2.0	3.5
• orally argued	72.6	80.3	43.9	47.0	36.9	54.9	32.6	81.6	84.7	39.9	65.4	41.9	52.6
• submitted on briefs	3.0	6.2	5.6	2.9	0.3	5.7	4.3	8.1	8.8	5.3	10.2	2.8	4.9
• with a dissent	98.7	100.0	98.8	87.4	62.3	85.8	57.8	91.5	94.2	56.8	65.6	85.3	74.5
• with a concurrence	98.6	100.0	97.9	91.8	39.4	82.9	52.0	94.6	96.1	59.9	69.6	82.4	73.2
• reversals	82.0	91.2	85.8	55.9	45.4	58.3	46.9	75.7	85.5	49.0	55.0	48.2	59.4
• partial reversals	79.3	96.8	88.5	64.1	38.1	56.9	50.3	76.9	86.3	43.2	63.6	47.3	58.5
• remands	40.2	79.4	72.5	14.9	7.8	6.8	11.9	13.8	33.3	24.5	45.7	12.0	35.6

Note: Figures are published, reasoned opinions as a percentage of terminations on the merits in the categories described.

Oral argument and representation by counsel. Table 4 displays the frequency of published opinions within categories of counsel status and disposition method. Oral argument is strongly associated with opinion publication overall.[1] Even absent argument, publication is more likely if all parties were represented by counsel than if a party (usually the appellant) was unrepresented. Although these patterns are sometimes interpreted as evidence of second class treatment of certain classes of cases or litigants, they are also the patterns one would expect if screening programs are operating as intended and if most meritorious cases can attract counsel.

[1] I have not disaggregated counseled and pro se cases in which argument is heard because, with the notable exception of the Second Circuit, most courts rarely or never grant oral argument to uncounseled litigants.

Dissents and concurrences. Some courts explicitly note the issuance of a separate opinion (either dissent or concurrence) as a condition that will trigger publication (at least if the author wishes to publish), and it is sometimes presumed that courts publish at least any decision on which the panel members disagree enough to generate a dissent. Although the preparation of a separate opinion makes it more likely that an opinion will be published, only in the First Circuit has it proved a thoroughly reliable predictor.

Case outcomes. As the chart summary of local rules reflects, some courts use case outcome—reversal, affirmance, etc.—as a criterion for publication. Where the judgment appealed from was published, reversals may be especially important. Table 4 shows that reversals and partial reversals tend to be published with fair frequency, although somewhat less predictably than cases in which a panel member felt strongly enough to prepare a separate expression. However, the dangers of overinterpreting reversals and partial reversals have been well documented, and nonpublication cannot necessarily be taken as evidence of unavailability of either results or reasoning that would be of substantial assistance to the bar.

4. Are unpublished opinions provided to Westlaw and LEXIS for electronic dissemination?

"Unpublished" opinions are available on Westlaw and LEXIS from all of the courts of appeals *except* those in the Third, Fifth, and Eleventh Circuits. It appears the Second Circuit is a relatively recent addition to the list of courts whose "unpublished" opinions are available through these services. As the Committee knows from the letters of some of the judges who responded to Judge Garwood's inquiry, the courts vary in how they label these opinions (e.g., "nonprecedential," "not-for-publication," "unpublished"), but whatever the label, the status of the opinion is always visible on the first page of the Westlaw and LEXIS versions.

5. & 6. Are counsel permitted to cite unpublished opinions in their briefs and other submissions, (and if so, what procedures are required)? Are unpublished opinions regarded as precedential?

These questions are linked conceptually and in many of the local rules. Table 5 (attached) shows the status of the published rules and internal operating procedures on the citability of unpublished opinions. As the Committee will have gleaned from the letters of the chief judges, disuniformity reigns in this area.[2] In light of the extensive commentary already received by the Committee, I have not attempted to recapitulate the arguments for and against noncitation rules.

[2] There was no significant disuniformity of procedure among those courts that allow unpublished opinions to be cited for whatever persuasive value they might be worth. Where a rule speaks to the procedures to be followed when citing unpublished opinions, they generally require the citing party to attach the opinion to the document (e.g., brief) it is purported to support, with service on other parties.

Table 3. Criteria for Publication (X = explicit statement of criterion; I = criterion inferred from other statements)

	Fed	DC	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
Publication generally ordered if opinion:													
Is of general public interest.[1]		X	I			X	X	X	X	X	X		
Has precedential or institutional value (general).					X							I[2]	I[3]
Establishes, alters, modifies, or significantly clarifies a rule of law (includes "first impression").		X	I			X	X	X	X	X	X		
Calls attention to an existing rule of law that appears to have been generally overlooked.		X					X				X		
Criticizes or questions existing law.		X				X	X		X		X		
Resolves an apparent conflict in decisions within the circuit or creates a conflict with another circuit.		X				X	X	X	X	X[4]			
Applies an established rule of law to a factual situation significantly different from that in published opinions.			I					X		X			
Constitutes a significant and non-duplicative contribution to legal literature by a historical review of law, or by describing legislative history.						X			X	X			

[1] Formulations vary: "a legal issue of continuing public interest" (4th Cir. Loc. R. 36(a)(ii)); "concerns or discusses a factual or legal issue of significant public interest" (5th Cir. Loc. R. 47.5); "involves an issue of continuing public interest" (7th Cir. R. 53(c)); "involves a legal or factual issue of continuing or unusual public or legal interest" (8th Cir. Plan for Publication, ¶ 4(d); "involves a legal or factual issue of unique interest or substantial public importance" (9th Cir. R. 36-2(d). Sometimes phrased in negative: "An opinion which appears to have value only to the trial court or the parties is ordinarily not published." (3rd Cir.)

[2] Disposition without opinion means "that the panel believes the case involves application of no new points of law that would make the decision of value as a precedent." 10th Cir. R. 36.1.

[3] Opinions that the panel believes to have no precedential value are not published. IOP 5.

[4] Also includes new interpretation of or conflict with decision of a state appellate court.

	Fed	DC	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
Reversal/remand													
Published if decision reversed was published		X							X	I			
Published regardless of publication below							X[5]	X[6]					
Where decision below was published													
Generally publish			X[7]					X			X[8]	X[9]	
Publish affirmance if grounds for affirmance differ from those in district court's opinion		X					X[10]			X			
Publish if disposition is not unanimous, or includes a separate expression			X[11]	I			X[12]	X			X[13]		
If disposition follows consideration of the case by the U.S. Supreme Court								X	X[14]				
Publish if S. Ct. considered merits in opinion							X						
Publish if S. Ct. reversed or remanded										X	X		
Publish if case is decided en banc			X										
Publish only if orally argued						X							

Note: Absence of entry denotes omission of criterion from published rules and procedures, not necessarily nonapplicability of criterion.

---

[5] "May" be published.

[6] Unless reversal caused by an intervening change in law or fact; or reversal is a remand without further comment to the district court of a case reversed or remanded by the Supreme Court. (6th Cir. R. 24(a)).

[7] "If a District Court opinion in a case has been published, the order of court upon review shall be published even when the court does not publish an opinion."

[8] Publish unless panel determines that publication is unnecessary for clarifying the panel's disposition of the case. 9th Cir. R. 36-2(e).

[9] If opinion would ordinarily not be published, court will designate for publication only the results of the appeal. 10th Cir. R. 36.2.

[10] "May" be published; also, rule does not explicitly limit to published district court opinion.

[11] Unless all the participating judges decide against publication.

[12] "May" be published.

[13] Published if author of separate expression requests publication.

[14] Publish "if pursuant to an order of remand from the Supreme Court and is not rendered merely in ministerial obedience to specific directions of that Court." 7th Cir. R. 53(c)(vi).

Table 5. Circuit Rules on the Citability of "Unpublished" Opinions

	Fed	DC	1st	2nd	3rd	4th	5th	6th	7th	8th	9th	10th	11th
Strict noncitation rules													
Specific statement re citation for purposes of res judicata, collateral estoppel, law of the case, etc.	X	X							X[1]		X		
General statement limiting use to related cases			X	X									
Loose noncitation rules													
When counsel believes the opinion is persuasive on a material issue:													
Citation is disfavored but permitted.													X
Citation is disfavored but permitted if no published opinion would serve as well.						X		X		X			
Citation is disfavored but permitted if opinion has persuasive value with respect to a material issue that has not been addressed in a published opinion and it would assist the court in its disposition.												X	
Unpublished opinion issued on or after January 1, 1996, are not precedent but may be cited as persuasive; must bear qualifying legend indicating nonprecedential status.							X						
Other													
Unpublished opinions issued before January 1, 1996, are precedent, but should not normally be cited because opinions believed to have precedential value were published.							X						
No explicit limitation on party citation; limitation on court's own citation, by tradition.					X[2]								

[1] Seventh Cir. R. 53(e) extends the prohibition on citation of unpublished opinions to those of other courts, if the rendering court also prohibits it.

[2] Practice is unclear from rules. LAR 28.3 governs format of citations to federal decisions "that have not been formally reported" but may be intended to cover recent decisions electronically available before printing of official reports. IOPs indicate that if an opinion has precedential value, it is published.

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New Orleans, Louisiana
December 5, 1997

via Federal Express

The Honorable Alicemarie H. Stotler
Chair, Committee on Rules of Practice and Procedure
United States District Judge
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Re: Report of Subcommittee on Technology --
Committee on Rules of Practice and Procedure

Dear Judge Stotler:

This is a brief report on the activities of the Technology Subcommittee since the last meeting of the Standing Committee.

By memorandum, dated October 14, 1997, addressed to the Advisory Committee Chairs and Reporters, and Liaison Members to the Technology Subcommittee, you requested that brief outlines be submitted to me to identify "what rules might be in the amendment pipeline in the future to deal with automation changes." To date, I have received responses from the Chair of the Advisory Committee on Bankruptcy Rules, the liaison to our subcommittee from the Advisory Committee on Appellate Rules, and the reporter of the Advisory Committee on Evidence. Attached are copies of these written responses.

Assuming that this report will be included in the agenda book for the January meeting of the Standing Committee, I am attaching also a copy of my letter dated November 18, 1997, to the members of the subcommittee bringing them up-to-date on matters, and suggesting a preliminary game plan for further action. That letter mentions a memorandum from John Rabiej suggesting that our subcommittee consider whether electronic submission of public comments on proposed rules amendments via the internet would be appropriate. As of now, I have only three responses from subcommittee members on that issue, but we will develop a subcommittee recommendation to be considered by the various advisory committees at their meetings next spring.

Next, I attach a memorandum to me from Peter McCabe dated December 8, 1997, to which is attached an updated report for the rules committees on the status of electronic filing in the federal courts. I should also mention that Peter has been provided by the Clerk of Court of the federal district court for the Eastern District of Pennsylvania with copies of recommended amendments to Civil Rules 5(b) and 77(d), Criminal Rule 49(c) and Appellate Rule 3(d) in connection with fax noticing. I do not have these recommended changes, and by copy of this letter to John, I am requesting that copies be available at Santa Barbara.

As mentioned in my letter to our subcommittee, after I have received responses to your request identifying rules changes that may be needed as a result of emerging technology, I will suggest a plan for our subcommittee to review all these issues.

Finally, for the benefit of Standing Committee members, I attach a copy of the letter dated November 7, 1997, from Judge Hornby, Chair of the Committee on Court and Case Management in response to your invitation that he make a brief presentation concerning future technology at the January meeting of the Standing Committee.

I look forward to seeing you in Santa Barbara.

With best wishes,

Gene W. Lafitte

GWL:ed
Enclosures
cc: Professor Daniel R. Coquillette (w/enc.) via Federal Express
John K. Rabiej, Esq. (w/enc.) via Federal Express

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

ALICEMARIE H. STOTLER
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEE

WILL L. GARWOOD
APPELLATE RULES

ADRIAN G. DUPLANTIER
BANKRUPTCY RULES

PAUL V. NIEMEYER
CIVIL RULES

W. EUGENE DAVIS
CRIMINAL RULES

FERN M. SMITH
EVIDENCE RULES

October 5, 1997

Mr. Gene Lafitte
Liskow and Lewis
50th Floor, One Shell Square
701 Poydras Street
New Orleans, Louisiana 70139

Dear Gene:

After consultation with our Reporter and sub-committee chairman, Judge Cristol, I submit this response to Judge Stotler's request that the Advisory Committees submit to you a brief outline identifying what rules might be in the amendment pipeline in the future to deal with automation changes.

The Advisory Committee on Bankruptcy Rules has tentatively approved, subject to further refinement at our next meeting proposed amendments to Rules 9013 and 9014 that, among other changes, will introduce the concept of electronic service of papers. We anticipate that these opposed amendments will be presented to the Standing Committee in June 1998, with a request that they be published for comment.

As amended, Rule 9013 will govern "applications", a category of procedures that relate to certain enumerated matters that usually are nonsubstantive and noncontroversial. The proposed amendments are designed to enable parties to obtain court orders relating to these matters in a relatively short period of time.

The proposed amendments to Rule 9014 are designed to govern another form of litigation, called "administrative proceedings," in which a party may obtain a court order relating to certain matters that are substantive and often contested. An administrative proceeding will be commenced by filing a motion, and a written response will be required. Examples of administrative proceedings are motions for the appointment of a trustee in a Chapter 11 case, for the relief from the automatic stay, for approval of the assumption or rejection of an executory contract, or for approval of postpetition financing.

The proposed amendments to Rules 9013 and 9014 provide that by local rule the court may permit an application, motion, or response papers to be "served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." This language is similar to the 1996 amendments to Bankruptcy Rule 5005(a) which allow bankruptcy courts, by local rules, to permit parties to file papers by electronic means.

Kind regards.

Sincerely,

Adrian G. Duplantier

c.c. Honorable Alicemarie H. Stotler
751 West Santa Ana Blvd.
Santa Ana, California 92701

CO ITTEE ON RULES OF PRACTICE AND PRC DURE
OF THE
JUDICIAL CONFERENCE OFTHE UNITED STATES
WASHINGTON, D.C. 20544

ALICEMARIE H. STOTLER
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FERN M. SMITH
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DATE: November 14, 1997

TO: Gene W. Lafitte, Chair
Standing Committee Subcommittee on Technology

FROM: Luther T. Munford, Liaison
Advisory Committee on Appellate Rules

In response to Judge Stotler's memorandum of October 14, 1997, I write to inform you that two items currently pending on the docket of the Advisory Committee on Appellate Rules might be of concern to the Subcommittee on Technology:

1. Agenda Item No. 91-17 (Uniform Plan for Publication of Opinions). At its September 1997 meeting, the Advisory Committee determined that a principal long-term project will be to consider development of uniform rules governing the publication, citation, and precedential effect of appellate opinions. The circuits currently have varying and conflicting rules and practices regarding the use of "unpublished" opinions. It is possible that the Advisory Committee will recommend rules governing the release of appellate opinions for electronic dissemination.

2. Agenda Item No. 95-5 (Amend FRAP 31 to require submission of digitally readable copy of brief, when available). Judge Easterbrook has suggested amending FRAP 32 to require counsel to file one copy of each computer-prepared brief on digital media — that is, on a computer disk — and to serve a copy of the disk on each party. This would permit judges to search the text for particular words or citations and judges with impaired vision to enlarge the text. It would also permit judges to load briefs into their laptop computers, so that they need not travel with stacks of briefs. At its September meeting, the Advisory Committee decided to retain this item on its study agenda with "medium" priority.

I should note that there is a strong consensus on the Advisory Committee that members of the bench and bar should be given an opportunity to become accustomed to the restylized appellate rules before being asked to comment on further amendments to those rules. The Advisory Committee has determined that, barring an emergency, no amendments to FRAP will be forwarded to the Standing Committee until the restylized rules have been in effect for at least a few months. If the restylized rules are approved by the Supreme Court and not blocked by

Congress, they will take effect on December 1, 1998. Thus, the Advisory Committee does not anticipate submitting proposed amendments to the Standing Committee until late 1999 or early 2000.

Please contact me if you have any questions. I look forward to working with you.

cc: Judge Will L. Garwood, Chair
Advisory Committee on Appellate Rules

Prof. Patrick J. Schiltz, Reporter
Advisory Committee on Appellate Rules

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Gene W. Lafitte, Esq.
Liskow & Lewis
50th Floor, One Shell Square
New Orleans, LA 70139

November 6, 1997

Per your request, I am enclosing a copy of the Uniform Rules Drafting Committee comment on a possible amendment to the Rules of Evidence. This amendment tries to accommodate technological changes in the presentation of evidence. As you know, the Evidence Rules Advisory Committee has decided to take up this question, but no decision has yet been made on the course that we might take. However, we will certainly be considering possible solutions like that proposed in the enclosed comment.

Best regards. I look forward to seeing you at the Standing Committee meeting in January.

Very truly yours,

Daniel J. Capra
Reed Professor of Law

Rule 106. [Remainder of or Related Records ~~Writings or Recorded Statements~~].

Whenever a record ~~writing or recorded statement~~ or part thereof is introduced by a party, an adverse party may require the introduction ~~him~~ at that time ~~to introduce~~ of any other part or any other record ~~writing or recorded statement~~ which in fairness ought to be considered contemporaneously with it.

Drafting Committee Note

The existing Comment to Rule 106 states that "[a] determination of what constitutes 'fairness' includes consideration of completeness and relevancy as well as possible prejudice."

Uniform Rule 106 also differs from its federal rule counterpart by substituting the phrase "in fairness ought" for the phrase "ought in fairness."

Two amendments to Rule 106 are proposed. First, this proposal for amending Rule 106 eliminates the gender-specific language in the rule which is technical and no change in substance is intended.

Second, the Drafting Committee proposes amending Uniform Rule 106 to substitute the word "record" for the language "writing or recorded statement" to conform the rule to the recommendation of the Task Force on Electronic Evidence, Subcommittee on Electronic Commerce, Committee on Law of Commerce in Cyberspace, Section on Business Law of the ~~American Bar~~ Association. Comparable amendments are also made in Rules 612, 801(a), 803(5) through (15), 803(17), 803(24), 901 through 903 and 1001 through 1007.

"Record" is defined by amending Rule 1001(1) of the Uniform Rules of Evidence to embrace the definition of "record" as follows:

> "Record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form. All writings, including documents, memoranda and data compilations, audio recordings, videotapes and all photographs are records.

This definition of "record" is derived from § 5-102(a)(14) of the Uniform Commercial Code and would carry forward established policy of the Conference to accommodate the use of electronic evidence in business transactions. The Drafting Committee has inserted for completeness in the foregoing definition of record the words "audio recordings, videotapes" between the words "compilations," and "and all photographs."

In proposing these changes in the Uniform Rules of Evidence, the Task Force believes they "are desirable to ensure that records are placed on the same plane with writings." It further argues as follows:

> To be sure, courts have been generally receptive to the introduction of electronic evidence, at least to the extent courts' actions are revealed in reported appellate opinions. * * * But reported opinions do not tell the entire story. A business person, in deciding whether to rely upon electronic media rather than writings for the storage of business records, may ask his or her lawyer for assurances that business records stored in electronic media will be as reliable as records stored in writings--that is to say, if legal rights must be enforced in court, the business person can have some degree of confidence that information stored electronically will be admissible as information stored in written format. The existing rules and case law do not permit an unambiguous response to this reasonable request.
>
> While the reported appellate cases give some assurance that the courts will lean in the direction of using the structure of the current rules to permit reliance upon electronic evidence, there is still the question of what happens at the trial court level on a day-to-day basis when records electronically stored are sought to be used in evidence. If the trial court refuses to permit admission of electronically stored records into evidence, the parties will likely incur additional expense to prove up the case in other ways, or even settle the case on less favorable terms, rather than appeal the case to get the evidentiary ruling corrected. Consequently, to the extent that the Uniform Rules of Evidence can be amended at least so as to put electronic records on a par with writings, the business community can have greater confidence that it can rely upon electronic records and thereby achieve desired efficiencies and productivity gains.

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New Orleans, Louisiana
November 18, 1997

To: Members of the Subcommittee on Technology of the Standing Rules Committee (Distribution List Attached)

Dear Friends:

I look forward to working with all of you as members of the Subcommittee on Technology of the Standing Rules Committee. Our work should be interesting and challenging, and I certainly welcome your suggestions and comments as we move ahead.

Because I am new to the subcommittee, I have had discussions with Judge Stotler to gain an understanding of the purposes and objectives of the subcommittee. Our basic responsibility is to monitor carefully rule changes that will be necessary to accommodate application of technologies adopted for use in the federal court system, and of course, to assist the advisory committees in initiating those rule changes. Keeping abreast of technological developments and uses will be formidable, because of the number of committees and groups involved with technology in the court system -- e.g., the Judicial Conference Committee on Automation and Technology, the Judicial Conference Committee on Court and Case Management, and the like. Our plan is to keep aware of the work of these committees and groups through the Administrative Office of the courts and the Rules support staff.

Judge Stotler has already requested of the advisory committees that we be furnished any input each committee may have as to rules that may require amendment in the future to deal with automation changes. In addition, I anticipate receiving from the federal district court in New Mexico a "list" of civil rules problems encountered in the implementation there of a pilot program on electronic case filing procedures. As I receive this input from the advisory committees and from the New Mexico court, I will, of course, provide the material to you.

On another note, I am attaching a copy of a memorandum to me from John Rabiej of the Rules Committee Support office suggesting that the subcommittee consider whether electronic submission of public comments on proposed rules amendments via the Internet would be appropriate. In his memorandum, John notes some pros and cons for the proposal.

Judge Stotler indicated that she would like to have the views of each advisory rules committee before a final decision is reached on this issue. It seems appropriate for our subcommittee to reach a preliminary consensus on this question and share it with each advisory rules committee before the respective spring 1998 meetings. Please let me have your thoughts on this issue. After I have heard from you, we can decide whether a conference call would be advisable to brainstorm about the matter.

Finally, once I have received responses to Judge Stotler's request identifying rules changes that may be needed as a result of emerging technology, I will begin to draw up a plan for the subcommittee to review all these issues, including the electronic submission of public comments.

I will be reporting on all of this to the Standing Rules Committee at its January, 1988 meeting.

Thanks for your help. Once again, I look forward to working with you.

With best wishes,

Gene Lafitte/E.D.

Gene W. Lafitte

GWL:ed
Attachment
cc: The Honorable Alicemarie H. Stotler (w/o attachment)
Professor Daniel R. Coquillette (w/o attachment)
Advisory Committee Reporters (w/attachment)
Richard G. Heltzel, Esq. (w/attachment)

LEONIDAS RALPH MECHAM
Director

CLARENCE A. LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D.C. 20544

JOHN K. RABIEJ
Chief
Rules Committee Support Office

October 31, 1997

MEMORANDUM TO GENE W. LAFITTE

SUBJECT: *Receipt of Comments on the Internet*

The proposed amendments to the federal rules, which were published for comment on August 15, 1997, are located on the Judiciary's Home Page on the Internet <http://www.uscourts.gov>. My office now has the capability to receive public comments on the proposed amendments directly on the Internet via E-mail. An E-mail address can be established at my office and we could receive all electronic comments, reproduce them, and circulate hard copies to each committee member.

Although we considered receiving comments electronically, a final decision was deferred. We need now to reach a consensus among our advisory rules committees on this issue. As we earlier discussed, your subcommittee could review this matter and report back to their respective committees the subcommittee's conclusions and recommendations. Hopefully the advisory rules committees will be able to agree on the subcommittee's proposals so that we can present the Standing Rules Committee with a uniform recommendation.

We have identified several arguments for and against the proposal, which may help the subcommittee's deliberations.

Arguments in Favor of Electronic Comments

- Electronic submission of comments would be consistent with the rules committees' policy of reaching out to the bar and public and informing them of proposed rules changes and encouraging public input.

- Electronic submission of comments meets recommendation No. 5 of the Standing

Committee's Self-Study Plan, which recommends to the Administrative Office that: "Electronic technologies should be used to promote rapid dissemination of proposals, receipt of comments, and the work of the rules committees." The text of the plan includes a specific recommendation that "Persons should be permitted to lodge their comments online for collection and transmittal to the Advisory Committee."

Arguments Against Electronic Comments

- Comments via E-mail are less likely to be as well thought out as comments submitted in writing, and many may not be serious.

- Under the Judicial Conference rulemaking procedures, each reporter must "prepare a summary of the written comments received and the testimony presented at the public hearings." Summarizing all Internet comments may be burdensome. Online comments may be viewed as non-written comments, or a clear disclaimer could be included on the Internet Home Page stating that all electronic comments will be circulated to each committee member, but will not be included in the summary of comments. But such treatment may perceived as establishing a "second-class" category of comments.

- Although not required by the Judicial Conference rulemaking procedures, my office has acknowledged each comment and followed it up with a communication explaining the advisory committee's response. Continuing to respond to each electronic comment would probably be impossible, but we could provide a generic explanation of the committee's actions and place it on the Internet.

John K. Rabiej

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
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WASHINGTON, D.C. 20544

December 8, 1997

MEMORANDUM TO: Gene W. Lafitte, Esq.
Chair, Subcommittee on Technology
Committee on Rules of Practice and Procedure

SUBJECT: Status Report on Electronic Filing in the Federal Courts

Attached for your consideration is an updated report for the rules committees on the status on electronic filing in the federal courts and the potential rules issues arising from the judiciary's efforts to develop and implement electronic case file systems. You will receive further reports on this topic periodically and as developments warrant.

Peter G. McCabe
Secretary to the Committee

Attachment

December 1997

Electronic Filing: A Status Report for the Rules Committees

I. Introduction

A year ago, the federal rules of procedure were amended to authorize courts to accept litigation papers in electronic form.[1] The amendments specifically provide that

> [a] court may by local rule permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.[2]

Empowered by this change, several local courts now are working to identify and test appropriate technology to accept and maintain court records in digitized form. As outlined in an attachment to this report, an Electronic Case Files (ECF) Initiative is also proceeding nationally to develop or acquire "core" electronic case file systems that interested courts can adapt to fit local needs.

II. Potential Issues Affecting the Federal Rules

A. *Issues Arising in ECF Experimentation*

Issues with potential implications for the federal rules of practice and procedure are already surfacing in the ongoing federal court experiments with electronic case filing. The following is a list of issues identified to date:

- Can electronic filing (or certain requirements for electronic filing) be authorized by a court's general or case-by-case orders, rather than by local rule?
- To what extent should initial case pleadings be filed and served electronically in view of filing fee and jurisdictional issues?
- Can service or notice of other documents filed in a case be provided electronically inasmuch as the rules now provide only for service by hand delivery, mail, or leaving a copy with the clerk (Fed. R. Civ. P. 5(b)), and various bankruptcy rules require "notice" of proposed actions?

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[1] Fed. R. Civ. P. 5(e); Fed. R. Bank. P. 5005; Fed. R. App. P. 25(a)(2)(D) (all effective Dec. 1, 1996). Fed. R. Crim. P. 49(d) provides that papers in criminal actions be filed in the manner provided in civil actions.

[2] Fed. R. Civ. P. 5(e). The language of the companion bankruptcy and appellate rules is essentially the same.

- Who—the courts or the parties—should be responsible for service of pleadings and providing proof of service?

- Should notice of court orders and opinions be provided electronically to the parties and, if so, how should it be done?

- Should the timeliness of filings be determined, and action deadlines be computed, differently when filing and service are accomplished electronically by some or all parties?

- How should signatures be verified, especially in terms of "Rule 11" requirements?

- How should signatures be verified on documents not signed by the attorney (e.g., affidavits and bankruptcy schedules of assets and liabilities)?

- How to handle questions involving document format, including:
  — documents received in a technologically incompatible format (and the accompanying potential issues involving timeliness and service of papers); and
  — other software incompatibilities among electronic filers?

B. *Technical Standards*

The 1996 rules amendments authorized electronic filing at local court option, subject to any technical standards the Judicial Conference may adopt. Accordingly, the Administrative Office developed and, in December 1996, circulated a series of "Proposed Technical Standards and Guidelines for Electronic Filing in the United States Courts" for comment in the judiciary and legal community. The proposed standards and guidelines were revised in light of the comments received and presented to the Committee on Automation and Technology at its June 1997 meeting. Recognizing that any standards may need to be further updated in response to other developmental efforts currently under way within the ECF Initiative, that committee chose not to recommend Judicial Conference approval at this time, but instead approved them as "interim technical standards" that courts choosing to implement electronic filing may use as guidance for their efforts.

III. Conclusion

As the judiciary moves forward to develop and implement ECF capabilities, it may be appropriate to consider additional amendments in the federal rules to resolve issues identified during the experimental stage. The staff in the Office of Judges Programs (OJP) assigned to the ECF Initiative will continue to monitor rules-related developments in the courts conducting ECF experiments and in other aspects of the Initiative. Any new or updated information will be

forwarded to the Technology Subcommittee through the Rules Committee Support Office. OJP staff are currently preparing a comparative summary of the electronic filing procedures adopted by local rule, general order, or other method in the 10 courts presently testing electronic filing systems. That summary should be available before the Standing Committee's January 1998 meeting.

The ECF Initiative

The Judicial Conference Committee on Automation and Technology has established the Electronic Case Files (ECF) Initiative as one of four priority Information Resource Management initiatives under the *Long Range Plan for Automation in the Federal Judiciary.*[1] Under that committee's oversight, the Administrative Office manages the ECF Initiative with guidance from an ad hoc ECF Advisory Group (consisting of judges, clerks, and other court managers), and with additional participation from the courts, other government agencies, the bar, and other court users in various forums (including other Judicial Conference committees). The overall objective of the ECF Initiative is to seek consensus on, and expedite the development and implementation of, judiciary-wide electronic case files and case file management systems within the next two to four years. Through the Initiative, ECF systems will be developed that provide flexibility for the individual courts, allowing each court to implement basic capabilities, and to build upon them, according to its local needs.

A fully developed ECF system would be expected to receive documents in electronic form at the earliest possible point, ideally from the person who creates the document. An ECF system would not only contain everything presently included in a paper case file, but could also accommodate the court's internal case-related documents. On the assumption that the transition away from paper documents should promote savings for the courts, an ECF system should include at least the following capabilities:

- electronic submission of documents to, from, and within the court;
- appropriate management of electronic documents, including storage and security;
- docket entries through information provided electronically by the filing party;
- case management based upon the electronic documents and docket entries; and
- retrieval of documents and case files, including public and remote access.

An ECF system should also be modular, enabling each court to implement its capabilities at its own pace. For example, a court could begin using the system with manually filed paper documents only; move through stages with varying proportions of paper documents, court-imaged electronic documents, attorney-imaged electronic documents, and electronic text documents; and eventually reach a stage where most filings are electronic text documents filed and docketed by attorneys.

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[1] Beginning with Fiscal Year 1998, that document is renamed the *Long Range Plan for Information Technology in the Federal Judiciary.*

To pursue these goals, the ECF Initiative consists of three closely interrelated efforts: coordination of the case management system modernization projects; assessment of ECF prototype systems; and further development of the legal and policy issues posed by ECF.

A. *Coordination of Case Management Systems Modernization Projects*

The ECF Initiative is coordinating the separate projects to modernize automated case management systems in the courts of appeals, district courts, and bankruptcy courts, respectively. Under the Initiative, the three projects are now moving together to define, with assistance from courts and other users, the functional requirements that ECF/case management systems would be expected to satisfy. After that process is completed, the three projects will jointly consider the alternatives for meeting the requirements that have been defined.[2]

The three case management modernization projects will be closely coordinated through the process of defining ECF requirements and analyzing alternative solutions. This is essential to gain efficiencies in defining and acquiring common elements of the new systems, and to ensure an adequate degree of consistency and data-sharing among the three court types. Coordination will enable development of common data and other standards to facilitate electronic exchange of information within and among court units throughout the judiciary and to eliminate redundant data entry in different court units.

Coordination under the ECF Initiative is also necessary because of the expected overlap of functions between an electronic case file system and a new automated case management system. Indeed, the capability to handle electronic case files would be an essential feature of any new case management system. Efforts to implement ECF and case management capabilities in the different court types may follow more independent paths (while remaining under the general aegis of the Initiative) after the analysis of alternatives is completed. The separate projects, however, will have the benefit of consistent sets of basic requirements and a common view of the available alternatives for implementation.

B. *Assessment of ECF Prototypes*

A number of federal courts are already operating "prototype" ECF systems. Using a system developed by the Administrative Office, the Northern District of Ohio began receiving electronic filings in maritime asbestos cases through the Internet in January 1996. The Ohio Northern system now manages over 10,000 such cases and has saved the court from handling many thousands of paper documents. Nearly 50 attorneys from around the country have not only

[2]The Administrative Office employs a controlled procedure for managing the development and deployment of automated systems. The definition of functional requirements and a formal analysis of alternatives are the first and second phases of the five-phase process.

submitted more than 125,000 documents in electronic form, but have also simultaneously and automatically created the court's official docket entries. Late in 1996, the bankruptcy court in the Southern District of New York began testing a prototype ECF system based on the same model that now handles more than 100 Chapter 11 cases, with an average 5 to 10 electronic filings every day.

Based on the early success in the two courts, the Administrative Office has expanded the capabilities of the prototype systems in the first two courts and is working to test those systems in three other district courts (Western District of Missouri, Eastern District of New York, and District of Oregon) and four other bankruptcy courts (Southern District of California, Northern District of Georgia, District of Arizona, and Eastern District of Virginia, Alexandria Division). Each of those courts has agreed to test the functionality of the prototype system initially in specified types of civil actions (e.g., non-prisoner civil rights and employment discrimination cases, intellectual property disputes, cases involving the federal, state and local governments or large national law firms) and various categories of bankruptcy cases (under Chapters 7, 11, and 13). Ultimately, however, the prototypes will be expanded to include broader categories of cases.

Other courts are moving more independently to test ECF capabilities. The district court in New Mexico has developed an Internet-based system with somewhat different capabilities than the Administrative Office prototypes. And the district court in the Southern District of Texas and the bankruptcy courts in the Western District of Oklahoma and the District of Kansas have each constructed their own electronic case files by having court staff scan paper documents into their systems.

All these efforts have already begun to demonstrate that ECF is feasible and could yield savings for the courts. Under the Initiative, the experience gained from the various prototypes and experiments will provide useful information for the above-described modernization efforts, aiding in the identification of functional requirements, providing possible alternatives to consider, and serving as test beds for the cost-benefit analyses needed to demonstrate the expected returns of ECF systems.

C. *Further Development of Legal and Policy Issues*

Moving towards implementation of ECF capabilities will require the federal judiciary to resolve numerous legal and policy questions—including several that may implicate the federal rules. The Administrative Office's March 1997 discussion paper, *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead*, provides a vision for how the courts might implement ECF systems and identifies "topics for further study." The ECF Initiative will follow up on that paper with legal analyses, planning support, policy development, and educational efforts. Among the legal, technical, and management issues to be addressed are:

- authentication, security, and preservation of electronic documents
- possible changes in procedural rules governing service, notice, timeliness, and document format
- appropriate access for all users, and encouragement of user participation
- funding of new systems and services (i.e., through appropriations, user fees, etc.)
- management of judiciary resources (e.g., staff utilization, education and training, allocation of courthouse space)
- potential use of commercial providers of electronic filing services (including questions of public access to court records, custody of public documents, document security, procurement requirements, and court staffing)
- integration of ECF systems with other automated sources of litigation-related information; and
- myriad administrative details needed to implement a timely shift from paper to electronic files.

D. *Status of the Initiative—December 1997*

The ECF Initiative is currently focusing on the above-described activities. The prototype systems developed by the Administrative Office are operational in eight of the nine courts mentioned above (the Southern District of California bankruptcy court is expected to begin testing of its system in December). Those systems continue to receive enhancements and provide substantial experience-based information that may guide further developments. Staff and other participants in the Initiative continue to make presentations to court and bar groups to raise awareness in the court community and to receive feedback from that community. Dialogue groups are being formed on the J-Net to facilitate discussion on the legal and policy issues associated with ECF. Efforts are currently on schedule to complete the definition of functional requirements by June 1998, complete the analysis of alternatives by September to December 1998, and make ECF systems available for implementation within the targeted two-to-four year period.

November 7, 1997

Honorable Alicemarie H. Stotler
United States District Court
United States Courthouse
751 West Santa Ana Boulevard
Santa Ana, CA 92701

Dear Judge Stotler:

Re: Request to Attend Standing Committee Meeting

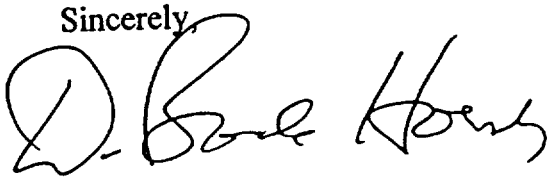
I appreciate receiving your letter of October 27, 1997, inviting me to make a brief presentation concerning future technologies that the Committee on Court Administration and Case Management ("CACM") foresees in connection with courtroom presentation as well as case management at the January meeting of your Committee. I understand from your letter that the Chair of the Committee on Automation and Technology ("CAT") is also invited to attend and discuss related issues. While the opportunity for communication between our Committees is always welcomed, I believe that it may be premature for someone from the CACM Committee to address the Standing Committee on Rules of Practice and Procedure regarding courtroom technology issues at this time.

As I am sure you are aware, the Electronic Courtroom Project is conducting an extensive assessment of various courtroom technologies under the auspices of the CAT Committee. My understanding is that the study will not be completed until the summer of next year. Although the CACM Committee has a sense of some of the policy issues that may need to be addressed as a result of the use of new courtroom technologies, our

Committee's role will only begin in earnest once we have received the final report from the project. In the meantime, the CAT representative will be able to provide to you a knowledgeable overview of the technologies and of the present study.

While I appreciate your Committee's desire to be ready to have rule changes in place to accommodate new technologies, we are not in a position to provide input at this time. I hope that the invitation will be reissued after the results of the study are ready for review. Thank you for keeping our Committee in mind, and I look forward to working with you and the Standing Committee on issues of mutual concern.

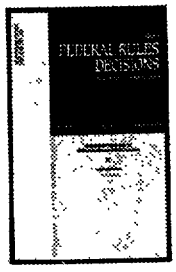
Sincerely,



D. Brock Hornby

cc: Honorable Edward W. Nottingham
Mr. Gene W. Lafitte
Mr. John K. Rabiej

LAWYER ADVISORY COMMITTEES TO THE U.S. COURTS OF APPEALS–REPORT AND RECOMMENDATIONS



COMPLIMENTS OF WEST GROUP

Lawyer Advisory Committees to the U.S. Courts of Appeals: Report and Recommendations

American Academy of Appellate Lawyers
February 1997

Introduction

In 1982, Congress required each federal Court of Appeals to "appoint an advisory committee for the study of the rules of practice ... of such court ...", 28 U.S.C. § 2077(b). Each Court of Appeals promptly appointed a committee. In the intervening 15 years, however, no one has systematically studied the work of those committees. This report, adopted by the Academy based on work done by its Appellate Courts Liaison Committee, fills that gap.

After a brief historical background, this report summarizes the committees' activities and makes recommendations as to how the Courts of Appeal should organize and use them in the future. Attached as appendices are a circuit-by-circuit collection of information on the operations of each committee and a copy of existing circuit rules governing these committees. This information is arranged in a manner that it is hoped will promote cross-fertilization of ideas among the courts as they consider how best to carry out this important statutory mandate.

Background

National Rules. Lawyers have helped federal judges draft court rules since the creation of the Federal Rules of Civil Procedure adopted in 1937. From 1937 to 1956, the Supreme Court promulgated rules with the help of a single Advisory Committee whose members served indeterminate terms, usually ended only by resignation or death. Misgivings about the tenure and influence of the committee led to its abolition in 1956, leaving a void Congress filled with the current advisory system in 1958 legislation.*

Pursuant to 28 U.S.C. § 2073(a)(2), the Chief Justice currently appoints separate rules committees that advise the Judicial Conference of the United States concerning the national civil, appellate, evidence, criminal, and bankruptcy rules. Members include federal and state judges, practitioners, and scholars, but usually federal judges predominate. Members serve a three-year, once-renewable term. They typically meet twice a year. A Standing Committee on Rules of Practice, Procedure and Evidence reviews the advisory committee proposals before offering them to the Judicial Confer-

*See Act of July 11, 1958, Pub.L. No. 93–12, 72 Stat. 356; T. Baker and F. Easterbrook, *A Self Study of Federal Judicial Rulemaking/A Report From the Subcommittee on Long Range Planning to the Committee on Rules of Practice, Procedure and Evidence of the Judicial Conference of the United States*, 168 F.R.D. 680, 683–87 (1996). *See also* T Baker, *An Introduction to Federal Court Rulemaking Procedure*, 22 Tex. Tech. L.Rev. 323 (1991); P McCabe, *Renewal of the Federal Rulemaking Process*, 44 Am. U.L.Rev. 1655 (1995).

ence. Changes the Judicial Conference adopts it sends the Supreme Court. That Court determines each year not later than May 1 whether to make the changes. Amendments take effect on December 1 if Congress takes no adverse action. *See* 28 U.S.C. §§ 2071–77.

When Congress established this system in 1958, it did not require the Supreme Court to appoint a committee to advise it concerning its own rules, and that Court has not had an advisory committee since 1956. More recently, the Academy requested that the Supreme Court appoint an advisory committee in light of the favorable experience with rules advisory committees in the lower courts since 1958. The Supreme Court did not grant the request but, in 1995, it for the first time published proposed rules changes and sought public comment before adopting final rules.

Local Rules. In 1982, Congress required that the federal Courts of Appeal appoint their own lawyer advisory committees. The statute, which now applies to all federal courts except the Supreme Court, reads in material part as follows:

> Each court, except the Supreme Court, that is authorized to prescribe rules of the conduct of such court's business under section 2071 of this title shall appoint an advisory committee for the study of the rules of practice and internal operating procedures of such court and, in the case of an advisory committee appointed by a court of appeals, of the rules of the judicial council of the circuit. The advisory committee shall make recommendations to the court concerning such rules and procedures. Members of the committee shall serve without compensation, but the Director may pay travel and transportation expenses in accordance with section 5703 of title 5.

28 U.S.C. § 2077(b).

The Senate Report accompanying the 1982 bill explained the purpose of the committees as follows:

> [They] would provide valuable assistance to the judges in developing sound rules and would provide practitioners with useful information and a better understanding concerning the court's business.

S.Rep. No. 97–275 at 11, 1982 U.S. Code Cong. & Admin. News 11, 21.

Congress thus left each Court of Appeals free to implement this bare-bones statute in its own fashion. They have done so largely independent of each other, although the similarity in the formal rules adopted by the First, Ninth, Tenth and D.C. Circuits suggests some awareness of practices elsewhere. The 1989 minutes of the Tenth Circuit committee show that it invited Judge James R. Browning, former Chief Judge of the Ninth Circuit, to describe how the Ninth Circuit Committee contributed to the operations of that court. To date, however, no systematic attempt has been made to collect information about the structure and activities of these committees or to share that information with the committees or the judges.

Summary of Committee Activities

The committees vary widely in their composition, the frequency with which they meet, and their activities. Eight of the circuits studied have

adopted local rules governing the operations of their committees. Four have not.

Some circuits give their chief judge full power to appoint the committee. Elsewhere that power rests with the court, or in some instances with associations who elect members. Generally, lawyer members are selected by either state or federal district. Some circuits expressly require that the committee include representatives of various sections of the bar. A few include a district judge. At least one court, the Ninth Circuit, includes three of its judges to promote communication between the court and the committee.

Some of the committees meet as many as three or more times a year. Others meet no more than once a year, and that meeting may be just a conference call. Some keep minutes. Others do not. Some courts pay travel expenses. Again, others do not.

All of the committees comment on changes the courts propose to make to their local rules. Some comments are nothing more than letters or telephone calls from individual committee members to the court. Other committees debate proposed changes and make formal recommendations. In the Seventh Circuit, the committee administers the Court's notice and comment procedures and then submits to the court a distillation of those comments vigorously refined by the committee's views. The Ninth Circuit committee prepares advisory committee notes to the local rules. In recent years, the committees have suggested rules concerning many subjects, including the appointment of counsel in death penalty cases, the electronic dissemination of unpublished opinions, the disclosure of panel members' names before argument, sanctions and using word counts to control brief length.

In addition, the committees have undertaken a number of other projects, including:

* **Bar survey.** The Seventh Circuit committee has surveyed selected practitioners to obtain comments on circuit rules, court opinions, clerk's staff responsiveness, and other matters. The Ninth Circuit committee, in a similar vein, has conducted focus groups with attorneys to determine how best to improve court procedures. The Seventh Circuit survey elicited some quite pointed anonymous comments that called attention to matters that might have otherwise escaped the court's attention, including a complaint that one judge at oral argument "openly mocks litigants, poking fun at them and then exchanging smirks with his law clerks."

* **Practitioner handbooks.** Several circuits or their committees publish practitioner handbooks, and the committees in the Seventh, Eighth, Ninth and Tenth Circuits make suggestions as to how their handbooks can be revised.

* **Comments on changes to Federal Rules of Appellate Procedure.** Several committees, particularly the Ninth Circuit committee, have debated not only changes to local rules but also proposed changes to federal rules published for notice and comment by the Judicial Conference committees. In 1995, the Ninth Circuit committee proposed changes to brief length

requirements that helped shape the "word count" provisions ultimately proposed by the advisory committee.

Recommendations

The Academy recommends that, to obtain maximum public benefit from § 2077, each Court of Appeals or lawyer advisory committee should do the following:

1. **Each court should adopt a formal rule concerning the membership and meetings of its lawyer advisory committee, and limit the terms of its members.** A formal rule helps publicize the existence of the committee, encourages public confidence in its work, and tells the bar how the members are chosen. The courts that use their committees the most include not only appointed lawyers but also judges and ex-officio members such as the officers of the circuit bar association. Membership should rotate to guard against the appearance of favoritism.

2. **Each court should adopt the federal rules model and change its local rules only once a year effective on December 1.** Adopting changes only once a year makes it easier for the bar to learn of new changes and establishes an annual cycle that facilitates review by lawyer advisory committees.

3. **Each proposed rule change should be submitted to an in-person meeting of the circuit's lawyer advisory committee for discussion and comment, unless the change is so insubstantial that the members agree no in-person meeting is needed.** Only by joint deliberation can a committee truly do its work and function as a committee rather than a list of individuals.

4. **Each committee should keep minutes and send a copy to the Administrative Office of the United States Courts.** Not only do minutes aid communication with the court and absent members about the work of the committee, but central filing will allow a modicum of coordination among committees and will encourage cross-fertilization of ideas.

5. **Each committee should be encouraged to undertake related projects, including bar surveys, practitioner handbooks, and comments on proposed changes to federal rules.** These projects enable committees to draw on their expertise to provide the court with useful feedback concerning its operations, to educate the bar concerning court procedures, and to improve the process through which the federal rules of appellate procedure are written.

Conclusion

In adopting § 2077(b), Congress recognized that federal appellate courts function better when courts seek and heed the advice of lawyers who represent the consumers of court services. The Academy believes that, by adopting useful ideas from committees in other circuits and the recommendations listed above, federal appellate courts can improve the administration of appellate justice throughout the United States.

APPENDIX I

OPERATION OF LAWYER ADVISORY COMMITTEES BY CIRCUIT

FIRST CIRCUIT:

Rule: 1st Cir. R. 47.2

Practice: The First Circuit committee has eight members: three from Massachusetts, two from Puerto Rico, one from Maine, one from Rhode Island and one from New Hampshire. They serve staggered three-year terms. The committee meets approximately once a year. Minutes are not kept.

Chair: Professor James Duggan, Franklin Pierce Law Center, 2 White Street, Concord, NH 03301, phone number 603/228–9218. The committee reports to the Chief Judge of the First Circuit, Judge Juan R. Torruella, and to Circuit Executive, Vincent Flanagan, 1606 U.S. Post Office and Courthouse, Boston, MA 02109, phone number 617/223–9613.

Accomplishments: At the court's request, the committee developed a rule governing appointment of counsel and procedures in death penalty cases. The First Circuit has now adopted that rule.

More recently, the committee has been asked to comment on emergency procedures developed by the First Circuit in habeas corpus cases.

Budget: None. The First Circuit pays travel expenses.

SECOND CIRCUIT:

Rule: No formal rule.

Practice: The committee has a dozen members. At least one member is appointed from each of the states of New York, Connecticut and Vermont. The committee meets once or twice a year at the call of the chair and also works through correspondence. When the committee proposes rule changes, it publishes them in the *New York Law Journal* and invites comments.

Chair: Judge Roger J. Miner, U.S. Court of Appeals for the Second Circuit, James T. Foley U.S. Courthouse, 445 Broadway, P.O. Box 858, Albany, NY 12201, phone number 518/431–0401. The committee is administered by Circuit Executive Steven Flanders, U.S. Courthouse, Room 2904, 40 Foley Square, New York, NY 10007, phone number 212/791–0982.

Accomplishments: The committee recently reviewed a change that would make all unpublished decisions available through electronic means but would continue the non-precedential status of such opinions. The court subsequently adopted this change.

The Second Circuit also considers rules comments generated by various state and local bar associations that have appellate practice committees.

Budget: None.

THIRD CIRCUIT:

Rule: 3d Cir. R. 47.1; Rule 12(5) of the Rules of the Judicial Council of the Third Circuit

Practice: The Chief Judge appoints the committee, which consists of lawyers representing various sections of the Bar. The committee is composed of not more than 15 members. Two are nominated from each district and the Chief Judge appoints the rest "at large." Within each district, active circuit judges nominate one member and active district judges nominate one member. They serve staggered three-year terms. Consecutive terms are not allowed. The committee meets at the Judicial Conference and whenever a rules change is proposed. Minutes are kept by the circuit executive.

Chair: Paul A. Manion, Manion, McDonough & Lucas, 882 USX Tower, 600 Grant Street, Pittsburgh, PA 15219, phone number 412/232–0200. The vice-chair is Lee Skipper, 437 Chestnut Street, Philadelphia, PA 19106, phone number 215/928–1100. The principal contact with the court is the Third Circuit Executive, Toby D. Slawsky, Room 22409, U.S. Courthouse, 601 Market Street, Philadelphia, PA 19106.

Accomplishments: The court forwards proposed rules changes to the committee for comment. The committee also helps plan the Third Circuit Judicial Conference, which is held every other year.

Budget: None.

FOURTH CIRCUIT:

Rule: 4th Cir. R. 47(b)

Practice: The Court's Advisory Committee on Rules and Procedure consists of five attorneys, one from each of the states constituting the Fourth Circuit.

The members are appointed by the Chief Judge of the Circuit for three-year terms. The terms are staggered, so that no more than two members' terms expire in any year. No person may serve more than two full three-year terms.

The Chief Judge of the Circuit designates one of the members to serve as chair of the Committee. The clerk serves as the Court's principal liaison with the Committee.

The Advisory Committee members' primary contact with one another is by fax, e-mail, and conference call. They do, however, actively participate in the Fourth Circuit Judicial Conference held annually in June and occasionally convene in person there. No minutes are kept of their meetings.

Chair: Professor Thomas D. Rowe, Jr., Duke School of Law, Science Drive at Tower View, Box 90360, Durham, North Carolina 27708–0360, phone number 919/613–7099. The principal contact with the court is Pat S. Connor, Clerk of the Court, U.S. Court of Appeals for the Fourth Circuit, U.S. Courthouse, 1100 East Main Street, Richmond, Virginia 23219, phone number 804/771–2033 (Fax 804/771–8017). The Committee is invited, if so desired, to contact directly Chief Judge J. Harvie Wilkinson, III, United States Court of Appeals for the Fourth Circuit, U.S. Courthouse, 1100 East Main Street, Richmond, Virginia 23219.

Accomplishments: Upon invitation of the court, the Advisory Committee submits comments on proposed new court rules and procedures and any amendments to court rules and procedures. They helped revise the local rules to include material formerly found in internal operating procedures and previously participated in the consideration of the establishment of a mediation program within the court.

Budget: None.

FIFTH CIRCUIT:

Rule: No formal rule

Practice: The Fifth Circuit committee has six members—two from each state—selected by the Chief Judge. The committee usually includes a prosecutor, a public defender and a law school professor. The members are invited to the annual Judicial Conference at which they have a breakfast meeting with the Chief Judge and the judge who serves as the Rules Proctor.

When the Fifth Circuit proposes a rule change, it circulates the proposal to the members and allows six weeks for comments. The committee does not have formal meetings and does not use a court reporter. It is an informal group that serves only to comment on the changes the court proposes to make to the rules.

The Fifth Circuit has a separate Bar Association of the Fifth Federal Circuit which sponsors an annual seminar for lawyers and publishes a monthly report on cases pending and recently decided.

Chair: None. The breakfast meetings are convened by Chief Judge Henry A. Politz, United States Court of Appeals For the Fifth Circuit, 500 Fannin Street, Suite 5226, Shreveport, LA 71101–3074, phone number 318/676–3472.

Accomplishments: Typically, only one or two committee members respond when the court solicits written comments on proposed

rule changes. The court relied on studies done by a committee member when it drafted its original rule governing the length of briefs in proportional type. On occasion, members of the committee have conferred personally with the chief judge or clerk concerning rules changes. The committee has not otherwise had much impact on rules changes, except when the members' suggestions have identified technical defects in the proposals, e.g., a change that inadvertently would have altered the court's practice concerning pre-argument disclosure of panel members' names.

Budget: None. The Judicial Conference pays for the annual breakfast.

SIXTH CIRCUIT:

Rule: 6th Cir. R. 27

Practice: The Committee is presently comprised of 12 lawyers—three from each of the Sixth Circuit's states, the judge who chairs the court's rules committee, and the Clerk of Court. The Chief Judge appoints the lawyers who include large and small firm civil practitioners, an assistant U.S. attorney, two federal public defenders and a law school professor. Of the 12, three are women.

The committee has generally met two times per year: late spring to coincide with the Sixth Circuit Judicial Conference, and in the fall to coordinate with the Rules Committee of the Court. The Advisory Committee does not meet with the Rules Committee but communicates through its chairman.

Chair: Kathleen McCree Lewis, Dykema Gossett PLLC, 400 Renaissance Center, Detroit, MI 48243–1668.

Accomplishments: The Advisory Committee was responsible for compiling the Circuit's Internal Operating Procedures and generally considers new local rules and amendments proposed by the Court's Rules Committee.

The Advisory Committee was recently successful in changing the oral argument rule to allow the parties to know the identity of the judges the day before argument.

Budget: None. The court pays members' travel expenses for the meetings.

SEVENTH CIRCUIT:

Rule: 7th Cir. R. 47.

Practice: The court appoints the members, who include one district judge, one law professor, and two lawyers each from Illinois, Indiana, and Wisconsin. These members serve staggered three-year terms. Ex officio members include the president and vice-president of the 7th Circuit Bar, the Circuit Executive, the Senior Staff

Attorney, and the Clerk of Court for the 7th Ci
The court appoints the chair of the committee
two-year term.

The committee acts as a conduit between the l
and the bar. It calls its own meetings. Whe
Circuit considers a rules change, the committe
ranges for public notice of the proposals and cons
the comments received. The committee keeps mi
of its meetings which include its proposals for
amendments.

The Committee meets once or twice a year.

Chair: John S. Skilton, Foley & Lardner, Verex Plaza
East Gilman Street, Madison, WI 53701, phone nu
608/258–4229.

Accomplishments: The committee regularly recommends proposed
changes to the court. These changes have rec
addressed counsel's duty to seek certiorari in cri
cases, using word counts to measure the leng
briefs, and precedential effect of unpublished or
among other topics.

In 1995, the committee initiated an attorney su
which was sent to, among others, lawyers who at
ed the Seventh Circuit joint meeting and law
whose cases had been decided by the court witl
fixed two-week period. The survey solicited re
mendations for improvements to circuit rules,
opinions, clerk's staff responsiveness, circuit Pract
er's Handbook, electronic Bulletin Board System
other services.

Budget: None.

EIGHTH CIRCUIT:

Rule: No formal rule. Rule 23 of the Judicial Miscor
and Disability rules, however, provides that the
mittee should make appropriate recommendatio
the circuit Judicial Council concerning these r

Practice: The committee is composed of a member of the b
each of the 10 districts in the circuit, as well
magistrate judge, an assistant U.S. Attorney, a fe
public defender, and a law professor. The comm
meets once each year in October. Some of t
meetings are held by conference call. The ex o
members of the committee include the court clerl
circuit executive, a representative district court c
and the president of the Eighth Circuit Histc
Society.

Chair: Douglas R. Herman, 502 First Avenue North, F
ND 58102–4804, phone number 701/237–6983.
court advisor to the committee is Judge C. A
Beam, 435 Federal Building, 100 Centennial

North, Lincoln, NE 68508–3875, phone number 402/437–5420.

Accomplishments: The principal function of the committee is to make recommendations to the court concerning rules and procedures.

The committee has also put together a Practitioner's Handbook for the circuit. There is a separate Eighth Circuit Historical Society.

Budget: None. If the committee meets in person, travel expenses are requested from the director of the administrative office. For the past two years, the meeting has been held by telephone conference call.

NINTH CIRCUIT:

Rule: 9th Cir. R. 47.2

Practice: The Chief Judge appoints 16 members for three-year terms. Membership includes three judges, 12 practitioners, and one law faculty member. The Chair of the Lawyer Representatives Coordinating Committee serves as an ex-officio non-voting member. The committee meets three times a year for four to six hours at each meeting.

The committee reacts to the substance of proposed changes in the rules, suggests other approaches, edits language for clarity and checks other rules for consistency. It also submits suggested rule changes and comments. It also fosters an outreach program to improve communication between the bench and the bar.

Chair: Peter W. Davis, Crosby, Heafey, Roach & May, 1999 Harrison Street, Oakland, CA 94612–3573, phone number 510/763–2000. The committee's principal contact with the court is the Circuit Clerk, Cathy Catterson, U.S. Court of Appeals for the Ninth Judicial Circuit, 95 Seventh Street, P.O. Box 193939, San Francisco, CA 94119–3939.

Accomplishments: The committee regularly reviews and often revises each of the court's rules proposals. Changes are suggested to avoid ambiguity, avoid conflicts with other rules, or to avoid creating new problems. The vast majority of the committee suggestions have been accepted by the court. The committee prepares advisory committee notes to the local rules.

The committee prepared a practitioner's guide and has also sponsored Bench–Bar and focus group programs. It convened focus groups of experienced attorneys in San Francisco, Boise, Phoenix, Portland and Los Angeles and generated 10 or more suggestions for improvements which have been or are in the process of being implemented by the court.

The committee prepared an extensive report on p posed changes to Fed.R.App.P. 32 governing the f mat of briefs, and forwarded that report to the Advi ry Committee on Appellate Practice for the Judi Conference of the United States.

Budget: The court pays travel expenses for the attorneys v attend the meetings. Meetings are held either in S Francisco or Pasadena. Members pay for their c lunch.

TENTH CIRCUIT:

Rule: 10th Cir. R. 47.3.

Practice: The committee is composed of 10 members: one circ judge, one district judge, one U.S. attorney, one fed al public defender and one practicing member of bar from each of the six states. Governmental me bers are selected by their respective associations wi in the circuit. The circuit judges in each state cho the bar members from that state. Members se staggered three-year terms and attorney memb may not serve successive full terms. The commit holds one regular meeting per year which coinci with the Judicial Conference and other special me ings as it determines may be necessary. The comn tee keeps minutes. The circuit's chief staff cour serves as a reporter to the committee and the circu executive or the executive's designee serves as secretary.

Chair: Judge Paul J. Kelly, P.O. Box 10113, Santa Fe, N 87504, phone number 505/988–6541.

Accomplishments: The committee advises the court concerning its pro dures and rules, makes suggestions concerning s selection and programs for the annual circuit judic conference, and conducts other such studies as t court requests or as it determines are needed.

The committee recently made a recommendation tha warning letter be sent before sanctions are imposed rule violations. The court has adopted this recomm dation.

The committee has also reviewed local rules and r ommended changes to the circuit's Practitione Guide. It also had suggested ways to set up t courtrooms to be more helpful to practitioners.

Budget: None. The committee expends minimal funds for tr el and meals and those funds come from the Attorr Admission Fund.

ELEVENTH CIRCUIT:

Rule: No formal rule. The rules for conduct of and rep sentation and participation in the Eleventh Circ Judicial Conference, however, include the lawyer ad

sory committee as ex officio members of the conference.

Practice: The circuit selects one representative from each district to serve for three-year terms. There is at least one annual meeting. The court also circulates proposed amendments to its rules to the committee and urges members to seek recommendations from members of the bar from each state's district.

Chair: There is no chair. The meetings are convened by the Chief Judge Joseph W. Hatchett, 110 E. Park Avenue, P.O. Box 10429, Tallahassee, Florida 32302, phone number 904/942-8840.

Accomplishments: In addition to reviewing rules changes proposed by the court, the committee has in the past worked with the court in setting up capital case resource persons in each state.

The committee also assisted the court in establishing a Committee on Attorney Discipline.

Budget: None. The court pays travel expenses when the committee meets. Non-Appropriated Funds have been used to support some of the committees, such as the Committee on Attorney Discipline.

D.C. CIRCUIT:

Rule: D.C.Cir. R. 47.4

Practice: The committee includes no less than 15 members of the bar who are selected by the active judges and who are intended to represent a cross section of those appearing in the D.C. courts. It includes representatives from government agencies, law schools, public interest groups, and private practitioners. The members serve three-year staggered terms and the court appoints its chairman.

The committee now meets approximately once a year, i.e., whenever the chair, the judicial liaison and the clerk believe a meeting is needed. Minutes are not kept.

Chair: John Nannes, Skadden Arps Slate Meagher & Flom, LLP, 1440 New York Avenue, N.W., Washington, DC 20005, phone number 202/371-7400. Judicial liaison is Hon. Stephen F. Williams, U.S. Courthouse, 3rd and Constitution Avenue, N.W., Washington, DC 20001.

Accomplishments: The committee revised the local rules to conform to the numbering system in the Federal Rules of Appellate Procedure. When engaged in that project, the committee met more than once a month and had subcommittees that did additional work. The members drafted the proposed rule changes and gave the proposal to Judge Ruth Bader Ginsburg, who was the judicial liaison at that time. Judge Ginsburg in turn discussed

them with the court and then reacted with the court's comments. The committee then re-drafted the proposed changes as needed.

When the court receives comments on the rules, it forwards them to the committee for its consideration. The committee was the first to propose using a word count to control brief length, a concept which has now been proposed for incorporation into the federal rules. The committee has also been responsible for rules changes concerning the corporate disclosure statement, filings under seal, and drop box filing. The court has rejected committee proposals for cameras in the courtroom and citation of unpublished opinions.

The committee has also revised the circuit's Handbook of Practice and Internal Procedures.

Budget: None. Firms whose members serve on the committee provide refreshments.

Note: Because it functions somewhat differently than the other circuits, the Court of Appeals for the Federal Circuit has been omitted from this survey.

APPENDIX II

LOCAL RULES GOVERNING LAWYER ADVISORY COMMITTEES BY CIRCUIT

FIRST CIRCUIT:

Loc. R. 47.2. Advisory Committee.

(a) Membership. In accordance with 28 U.S.C. § 2077(b) an advisory committee on the rules of practice and internal operating procedures is hereby created for the court. This committee shall consist of members of the Bar of the court as follows: Three members from the District of Massachusetts, two members from the District of Puerto Rico and one each from the Districts of Maine, New Hampshire and Rhode Island.

(b) Duties. The advisory committee shall have an advisory role concerning the rules of practice and internal operating procedures of the court. The advisory committee shall, among other things, (1) provide a forum for continuous study of the rules of practice and internal operating procedures of the court; (2) serve as a conduit between the bar and the public and the court regarding procedural matters and suggestions for changes; (3) consider and recommend rules and amendments for adoption; and (4) render reports from time to time, on its own initiative and on request, to the court.

(c) Terms of members. The members of the advisory committee shall serve three-year terms, which will be staggered commencing on October 1, 1986, so that three new members will be appointed every year in such order as the court decides. The court shall appoint one of the members of the committee to serve as chairman.

THIRD CIRCUIT:

Rule 12(5) of the Rules of the Judicial Council of the Third Circuit.

. . . The Chief Judge shall also appoint a Lawyer's Advisory Committee consisting of lawyers representing various sections of the bar. The committee shall be composed of not more than fifteen members who shall serve staggered three-year terms. Two members shall be nominated from each district. If he approves the nominations, the Chief Judge shall appoint the nominees to the Lawyers Advisory Committee. One member from each district shall be nominated by the active judges of the District Court. If there are active circuit judges stationed within the district, they shall nominate the other member. If there are no active circuit judges within the district, the other member from the district shall be appointed by the Chief Judge of the Circuit. One member shall be nominated by the active judges of the District Court of the Virgin Islands. The remaining members of the committee will be appointed as "at large" members by the Chief Judge. A member shall not serve more than one full three-year term consecutively, except that an appointment to serve for the remainder of an unexpired term shall not bar appointment for a consecutive full term thereafter.

Local Rule 47.1. Advisory Committee.

Any proposed change in the Third Circuit Local Appellate Rules shall be forwarded for comment to the Lawyers Advisory Committee, which constitutes the advisory committee for the study of the rules of practice as required by 28 U.S.C. § 2077(b).

FOURTH CIRCUIT:

Rule 47(b). Advisory Committee on Rules and Procedures

The Court's Advisory Committee on Rules and Procedures shall consist of five attorneys, one from each of the states constituting the Fourth Circuit.

The members shall be appointed by the Chief Judge of the Circuit for three year terms. The terms shall be staggered, so that no more than two members' terms expire in any year. No person may serve more than two full three year terms.

The Chief Judge of the Circuit shall designate one of the members to serve as chair of the Committee. The Clerk shall serve as the court's principal liaison with the Committee.

The Committee shall study the Court's local rules and internal operating procedures, make recommendations concerning them, and advise the court concerning all proposed changes to them.

SIXTH CIRCUIT:

Rule 27. Advisory Committee on Rules

(a) Purpose. Pursuant to 28 U.S.C. § 2077(b) there is hereby created an advisory committee on rules for the United States Court of Appeals for the Sixth Circuit. It is the policy of the court that the members of the court's rules committee and its administrative staff shall cooperate with the advisory committee to the end that the advisory committee is well and fully informed upon the exiting procedures and rules and practices of the court as they affect the practice of law before the court, but nothing herein shall

confer upon the committee any powers other than those which are advisory in nature.

(b) Membership. The advisory committee shall consist of twelve members appointed by the Chief Judge of the circuit. Three members shall be appointed from each state in the circuit. At least one member shall be appointed from each district in the circuit.

Members shall be selected by the Chief Judge in such a manner as shall in his judgment assure broad representation of all aspects of litigation practiced before the Sixth Circuit and the individual members shall, in the discretion of the Chief Judge, be selected from among those attorneys who are currently active practitioners before the Sixth Circuit, except that the Chief Judge may in his discretion in lieu thereof appoint a representative from an accredited law school in the circuit and a public member who is not a lawyer.

(c) Terms of office. Except as hereinafter set forth, terms of appointment to the committee shall be for a period of three years except that the initial appointment shall be made by the Chief Judge in staggered terms of one, two, and three years in such a manner as shall best achieve continuity of the committee. No person shall be appointed to serve more than two successive three-year terms on the committee. Initial or interim appointments of less than two years shall commence and end on October 1.

(d) Meetings.

(1) The committee shall meet annually, at the time of and concurrent with the Judicial Conference in any year in which such a conference is convened. In years in which no conference is held, the annual meeting shall be called by the chairperson. In addition, the committee may meet at such other times as the Chief Judge may direct.

(2) When possible, the meeting of the advisory committee shall be coordinated with the meeting of the Sixth Circuit Rules Committee itself.

Any recommendations for changes in the rules and procedures of the Sixth Circuit may be made by resolution of the advisory committee and transmitted to the Chief Judge with copy thereof to be transmitted to the chairman of the Sixth Circuit Rules Committee. Conversely, except where the committee expressly deems it impracticable because of time or other circumstances, any proposals for change in the existing rules of the Sixth Circuit by the rules committee shall first be transmitted for comment to the advisory committee.

(3) Members shall serve without compensation, but travel and transportation expenses may be paid as authorized by the Director of the Administrative Office of the United States Courts in accordance with 5 U.S.C. § 5703.

[Effective June 1, 1984; amended January 2, 1990; May 4, 1994.]

SEVENTH CIRCUIT:

Circuit Rule 47. Advisory Committee.

The court shall appoint an Advisory Committee to provide a forum for continuing study of the procedures of the court and to serve as a conduit between members of the bar who have suggestions for change and the

court, which retains ultimate responsibility for effectuating change. The committee shall consist of one district judge, one law school professor, and two attorneys from each state of the circuit, Illinois, Indiana, and Wisconsin, and, as *ex officio* members, the President and First Vice–President of the Seventh Circuit Bar Association, the Circuit Executive, the Senior Staff Attorney, and the Clerk of this court. The district judges, attorneys, and law school professors on the committee shall serve three-year terms with the appointments being staggered.

The court shall appoint a chairman from the membership of the committee to serve for a two-year term. The advisory committee shall promulgate its own rules, and call its own meetings. The advisory committee shall arrange for notice of proposed rule changes and shall consider comments received. From time to time, as it deems necessary or advisable, it shall make recommendations to the circuit council or to the court. Suggestions for consideration by the advisory committee may be filed with the clerk of this court.

(As amended Feb. 1, 1992).

NINTH CIRCUIT:

Circuit Rule 47–2. Advisory Committee on Rules.

(a) Function. Pursuant to 28 U.S.C. § 2077(b), the chief Judge shall appoint an advisory committee on Ninth Circuit Court of Appeals rules and internal operating procedures. The committee shall generally provide a forum for ongoing study of the court's rules and internal operating procedures, including:

(1) proposing rule changes and commenting on changes proposed by the court,

(2) considering public comments, including comments from the bar, and

(3) providing reports and evaluations, either on the committee's own initiative or at the request of the court.

(b) Membership. The Chief Judge shall appoint three judges, twelve practitioners and one member of a law faculty to serve on the committee for three years. The attorney members shall be selected in a manner that seeks both representation of the various geographic areas in the circuit and the distinct types of litigation considered by the court. The Chair of the Lawyer Representatives Coordinating Committee shall be an ex officio (non-voting) member of the committee.

(c) Meetings. The committee shall meet at least once a year and shall have additional meetings as the committee deems appropriate. (new rule 1/96).

TENTH CIRCUIT:

10th Cir. R. 47.3. Advisory Committee.

47.3.1. Membership. Pursuant to 28 U.S.C. § 2077(b) there shall be an advisory committee on procedures for the court of appeals. This committee shall consist of ten members: one circuit judge, one district judge, one United States attorney or assistant United States attorney, one federal public defender or assistant federal public defender, and one actively practicing member of the bar of this court from each of the six states in the

circuit. The committee may appoint ad hoc committees consisting nonmembers of the advisory committee.

47.3.2. Selection of members and organization. The circuit judge me ber shall be the chief judge of the circuit or the chief judge's designee. T district judge member and representatives of the United States attorne offices and federal public defenders' offices shall be selected by th respective associations within the circuit or in such other manner as members of the group shall agree. The members of the bar shall selected by agreement of the circuit judges resident in the particular st from which the member is to be selected from a list containing three more names submitted to the circuit judges by the federal district judg resident in that state; all such candidates must have active substant federal practices. The circuit judge shall serve as chair. As designated the chief judge, one-third of the initial membership shall serve one-y terms, one-third two-year terms, and one-third three-year terms, with subsequent selections serving three-year terms. Terms shall commence April 1. No member, except the chief judge of the circuit, or the ch judge's designee, may serve successive terms; however, a person selected fill an unexpired term may also serve a successive term. The chief st counsel shall serve as reporter to the committee and the circuit executive, designee, shall serve as secretary.

47.3.3 Meetings. The advisory committee shall have one regular me ing each year at the time of the judicial conference and such spec meetings as it shall determine from time to time. The advisory committ may also conduct business by mail, telephone, or other means.

47.3.4 Duties. The advisory committee shall have an advisory r concerning the operative procedures of the court. The committee sh among other things, (1) provide a forum for continuous study of t operating procedures and published rules of the court; (2) serve as conduit between the bar, the public and the court regarding procedu matters and suggestions for changes; (3) consider and recommend rul and amendments for adoption by the court; (4) make suggestions programs at the annual circuit judicial conference; and (5) make such oth studies and render such other reports and recommendations from time time as the court requests or as it shall determine on its own initiati

D.C. CIRCUIT

Circuit Rule 47.4. Advisory Committee on Procedures.

(a) Establishment of Committee; Membership. In accordance with U.S.C. § 2077(b), there shall be an Advisory Committee on Procedur which shall consist of not less than 15 members of the bar of this court wh shall be selected by the judges of the court in regular active service in su a way as to represent a broad cross section of those appearing in the feder courts of the District of Columbia, including representatives from gover ment agencies, law schools, public interest groups, and private practitione

(b) Committee Functions. The committee shall, among other things:

(1) Provide a forum for study of the internal operating procedures a rules of this court.

(2) Serve as a conduit from the bar and the public to the court regarding procedural matters and suggestions for changes.

(3) Draft, consider, and recommend, for the court's adoption, rules and internal operating procedures, and amendments thereto.

(4) Render reports from time to time, on its own initiative and on request, to the court and to the Judicial Conference of the District of Columbia Circuit on the activities and recommendations of the committee.

(c) Terms of Members. The members of the committee shall serve 3-year terms that will be staggered in such a way as to enable the court to appoint or reappoint one-third of the committee each year. The court shall appoint one of the members to chair the committee.

APPENDIX III

AMERICAN ACADEMY OF APPELLATE LAWYERS APPELLATE COURTS LIAISON COMMITTEE

Luther T. Munford, Jackson, Mississippi
Committee Chair, 1996–97

Arthur J. England, Jr., Miami, Florida
Committee Chair, 1995–96

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