ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, D. C.
April 15-16, 1999

Agenda for Spring 1999 Meeting of
Advisory Committee on Appellate Rules
April 15 & 16, 1999
Washington, D.C.

I. Introductions

II. Approval of Minutes of October 1999 Meeting

III. Report on January 1999 Meeting of Standing Committee

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

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

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

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

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

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

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VII. Schedule of Dates and Location of Fall 1999 Meeting

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Advisory Committee on Appellate Rules
Table of Agenda Items — Revised March 1999

FRAP Item	Proposal	Source	Current Status
95-03	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 Draft approved 10/98 for submission to Standing Committee after 12/1/98
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee after 12/1/98
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 10/98 for submission to Standing Committee after 12/1/98
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Assn.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee after 12/1/98
97-05	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 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98

FRAP Item	Proposal	Source	Current Status
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 Draft approved 4/98 for submission to Standing Committee after 12/1/98
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 Discussed and retained on agenda 4/98
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 Draft approved 10/98 for submission to Standing Committee after 12/1/98
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
97-30	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 Draft approved 4/98 for submission to Standing Committee after 12/1/98
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 Draft approved 4/98 for submission to Standing Committee after 12/1/98
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 Discussed and retained on agenda 10/98; awaiting specific proposal from appellate clerks
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 Discussed and retained on agenda 10/98; awaiting specific proposal from appellate clerks

FRAP Item	Proposal	Source	Current Status
97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee after 12/1/98
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 approved 4/98 for submission to Standing Committee after 12/1/98
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee after 12/1/98
98-03	Amend FRAP 29(e) to increase the time for amici to file their briefs and to clarify the status of local rules on amicus briefs, and amend FRAP 31(a)(1) so that the time to file a reply brief runs from the filing of the amicus brief rather than the service of the appellee's brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice, et al.
98-06	Amend FRAP 4(b)(3)(A) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice
98-07	Amend FRAP 22(a) to permit circuit judges to deny applications for writs of habeas corpus.	Hon. Kenneth F. Ripple (CA7)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice
98-08	Amend unspecified rules to provide for appeals from Tax Court decisions that meet the criteria of FRCP 54(b).	Hon. Richard A. Posner (CA7)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting report from Department of Justice
98-10	Amend FRAP 46(b)(3) to delete requirement of hearing in reciprocal discipline cases.	Prof. Thomas D. Rowe, Jr. Patricia S. Connor (CA4 Clerk)	Awaiting initial discussion
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion
98-12	Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 10/98

FRAP Item	Proposal	Source	Current Status
99-01	Amend FRAP 24(a)(3) & 24(a)(5) to address potential conflicts with Prisoner Litigation Reform Act.	Hon. Will Garwood (CA5)	Awaiting initial discussion
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion

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Minutes of the Fall 1998 Meeting of the
Advisory Committee on Appellate Rules
October 15 & 16, 1998
New Orleans, Louisiana

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 15, 1998, at 8:30 a.m. at Le Meridien Hotel in New Orleans, Louisiana. The following Advisory Committee members were present: Judge Samuel A. Alito, Jr., Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, and Mr. Michael J. Meehan. Mr. Douglas N. Letter, Appellate Staff, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Judge Phyllis A. Kravitch was present as the liaison from the Standing Committee, and Mr. Charles R. "Fritz" Fulbruge, III, was present as the liaison from the appellate clerks. Also present were Mr. Luther T. Munford, whose term as a member of the Advisory Committee expired on October 1, 1998, as well as Mr. John K. Rabiej and Mr. Mark D. Shapiro from the Administrative Office and Ms. Judith McKenna from the Federal Judicial Center.

Judge Garwood announced that Mr. W. Thomas McGough, Jr., had been appointed to the Committee to replace Mr. Munford, but was unable to attend the meeting because he was in trial. Judge Garwood also announced that Judge Anthony J. Scirica, the newly appointed Chair of the Standing Committee, was unable to attend the meeting because of an illness in his family.

II. Approval of Minutes of April 1998 Meeting

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

1. In the third line of the fourth full paragraph on page 4, change "sixth" to "six."

2. In the last line of the third full paragraph on page 26, change "that" to "than."

3. Change all references to "Advisory Committee Note" to "Committee Note."

The last change, suggested by the Reporter, was the subject of substantial discussion. The Reporter said that, at the last meeting of the Standing Committee, Prof. Daniel R. Coquillette (the Standing Committee's reporter) had informed the reporters for the advisory committees that Judge Alicemarie H. Stotler (who then chaired the Standing Committee) had directed that the term "Committee Note" be used instead of "Advisory Committee Note." According to Prof. Coquillette, Judge Stotler believes that use of "Committee Note" better reflects the fact that

notes are produced through the joint efforts of the advisory committees and the Standing Committee, and not by the advisory committees alone.

Several members objected and said that they preferred "Advisory Committee Note." Some members pointed out that throughout the profession — in courts, in law offices, and in law school classrooms — reference is made to "Advisory Committee Notes," not to "Committee Notes." Other members pointed out that most written resources — such as judicial opinions, statutory and rule compilations, treatises, and law school casebooks — also refer to "Advisory Committee Notes."

Mr. Rabiej said that an additional reason for using "Committee Note" is that it permits the Standing Committee to make changes to a note, with the agreement of the chair and reporter of the relevant advisory committee, without requiring the amended note to be approved by the entire advisory committee. A member responded that, in that circumstance, the chair and reporter are acting *on behalf of* the advisory committee, and thus the note can still be considered the advisory committee's. After further discussion, the Committee agreed to accede to the request of the Standing Committee, but directed that its objections be noted on the record.

III. Report on June 1998 Meeting of Standing Committee

Judge Garwood asked the Reporter to report on the Standing Committee's June 1998 meeting.

The Reporter said that Judge Garwood had informed the Standing Committee that this Committee had approved a number of amendments to the Federal Rules of Appellate Procedure ("FRAP") — and that the amendments and accompanying Committee Notes appeared as an appendix to the draft minutes of this Committee's April 1998 meeting. Judge Garwood once again told the Standing Committee that this Committee will not seek permission to publish proposed amendments until January 2000, so that the bench and bar can become accustomed to the restylized rules before being asked to comment on amendments to those rules.

The Reporter also said that he had described for the Standing Committee the amendment to Rule 47(a) that had been approved by this Committee. Under that amendment, changes to local rules would take effect on December 1, unless there was an immediate need for a change. In addition, no amendment to local rules could be enforced until it had first been received by the Administrative Office ("AO"). The Reporter informed the Standing Committee that this Committee might revisit the issue of whether the ability to enforce a change in a local rule should be contingent upon the *receipt* of that change by the AO, in light of the AO's fears that it might be overwhelmed with inquiries from attorneys.

The Reporter mentioned that Judge Stotler had asked him to distribute the amendment to Rule 47(a) to the other reporters. The Reporter said that he had done so, and that the Advisory Committee on Bankruptcy Rules had already reviewed the amendment and lodged objections to

it. The Reporter distributed an October 12, 1998 letter from Prof. Alan N. Resnick describing those objections. The Bankruptcy Committee recommends that the ability to enforce local rules be contingent upon their being *published* in a manner prescribed by the AO (rather than upon their being *received* by the A.O.) and that changes to local rules be permitted to take effect on a date other than December 1 if a majority of the court's judges desire that result (rather than only upon immediate need).

Members expressed disagreement with the Bankruptcy Committee on both points. First, members pointed out that the purpose of blocking enforcement until receipt by the AO was to ensure that there was a single national repository for all local rules currently in force in the federal courts; a "publication" requirement would not accomplish that goal. One member mentioned that, in addition, courts are required *by statute* to provide local rules to the AO, and not merely to publish local rules as the AO directs. *See* 28 U.S.C. § 2071(d). Another member argued that the AO's concerns about being inundated with calls from attorneys wondering whether new local rules had been received could easily be alleviated if the AO would simply post all local rules on its website. Mr. Rabiej agreed, but said that some technical issues would have to be worked out before the AO would be prepared to do that.

As to the Bankruptcy Committee's suggestion that changes in local rules be permitted to take effect on some date other than December 1 upon the mere agreement of a majority of a court's judges, members argued that the purpose of the amendment was to bring about uniformity and that a strict "immediate need" standard was necessary to accomplish that goal. One member pointed out that the "immediate need" standard was a familiar one, having been borrowed from 28 U.S.C. § 2071(e).

The Committee briefly discussed other possible changes to the amendment to Rule 47(a), but ultimately decided to await the input of the other advisory committees.

The Reporter, finishing his report on the Standing Committee's June 1998 meeting, said that he had informed the Standing Committee that this Committee supported the shortening of the Rules Enabling Act ("REA") process and had no objection to permitting comments on proposed rules to be sent to the AO electronically. The Reporter also told the Standing Committee that, while this Committee would contribute members to an ad hoc committee to draft Federal Rules of Attorney Conduct, this Committee remained skeptical that any changes in Rule 46 were necessary, was troubled about the ad hoc committee's lack of expertise regarding legal ethics, and was concerned that the ad hoc committee take seriously the limits on its authority under the REA. Finally, the Reporter informed the Standing Committee that this Committee had removed from its study agenda the topic of unpublished judicial opinions.

The Committee next turned to the action items on its agenda.

IV. Action Items

A. Item No. 95-03 (FRAP 15(f) — premature petitions to review agency action)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

(f) **Petition or Application Filed Before Agency Action Becomes Final.** A petition for review or application to enforce filed after an agency announces or enters an order but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final (and thus non-appealable) becomes effective to appeal or seek enforcement of such order upon agency disposition of the last such petition for rehearing, reopening, or reconsideration.

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeals. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g.*, *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Subdivision (f) is intended to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *see also Chu v. INS*, 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review with the court after the petition for rehearing is denied by the agency, that party will find itself shut out of court: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

Mr. Letter said that he had talked with Judge Stephen F. Williams, who had initially proposed this change to Rule 15, and to Mark J. Langer, the Clerk of the D.C. Circuit, as well as to the agencies most often involved in litigation in federal court. Mr. Letter said that the consensus of all of those with whom he spoke was that the procedural trap that the amendment seeks to remove does not arise frequently, but that the amendment would cause no harm and might do some good. The only concern that had been expressed was Mr. Langer's concern that the statistics regarding the size and age of the D.C. Circuit's caseload would look worse.

A member said that he opposed the amendment, given that there was no hue and cry for change.

Another member expressed concern about whether the amendment was within the authority of this Committee under the REA. He pointed out that Rule 4(a)(4)(B)(i) was designed to eliminate a procedural trap created by *Rule 4 itself*. By contrast, the procedural trap that the amendment to Rule 15 purports to eliminate was created because the D.C. Circuit, in interpreting the *governing statutes*, had concluded that a premature petition to review agency action was a nullity. If the D.C. Circuit is correct, then the amendment represents an attempt to use FRAP to effectively amend those governing statutes. A couple members responded that, while that was true, the Supreme Court has authority under the REA to promulgate *procedural* rules that supercede statutes, which is precisely what is being proposed here.

Several members spoke in favor of the proposed amendment, arguing, in essence, that the procedural trap addressed by the amendment undoubtedly exists — although it doesn't seem to arise frequently — and that there was no "downside" to eliminating it.

A member moved that Item No. 95-03 be removed from the Committee's study agenda. The motion was seconded. The motion failed (2-5).

A member suggested stylistic changes to the proposed amendment. The Reporter also informed the Committee of other stylistic changes that had been proposed by the Subcommittee on Style. After further discussion and redrafting, it was moved and seconded that the following amendment to Rule 15 be approved:

> **(f)** **Petition or Application Filed Before Agency Action Becomes Final.** If a petition for review or application to enforce is filed after an agency announces or enters its order — but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable — the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

The motion carried (5-2).

By consensus, the Committee accepted the following suggestions of the Subcommittee on Style with respect to the Committee Note:

1. In the third line of the first paragraph, change "appeals" to "appeal."

2. In the first line of the second paragraph, change "intended" to "designed."

3. In the ninth line of the second paragraph, delete "with the court."

4. In the tenth line of the second paragraph, change "shut out of court" to "out of time."

By consensus, the Committee rejected the suggestion of the Subcommittee on Style that the word "trap" at the very end of the Note be changed to "problem." The Committee thought that "trap" was clearer, as it more clearly communicated that it was referring to the same "trap" mentioned in the first sentence of the second paragraph.

B. Item No. 95-07 (FRAP 4(a)(5) — application of both "good cause" and "excusable neglect" standards to extensions of time to appeal)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(5) **Motion for Extension of Time.**

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) <u>regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires,</u> that party shows excusable neglect or good cause.

Committee Note

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its

motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Notwithstanding the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir.1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Committee Note to the 1979 amendment to Rule 4(a)(5). What these courts have overlooked is that the Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or after the time prescribed by Rule 4(b) expires.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The Reporter stated that, for the reasons given in his memorandum to the Committee, he thought it unlikely that the courts of appeals would fix the circuit split over Rule 4(a)(5)(A). He recommended that the Committee amend the rule as proposed, unless the Committee concludes that the difference between the "good cause" standard and the "excusable neglect" standard is of too little practical consequence to justify an amendment to FRAP.

A member expressed support for the amendment. He said that the difference between "good cause" and "excusable neglect" is not just theoretical; when interpreting other rules of

practice and procedure, the courts have consistently held that the "good cause" standard is substantially less demanding than the "excusable neglect" standard.

Another member also expressed support for the amendment. He pointed out that the "good cause" and "excusable neglect" standards appear elsewhere in the rules of practice and procedure (e.g., FRCP 6(b)), and that it is important that the standards be interpreted consistently.

Mr. Munford, who initially suggested amending Rule 4(a)(5), said that he does not strongly object to the *substance* of the position taken by the majority of the courts of appeals. His concern is that the text of the rule fails to give litigants fair notice of that position. He supports the proposed amendment, but he would also have no objection to amending the rule to adopt the majority position. In fact, adopting the majority position would bring Rule 4(a)(5) in line with FRCP 6(b). His concern is simply that, one way or another, the rule be applied as written.

One member asked why "excusable neglect" is not considered an example of "good cause." Others responded that, while in theory one might think that "excusable neglect" is a form of "good cause," in practice courts had distinguished between the two.

A member moved that the amendment and Committee Note be approved. The motion carried (unanimously).

The Reporter informed the Committee that the Subcommittee on Style had recommended that Rule 4(a)(5) read as follows:

> (5) **Motion to Extend Time.** Upon a showing of excusable neglect or good cause, the district court may extend the time to file a notice of appeal for a period not to exceed 30 days from the time otherwise prescribed by this Rule 4(a).

Several members objected, pointing out that this purportedly stylistic suggestion would result in a major substantive change to the rule by eliminating the requirement that a *motion* be filed. The Subcommittee on Style took its suggested language directly from Rule 4(b)(4), apparently without realizing that extensions can be granted in criminal cases without motion, but in civil cases only upon motion. It was moved and seconded that the Subcommittee on Style's suggestion be rejected. The motion carried (unanimously).

The Subcommittee on Style recommended two changes to the Committee Note:

1. In the first line of the second paragraph, change "[n]otwithstanding" to "despite." By consensus, the Committee accepted the suggestion.

2. In the second line of the last paragraph, delete "in this respect." By consensus, the Committee rejected this suggestion. The amendment to Rule 4(a)(5)(A)(ii) brings

Rule 4(a)(5) in harmony with Rule 4(b)(4) only in one specific respect, and not in others, and the Note as drafted more accurately reflects that fact.

C. Item No. 97-04 (FRAP 15(c)(1) — notice to parties in proceedings to review informal rulemaking)

Mr. Letter introduced the following proposed amendment and Committee Note:

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

(c) Service of the Petition or Application. The circuit clerk must serve a copy of the petition for review, or an application or cross-application to enforce an agency order, on each respondent as prescribed by Rule 3(d), unless a different manner of service is prescribed by statute. At the time of filing, the petitioner must:

(1) serve, or have served, a copy on each party admitted to participate in the agency proceedings, except that the petitioner need not serve ~~for~~ the respondents and, in cases involving informal agency rulemaking, the petitioner need not serve any party unless the law requires otherwise;

(2) file with the clerk a list of those so served; and

(3) give the clerk enough copies of the petition or application to serve each respondent.

Committee Note

Subdivision (c)(1). Under Rule 15(c), it is the responsibility of the circuit clerk to serve a copy of the petition for review or application for enforcement on the respondents, and it is the responsibility of the petitioner to serve a copy of the petition for review or application for enforcement on "each party admitted to participate in the agency proceedings." An ambiguity arises when "agency proceedings" involve informal rulemaking, such as informal rulemaking conducted pursuant to 5 U.S.C. § 553. It is common for hundreds or thousands of people to submit comments to the agency in the course of informal rulemaking proceedings. If each commentator is deemed to be a "party admitted to participate in the agency proceedings," then the petitioner will have to serve its petition for review or application for enforcement on hundreds or thousands of people, perhaps making it prohibitively expensive to seek judicial review.

To forestall that result, subdivision (c)(1) has been amended to make clear that, when a petition for review or application for enforcement pertains to informal rulemaking, the petitioner is not required to serve all commentators. Indeed, the petitioner is not required to serve *anyone*

(again, the respondents will be served by the circuit clerk), except when a statute requires that service be made on the United States or another entity or person. *See, e.g.*, 28 U.S.C. § 2344. This amendment to subdivision (c)(1) is patterned after D.C. Cir. R. 15(a), which appears to have worked well.

Mr. Letter said that there is a need for this amendment. For example, in one informal rulemaking proceeding regarding the regulation of tobacco, the FDA received comments from over 500,000 people. Each of those commentators might have been considered a "party" entitled to service of a petition to review the FDA's final action. D.C. Cir. R. 15(a) has worked well. The only concern that anyone has expressed about the amendment is that a party who wishes to file a petition for review if and only if another party files such a petition will not get formal notice of the filing of the other party's petition. The party will have to periodically call the clerk's office to inquiry whether a petition for review has been filed by any other party. When there are many parties, and any of those parties might file a petition for review in any of the circuits, the burden on such a party might be substantial. Agencies are supposed to note on their dockets when they are served with petitions for review — and thus, in theory, such a party could simply check with the agency — but not all agencies update their dockets promptly. One possible solution to this problem is to require the clerks to publish notice in the Federal Register of all petitions for review of agency action received by the courts. Another is simply to trust that courts will use their discretion to permit late requests to intervene.

A member pointed out that the Ninth Circuit has recently held — citing D.C. Cir. R. 15(a) — that those who submit comments in an informal rulemaking proceeding are not "parties" for purposes of Rule 15(c). Mr. Letter said that the D.C. Circuit certainly did not think that its local rule defined commentators in informal rulemaking as non-parties.

A member asked if the proposed amendment to Rule 15(c) would have any impact on *formal* rulemaking. Two members explained that it would not.

A member expressed opposition to the amendment. She said that the D.C. Circuit, which hears the vast majority of petitions to review agency action, has already solved this problem with its local rule. The clerks of the other circuits, in response to Judge Garwood's survey, uniformly reported that this problem has not arisen outside of the D.C. Circuit. Given the potential problems with the amendment described by Mr. Letter, why approve it? Several members agreed.

A member moved that Item No. 97-04 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

D. Item No. 97-18 (FRAP 1(b) — assertion that rules do not limit jurisdiction)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 1. Scope of Rules; Title

(b) ~~**Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.~~ [Abrogated]

Committee Note

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use FRAP to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use FRAP to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

The Reporter stated that, for the reasons given in his memorandum to the Committee, he did not believe that abrogating Rule 1(b) was required by the case law characterizing the limitations of Rules 3 and 4 as "mandatory and jurisdictional." However, the abrogation of Rule 1(b) was clearly appropriate in light of the amendments to §§ 1292(e) and 2072(c).

The Reporter said that Mr. Rabiej had suggested that the phrase "federal rules of practice and procedure" be substituted for the word "FRAP" in the fourth and sixth lines of the Committee Note. As written, the Note misleading suggests that the Supreme Court can define finality or provide for interlocutory appeals only in FRAP, when, in fact, the Court can also do so in any of the other rules of practice and procedure.

Several members briefly expressed support for the amendment. No member expressed opposition.

A member moved that the amendment and Committee Note be approved, with the changes suggested by Mr. Rabiej. The motion was second. The motion carried (unanimously).

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

Mr. Munford introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later:

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

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

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

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

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

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered or when the judgment altered or amended in response to such a motion is entered, whichever comes later.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal — in compliance with Rule 3(c) — within the time

prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later.

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

* * *

(7) **Entry Defined.** 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)(A). 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.

Committee Note

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

Subdivision (a)(7). The courts of appeals are divided on the question of whether an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) must be entered on a separate document in compliance with Fed. R. Civ. P. 58 before that order can be appealed and before the time to appeal the original judgment begins to run. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3950.2, at 113 (1996) ("The caselaw is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions."). The First and Second Circuits (as well as at least one decision of the Ninth Circuit) hold that Fed R. Civ. P. 58 applies to all orders disposing of post-judgment motions. *See Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 234 (1st Cir. 1992) (en banc); *Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1458 (9th Cir. 1989); *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2d Cir. 1987). The Fifth and Seventh Circuits (as well as at least one decision of the Ninth Circuit) hold that Fed. R. Civ.

P. 58 applies when post-judgment relief is granted, but not when such relief is denied. *See Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Chambers v. American Trans Air, Inc.*, 990 F.2d 317, 318 (7th Cir. 1993); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231 (9th Cir. 1989). The Eleventh Circuit holds that Fed. R. Civ. P. 58 never applies to orders granting or denying post-judgment relief. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991), *cert. denied*, 502 U.S. 1049 (1992).

Subdivision (a)(7) has been amended to adopt the position of the Fifth and Seventh Circuits. The time to appeal an order *granting* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) does not begin to run until it is entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order usually alters or amends a judgment, the order should be entered with the same formality as a judgment. The time to appeal an order *denying* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) begins to run immediately upon entry of the order, whether or not the order has been entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order does not disturb the original judgment, compliance with the separate document requirement of Fed. R. Civ. P. 58 seems unnecessary.

Subdivision (a)(7) has been further amended to apply the one-way waiver doctrine when an order or judgment is required to be entered in compliance with Fed. R. Civ. P. 58 but is not. In that situation, the party against whom the order or judgment is entered has two options. First, the party can choose to appeal the order or judgment, and thereby waive its right to have the order or judgment entered in compliance with Fed. R. Civ. P. 58. The appeal will be heard, even if the appellee objects to the lack of a Fed. R. Civ. P. 58 order or judgment. Second, the party can wait until the order or judgment is entered in compliance with Fed. R. Civ. P. 58 and then appeal. In theory, the party could wait forever to appeal, but, in practice, that is highly unlikely to occur. Nevertheless, "[v]ictorious litigants wishing to write *finis* to the case would do well to ensure that the district court adheres to Rule 58." *Otis v. City of Chicago*, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc).

The incorporation of the one-way waiver doctrine in subdivision (a)(7) reflects the fact that the separate document requirement is imposed for the benefit of the losing party. If that party wishes to waive that requirement by bringing a premature appeal, it seems pointless to dismiss the appeal, require the district court to enter the order or judgment on a separate document, and force the party to appeal a second time. "Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978). At the same time, the right of the losing party to have an order or judgment entered in compliance with Rule 58 should not be lost through the party's silence. Cases to the contrary — in particular, *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229 (1st Cir. 1992) (en banc) — are expressly rejected.

Mr Munford said that three ambiguities gave rise to this amendment:

1. **The "Applicability" Question:** Does FRCP 58 apply to the "order" referred to in Rule 4(a)(4)(A) — that is, to "the order disposing of the last such remaining motion"?

2. **The "Prematurity" Question:** If FRCP 58 does apply to the "order" referred to in Rule 4(a)(4)(A) — and thus the time to bring an appeal in a civil case does not begin to run until an order granting or denying post-judgment relief is entered in compliance with FRCP 58 — what happens if a party brings an appeal *before* such an order is entered?

3. **The "Timing" Question:** When a post-judgment motion is granted and the judgment is amended, does the time for appealing the amended judgment run from the date on which the district court orders the judgment to be amended or from the date on which the clerk enters the amended judgment?

Mr. Munford said that the Reporter's memorandum accurately described these questions and the need for the amendment.

A member said that it was not clear to him that, under current law, orders that deny post-judgment motions need to be entered in compliance with FRCP 58. Mr. Munford said that he agreed that FRCP 58 *should* not apply, but several courts have held that, under Rule 4, it *does* apply. He said that it was important to amend the rule to clarify the situation.

Another member asked about the purpose of FRCP 58. Members explained that its purpose was to clearly signal when the time to bring an appeal begins to run, so that a potential appellant does not unwittingly lose her right to appeal.

Judge Kravitch asked whether the ambiguity regarding the application of FRCP 58 was limited primarily to orders denying post-judgment motions. Mr. Munford said that, while the question can arise in other settings (such as collateral orders), the disagreement in the courts pertains to orders disposing of post-judgment motions.

A member said that he had some sympathy with the First Circuit approach. He was concerned that, under the amendment, a party who wishes to appeal an order that *grants* a post-judgment motion but is not entered in compliance with FRCP 58 might wait for years before bringing an appeal. But another member responded that such a result, although theoretically possible, was highly unlikely to occur in reality, and that a party whose motion is granted can always protect itself against such a result by asking the judge to enter the order in compliance with FRCP 58.

Mr. Munford expressed concern that the Committee Note to the amendment to Rule 4(a)(7) should more clearly state that the one-way waiver doctrine applies to the appeal of *any* order that must be entered in compliance with FRCP 58, and not just orders granting post-judgment motions. He proposed changes in the language of the Note. In response, the Reporter suggested that, in the second line of the third paragraph of the Note:

1. "an" be changed to "any", and

2. "— whether or not it disposes of a post-judgment motion —" be inserted after "judgment" and before "is required."

Mr. Munford stated that he preferred the Reporter's formulation and withdrew his suggestion. By consensus, the Committee approved the change to the Committee Note recommended by the Reporter.

The Reporter reviewed with the Committee the changes that had been recommended by the Subcommittee on Style:

1. In the text of Rule 4(a)(4), the Subcommittee recommended substituting "the amended judgment changed in response" for "the judgment altered or amended in response" in the three places that the latter phrase appeared. By consensus, the Committee rejected the suggestion, on grounds that the original language was clearer and more accurate.

2. In the text of Rule 4(a)(7), the Subcommittee recommended a number of changes, most of which were accepted. By consensus, the Committee redrafted the amendment to Rule 4(a)(7) to read:

   (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, but compliance with Rule 58 is not required when an order denies all relief sought by any motion listed in Rule 4(a)(4)(A). The failure to enter an order or judgment under Rule 58 when required does not invalidate an otherwise timely appeal from that order or judgment.

3. In the Committee Note to Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii), the Subcommittee recommended deleting the phrase "[t]he Committee intends that" in the first line of the first paragraph. By consensus, the Committee rejected the recommendation. If the Note were changed as the Subcommittee recommended, the Note would appear to be describing the law as it presently exists — and therefore would be inaccurate — rather than the changes that the Committee intends to make to the law.

4. In the Committee Note to Subdivision (a)(7), the Subcommittee recommended two changes to bring the citations into compliance with the Bluebook. Those changes were accepted by consensus. The Subcommittee also recommended changing the word "that" to "this" in the eighth line of the third paragraph, inserting a period after the word "unlikely" in the same line, and deleting "to occur" in the following line. By consensus, the recommendation was approved.

The Committee also made a stylistic change of its own in the ninth line of the second paragraph, changing "seems" to "should be."

A member moved that the amendment and Committee Note, as changed, be approved. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

Possible Amendments to Rule 26.1

In April 1998, the Kansas City *Star* published a series of articles describing the alleged failure of federal judges to recuse themselves from cases in which they had a financial interest. These articles have spurred the Committee on Codes of Conduct to consider anew how judges might be assisted in meeting their disclosure and recusal obligations. One option under consideration is incorporating a provision similar to Rule 26.1 into the civil, criminal, and bankruptcy rules. After the agenda book was distributed, the AO circulated a memorandum to the chairs and reporters of the advisory committees asking them to be prepared to share their "preliminary views" on this proposal at the January 1999 meeting of the Standing Committee.

Mr. Rabiej introduced this topic. He mentioned that, in addition to incorporating a provision similar to Rule 26.1 into the other rules of practice and procedure, consideration was being given to amending Rule 26.1 to broaden its scope and to require that corporate disclosure statements be updated during the course of litigation.

Several members said that they would be favorably inclined to consider proposals to broaden Rule 26.1. Among other problems with Rule 26.1, members mentioned in particular the fact that the recusal statute (28 U.S.C. § 455) addresses a much broader array of financial interests than does the rule. Rule 26.1 applies only to publicly traded corporate parties — not, e.g., to privately held companies or partnerships.

Other members warned that broadening Rule 26.1 would be very difficult. As initially proposed, Rule 26.1 was broader than the version that was eventually adopted. The broader version of Rule 26.1 attracted a great deal of opposition from the chief judges. In addition, the Committee had difficulty drafting workable language that would reach all of the financial interests that should be addressed.

One member said that his court already requires, by local rule, disclosure that is broader than that required by Rule 26.1. For example, parties to a bankruptcy proceeding are required to identify all creditors. Another member said that other circuits similarly require broader disclosure.

A couple of members stressed that the disclosure and recusal process should be as mechanical as possible Ideally, a computer program should be developed, so that judges would not have to personally review corporate disclosure statements in every case. Some of those statements are so long that it is easy for a judge's mind to wander and for the judge to make a

mistake. Mr. Rabiej responded that the Committee on Codes of Conduct is exploring various software alternatives.

The members discussed the practices of various circuits. In some circuits, the judges give the clerk's office a list of individuals and entities whose interest in a case should result in the recusal of the judge, and the clerk's office then screens the corporate disclosure statements for the judges. Judges do not see the corporate disclosure statements until the judges are assigned to a panel and get the briefs — and, even then, if the system has worked as it should, no judge should have to recuse herself. In other circuits, the judges must review corporate disclosure statements for *every* case — even cases being heard by panels to which the judge has not been assigned. In other circuits, the judges must review corporate disclosure statements only in the cases being heard by panels to which they've been assigned, as well as in all cases in which petitions for rehearing en banc have been filed.

Some members had specific suggestions for amending Rule 26.1. One member said that it should be amended to require the disclosure of partnerships in which a publicly traded company participates. Another said that it should specifically address limited liability companies.

After further discussion, the committee reached a consensus that it may be worthwhile to examine the question of whether Rule 26.1 should be broadened. The Committee will await further guidance from the Committee on Codes of Conduct and/or the Standing Committee.

The Committee broke for lunch at 12:30 p.m. and reconvened at 2:00 p.m.

A. Item Nos. 95-04 & 97-01 (FRAP 26(a) — making time computation under FRAP consistent with time computation under FRCP and FRCrP)

The Reporter introduced the following proposed amendment and Committee Note:

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~~.

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, as are deadlines of 1, 2, 3, 4, 5, and 6 *calendar* days. This creates 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. In addition, the rules will no longer state some deadlines in "days" and others in "calendar days." All deadlines will be stated in "days," and all deadlines will be calculated in the same manner.

The Reporter stated that three questions are before the Committee:

1. Does the Committee wish to amend Rule 26(a)(2), so that intermediate Saturdays, Sundays, and legal holidays will not be counted when deadlines are less than 11 days — instead of less than 7 days?

2. Does the Committee wish to amend FRAP so that the rules no longer distinguish between "calendar days" and "days"?

3. If the Committee wishes to make either or both of these changes, does the Committee wish to change any of the deadlines in FRAP to take into account the new, more generous way of calculating deadlines?

A member said that some deadlines — such as Rule 4(b)(1)(A)'s 10 day deadline for appealing criminal cases — are so fixed in the minds of judges and practitioners that they are best left alone, even if amending Rule 26(a)(2) will extend them as a practical matter. However, other deadlines — particularly some of the 7 day deadlines — were originally set by the Committee upon the assumption that Saturdays, Sundays, and legal holidays counted, and probably should be shortened if that no longer remains true. With respect to the deadlines stated in calendar days, the member said that only three deadlines in FRAP are stated in calendar days, and those deadlines are *delivery* deadlines rather than deadlines by which parties must act. He favored leaving those three deadlines undisturbed.

Mr. Letter said that the Justice Department favored amending Rule 26(a)(2) to bring it into line with FRCP 6(a) and FRCr P 45(a) and saw no reason to shorten any of the deadlines in FRAP to take into account the new method of calculation. Mr. Letter also said that the Justice Department had no objection to leaving the three calendar day deadlines undisturbed.

A member opposed making any change to Rule 26(a)(2). He said that the rule is clear and that only attorneys who do not bother to read it carefully will get trapped. He also feared that adopting the FRCP/FRCrP counting method may result in unanticipated problems.

Mr. Fulbruge, on behalf of the clerks, also opposed the change. He said that the clerks will have to retrain their staffs on how to calculate deadlines and that many local rules will have to be changed to take into account the new calculation method.

A member supported the change. He argued that most appellate lawyers are primarily trial lawyers and are accustomed to the FRCP/FRCrP calculation method. It is understandable that they get trapped and, given that this trap serves no good purpose, it should be eliminated. One factor that aggravates the trap is the fact that some deadlines — such as 28 U.S.C. 1292(b)'s 10 day deadline — are *statutory* and trial attorneys would naturally assume that those deadlines would be calculated pursuant to the FRCP/FRCrP method. Several other members agreed with these sentiments.

A member pointed out that the proposed change was a *forgiving* one. In other words, any attorney who calculated deadlines under the current Rule 26(a)(2) method rather under than the proposed method would merely find that he had *more* time to act then he thought. Another member agreed. She acknowledged that there would be transition problems, but those problems would not *hurt* anyone, except that some lawyers may hurry to file papers earlier than necessary.

A member said that, if the FRCP/FRCrP calculation method is adopted, then she would favor shortening the deadlines for responding to motions. Another member said that she agreed, but that she would otherwise leave the 7 and 10 day deadlines unchanged.

A member said that one way of shortening 7 or 10 day deadlines is to simply state them in calendar days. A couple members objected to that technique, arguing that the use of calendar days should be restricted, as it is now, to delivery deadlines.

A member said that, in considering whether any 7 or 10 day deadlines should be shortened, the Committee should take into account the fact that some deadlines begin running upon *service*, while others begin running upon *filing* or *entry*. In the latter case, the attorney may not learn of the triggering event until several days later.

[Prof. Daniel R. Coquillette, Reporter to the Standing Committee, joined the meeting at this point.]

A member moved that (1) Rule 26(a)(2) be amended so that intermediate Saturdays, Sundays, and legal holidays will not be counted when deadlines are less than 11 days (instead of less than 7 days), and (2) no change be made to Rule 26(a)(2) with respect to "calendar days." The motion was seconded. The motion carried (unanimously). The Reporter was directed to make the necessary changes to the draft amendment and Committee Note that he had prepared.

The Reporter informed the Committee that, even though the only change necessary in Rule 26(a)(2) was inserting "11" in place of "7," the Subcommittee on Style had nevertheless recommended extensive stylistic changes to the rule. Several members objected that it should not be necessary to restylize a rule that the Subcommittee had already restylized. Other members added that to extensively rewrite the rule would camouflage the simplicity of the substantive change that had been made and confuse judges and practitioners. By consensus, the Committee rejected the Subcommittee's recommendations.

The Subcommittee also recommended that, in the third line of the second paragraph of the Committee Note, the word "and" be changed to "but." By consensus, the recommendation was approved.

The Committee next turned to the question of which deadlines in FRAP, if any, should be shortened to take into account the new method of calculation.

A member argued that the 10 day deadline in Rule 27(a)(3)(A) for filing responses to motions should be shortened to 7 days. Under the new calculation method, all 10 day deadlines in FRAP will, as a practical matter, become at least 14 day deadlines. Fourteen days is too long to wait for a response to a motion. The member was also concerned about Rule 41(b)'s 7 day deadline for the issuance of mandates. He pointed out that, under the "old" calculation method, that 7 day deadline had always meant 7 actual days, and judges and clerks were quite accustomed to the deadline. Mr. Fulbruge agreed.

A member suggested that Rule 41(b)'s 7 day deadline be stated in calendar days. Although this would expand the use of calendar days beyond service-related delivery deadlines, Rule 41(b) sets a deadline for *clerks*, not attorneys, so the change should not sow too much confusion among the bar.

A couple members argued in support of shortening the deadline in Rule 27(a)(3)(A) to 7 days. One member argued that, at the same time, the deadline in Rule 27(a)(4) for *replying* to responses to motions should be shorted from 7 days to 5 days. Under the "new" calculation method, all 7 day deadlines in FRAP will, as a practical matter, become at least 9 day deadlines, and 9 days is too long to wait for a reply to a response to a motion. Although changing the deadline in Rule 27(a)(4) to 5 days may be a bit confusing for the bar, Rule 27(a)(4) is a new rule that will not even take effect until December 1, 1998, and thus the bar will not have long to get used to the 7 day deadline.

A member expressed concern about the 7 day deadline in Rule 29(e) (regarding the filing of amicus briefs), but said that discussion of his concern should be postponed until the Committee considers agenda item V(D)(13) (study agenda Item No. 98-03).

A member asked whether the 10 day deadlines of Rule 10(c) and Rule 30(b)(1) should be shortened. A couple members argued that they should not, as they are not terribly important deadlines and not much is to be gained by changing them.

A member cautioned that the deadline in Rule 27(a)(3)(A) was set at 10 days in the first place in an attempt to cut down on the number of motions filed by attorneys seeking an extension of time within which to file responses to motions. If the 10 day deadline in Rule 27(a)(3)(A) is cut back to 7 days, the courts could see an increase in requests for extensions. Another member responded that when a serious substantive motion is made, parties are going to seek extensions, whether the deadline is 7 days or 10 days. However, for routine procedural motions, it makes sense to cut the deadline back to 7 days.

A member moved:

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

2. that Rule 27(a)(4) be amended by substituting "5" for "7"; and

3. that Rule 41(b) be amended by inserting the word "calendar" after "7" and before "days."

The motion was seconded. The motion carried (unanimously).

The Reporter was directed to prepare the appropriate amendments and Committee Notes and to place them on the agenda for the Committee's spring 1999 meeting.

B. Item No. 96-02 (FRAP 4(b) — permit time to appeal criminal case to be extended, even without good cause or excusable neglect)

Generally speaking, Rule 4(b) provides that a criminal defendant must file a notice of appeal within 10 days after entry of the judgment or order that he seeks to appeal. The district court is authorized to extend the 10 day deadline up to an additional 30 days. Under the current version of Rule 4(b), the district court may do so only "[u]pon a showing of excusable neglect." Under the restylized version of Rule 4(b) (effective December 1), the district court will be able to grant an extension only "[u]pon a finding of excusable neglect or good cause." Under neither the current nor future version of Rule 4(b) may a district court extend the time to appeal beyond the 40th day following entry of the judgment or order.

In *United States v. Marbley*, 81 F.3d 51 (7th Cir. 1996), Chief Judge Richard A. Posner urged that Rule 4(b) be amended so that a district court could extend the 10 day deadline up to an additional 30 days whether or not the defendant makes a showing of excusable neglect or good cause. One way or another, he contends, the court of appeals is going to end up examining the merits of the appeal — either immediately on direct appeal or later when the defendant collaterally attacks his conviction. In Judge Posner's view, it would be better for all concerned if Rule 4(b) would "permit untimely appeals in any criminal case in which the district judge and the court of appeals agreed that the appeal should be heard" rather than giving that permission only when there is excusable neglect or good cause, thereby forcing "the appeal [to be] heard later through

the Sixth Amendment route." *Id.* at 53. This, he says, "introduces real delay into the system of criminal justice." *Id.*

At Judge Garwood's request, the Reporter circulated a memorandum to the Committee outlining several problems with Judge Posner's suggestion, including (1) the fact that the Committee just rewrote Rule 4(b) — changing the "excusable neglect" standard to "excusable neglect or good cause" — and may not be inclined to change the standard yet again; (2) the fact that it is questionable whether the Judicial Conference and the Supreme Court would approve a change to Rule 4(b) that would permit district courts to extend the venerable 10 day deadline for any or even no reason; (3) the fact that it simply is not true, as Judge Posner seems to assume, that every defense attorney who cannot show excusable neglect or good cause for failing to file a timely appeal has committed ineffective assistance of counsel; (4) the fact that one could justify waiving many of the requirements of FRAP — or, for that matter, of the FRCrP or FRE — in the same way that Judge Posner justifies waiving the requirements of Rule 4(b); and (5) the fact that the scenario that Judge Posner fears seems to occur quite infrequently in practice.

Mr. Letter said that the Justice Department strongly supports removing Judge Posner's suggestion from the study agenda, largely for the reasons stated in the Reporter's memo.

A member asked whether the desire to avoid a § 2255 attack would itself provide the "good cause" necessary to extend the deadline. Another member said that he was unaware of any case so holding. A third member pointed out that no such case *could* exist, as the "good cause" standard will not be incorporated into Rule 4(b) until December 1.

A member argued that a *defendant* may have good cause for an extension if his attorney failed to file a timely appeal, despite being instructed to do so. Another member responded that, in such a case, the allegation of the defendant — and, presumably, the denial of the attorney — *should* be the subject of a § 2255 proceeding, so that the district court can take testimony and evidence on the issue.

A member moved that Item No. 96-02 be removed from the study agenda. The motion was seconded.

A couple members spoke in favor of retaining Item No. 96-02 on the study agenda. They thought Judge Posner's suggestion had merit, and favored giving district courts carte blanche to extend the deadline.

Judge Kravitch pointed out that, even if district courts had such discretion, an attorney would be taking a big risk by not filing a timely appeal or timely request for an extension, as the attorney would have no guarantee that the district court would exercise its discretion favorably.

A member argued in favor of removing Item No. 96-02 from the study agenda. He said that, among other problems, he did not know how the appellate courts could possibly review

district court decisions to grant or not to grant extensions. If district courts had carte blanche to use their discretion to grant extensions, what would constitute an abuse of that discretion?

After further discussion, the motion to remove Item No. 96-02 carried (4-3).

C. Item No. 97-19 (FRAP 4(b)(1)(B)(ii) — timing of government's notice of appeal in multi-defendant criminal cases)

Rule 4(b)(1)(B) provides that, when the government is entitled to bring an appeal in a criminal case, its notice of appeal must be filed "within 30 days after the later of: (i) the entry of the judgment or order being appealed; or (ii) the filing of a notice of appeal by any defendant." The use of the phrase "any defendant" creates an ambiguity in multi-defendant cases: Does the 30 days begin to run after the *first* notice of appeal is filed by a defendant or not until the *last* notice of appeal is filed by a defendant? Or does the 30 days begin to run after the particular defendant as to whom the government is considering bringing a cross-appeal files his notice of appeal? The Committee attempted to correct this problem at its April 1997 meeting, but the complexity of the problem soon became apparent, and the Committee postponed further discussion.

Mr. Letter argued that this matter should be removed from the study agenda. Mr. Letter said that he had consulted with his colleagues in the Justice Department and learned that this issue rarely arises in practice and does not pose a real problem for federal prosecutors. The Justice Department thought it likely that an attempt to fix this ambiguity would create more problems than it would solve. Moreover, Mr. Letter pointed out that the ambiguous language was inserted into Rule 4(b) directly by Act of Congress. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VIII, § 7111, 102 Stat. 4419 (Nov. 18, 1988).

Several members briefly spoke in favor of removing this item from the study agenda. No member spoke in favor of continuing to study this issue.

A member moved that Item No. 97-19 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

D. Items Awaiting Initial Discussion and Prioritization

The Committee next turned to a series of proposals that were awaiting initial discussion.

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

Agenda items V(D)(1) through V(D)(9) (study agenda Item Nos. 97-32 through 97-40) all arise out of suggestions made by the appellate working group of the Methods Analysis Program ("MAP"). Judge Garwood asked Mr. Fulbruge to introduce these items.

Mr. Fulbruge first described the background of the MAP and stated that the appellate working group had drafted 115 recommendations for making appellate practice more efficient. Nine of those 115 recommendations would require amendments to FRAP. However, at an August 1998 meeting of the clerks of the appellate courts, the clerks agreed that six of the nine proposals for amending FRAP should be withdrawn:

Agenda Item V(D)(3) (Study Agenda Item No. 97-34): The appellate working group had proposed that Rule 3(d)(1) be amended to specify precisely when district court clerks should forward updated docket entries to appellate court clerks. The appellate clerks decided to withdraw this suggestion because the district court clerks were sure to oppose it, because this has not been a major problem in practice, and because any rule would, as a practical matter, be unenforceable. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(4) (Study Agenda Item No. 97-35): The appellate working group had proposed that FRAP be amended to specify how complex cases — such as class actions, multidistrict litigation, and complex bankruptcy cases — should be captioned. The appellate clerks decided to withdraw this suggestion because it needs more thought and because it might better be addressed to the Advisory Committee on Civil Rules and Advisory Committee on Bankruptcy Rules. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(6) (Study Agenda Item No. 97-37): The appellate working group had proposed that FRAP be amended to require that counsel who represented a criminal defendant at trial must represent that defendant on appeal unless specifically permitted to withdraw by the appellate court. The appellate clerks decided to withdraw this suggestion because most courts already impose this requirement by standing order or local rule and because the suggestion is better addressed to the Advisory Committee on Criminal Rules. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(7) (Study Agenda Item No. 97-38): The appellate working group had proposed that FRAP be amended to forbid counsel who represented a criminal defendant at trial to withdraw from that representation before filing a notice of appeal. The appellate clerks decided to withdraw this suggestion for the same reasons that they decided to withdraw the previous suggestion. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(8) (Study Agenda Item No. 97-39): The appellate working group had proposed that Rule 15(c) be amended to require that a petitioner seeking review of agency action file with the court of appeals a list of all parties to the agency action and identify for the court the name and address of the respondent agency. The appellate clerks decided to withdraw this suggestion because this problem has arisen only in the D.C. Circuit and can best be addressed by a local rule of that court. By consensus, the Committee removed this item from its study agenda.

Agenda Item V(D)(9) (Study Agenda Item No. 97-40): The appellate working group had proposed that FRAP be amended to require advance notice and pre-filings in death penalty

cases. The appellate clerks decided to withdraw this suggestion because counsel in death penalty cases are already providing advance notice and pre-filings, so problems are not being experienced in practice. Mr. Letter said that the Justice Department did not object to removing this item from the study agenda, but noted that, as the number of federal capital cases increases, the Department may return to this Committee sometime in the future and propose amendments to FRAP regarding the handling of such cases. By consensus, the Committee removed this item from its study agenda.

Mr. Fulbruge returned to Agenda Item V(D)(1) (Study Agenda Item No. 97-32). At present, Rule 12(a) requires the circuit court to docket an appeal "under the title of the district-court action." District court captions sometimes identify hundreds of parties and run several pages long. It is often a waste of effort for appellate clerks to docket cases under these captions, particularly when only a few of those parties are involved in the appeal. Mr. Fulbruge said that the appellate clerks would like Rule 12(a) redrafted to give them more flexibility in docketing appeals.

A member supported the suggestion. He said that, in complex cases, appellate clerks have a terrible time trying to docket the cases and correctly identify appellants, appellees, cross-appellants, and the like, resulting in frequent motions to recaption.

Another member said that he had reservations about the suggestion. He saw an advantage to using the district court caption. He wondered whether Rule 12(a) might be amended to require use of the district court caption, but, in cases exceeding ten parties or so, require only some of the parties to be identified.

Mr. Fulbruge said that the real problem is cases involving hundreds of parties or complex cases in which it is very difficult for the clerks to ascertain not just who are the appellants and appellees, but who were plaintiffs, defendants, intervenors, and the like in the district court.

After further discussion, the Committee decided by consensus to retain Item No. 97-32 on its study agenda. Judge Garwood asked Mr. Fulbruge to work with the appellate clerks on drafting a specific amendment to Rule 12(a) and then to return to the Committee with that proposed amendment.

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

Mr. Fulbruge said that appellate clerks waste a substantial amount of time trying to ascertain which attorneys represent which parties on appeal. Rule 12(b) requires only the attorney who filed the notice of appeal to file a representation statement; no such requirement is imposed upon appellees or intervenors.

One member asked about the possibility of addressing this problem by local rule. Another pointed out that some circuits now require all attorneys to file representation statements. Prof.

Coquillette said that the Standing Committee is very hostile to the use of local rules to address a problem that affects all courts of appeals equally, such as the problem under consideration.

A member moved that Item No. 97-33 be retained on the Committee's study agenda and that the appellate clerks be asked to draft a specific amendment to Rule 3 or Rule 12. The motion was seconded. The motion carried (unanimously).

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

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

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

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

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

Mr. Fulbruge said that, while the appellate clerks had no illusions about their likelihood of success, they once again wanted to ask the Committee to restore their authority to reject documents that do not comply with FRAP or the local rules of a court. At present, Rule 25(a)(4) states: "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 rule or practice." Mr. Fulbruge said that, in the view of the clerks, Rule 25(a)(4) makes it impossible for them to deal effectively with improper filings.

According to Mr. Fulbruge, 53% of the cases in the Fifth Circuit are filed pro se. The figure is 48% in the Fourth Circuit. In *every* circuit, at least a third of the filings are pro se. These pro se filings are often in blatant violation of the rules, yet, under Rule 25(a)(4), the clerks must stamp them, enter them on the docket, review them, and then send a letter to the litigant advising him of how his filing violates the rules and requesting a corrected filing. Often, that spurs arguments between the litigant and the clerk's office. If the litigant does comply with the clerk's request, the clerk has to again stamp, docket, and review the corrected pleading; often, the corrected pleading has not solved the original problem or suffers from additional problems. If the litigant does not comply with the clerk's request, the clerk has to get a judge to enter an order. The inability of the clerks to reject deficient filings wastes thousands of hours every year and undermines morale in the clerks' offices.

The problem is not limited to pro se parties, Mr. Fulbruge said. Paid counsel will sometimes file deficient pleadings with the court in order to meet a deadline, knowing that they will have an opportunity to correct the deficiencies after the deadline.

Mr. Fulbruge said that the appellate clerks urge this Committee to amend Rule 25(a)(4) so that clerks are required to *receive* deficient papers, but not to *file* them until and unless corrections are made.

Mr. Letter said that the Justice Department opposes the request. He reminded the Committee that Rule 25(a)(4) resulted from the unreasonable practices of some clerks' offices. With the myriad of local and national rules, it is extremely difficult for even the most conscientious attorney to file a perfect brief every time. Before the rule was changed, the Justice Department was finding that a large percentage of its briefs were getting bounced back for one hypertechnical violation or another.

Mr. Fulbruge said that the restylized rules should mitigate the problem described by Mr. Letter. The rules are much more specific and understandable, and thus the number of problems should be substantially reduced. Also, clerks have to meet increasingly high caseloads without additional staff, reducing the incentive to pick fights with counsel over hypertechnical violations. Mr. Letter responded that, while the restylized rules will help, a large number of conflicting and confusing local rules remain.

A member agreed with Mr. Letter. He said that the first recommendation of the clerks — "[r]eturn to the former version of Rule 25" — was "D.O.A.," not only in this Committee, but in the Standing Committee. The second recommendation of the clerks — "[a]dopt 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 [and which permits e]ither a judge, a panel, or the clerk (by delegated authority) [to] strike the document if the defect is not timely cured" — seems to simply restate existing law, except that clerks cannot be delegated the authority to strike documents.

Another member asked if that was true. Why can't clerks be delegated the authority to strike documents by local rule? Mr. Fulbruge said that it was because clerks are not considered "judicial officers." Prof. Coquillette reminded the Committee that, in addition, such a use of local rules would be highly disfavored by the Standing Committee.

A couple members said that, while they could not support the clerks' suggestion, they sympathized with the problem, and hoped that other means could be found for addressing it. Judges Motz and Kravitch both reported that the PLRA had reduced the number of frivolous pro se filings in their circuits. Mr. Fulbruge said that the Fifth Circuit had not seen a similar decline.

A member moved that Item No. 97-36 be removed from the study agenda. The motion was seconded. The motion carried (6-1).

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

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

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)

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

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

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

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

As noted above (see Agenda Item V(D)(1)), the Committee removed this item from its study agenda.

Report on Federal Rules of Attorney Conduct

At Judge Garwood's request, Prof. Coquillette updated the Committee on efforts to address the wide variety of local rules governing attorney conduct. Prof. Coquillette said that there had been a substantial amount of misinformation circulated about the issue. Contrary to public reports, the Standing Committee has *not* decided how to address this problem, but only that something has to be done to bring about uniformity. The Conference of Chief Justices favors a "dynamic conformity" approach, under which attorney conduct in federal court would be governed by the professional conduct rules of the state in which the federal court sits. The Justice Department opposes dynamic conformity and instead favors the promulgation of "Federal Rules of Attorney Conduct" that would apply in all federal courts. The Standing Committee and the advisory committees appear to be closely divided between these two approaches, and even those who favor the federal rules approach disagree about the scope of such rules.

Prof. Coquillette reported that an ad hoc committee has been formed to study this issue and make a proposal to the Standing Committee. Judge Alito and Mr. Thomas will represent this advisory committee on the ad hoc committee. Judge Scirica will chair the ad hoc committee, and Prof. Coquillette will serve as its reporter. Each advisory committee has appointed two

representatives. The Standing Committee will be represented by Chief Justice E. Norman Veazy and Prof. Geoffrey C. Hazard, Jr., both of whom have considerable expertise in legal ethics. Also, the Justice Department will have two representatives on the ad hoc committee.

Prof. Coquillette said that Judge Scirica wants the ad hoc committee to proceed slowly and not get too far out ahead of the ABA's Ethics 2000 project. In addition, Judge Scirica wants to give negotiators for the Justice Department and the Conference of Chief Justices time to work out a compromise on the applicability of Model Rule 4.2 to federal investigations. Finally, the Federal Judicial Center is undertaking a study of attorney conduct matters for the Bankruptcy Committee, and Judge Scirica wants to await the results of that study.

After some brief questioning of Prof. Coquillette, Judge Motz raised a related issue. Judge Motz noted that several of her colleagues objected to the fact that, under Rule 46(b)(2), an attorney cannot be suspended or disbarred without a hearing, even if he has already been suspended or disbarred by a state supreme court. In the view of some members of the Fourth Circuit, it is a waste of judicial resources to afford hearings to attorneys who have already been suspended or disbarred for unethical conduct, presumably after notice and hearing.

One member said that he sympathized with the views of Judge Motz's colleagues. Other members and the Reporter disagreed. Some expressed the view that the benefits of affording a hearing to an attorney who had already been suspended or disbarred by a state court outweighed the relatively minor judicial inconvenience. Hearings in such obvious cases are rarely requested and can be conducted quickly. At the same time, such hearings ensure both the appearance and reality of fairness and help to head off constitutional challenges.

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

Item No. 97-42 arises from a suggestion by several district court clerks that the FRCP, FRCrP, and FRAP be amended to permit clerks to serve notices by fax or e-mail. The Reporter asked the Committee to remove this item from its study agenda. The Reporter said that this proposal is squarely within the jurisdiction of the Subcommittee on Technology and that it would be ill-advised for this or any advisory committee to move forward on its own. The proposal itself recognizes that the amendments it seeks will not be feasible until the Judicial Conference establishes certain technical standards, and that is precisely what the Subcommittee on Technology was created to do.

Several members agreed with the Reporter, and Item No. 97-42 was removed from the study agenda by consensus.

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

Mr. John McCarthy, who is incarcerated in a federal prison, submitted a lengthy handwritten letter to the Committee in which he makes two primary complaints. First, he complains that no time period is prescribed for seeking a certificate of appealability ("COA"). Second, he claims that when a notice of appeal is filed before a COA is sought, it is "ambiguous" under Rule 22(b)(1) whether the district court is supposed to await a formal request for a COA or instead rule sua sponte on whether a COA should issue.

The Reporter recommended that this item be removed from the study agenda. He pointed out that a litigant presumably has to seek a COA within the time for filing a notice of appeal; if the litigant does not, then he will provide a compelling justification for the court to deny the COA (i.e., the COA will be denied because the time to appeal has expired). The Reporter also said that restylized Rule 22 seems to make it clear that a district court should decide sua sponte whether to issue a COA if a notice of appeal is filed without a formal request for a COA.

Several members agreed with the Reporter, and Item No. 97-43 was removed from the study agenda by consensus.

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

Under FRCP 62(a), a judgment in a civil action may not be executed or enforced until 10 days after its entry. A district court may, at its discretion, stay execution or enforcement of the judgment for a longer period of time — e.g., to give the court time to consider post-judgment motions. However, if the district court chooses not to grant such a stay, the judgment may be executed or enforced on the 11th day after entry, even if post-judgment motions are pending.

Mr. Michael F. Dahlen, an Illinois attorney, was recently involved in a case in which the district court refused to extend the automatic 10-day stay pending its ruling on the defendant's post-judgment motions. Mr. Dahlen, who represented the defendant, feared that the plaintiff would garnish his client's bank accounts and, in effect, put his client out of business before his client's post-judgment motions were even decided. Mr. Dahlen found, to his chagrin, that no means existed for seeking immediate appellate review of the district court's refusal to extend the 10-day stay pending resolution of post-judgment motions.

A member said that Mr. Dahlen's suggestion is better directed to the Advisory Committee on Civil Rules. After all, it is FRCP 62(a) that expressly gives the district court discretion to decide whether to extend the 10-day stay pending resolution of post-trial motions. The member said that, in his view, the "default" rule should be the opposite — that is, enforcement of all civil judgments should be stayed pending resolution of post-trial motions unless the district court orders otherwise Such an order would be appropriate where it appeared that the judgment debtor was attempting to waste or hide assets.

A member moved that Mr. Dahlen's suggestion be referred to the Advisory Committee on Civil Rules and removed from this Committee's study agenda. The motion was seconded.

A member asked whether changing FRCP 62(a) as suggested would take care of the problem described by Mr. Dahlen. Mr. Dahlen's complaint was that, when a district court permitted enforcement of a judgment prior to disposing of post-judgment motions, there was no way for the judgment debtor to get immediate appellate review of that decision. That problem would remain even if FRCP 62(a) was redrafted as suggested. Another member responded that, especially if FRCP 62(a) was redrafted as suggested, a judgment debtor in the position of Mr. Dahlen's client could use mandamus to seek appellate review.

The motion to refer Mr. Dahlen's suggestion to the Advisory Committee on Civil Rules carried (unanimously).

A member asked that the referral make it clear that this Committee takes no position on the merits of Mr. Dahlen's suggestion. The member thinks that FRCP 62(a) works well as drafted and is concerned that redrafting the rule as suggested would lead to widespread wasting and hiding of assets by judgment debtors. He does not want to imply that this Committee endorses Mr. Dahlen's suggestion.

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

Under the present version of Rule 29(e), an amicus brief is due at the same time as the principal brief of the party whom the amicus is supporting. Under restylized Rule 29(e) (effective December 1), an amicus brief will be due 7 days after the principal brief of the party whom the amicus is supporting. This 7 day period will begin to run with the filing of the principal brief in court — and not from the time that the brief is served or that the amicus becomes aware of the brief's filing. Mr. Paul Alan Levy of Public Citizen Litigation Group has raised a number of concerns about restylized Rule 29(e):

First, Mr. Levy asks whether Rule 29(e) is intended to supercede local rules (such as those of the D.C. and Fifth Circuits) that give amici a longer period of time to file their briefs. Rule 29(e) states that "[a] court may grant leave for later filing, specifying the time within which an opposing party may answer," but does not make clear whether the court may "grant leave" in *all* cases through a local rule or only in *particular* cases through orders entered in those cases. (By contrast, Rule 31(a)(2) uses the more specific phrase, "either by local rule or by order in a particular case.")

Second, Mr. Levy argues that 7 days is an insufficient period of time to allot to amici in cases in which the party being supported by an amicus does not permit the amicus to see its brief before the brief is filed.

Third, Mr. Levy describes a problem that can develop under restylized Rule 29(e) when an amicus wishes to file a brief supporting an appellee. Suppose that, on June 1, an appellee located

in Washington, D.C., mails its briefs to the Ninth Circuit for filing and hand delivers a copy of its brief to the appellant. Suppose further that the Ninth Circuit receives and files the appellee's brief on June 4. Under these circumstances, the brief of the amicus in support of the respondent would be due on June 11 (7 days after *filing*), and the reply brief of the appellant would be due on June 15 (14 days after *service*) — meaning that the appellant would have only 4 days to review and respond to the arguments raised by the amicus *if it received the amicus brief on the day it was filed.* If the amicus served and filed its brief by mail, the appellant might not see it at all before its reply brief is due. Mr. Levy suggests that this problem could be solved if the time for appellees to file their principal briefs ran from the service of the briefs of amici supporting the appellant (rather than from the service of the briefs of appellants) and if the time for appellants to file reply briefs ran from the service of the briefs of amici supporting the appellee (rather than from the service of the briefs of appellees).

Mr. Letter said that the problems identified by Mr. Levy were real ones that are likely to affect the Justice Department, and that Mr. Levy's suggestions should be retained on the study agenda. The Reporter responded that, although Mr. Levy's concerns are valid, his suggested alternative — running the deadlines for the filing of principal briefs from the service of amici briefs — seems problematic. Mr. Letter agreed and offered to meet with Public Citizen and with other groups who frequently file amicus briefs to try to draft an amendment to Rule 29(e).

A member moved that Item No. 98-03 be retained on the study agenda and that the Justice Department be asked to propose a specific amendment to Rule 29(e), after consultation with others who often file amicus briefs. The motion was seconded. The motion carried (unanimously).

14. Item No. 98-04 (docketing fees/certificates of appealability)

Under 28 U.S.C. § 2253(c), a prisoner may not appeal the denial of habeas relief unless either the district court or a judge of the circuit court issues a COA. When a prisoner applies to a circuit judge for a COA, must the prisoner pay the docketing fee at that point, or only if and when the COA is issued?

In August, Judge Kenneth F. Ripple of the Seventh Circuit informed the Reporter that the circuits have not been answering this question consistently. Judge Ripple said that he was not certain that FRAP needed to be amended to address the problem; perhaps the fee resolution of the Judicial Conference could be changed to specify when the fee should be collected.

At Judge Garwood's request, Mr. Fulbruge surveyed the circuit clerks. Seven clerks reported that they require the fee to be paid before an application for a COA is even *considered*, while two reported that they require the fee to be paid only if and when a COA is *granted*.

A member said that perhaps FRAP should be amended to specify that the fee must be paid before an application for a COA is even considered. Another member agreed; she said that the decision whether to grant a COA is practically indistinguishable from the decision whether habeas

relief will be granted, and the fee should be paid before a court is asked to undertake such a detailed review of the case. She said that it made no sense to collect the fee only if, in essence, the appeal is won.

Mr. Rabiej suggested that this Committee formally refer this matter to the Committee on Court Administration and Case Management ("CACM"), which has authority over the Judicial Conference fee schedule. CACM may be able to resolve this problem either through some gentle persuasion directed at the two "renegade" clerks' offices or by inserting a provision in the fee schedule making it clear that the fee must be collected before an application for a COA is even considered.

A member moved that Item No. 98-04 be referred to CACM and removed from this Committee's study agenda. The motion was seconded. The motion carried (unanimously).

The Committee adjourned for the day at 5:30 p.m.

The Committee reconvened on Friday, October 16, at 8:30 a.m. Chief Justice Pascal F. Calogero, Jr., joined the Committee.

15. Item No. 98-05 (FRAP 15(a)(1) — joint appeals/Hobbs Act cases)

Mr. Charles H. Montange, a Seattle attorney, has suggested that FRAP be amended, essentially to supercede the venue provisions of the Hobbs Act. Under the Act, a person aggrieved by an agency action may file a petition for review in (1) the D.C. Circuit, or (2) the circuit in which the petitioner resides, or (3) the circuit in which the petitioner maintains its principal place of business. 28 U.S.C. § 2343. Mr. Montange complains that, under this provision, two petitioners who want to file a joint petition but do not want to file it in the D.C. Circuit are out of luck, unless they reside or maintain their principal places of business in the same circuit. Mr. Montange recommends that FRAP be amended to permit a joint petition for review of agency action to be filed in the D.C. Circuit or in any circuit in which at least one of the joint petitioners resides or maintains its principal place of business.

Several members briefly stated their opposition to the suggestion. The members thought that, even if it could do so under the REA, this Committee should not use FRAP to supercede the venue provisions of the Hobbs Act. No member spoke in favor of retaining Mr. Montange's suggestion on the study agenda.

A member moved that Item No. 98-05 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

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

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

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

In *United States v. Carmouche*, 138 F.3d 1014 (5th Cir. 1998), the Fifth Circuit fractured badly on this question. Judge DeMoss concluded that the particular motion filed by the defendant in *Carmouche*, although *labeled* a FRCrP 35(c) motion, was not, in fact, a FRCrP 35(c) motion, but was instead a "motion for reconsideration," and (apparently for that reason) tolled the time to appeal. Judge Duhé, joined by Judge Garwood, concluded that FRCrP 35(c) motions *do* toll the time to appeal, and that the particular motion filed by the defendant in *Carmouche* was exactly what it purported to be — a FRCrP 35(c) motion. Thus, all three judges agreed that the motion filed by the defendant tolled the time to appeal for *some* length of time, although they disagreed as to why.

The second question is this: Given that a district court has authority to correct a sentence under FRCrP 35(c) only when "acting within 7 days after the imposition of sentence," what happens when a timely FRCrP 35(c) motion is filed but the district court does not rule upon the motion until, say, 30 days after imposition of sentence? Again, the judges in *Carmouche* disagreed. Judge DeMoss argued that the authority of a district court to grant a motion should not necessarily be deemed coextensive with the tolling effect of that motion. Thus, even though a district court cannot grant a FRCrP 35(c) motion after the 7 day period expires, the time to appeal should continue to be tolled until the district court actually denies the motion. Judges Duhé and Garwood disagreed. They argued that, after the 7 day period of FRCrP 35(c) expires, any FRCrP 35(c) motion should be deemed denied — since the district court has lost any authority to grant that motion — and the time to appeal under Rule 4(b)(1) should begin to run. Thus, in the view of Judges Duhé and Garwood, if a defendant is sentenced on June 1 and files a FRCrP 35(c) motion on June 2, but the district court does not rule on the motion until June 30, the time to appeal begins to run on June 8. This is the law of the First Circuit, *see United States v. Morillo*, 8 F.3d 864, 867-70 (1st Cir. 1993), and, in the opinion of Judges Duhé and Garwood, it should be the law of the Fifth Circuit. However, an unpublished opinion of the Fifth Circuit is to the

contrary, *see United States v. Moya*, No. 94-10907 (5th Cir. July 25, 1995), and, under Fifth Circuit rules, that precedent binds the circuit until overturned by the en banc court.

Judge Garwood, who placed Item No. 98-06 on the Committee's study agenda, introduced this matter and reiterated his views. Judge Garwood also pointed out, in support of his position, that Rule 4(b)(5) specifically states that a FRCrP 35(c) motion does not "affect the validity of a notice of appeal filed before entry of the order disposing of the motion." In other words, Rule 4(b)(5) specifically provides that FRCrP 35(c) motions do not render the underlying judgments non-final.

Mr. Letter stated that the Justice Department strongly agrees with the First Circuit view advocated by Judges Duhé and Garwood in *Carmouche*. He urged that the issue be retained on the agenda and offered to make a specific proposal for amending Rule 4(b) at the next meeting of the Committee. Judge Garwood stated that he would welcome such a proposal from the Justice Department.

A member moved that Item No. 98-06 be retained on the study agenda. The motion was seconded. The motion carried (unanimously).

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

Rule 22(a) requires that a habeas petition be filed in the district court and that, if it is erroneously presented to a circuit judge, it be transferred to the district court. Judge Kenneth F. Ripple has suggested that Rule 22(a) be amended to permit circuit judges to deny habeas petitions. He argues that it is a waste of time for a circuit judge to review a frivolous habeas petition and then, instead of denying it, transfer it to a district judge, who will have to take the time to review it before denying it.

A member said that this issue is worthy of further study. This issue arises frequently under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which has been interpreted by some courts to bar aliens from filing petitions for judicial review of deportation orders, but to permit aliens to effectively seek judicial review by filing habeas petitions. Another member agreed; she stressed that she did not necessarily agree with Judge Ripple — in fact, she was sympathetic to retaining the requirement in Rule 22(a) that all habeas petitions be ruled upon in the first instance by district courts — but she wanted to give Judge Ripple's argument more thought.

Mr. Letter stated that the government was now involved in litigation over the IIRIRA provisions on this issue and offered to make a formal presentation — and perhaps to present a proposal for amending Rule 22(a) — at the Committee's next meeting. Judge Garwood said that such a presentation would be most welcome.

A member moved to retain Item No. 98-07 on the study agenda. The motion was seconded. The motion carried (unanimously).

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

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

The Reporter introduced this issue and said that, in his opinion, it would be appropriate for such a "54(b)-type" provision to appear in the rules of the Tax Court rather than in FRAP. He suggested referring this issue to the committee responsible for drafting amendments to the Tax Court's procedural rules.

Mr Letter asked that this matter be retained on the study agenda of this Committee. According to Mr. Letter, there is no final judgment rule for the Tax Court, and thus in theory *every* Tax Court order is immediately appealable. However, in practice, the circuits are split on whether and in what circumstances "partial" decisions of the Tax Court may be appealed. The normal practice of the Tax Court is not to issue a decision until all of the issues in dispute between the IRS and the taxpayer have been resolved. On occasion, though, the Tax Court varies from its normal practice and issues "partial" decisions, and the circuit courts have been inconsistent in their treatment of the appealability of such "partial" decisions. Mr. Letter's impression is that this issue needs to be addressed, but that FRAP is probably not the place to address it. Before this issue is removed from the Committee's study agenda, though, Mr. Letter would like to consult with the IRS and the Chief Judge of the Tax Court.

Several members expressed agreement with the Reporter that this issue is one that should be addressed in the rules of the Tax Court, and that FRAP should not be amended to incorporate a special "54(b)-type" provision applicable only to Tax Court decisions. Mr. Letter reiterated that he did not necessarily disagree, but wanted a chance to consult with the IRS and the Tax Court before this item was removed from the Committee's study agenda. Mr. Letter said that he would report back to the Committee at its next meeting.

A member moved that Item No. 98-08 be retained on the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

19. Item No. 98-09 (FRAP 32(a)(7)(B) — define "word")

Restylized Rule 32(a)(7) (set to take effect on December 1) 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 32(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. However, no where in Rule 32 is the word "word" defined.

Mr. Fulbruge said that the Fifth Circuit has for some time been enforcing limitations on briefs similar to those that will be implemented by restylized Rule 32, and that it has recently become clear that the failure of those limitations to define the word "word" has given counsel a loophole. Although Rule 32(a)(7)(C) states that an attorney who prepares her brief on computer *may* rely on the word count of the word processing software used to prepare the brief, it does not *require* use of the word count program. This permits attorneys to choose to count the words manually, and to define for themselves whether, e.g., numbers, symbols, and abbreviations count as words. For example, one attorney may count "*Smith v. Jones*, 150 F.3d 300 (5th Cir. 1998)" as two words, while another might count it as nine. Mr. Fulbruge described a recent Fifth Circuit case involving extraordinarily "creative" word counting by an attorney. Mr. Fulbruge suggests that Rule 32 may have to be rewritten to more specifically define "word."

A member asked whether *requiring* use of the computer's word count program would solve the problem. Mr. Fulbruge said that it would not. First, different word processing programs count words differently. Second, many pro se briefs are handwritten, often using tiny letters and lines cramped closely together. The only effective way of limiting the length of pro se briefs is by limiting the number of words. However, the clerks do not have time to manually count the words in these briefs — and, even if they did, they could not do so until "word" was first defined.

Judge Garwood said that, in his opinion, trying to define "word" in Rule 32 would be an exercise in futility. He said that the Fifth Circuit case described by Mr. Fulbruge was unusual; for the most part, the Fifth Circuit rule has worked well. Moreover, the lengthy handwritten pro se briefs described by Mr. Fulbruge are just an unfortunate reality of appellate judging. The "cheating" done by the pro se litigant — that is, the tiny handwriting and cramped lines — is far more likely to prejudice the litigant than the litigant's opponent.

A member said that the D.C. Circuit has imposed a word limit on briefs for almost 5 years and, to his knowledge, it has not been a problem. He noted, though, that the D.C. Circuit rule differs from restylized Rule 32 in an important respect: Under the D.C. Circuit rule, a party who prepares his brief on a computer must comply with a word count limit, while a party who does not prepare his brief on a computer must comply with a page count limit.

A member asked why the D.C. Circuit approach would not work for FRAP. For example, all principal briefs could be limited to 30 pages *unless* they were prepared on computer, in which case they would be limited to 14,000 words. However, other members expressed reluctance to begin rewriting restylized Rule 32 before it even takes effect.

A member said that trying to define "word" in Rule 32 would be a nightmare. She also pointed out that, even if "word" could be defined successfully, the very act of defining "word" would make it impossible for parties to rely on word count programs, as none of those programs would count words exactly like Rule 32.

Prof Coquillette asked whether it was possible to draft limitations that would apply only to pro se briefs or prisoner briefs. A couple members responded that, while it might be possible, they would be reluctant to single out specific categories of litigants in this manner. Prof. Coquillette said that he shared those sentiments and suggested that a better means for getting prisoners to comply with limitations on briefs is to create "plain English" forms and instructions. That step would at least help to eliminate abuses that are the result of ignorance of the rules.

A member moved that Item No. 98-09 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

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

Ms. McKenna drew the Committee's attention to the recently released report of the Commission on Structural Alternatives for the Federal Courts of Appeals and said that comments on the report from members of this Committee would be welcomed. She said that none of the Commission's proposals would immediately impact upon FRAP. The Committee briefly discussed some of the Commission's recommendations.

Judge Garwood thanked Mr. Munford for his outstanding service to this Committee and presented him with a certificate of appreciation.

VII. Scheduling of Dates and Location of Spring 1999 Meeting

The Committee agreed that it will meet in Washington, D.C., on April 15 and 16, 1999.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 9:35 a.m.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

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

APPENDIX

To the Minutes of the Fall 1998 Meeting of the Advisory Committee on Appellate Rules

Reporter's Note: This appendix contains copies of all amendments to the Federal Rules of Appellate Procedure and Committee Notes approved by the Advisory Committee on Appellate Rules at its October 1998 meeting.

Rule 1. Scope of Rules; Title

(b) ~~**Rules Do Not Affect Jurisdiction.** These rules do not extend or limit the jurisdiction of the courts of appeals.~~ [Abrogated]

Committee Note

Subdivision (b). Two recent enactments make it likely that, in the future, one or more of the Federal Rules of Appellate Procedure ("FRAP") will extend or limit the jurisdiction of the courts of appeals. In 1990, Congress amended the Rules Enabling Act to give the Supreme Court authority to use the federal rules of practice and procedure to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291. *See* 28 U.S.C. § 2072(c). In 1992, Congress amended 28 U.S.C. § 1292 to give the Supreme Court authority to use the federal rules of practice and procedure to provide for appeals of interlocutory decisions that are not already authorized by 28 U.S.C. § 1292. *See* 28 U.S.C. § 1292(e). Both § 1291 and § 1292 are unquestionably jurisdictional statutes, and thus, as soon as FRAP is amended to define finality for purposes of the former or to authorize interlocutory appeals not provided for by the latter, FRAP will "extend or limit the jurisdiction of the courts of appeals," and subdivision (b) will become obsolete. For that reason, subdivision (b) has been abrogated.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later:

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

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

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

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

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

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such

remaining motion is entered or when the judgment altered or amended in response to such a motion is entered, whichever comes later.

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

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

* * *

(7) **Entry Defined.** 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, but compliance with Rule 58 is not required when an order denies all relief sought by any motion listed in Rule 4(a)(4)(A). The failure to enter an order or judgment under Rule 58 when required does not invalidate an otherwise timely appeal from that order or judgment.

Committee Note

Subdivisions (a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii). The Committee intends that when a district court, in ruling upon one of the post-judgment motions listed in Rule 4(a)(4)(A), orders that a judgment be altered or amended, the time to appeal that order and the altered or

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

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

Subdivision (a)(7) has been amended to adopt the position of the Fifth and Seventh Circuits. The time to appeal an order *granting* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) does not begin to run until it is entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order usually alters or amends a judgment, the order should be entered with the same formality as a judgment. The time to appeal an order *denying* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) begins to run immediately upon entry of the order, whether or not the order has been entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order does not disturb the original judgment, compliance with the separate document requirement of Fed. R. Civ. P. 58 should be unnecessary.

Subdivision (a)(7) has been further amended to apply the one-way waiver doctrine when any order or judgment — whether or not it disposes of a post-judgment motion — is required to be entered in compliance with Fed. R. Civ. P. 58 but is not. In that situation, the party against whom the order or judgment is entered has two options. First, the party can choose to appeal the order or judgment, and thereby waive its right to have the order or judgment entered in compliance with Fed. R. Civ. P. 58. The appeal will be heard, even if the appellee objects to the

lack of a Fed. R. Civ. P. 58 order or judgment. Second, the party can wait until the order or judgment is entered in compliance with Fed. R. Civ. P. 58 and then appeal. In theory, the party could wait forever to appeal, but, in practice, this is highly unlikely. Nevertheless, "[v]ictorious litigants wishing to write *finis* to the case would do well to ensure that the district court adheres to Rule 58." *Otis v. City of Chicago*, 29 F.3d 1159, 1167 (7th Cir. 1994) (en banc).

The incorporation of the one-way waiver doctrine in subdivision (a)(7) reflects the fact that the separate document requirement is imposed for the benefit of the losing party. If that party wishes to waive that requirement by bringing a premature appeal, it seems pointless to dismiss the appeal, require the district court to enter the order or judgment on a separate document, and force the party to appeal a second time. "Wheels would spin for no practical purpose." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978). At the same time, the right of the losing party to have an order or judgment entered in compliance with Rule 58 should not be lost through the party's silence. Cases to the contrary — in particular, *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229 (1st Cir. 1992) (en banc) — are expressly rejected.

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

Committee Note

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought after the expiration of the original deadline. *See Pontarelli v. Stone*, 930 F.2d 104, 109-10 (1st Cir.1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). What these courts have overlooked is that the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. *See* 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district

court to extend the time for filing a notice of appeal in a *criminal* case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or after the time prescribed by Rule 4(b) expires.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

Rule 15. Review or Enforcement of an Agency Order — How Obtained; Intervention

(f) Petition or Application Filed Before Agency Action Becomes Final. If a petition for review or application to enforce is filed after an agency announces or enters its order — but before it disposes of any petition for rehearing, reopening, or reconsideration that renders that order non-final and non-appealable — the petition or application becomes effective to appeal or seek enforcement of the order when the agency disposes of the last such petition for rehearing, reopening, or reconsideration.

Committee Note

Subdivision (f). Subdivision (f) is modeled after Rule 4(a)(4)(B)(i) and is intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal. Subdivision (f) does not address whether or when the filing of a petition for rehearing, reopening, or reconsideration renders an agency order non-final and hence non-appealable. That is left to the wide variety of statutes, regulations, and judicial decisions that govern agencies and appeals from agency decisions. *See, e.g.*, *ICC v. Brotherhood of Locomotive Eng'rs*, 482 U.S. 270 (1987). Rather, subdivision (f) provides that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing, petition for reopening, petition for reconsideration, or functionally similar petition, any petition for review or application to enforce that non-final order will be held in abeyance and become effective when the agency disposes of the last such finality-blocking petition.

Subdivision (f) is designed to eliminate a procedural trap. Some circuits hold that petitions for review of agency orders that have been rendered non-final (and hence non-appealable) by the filing of a petition for rehearing (or similar petition) are "incurably premature," meaning that they do not ripen or become valid after the agency disposes of the rehearing petition. *TeleSTAR, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir. 1989) (per curiam); *see also Chu v. INS*, 875 F.2d 777, 781 (9th Cir. 1989), *overruled on other grounds by Pablo v. INS*, 72 F.3d 110 (9th Cir. 1995); *West Penn Power Co. v. EPA*, 860 F.2d 581, 588 (3d Cir. 1988); *Aeromar, C. Por A. v. Department of Transp.*, 767 F.2d 1491, 1493-94 (11th Cir. 1985). In these circuits, if a party aggrieved by an agency action does not file a second timely petition for review after the petition for rehearing is denied by the agency, that party will find itself out of time: Its first petition for review will be dismissed as premature, and the deadline for filing a second petition for review will have passed. Subdivision (f) removes this trap.

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.

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. This creates 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 but will be counted when computing deadlines of 11 days and over.

III

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 7-8, 1999
Marco Island, Florida

Draft Minutes

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Marco Island, Florida on Thursday and Friday, January 7-8, 1999. The following members were present:

Judge Anthony J. Scirica, Chair
Judge Frank W. Bullock, Jr.
Charles J. Cooper, Esquire
Professor Geoffrey C. Hazard, Jr.
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge Morey L. Sear
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge Phyllis A. Kravitch and Deputy Attorney General Eric H. Holder were unable to be present. The Department of Justice was represented at the meeting by Neal K. Katyal, Advisor to the Deputy Attorney General. Roger A. Pauley also participated in the meeting on behalf of the Department.

Providing support to the committee were: Professor Daniel R. Coquillette, reporter to the committee; Peter G. McCabe, secretary to the committee; John K. Rabiej, chief of the Rules Committee Support Office of the Administrative Office of the United States Courts, Mark D. Shapiro, deputy chief of that office, and Nancy G. Miller, the Administrative Office's judicial fellow.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Will L. Garwood, Chair
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., consultant to the committee; Professor Mary P. Squiers, project director of the local rules project; and Marie C. Leary of the Research Division of the Federal Judicial Center.

Alan C. Sundberg, former member of the committee attended the meeting and was presented with a certificate of appreciation, signed by the Chief Justice, for his distinguished service on the committee over the past six years.

INTRODUCTORY REMARKS

Judge Scirica reported that Judge Stotler was unable to attend the meeting because she had to participate in the dedication of the new federal courthouse in Santa Ana, California. He added that she would participate at the next committee meeting, to be held in Boston in June 1999.

Judge Scirica noted that he was participating in his first meeting as chair of the Standing Committee. He stated that it had been his great honor to have served for six years as a member of the Advisory Committee on Civil Rules under three extraordinary chairmen — Judges Pointer, Higginbotham, and Niemeyer.

Judge Scirica observed that it was very important for the rules committees to uphold the integrity of the Rules Enabling Act and be vigilant against potential violations of the Act. At the same time, he pointed out that the committees had to be careful in their work in distinguishing between matters of procedure and substance.

He emphasized the importance of establishing and maintaining good professional relations with members and staff of the Congress. He said that it would be ideal if these relationships were personal and long-lasting. But membership changes in the Congress and on the committees make it difficult as a practical matter to achieve that goal. Nevertheless, he said, it is possible to keep the Congress informed about the benefits of the Rules Enabling Act, the important institutional role of the rules committees, and ways in which the committees can be of service to the Congress.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on June 18-19, 1998.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej presented a list of 41 bills introduced in the 105th Congress that would have had an impact on the federal rules or the rulemaking process. (Agenda Item 3A) He pointed out that the Administrative Office had monitored the bills on behalf of the rules committees and the Judicial Conference, and it had prepared several letters for the chair to send to members of Congress commenting on the language of specific bills and emphasizing the need to comply with the provisions of the Rules Enabling Act. He noted that only three of the 41 bills had actually been enacted into law, and their impact on the federal rules would be comparatively minor. They included provisions: (1) establishing a new evidentiary privilege governing communications between a taxpayers and an authorized tax practitioner, (2) requiring each court to establish voluntary alternative dispute resolution procedures through local rules, and (3) subjecting government attorneys to attorney conduct rules established under state laws or rules.

Mr. Rabiej stated that comprehensive bankruptcy legislation had come close to being enacted in the 105th Congress, and it likely would be reintroduced in the 106th Congress. He pointed out that the legislation, if enacted, would create an enormous amount of work for the Advisory Committee on Bankruptcy Rules. He also predicted that legislation would also be reintroduced in the new Congress to federalize virtually all class actions.

Administrative Actions

Mr. Rabiej reported that the Rules Committee Support Office was now sending comments from the public on proposed amendments to the rules to committee members by electronic mail. He noted that the Administrative Office had received about 160 comments from the bench and bar on the proposed amendments to the bankruptcy rules, about 110 comments on the amendments to the civil rules, and about 65 comments on the amendments to the evidence rules. He added that all the comments, together with committee minutes, would be placed on a CD-ROM and made available to all the members of the advisory and standing committees.

when transmitting rules amendments to Congress, by legal publications, and by the legal profession generally.

Professor Cooper and Mr. Rabiej responded that the use of the term "Committee Notes" had been selected over "Advisory Committee Notes" because the Standing Committee from time to time revises or supplements the notes of an advisory committee. As a result, the published notes will contain language representing the input of both the pertinent advisory committee and the standing committee, and it is often difficult to tell exactly what has been authored by each committee.

Judge Garwood pointed out that when the Standing Committee proposes that a change be made in a note *before publication,* the chair of the advisory committee will take the matter back to the advisory committee for consideration of the change. As a rule, the advisory committee will in fact agree with — and often improve upon — the proposed change and incorporate it into the publication distributed to bench and bar. Therefore, the note effectively remains that of the advisory committee. On the other hand, when changes in a note are made by the standing committee *after publication,* the chair of the advisory committee will normally accept the changes at the standing committee meeting on behalf of the advisory committee and thereby avoid the delay of returning them for further consideration by the advisory committee.

Professor Coquillette added that the standing committee has always been deferential to the advisory committees in the preparation of committee notes, and it normally will make only minor changes in the notes and obtain the agreement of the chair and reporter of the pertinent advisory committee in doing so. But, he said, when the standing committee proposes changes that are major in nature, or disputed, it will normally send the note back to the advisory committee for further consideration and redrafting. He concluded that the question of the appropriate terminology for the notes was an important matter that would be discussed further at the reporters' next luncheon.

Proposed Effective Date for Local Rules

Judge Garwood reported that the advisory committee at its April 1998 meeting had drafted a proposed amendment to FED. R. APP. P. 47(a)(1) that would mandate an effective date of December 1 for all local court rules, except in cases of "immediate need." After the meeting, however, the advisory committee was informed by the Advisory Committee on Civil Rules that the concept of having a uniform, national effective date for local rules may conflict with the Rules Enabling Act, which gives each court authority to prescribe the effective date of their local rules. 28 U.S.C. § 2071(b).

Judge Garwood said that the Advisory Committee on Appellate Rules had not considered this potential legal impediment at its April meeting. Rather, it had focused only on the merits of the proposal referred to all the advisory committees to fix a uniform national effective date for all local rules. Accordingly, he suggested that it would be appropriate for the standing committee to make a threshold decision on whether the Rules Enabling Act would permit amendments to the national rules to mandate effective dates for local rules. If the committee were to decide that there would be no conflict with the Rules Enabling Act, the Advisory Committee on Appellate Rules would recommend fixing a single annual date of December 1 for all local rules of court, except in the case of emergencies.

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 3, 1998. (Agenda Item 6)

Pending Amendments to the Bankruptcy Rules

Judge Duplantier reported that a heavy volume of comments had been received from bench and bar in response to the "litigation package" of proposed amendments to the Federal Rules of Bankruptcy Procedure. He said that the great majority of the comments had expressed opposition to the package generally. The most common argument made in the comments, he said, was that the proposed amendments were simply not needed and would impose elaborate and burdensome procedures for the handling of a heavy volume of relatively routine matters in the bankruptcy courts. Most of the bankruptcy judges who commented, he said, had argued that FED. R. BANKR. P. 9013 and 9014 currently work well because they give judges flexibility — through local rules on motion practice — to distinguish among various types of "contested matters" and to fashion efficient and summary procedures to decide routine matters.

He added that many judges also had commented negatively about the requirement in revised Rule 9014 that would make FED. R. CIV. P. 43(e) inapplicable at an evidentiary hearing on an administrative motion. The proposed amendment would thus require witnesses to appear in person and testify — rather than give testimony by affidavit — when there is a genuine issue of material fact.

Judge Duplantier pointed out that the advisory committee would hold a public hearing on the proposed amendments on January 28, 1999, and it would meet again in March to consider all the comments and make appropriate decisions on the amendments.

Omnibus Bankruptcy Legislation

Professor Resnick reported that comprehensive bankruptcy legislation was likely to be introduced early in the new Congress. Among other things, it would probably add new provisions to the Bankruptcy Code to govern small business cases and international or transnational bankruptcies. In addition, the Congress may alter the appellate structure for bankruptcy cases and authorize direct appeals from a bankruptcy judge to the court of appeals. He said that the sheer magnitude of the expected legislative changes would likely require the Advisory Committee on Bankruptcy Rules to review in essence the entire body of Federal Rules of Bankruptcy Procedure and Official Forms in order to implement all the new statutory provisions.

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 10, 1998. (Agenda Item 7)

He pointed out that the committee was seeking authority to publish for comment proposed amendments that would abrogate the copyright rules and bring copyright impoundment procedures explicitly within the injunction procedures of FED. R. CIV. P. 65.

Copyright Rules

Professor Cooper noted that the proposed abrogation of the Copyright Rules of Practice had been proposed in 1964, but had been deferred for various reasons since that time. He explained that the advisory committee was now recommending:

1. abrogating the separate body of copyright rules;
2. adding a new subdivision (f) to FED. R. CIV. P. 65 to bring copyright impoundment procedures within that rule's injunction procedures; and
3. amending FED. R. CIV. P. 81 to reflect the abrogation of the copyright rules.

He noted that FED. R. CIV. P. 81 would also be amended both to restyle its reference to the Federal Rules of Bankruptcy Procedure and eliminate its anachronistic reference to mental health proceedings in the District of Columbia.

Professor Cooper explained that the language of the current Rule 81 was the starting point in considering the proposed amendments. RULE 81 states explicitly that the Federal Rules of Civil Procedure do not apply to copyright proceedings, except to the extent that a rule adopted by the Supreme Court makes them apply. Professor Cooper then pointed out that Rule 1 of the Copyright Rules of Procedure promulgated by the Supreme Court

specifies that copyright proceedings are to be governed by the Federal Rules of Civil Procedure. But that rule applies only to proceedings brought under the 1909 Copyright Act, which was repealed by the Congress in 1976. Thus, on the face of it, there appear to be no current rules governing copyright infringement proceedings.

Professor Cooper pointed out that the remainder of the copyright rules establish a pre-judgment procedure for seizing and holding infringing items and the means of making those items. But the procedure does not provide for notice to the defendant of the proposed impoundment, even when notice can reasonably be provided. Nor does it provide for a showing of irreparable injury as a condition of securing relief, nor for the exercise of discretion by the court. Rather, the Copyright Rules provide that an application to seize and hold items is directed to the clerk of court, who signs the writ and gives it to the marshal.

To that extent, he said, the rules are inconsistent with the 1976 copyright statute that vests a court with discretion both to order impoundment and to establish reasonable terms for the impoundment. Professor Cooper added that the pertinent case law leads to the conclusion that the procedures established by the copyright rules would likely not pass constitutional muster.

He stated that most of the courts have reacted to the lack of explicit legal authority for copyright impoundment procedures by applying the Federal Rules of Civil Procedure, especially FED. R. CIV. P. 65, which sets forth procedures for issuing restraining orders and authorizing no-notice seizures in appropriate circumstances. He added that the amendments proposed by the advisory committee would regularize the current practices of the courts and provide them with a firm legal foundation.

He also noted that another important advantage of the proposed amendments is that they would make it clear that the United States will meet its responsibilities under international conventions to provide effective remedies for preventing copyright infringements. To that end, the proposed changes would give fair and timely notice to defendants, vest adequate authority in the judiciary, and provide other elements of due process. He said that the proposed amendments would let the international community know that the United States has clear and effective procedures against copyright infringements. He added that the copyright community had expressed its acceptance of the advisory committee's proposal.

The committee approved abrogation of the copyright rules and adoption of the proposed amendments to the civil rules for publication without objection.

Discovery Rules

Judge Niemeyer reported that the standing committee had approved publication of a package of changes to the discovery rules at its last meeting. He noted that the volume of public comments received in response to the proposed amendments had been heavy. The majority of the comments, he said, were favorable to the package, but there had also been many negative comments. He added that the advisory committee had conducted one public hearing on the amendments in Baltimore, and it would conduct additional hearings in San Francisco and Chicago. Following the hearings and additional review of all the comments at its next business meeting, he said, the advisory committee could present a package of proposed amendments to the standing committee for final action in June 1999.

Mass Torts

Judge Niemeyer reported that the Chief Justice had authorized a Mass Torts Working Group, spearheaded by the Advisory Committee on Civil Rules, to conduct a comprehensive review of mass-tort litigation for the Judicial Conference. The group held four meetings in various parts of the country to which it invited prominent attorneys, litigants, judges, and law professors to discuss mass tort litigation. Judge Niemeyer stated that the legal and policy problems raised by mass torts were both numerous and complex. He added that the group had prepared a draft report identifying the principal problems arising in mass torts and suggesting a number of possible solutions that might be pursued by the Judicial Conference, in cooperation with the Congress and others. The final report, he said, would be presented to the Chief Justice in February 1999.

Special Masters

Judge Niemeyer noted that the Advisory Committee on Civil Rules had appointed a special subcommittee, chaired by Chief Judge Roger C. Vinson, to study the issues arising from the use of special masters in the courts.

Local Rules of Court

Judge Niemeyer reported that the advisory committee would address a number of concerns raised by the proliferation of local rules of court. He noted that the Civil Justice Reform Act had encouraged local variations in civil procedure, with a resulting erosion of national procedural uniformity among the district courts. He noted that the advisory committee was giving preliminary consideration to two alternative amendments to FED. R. CIV. P. 83.

The first suggested amendment would provide that a local rule of court could not be enforced until it is received in both the Administrative Office and the judicial council of the

circuit. The second alternative would go much further and provide that a court could not enforce a new local rule or amended rule — except in case of "immediate need" — until 60 days after the court has: (a) given notice of it to the judicial council of the circuit and the Administrative Office; and (b) made it available to the public and provided them with an opportunity to comment. Under this alternative, the Administrative Office would be required to review all new local rules or amendments and report to the district court and the circuit council if it finds that they do not conform to the requirements of Rule 83. If a new rule or amendment has been reported by the Administrative Office, enforcement of it would be prohibited until the judicial council has approved the provision.

Judge Niemeyer pointed out that the advisory committee would like to see greater national procedural uniformity and fewer local rules. He added that proposed changes in the provisions dealing with local rule authority would have to be coordinated among the other advisory committees under the supervision of the standing committee.

One of the members responded that there was a legitimate need for local rules of court, especially to govern matters that necessarily have to be treated individually in each district — such as issues flowing from geographic considerations. In addition, he said, local rules help to reduce variations in practice among the judges within a district. He pointed out that the Rules Enabling Act requires the circuit councils to review and, if necessary, modify or abrogate local rules. Accordingly, he said, the most appropriate way to deal with problems that may arise from local rules of court is not to limit the authority of the courts to issue local rules, but to persuade the respective circuit councils to review the rules adequately. He added that the council in his own circuit had been very conscientious in reviewing and commenting on the local rules of the courts within the circuit.

Judge Scirica said that the proposed amendments were very helpful, and he suggested that they be referred to the local rules project for consideration in connection with a new, national study of local rules.

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 3, 1998. (Agenda Item 8)

FED. R. CRIM. P. 32.2 - *Criminal Forfeiture*

Judge Davis reported that the proposed new FED. R. CRIM. P. 32.2 — together with proposed conforming amendments to FED. R. CRIM. P. 7, 31, 32, and 38 — would govern criminal forfeiture in a comprehensive manner. He noted that an earlier version of the new rule had been presented to the standing committee at its June 1998 meeting but rejected by a

vote of 7 to 4. He said that much of the discussion at the standing committee meeting had focused on whether a defendant would be entitled to a jury trial on the issue of the nexus between the offense committed by the defendant and the property to be forfeited. In addition, concerns had been raised at the meeting regarding the right of the defendant to present evidence at the post-verdict ancillary proceeding over ownership of the property.

Judge Davis explained that the advisory committee had considered the rule anew at its October 1998 meeting, taking into account the concerns expressed by the standing committee. As a result, the advisory committee had made changes in the rule to accommodate those concerns, and it had made a number of other improvements in the rule as well. The advisory committee, he said, recommended approval of the revised version of Rule 32.2, and he directed attention to a side-by-side comparison of the June 1998 version and the revised version of the rule. He then proceeded to summarize each of the principal changes made by the advisory committee since the last meeting.

First, he pointed out that the principal change made by the advisory committee had been to paragraph (b)(4) of the rule. The revised language would specify that either the defendant or the government may request that the jury determine the issue of the requisite nexus between the property to be forfeited and the offense committed by the defendant.

He said that the advisory committee had also added language to paragraph (b)(1) to provide explicitly that both the government and the defendant have the right to present evidence to the court on the issue of the nexus between the property and the offense. To that end, the revised rule provided specifically that the court's determination may be based on evidence already in the record, including any written plea agreement, or — if the forfeiture is contested — on evidence or information presented by the parties at a hearing after the verdict or finding of guilt.

Judge Davis stated that the advisory committee had amended paragraph (b)(1) to include a specific reference to money judgments. He noted that the courts of appeals of four circuits had held that the government may seek not only the forfeiture of specific property, but also a personal money judgment against the defendant. He said that there was no reason to treat a forfeiture of specific property in the same manner as a forfeiture of a sum of money. Thus, paragraph (c)(1) had also been amended to provide that an ancillary proceeding is not required to the extent that the forfeiture consists of a money judgment.

Judge Davis noted that the advisory committee had amended Rule 32.2(a) to make it clear that the government need only give the defendant notice in the indictment or information that it will seek forfeiture of property. The earlier version had required an allegation of the defendant's interest in property subject to forfeiture.

Paragraph (b)(2) had been revised to make it clear that resolution of a third party's interest in the property to be forfeited had to be deferred until the ancillary proceeding. Paragraph (b)(3) had been amended to allow the Attorney General to designate somebody outside the Department of Justice, such as the Department of the Treasury, to seize property.

Judge Davis noted that paragraph (c)(2) had been simplified to make it clear that if no third party is involved, the court's preliminary order of forfeiture becomes the final order if the court finds the defendant had an interest in the property that is forfeitable under the applicable statute. He said that under subdivision (e) there would be no right to a jury trial on the issue of subsequently located property or substitute property

Judge Davis said that the advisory committee had spent more than two and one-half years in considering the rule and had devoted two hearings and several meetings to it. He said that the committee was very comfortable with the revised rule and believed that it would bring order to a complicated area of the law.

Judge Wilson moved to approve the revised rule, subject to appropriate restyling, and send it to the Judicial Conference. He added that he had opposed the rule at the June 1998 meeting, but said that inclusion of a provision for the jury to determine the issue of the nexus between the property and the offense had led him to support the current proposal.

One of the members expressed continuing concern over the jury trial issue and suggested that the revised rule was internally inconsistent in that it provided for a jury's determination in certain situations, but not in others. He said that he was troubled over the issue of money judgments, in that the government would be given not only a right to forfeit specific property connected with an offense, but also a right to restitution for an amount of money equal to the amount of the property that would otherwise be seized. He suggested that the money judgment concept constituted a improper extension beyond what is authorized by the pertinent forfeiture statutes.

Judge Davis responded that at least four of the circuits had authorized the practice. He added that the advisory committee was only attempting to provide appropriate procedures to follow in those circuits where money judgments are authorized under the substantive law of the circuit. The underlying authority, he said, is provided by circuit law, not by the rule. At Judge Tashima's request, Judge Davis agreed to insert language in the committee note to the effect that the committee did not take a position on the correctness of those rulings, but was only providing appropriate procedures for those circuits that allowed money judgments in forfeiture cases.

One member expressed concern about the concept of seizure in connection with a money judgment. He noted that paragraph (b)(3) of the revised draft provided that the

government may "seize the property," and he suggested that the word "specific" be added before the word "property." Thus, the government could not "seize" money. It could only seize the "specific property" specified in paragraph (b)(2). Judge Davis agreed to accept the language change.

Another member questioned why a jury trial would be required to determine the nexus of the property to the offense, but not when substitute property is involved. Judge Davis responded that it would be very difficult to do so, since substitute property is usually not found until after the trial is over and the original property has been converted or removed. Mr. Pauley added that the pertinent case law had been uniform in holding that there is no jury-tial right as to substitute and later-found property.

Chief Justice Veasey expressed support for the substance of the revised amendments submitted by the advisory committee. But he pointed to a letter recently received from the National Association of Criminal Defense Lawyers, which had been distributed to the members before the meeting. The letter argued that the advisory committee had made major changes in the original proposal, had approved the rule by a vote of 4 to 3, and should be required to republish it for additional public comment. He said that he was concerned about forwarding the revised new rule to the Judicial Conference without further publication. **Accordingly, Chief Justice Veasey moved to republish proposed new Rule 32.2 for additional public comment.**

Professor Schlueter responded that the 4-3 vote in the advisory committee had been on the question of whether a right to a jury determination should be preserved in light of the Supreme Court's decision in *Libretti v. United States.* In that case, the Court held that criminal forfeiture is a part of the sentencing process. He added that considerable sentiment remained in the advisory committee that a jury determination is simply not required.

Judge Davis and three members of the committee added that it was unlikely that any additional, helpful information would be received if the proposed rule were to be published again. They recommended that the committee approve the revised rule and send it to the Conference.

The motion to republish the rule for further comment was defeated by a vote of 9 to 2.

Judge Tashima moved to adopt the proposed Rule 32.2 and the companion amendments to Rules 7, 31, 32, and 38 and send them to the Judicial Conference, subject to: (a) making appropriate style revisions, and (b) adding language to the committee note stating that the committee takes no position on the merits of using money judgments in forfeiture proceedings. The committee thereupon voted to approve the proposed new rule without objection.

Judge Davis and Professor Schlueter presented the committee with an additional sentence that would be inserted at line 277 of the committee note. After accepting suggestions from Mr. Sundberg and Judge Duplantier, they agreed to add the following language: "A number of courts have approved the use of money forfeiture judgments. The committee takes no position on the correctness of those rulings."

Professor Schlueter added that the advisory committee wished to delete the words "legal or possessory" from line 422 of the committee note. Thus, the pertinent sentence in the note would read: "Under this provision, if no one files a claim in the ancillary proceeding, the preliminary order would become the final order of forfeiture, but the court would first have to make an independent finding that at least one of the defendants had an interest in the property such that it was proper to order the forfeiture of the property in a criminal case."

Presence of Defense Attorneys in Grand Jury Proceedings

Judge Davis reported that the congressional conference report on the Judiciary's appropriations legislation required the Judicial Conference to report to Congress by April 15, 1999, on whether Rule 6(d) of the Federal Rules of Criminal Procedure should be amended to allow a witness appearing before a grand jury to have counsel present.

He noted that the time frame provided by the Congress was extremely short and simply did not permit a comprehensive study of the issues. The Advisory Committee on Criminal Rules, he said, had appointed a special subcommittee to consider the matter and make recommendations. The subcommittee reviewed earlier studies, including: (a) a comprehensive report by the Judicial Conference to the Congress in 1975 that declined to support a change to Rule 6(d); and (b) a 1980 report by the Department of Justice to the Congress opposing pending legislation that would have allowed attorney representation in the grand jury room. He noted that the subcommittee had decided that the reasons stated in the past for declining to amend Rule 6(d) remained valid today. In summary, he said, the three principal reasons for not allowing a witness to bring an attorney into the grand jury were that the practice would lead to:

1. loss of spontaneity in testimony;
2. transformation of the grand jury into an adversary proceeding; and
3. loss of secrecy, with a resultant chilling effect on witness cooperation, particularly in cases involving multiple representation.

Judge Davis said that the subcommittee had concluded by a vote of 3 to 1 not to recommend any changes Rule 6(d). The full advisory committee was then polled by a mail vote, and it concurred in the recommendation of the subcommittee by a vote of 9 to 3.

Judge Davis reported that members of the advisory committee had been concerned that allowing attorneys in the grand jury without a judge present would create problems and prolong the proceedings. He pointed out that about half the states that have retained a grand jury system do in fact permit lawyers in grand jury proceedings, but he noted that there were other ways to indict defendants in these states.

One member stated that he was in favor of amending Rule 6 to relax the restriction on the presence of attorneys. He suggested that it was not necessary to allow individual lawyers for every witness, but at least one attorney might be present to protect the basic rights of witnesses and prevent abuse and mistreatment by prosecutors. A second member expressed support for the suggestion and added that it would be fruitful to establish pilot districts to test out the concept and see whether a limited presence of attorneys for witnesses would lead to improvements in the grand jury system.

A third member concurred with the suggestion to establish pilot projects. He said that the advisory committee might wish to explore an amendment to Rule 6(d) to allow an attorney for a witness in the grand jury room upon the express approval of the court or the United States attorney. He added, however, that the time given by the Congress to respond was unreasonably short and did not allow for thoughtful consideration of alternatives. As a result, the committee would have to take a quick "up or down" vote at this time, but it could at a later date consider the advisability of further research and the establishment of pilot projects. Judge Scirica added that the judiciary had inquired informally as to whether the Congress would be amenable to giving additional time to respond, but had been informed that a request along those lines would not be well received.

Mr. Pauley expressed the strong support of the Department of Justice for the advisory committee's report and recommendation. He pointed out that the proposal to amend Rule 6(d) was not new and had been rejected in the past. He added that the Department was very much opposed to a change in the rule and feared that it would adversely impact its ability to investigate organized crime. He concluded a prerequisite for consideration of any change in the rule should be the demonstration of an "overwhelming" case of need for the change.

Mr. Pauley also emphasized that the Department of Justice had taken effective steps against potential prosecutorial abuses and had set forth effective safeguards in the United States attorneys' manual. Among other things, the manual requires prosecutors to give *Miranda* warnings to witnesses who may be the target of grand jury proceedings. He added that the Department enforced the manual strictly.

Chief Justice Veasey moved to approve the report of the advisory committee.

Judge Wilson moved, by way of amendment, to have the committee inform the Judicial Conference that it did not support changes in Rule 6(d) at this time, but that it would enthusiastically support the establishment of pilot studies to test the impact of the presence of lawyers for witnesses in the grand jury.

Another member said that empirical data would be needed to test the concerns expressed on both sides of the issue and how they would play out in practice. He suggested that, rather than establishing a pilot program, it would be advisable at the outset to research the practice and experience in the states that permit lawyers into the grand jury room.

Three other members said that the advisory committee might well study the issues further and make appropriate recommendations for change in the future, but they emphasized that the Judicial Conference had been required by legislation to provide a quick response to the Congress. Therefore, the committee had to take a "yes or no" vote on whether to amend Rule 6(d) at this time.

Judge Scirica proceeded to call the question, noting that the committee could discuss at a later point whether any pilot projects or additional research were needed. He noted that the Advisory Committee on Criminal Rules would be responsible for taking the lead on giving any additional consideration to the matter.

The committee voted to reject Judge Wilson's amendment by a voice vote.

It then approved Chief Justice Veasey's motion to approve the report of the advisory committee by a vote of 7 to 2. Judges Wilson and Tashima noted for trhe record their opposition to the motion.

One of the members said that there was no need to discuss the matter of pilot projects further since the chair and reporter of the Advisory Committee on Criminal Rules had just participated in the discussion and could take the issues and suggestions back to the advisory committee for any additional consideration. Judge Davis concurred and noted that the Rules Committee Support Office had already begun to gather information on state practices regarding attorneys for witnesses in grand jury proceedings.

Restyling of the Criminal Rules

Professor Schlueter reported that the advisory committee had been working with the style subcommittee to restyle the Federal Rules of Criminal Procedure. He said that the committee would spend a substantial amount of time on the restyling project at its next several meetings, and it would address other matters only if they were found to be essential. He added that Professor Stephen Saltzburg had been engaged by the Administrative Office to work with the advisory committee and the style subcommittee on the restyling project.

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 1, 1998. (Agenda Item 9)

Judge Smith reported that the advisory committee had no action items to present to the standing committee. She noted that a substantial number of public comments had been received in response to the package of rule amendments published in August 1998 and that:

1. eight commentators had appeared before the committee at its October 1998 hearing in Washington;
2. the December 1998 hearing in Dallas had been canceled; and
3. at least 15 people had filed requests to date to testify at the San Francisco hearing in January 1999.

Judge Smith said that most of the comments received had been directed to the proposed amendments to FED. R. EVID. 701-703, dealing with expert testimony.

FED. R. EVID. 701-703

Judge Smith noted that the proposed amendment to FED. R. EVID. 701 was designed to prohibit the use of expert testimony in the guise of lay testimony. The Department of Justice, she said, had submitted a negative comment on the proposal, but the other public comments in response to the rule had been positive. She added that the advisory committee was listening to the Department's concerns and was open to refining the language of the amendment further, particularly with regard to drawing a workable distinction between lay testimony and expert testimony.

Judge Smith explained that the proposed amendment to FED. R. EVID. 702 would provide specific requirements that must be met for the admission of all categories of expert testimony. She said that the public comments received in response to the proposed amendments to Rule 702 were about evenly divided, with defense lawyers strongly in favor of the amendments and plaintiffs' lawyers strongly opposed to them.

She noted that the Supreme Court had recently granted certiorari in *Kumho Tire v. Carmichael,* where the issue was whether the gatekeeping standards set down by the Supreme Court in the *Daubert* case apply to the testimony of a tire failure expert who had testified largely on the basis of his personal experience. She said that the Department of Justice had cautioned against making amendments in the rule before the Court renders its decision in the *Kumho* case. But, she said, the advisory committee wanted to continue receiving public comments on the merits of the proposed amendment to Rule 702. The

advisory committee, though, would await the outcome of the *Kumho* case before forwarding any amendment to the Standing Committee.

Judge Smith pointed out that the amendment to FED. R. EVID. 703 would limit the ability of an attorney to introduce hearsay evidence in the guise of information relied upon by an expert. She said that the advisory committee wanted to admit the opinion of the expert into evidence but have a presumption against admitting the underlying information relied upon by the expert unless it is independently admissible. She reported that the public comments on Rule 703 had been uniformly positive.

FED. R. EVID. 103

Judge Smith noted that the proposed amendment to FED. R. EVID. 103 would provide that there is no need for an attorney to renew an objection to an advance ruling of the court on an evidentiary matter as long as the court makes a "definitive ruling" on the matter. She said that some public comments had questioned whether the term "definitive ruling" was sufficiently explicit.

FED. R. EVID. 404

Judge Smith pointed out that the proposed amendment to FED. R. EVID. 404 would provide that if an accused attacked the character of a victim, evidence of a "pertinent" character trait of the accused may also be introduced. She explained, however, that use of the term "pertinent" in the proposed amendment might allow the introduction of more matters than the advisory committee believes advisable. Accordingly, she said, it was inclined to refine the language of the proposed amendment to allow the introduction only of evidence bearing on the "same" character trait of the witness. She added that the issue arises most frequently in matters of self-defense. Thus, for example, if the defendant were to attack the aggressiveness of a witness, the witness could in turn raise the question of the aggressiveness of the defendant.

FED. R. EVID. 803 AND 902

Judge Smith said that the proposed amendments to FED. R. EVID. 803(g) and 902 would allow certain business records to be admitted into evidence as a hearsay exception without calling the custodian for in-court testimony. She said that the proposed rule would provide consistency in the treatment of domestic business records and foreign business records. Currently, she noted, proof of foreign business records in criminal cases may be made by certification, but business records in civil cases and domestic business records in criminal cases must be proven by the testimony of a qualified witness.

DISCLOSURE OF FINANCIAL INTERESTS

Professor Coquillette stated that recent news accounts had focused attention on the need to provide federal judges with assistance in meeting their statutory responsibility of recusing themselves in cases of financial conflict. He said that the Judicial Conference's Committee on Codes of Conduct had suggested that it would be beneficial to "revis[e] the Federal Rules of Civil Procedure or local district court rules to require corporate parties to disclose their parents and subsidiaries (along the lines of FED. R. APP. P. 26.1) and possibly also to require periodic updating of such affiliations." The Codes of Conduct Committee had reported to the Conference in September 1998 that it would coordinate with the standing committee on the possible addition of corporate disclosure requirements in the federal rules.

Professor Coquillette reported that the reporters had discussed this matter collectively at their luncheon and had agreed to coordinate with each other in drafting common language for the advisory committees that might be used as the basis for proposed amendments to the various sets of federal rules on corporate disclosure. He pointed out, though, that bankruptcy cases presented special problems and that some adjustments in the common language might be needed in proposed amendments to the Federal Rules of Bankruptcy Procedure.

Mr. Rabiej pointed out that FED. R. APP. P. 26.1 was quite narrow in scope and did not apply to subsidiaries. He suggested that the advisory committees might seek some guidance from the Standing Committee as to whether a proposed common disclosure rule should include subsidiaries or in other respects be broader than the current FED. R. APP. 26.1.

Judge Garwood said that the Advisory Committee on Appellate Rules had considered Rule 26.1 recently and had concluded that it would simply not be possible to devise a workable disclosure statement rule that would cover all the various types of conflicting situations and financial interests that require recusal on the part of a judge. He said that the rule should focus on those categories of conflicts that require automatic recusal under the statute, rather than the conflicts that entail judicial discretion.

PROPOSED RULES GOVERNING ATTORNEY CONDUCT

Professor Coquillette referred to his memorandum of December 6, 1998, and reported that each of the five advisory committees had appointed two members to serve on the Special Committee on Rules Governing Attorney Conduct. He said that Judge Stotler had named Chief Justice Veasey and Professor Hazard to serve on the committee as representatives of the standing committee and that the Department of Justice would also be asked to name participants.

He said that the special committee would hold a meeting in Washington on May 4, 1999. At that time, the members would review the pertinent empirical studies and consider the major recommendations submitted to date by various organizations and individuals. All options would be discussed at the May meeting, but no decisions would be made at that time.

The special committee would then meet again in the fall of 1999. At that time, it would be expected to approve concrete proposals to bring before the respective advisory committees for a vote at their fall meetings. The standing committee at its January 2000 meeting could then consider the final attorney conduct recommendations of the special committee and the advisory committees.

Professor Coquillette said that the options at this point appeared to be either:

1. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits; or
2. to adopt a single federal rule adopting the attorney conduct statutes and rules of the state in which a federal district court sits; except for a small number of "core" issues to be governed by uniform, national federal rules. These would be limited to matters of particular concern to federal courts and federal agencies, such as the Department of Justice.

He pointed out that there was considerable disagreement over these options within the legal community.

SHORTENING THE RULEMAKING PROCESS

Judge Scirica reported that the Executive Committee of the Judicial Conference had asked the committee to consider ways in which the length of the rulemaking process might be shortened without adverse effect. He said that there were, essentially, two basic options that might accomplish that objective — either eliminating the participation in the rules process of one of the bodies presently required to approve rule amendments or shortening the time periods now prescribed by statute or Judicial Conference procedures. He said that neither alternative was attractive and added that most of the members of the standing committee had already expressed opposition to shortening the time allotted for public comment on proposed amendments.

Some members added that it was apparent that the Supreme Court wanted to continue playing a significant role in the rulemaking process. They said that it would be very difficult, in light of the Court's schedule, to reduce the amount of time that the justices currently are given to review proposed rules amendments. Nevertheless, they said, it might

be useful to take a fresh look at all the time limits currently imposed by statute or Judicial Conference procedures.

Judge Scirica reported that it had been suggested that the committee consider adopting an emergency procedure for adopting amendments on an expedited basis when there is a clear need to do so. Several members pointed out that the rules committees had, in fact, acted on an expedited basis on several occasions in response to pending action by the Congress. Most recently, they noted, the committees had acted outside the normal, deliberative Rules Enabling Act process in responding to the Congressional mandate for their views on the advisability of amending FED. R. CRIM. P. 6(d) to permit witnesses to bring their lawyers into the grand jury room.

But several members also cautioned against establishing a regularized procedure for handling potential amendments on an expedited basis. They said that the Rules Enabling Act process, as protracted as it may seem, ensures the integrity of the rulemaking process. It assures careful research and drafting, thorough committee deliberations, and meaningful input by the public. They added that only a few selective matters require expedited treatment, and these exceptions can be dealt with expeditiously on a case-by-case basis. They said that the very establishment of a regularized "fast track" procedure would only encourage its use and undermine the effectiveness of the rulemaking process.

Judge Scirica said that the committee might respond to the Executive Committee by stating that the present deliberative process serves the public very well, but that the rules committees are prepared to respond to individual situations on an expedited basis whenever necessary. The members agreed with his observation and suggested that he explore it with the chairman of the Executive Committee.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the restyling of the body of the Federal Rules of Criminal Procedure was the major task pending before the style subcommittee. He noted that soon after the Supreme Court had promulgated the revised Federal Rules of Appellate Procedure, Bryan Garner, the Standing Committee's style consultant, prepared a first draft of a restyled set of criminal rules. That draft, he said, was then revised by each member of the style subcommittee and by Professor Stephen Saltzburg, who had been engaged specially by the Administrative Office to assist in the restyling task. Mr. Garner then prepared a second draft of the criminal rules, and the style subcommittee met in Dallas to begin work on reviewing the product.

Judge Parker reported that the style subcommittee had completed its review of FED. R. CRIM. P. 1-11, 54, and 60, and it planned to complete action on another dozen rules

by mid-February 1999. Judge Davis added that the Advisory Committee on Criminal Rules was working closely with the style subcommittee on the project. He stated that one of the great challenges was to avoid making inadvertent, substantive changes in the rules as they are restyled.

REPORT OF THE TECHNOLOGY SUBCOMMITTEE

Mr. Lafitte reported that the technology subcommittee was monitoring developments in technology with a view towards their potential impact on the federal rules. He noted that the subcommittee was concentrating its efforts on considering rules amendments that might be needed to accommodate the judiciary's Electronic Case Files (ECF) initiative. He said that, among other things, ECF will permit: (a) electronic filing and service of court papers, (b) maintenance of the court's case files in electronic format, (c) electronic linkage of docket entries to the underlying documents, and (d) widespread electronic access to the court's files and records. The project, he added, was being tested in 10 pilot courts and was expected to be made available by the Administrative Office to all federal courts within one to two years.

Mr. Lafitte reported that the subcommittee had met the afternoon before the standing committee meeting to review the status of ECF and identify any federal rules that might need to be changed to accommodate electronic processing of case papers. He said that the subcommittee had been aided substantially in that effort by a comprehensive policy paper prepared by Nancy Miller, the Administrative Office's judicial fellow.

Mr. Lafitte said that the 1996 amendments to the rules had authorized a court by local rule to "permit papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference . . . establishes." [FED. R. CIV. P. 5(e); FED. R. BANKR. P. 5005; FED. R. APP. P. 25(a)(2). *See also* FED. R. CRIM. P. 49(d).] The rules, however, do not authorize service by electronic means. Accordingly, he said, the ECF pilot courts have relied on the consent of the parties in experimenting with electronic service in the prototype systems.

Mr. Lafitte reported that the subcommittee had concluded that it was necessary to legitimize the experiments taking place in the pilot courts and amend the federal rules to provide an appropriate legal foundation for electronic service. To that end, he said, the subcommittee would like the advisory committees to consider a common amendment to the rules that would authorize courts by local rule to permit papers to be *served* by electronic means — just as they may currently authorize papers to be *filed, signed, or verified* by electronic means. He said that the subcommittee had asked Professor Cooper to prepare a draft rule, using as a model the proposed amendment to FED. R. BANKR. P. 9013(c) published in August 1998.

He added, however, that the proposed amendment to authorize electronic service through local rules should be identified as an interim solution, necessary because of rapid advances in technology and local experimentation. The ultimate objective, he said, should be to fashion a uniform set of national rules that will govern electronic files and filing in the federal courts.

Mr. Lafitte also reported that the subcommittee would meet again in February 1999 — together with judges, clerks, and lawyers from the ECF pilot districts and Administrative Office staff — to consider procedural issues raised by the change from manual to electronic processing of case papers and files.

Judge Scirica recommended that Nancy Miller's paper be sent to all members of the standing committee.

LOCAL RULES PROJECT

Professor Coquillette reported that the first local rules project had been mandated by the Congress in response to widespread concern over the proliferation of federal court local rules. He explained that Professor Mary Squiers, the director of the project, had reviewed the local rules of every district court and reported back to those courts on inconsistencies and other problems with their rules. The process, he said, had been voluntary, and it led a number of courts to improve and reduce their local rules.

Professor Squiers then described the original project in detail and pointed out that the review of all the local rules had also been beneficial in that it revealed many subjects covered by local rules that were later determined to be appropriate subjects to be included in the national rules. The project, she said, had also considered the possibility of drafting a set of model local rules, but it decided instead simply to compile several samples of effective local rules for the courts to consider. Professor Squiers added that the 1995 amendments to the federal rules required courts to renumber their local rules to conform with the numbering systems of the national rules.

Professor Coquillette said that a new study of local rules was needed. He pointed out that the Civil Justice Reform Act had greatly complicated the picture by encouraging local procedural experimentation and de facto "balkanization" of federal procedure. In addition, he said, several courts had not yet complied with the requirement to renumber their local rules.

One of the members added that recently-enacted legislation requires each district court to establish an alternative dispute resolution program under authority of local rules. He suggested that a new local rules project consider the advisability of having certain uniformity among the courts in this area.

Professor Coquillette said that it was important for the committee to decide in advance as a matter of policy what it would do with the results of a new national study of local rules. He said, for example, that the committee might consider the following options:

1. developing model local rules;
2. proposing new national rules to supersede certain categories of local rules; or
3. encouraging more vigorous enforcement of FED. R. CIV. P. 83.

One of the members suggested that the committee draft model local rules and use them as a vehicle for judging the local rules of the courts.

NEXT COMMITTEE MEETING

The committee will hold its next meeting in Boston on Monday and Tuesday, June 14-15, 1999. Judge Scirica pointed out that the agenda for the meeting would be very heavy and may require the scheduling of a working dinner for Sunday night, June 13.

Respectfully submitted,

Peter G. McCabe,
Secretary

IV-A

MEMORANDUM

DATE: February 24, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 97-22

In the past, Rule 34(a) provided that oral argument "shall be allowed in all cases," unless a court, by local rule, authorized a panel unanimously to determine that oral argument was not necessary. Any such local rule was also required to set forth "[a] general statement of the criteria employed" in deciding whether oral argument was necessary and to "provide any party with an opportunity to file a statement setting forth the reasons why oral argument should be heard."

Restylized Rule 34(a)(1) (which took effect on December 1, 1998) *permits* a party to "file . . . a statement explaining why oral argument should, or need not, be permitted." Rule 34(a)(1) also provides that a court may *require* parties to file such statements by local rule.

Most local rules on the topic of requesting or waiving oral argument seem not to have been updated to take into account the changes to Rule 34. In their present form, these local rules fall into three categories:

1. Some circuits permit a party — after being informed that the court has decided to dispense with oral argument — to file a statement asking the panel to change its mind. *See* D.C. Cir. R. 34(j)(3); 1st Cir. R. 34.1(a); 2d Cir. R. 34(d)(1) (all parties except incarcerated pro se appellants); 9th Cir. R. 34-4(c). By implication, these

circuits seem to forbid parties from making statements about the desirability of oral argument in their principal briefs or elsewhere.

2. Some circuits *permit*, but do not require, parties to make statements about the desirability of oral argument in their principal briefs or in papers filed with or shortly after their principal briefs. *See* 3d Cir. R. 34.1(b); 4th Cir. R. 34(a); 7th Cir. R. 34(f).[1]

3. Some circuits *require* parties to make statements about the desirability of oral argument in their principal briefs or in papers filed with or shortly after their principal briefs. *See* 2d Cir. R. 34(d)(2) (incarcerated pro se appellants); 5th Cir. R. 28.2.4; 6th Cir. R. 9(d); 8th Cir. R. 28A(i)(1); 10th Cir. R. 28.2(e); 11th Cir. R. 28-2(c).

In the past, some members of the Committee have argued that Rule 34(a)(1) should be amended to require parties to include in their principal briefs a statement regarding oral argument, rather than leave the issue to be regulated under conflicting local rules. To assist the Committee in its consideration of this proposal, I have attached draft amendments to Rules 28(a), 28(b), 28(h), and 34(a)(1). The draft amendments would require every party to include in its principal brief a statement with respect to oral argument, direct that the statement appear between the table of authorities and the jurisdictional statement (the location suggested by Rule 32(a)(7)(B)(iii)), and place a 125 word limit on the statement. Please note that Rule 32(a)(7)(B)(iii) already

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[1]Last year, the First Circuit sought comments on a proposal to amend 1st Cir. R. 34.1(a)(2) to permit parties to request oral argument in their principal or reply briefs. The amendment has not yet been adopted.

provides that the "statement with respect to oral argument" does not count toward the type-volume limitation.

Rule 28. Briefs

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

* * *

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

Committee Note

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

Rule 34. Oral Argument

(a) In General.

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

Committee Note

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

IV-B

MEMORANDUM

DATE: February 22, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 98-12

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

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

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

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

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

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

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

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

Attached are draft amendments and Committee Notes to implement these changes. I have also attached a draft amendment to Rule 4(a)(4)(A)(vi) to delete a parenthetical that has become superfluous in light of the change to Rule 26(a)(2).

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

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(vi) for relief under Rule 60 if the motion is filed no later than 10 days ~~(computed using Federal Rule of Civil Procedure 6(a))~~ after the judgment is entered.

Committee Note

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10 day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

Rule 27. Motions

(a) In General.

(3) **Response.**

(A) **Time to file.** Any party may file a response to a motion; Rule 27(a)(2) governs its contents. The response must be filed within ~~10~~ 7 days after service of the motion unless the court shortens or extends the time. A motion authorized by Rules 8, 9, 18, or 41 may be granted before the ~~10~~7-day period runs only if the court gives reasonable notice to the parties that it intends to act sooner.

Committee Note

Subdivision (a)(3)(A). Subdivision (a)(3)(A) presently requires that a response to a motion be filed within 10 days after service of the motion. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 10 day deadline, which means that, except when the 10 day deadline ends on a weekend or legal holiday, parties generally must respond to motions within 10 actual days.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 10 day deadlines (such as that in subdivision (a)(3)(A)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 14 actual days to respond to motions, and legal holidays could extend that period to as much as 18 days.

Permitting parties to take two weeks or more to respond to motions would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 10 day deadline in subdivision (a)(3)(A) has been reduced to 7 days. This change will, as a practical matter, ensure that every attorney will have at least 9 actual days — but, in the absence of a legal holiday, no more than 11 actual days — to respond to motions. The court continues to have discretion to shorten or extend that time in appropriate cases.

Rule 27. Motions

(a) In General.

(4) **Reply to Response.** Any reply to a response must be filed within ~~7~~ 5 days after service of the response. A reply must not present matters that do not relate to the response.

Committee Note

Subdivision (a)(4). Subdivision (a)(4) presently requires that a reply to a response to a motion be filed within 7 days after service of the response. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7 day deadline, which means that, except when the 7 day deadline ends on a weekend or legal holiday, parties generally must respond to motions within one week.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7 day deadlines (such as that in subdivision (a)(4)) have been lengthened as a practical matter. Under the new computation method, parties would never have less than 9 actual days to respond to motions, and legal holidays could extend that period to as much as 13 days.

Permitting parties to take 9 or more days to reply to a response to a motion would introduce significant and unwarranted delay into appellate proceedings. For that reason, the 7 day deadline in subdivision (a)(4) has been reduced to 5 days. This change will, as a practical matter, ensure that every attorney will have 7 actual days to file replies to responses to motions (in the absence of a legal holiday).

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

(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

Committee Note

Subdivision (b). Subdivision (b) directs that the mandate of a court must issue 7 days after the time to file a petition for rehearing expires or 7 days after the court denies a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. Intermediate Saturdays, Sundays, and legal holidays are counted in computing that 7 day deadline, which means that, except when the 7 day deadline ends on a weekend or legal holiday, the mandate issues exactly one week after the triggering event.

Fed. R. App. P. 26(a)(2) has been amended to provide that, in computing any period of time, one should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days, unless stated in calendar days." This change in the method of computing deadlines means that 7 day deadlines (such as that in subdivision (b)) have been lengthened as a practical matter. Under the new computation method, a mandate would never issue sooner than 9 actual days after a triggering event, and legal holidays could extend that period to as much as 13 days.

Delaying mandates for 9 or more days would introduce significant and unwarranted delay into appellate proceedings. For that reason, subdivision (b) has been amended to require that mandates issue 7 *calendar* days after a triggering event.

Agenda for Spring 1999 Meeting of
Advisory Committee on Appellate Rules
April 15 & 16, 1999
Washington, D.C.

I. Introductions

II. Approval of Minutes of October 1999 Meeting

III. Report on January 1999 Meeting of Standing Committee

IV. Action Items

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

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

V. Discussion Items

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

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

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

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

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

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

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

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

I. Items Awaiting Initial Discussion

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

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

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

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

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

VII. Schedule of Dates and Location of Fall 1999 Meeting

VIII. Adjournment

V-A

MEMORANDUM

DATE: March 12, 1999

TO: Advisory Committee on Appellate Rules

FROM: Judge Will Garwood, Chair

RE: Item No. 98-02

I have placed Item No. 98-02 back on the agenda for our April 1999 meeting, as I have concluded, upon reflection, that some of the amendments to Rules 4(a)(4) and (7) that we approved at our October 1998 meeting ought to be reconsidered. I realize, painfully, that this is an about-face on my part, and I apologize for asking you to revisit a matter on which we have already spent considerable time.

I. BACKGROUND

Let me begin by refreshing your recollection: 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 not "entered" for purposes of Rule 4(a) until "it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." FRCP 79(a) requires that a judgment or order be entered in the civil docket, and FRCP 58 requires that "[e]very judgment shall 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. Thus, under Rule 4(a)(1)(A), the time to appeal a judgment or order does not begin to run until the judgment or order is both set forth on a separate document pursuant to FRCP 58 and entered in the civil docket pursuant to FRCP 79(a).

Under Rule 4(a)(4)(A), the time to file an appeal is tolled upon the timely filing of any of several specified post-judgment motions (e.g., a motion for a new trial under FRCP 59). According to Rule 4(a)(4)(A), when one of these motions is filed with the district court at the conclusion of a civil case, the time to file a notice of appeal in that case does not begin to run for any of the parties until "the entry of the order disposing of the last such remaining motion." Again, under Rule 4(a)(7), an order is not "entered" for purposes of Rule 4(a)(4)(A) until it is entered in compliance with FRCP 58 (that is, set forth on a separate document) and FRCP 79(a) (that is, entered in the civil docket). Until an order disposing of one of the post-judgment motions listed in Rule 4(a)(4)(A) is set forth on a separate document and entered in the civil docket, neither the time to appeal that order nor the time to appeal the original judgment begins to run.

Several problems are presented by these provisions of Rule 4(a), particularly in combination with FRCP 58. The common thread of many of these problems is that in certain situations the time for appeal does not begin to run even though the parties and the district court think the case has long since been concluded. Professor Schiltz's thorough research memorandum of September 16, 1998 — which you can find in the agenda book distributed in advance of our October 1998 meeting — discusses these problems in detail. I will briefly summarize here.

A. The "Applicability" Question. Must the order referred to in Rule 4(a)(4)(A) — that is, "the order disposing of the last such remaining [post-judgment] motion"— be entered in accordance with FRCP 58 before the time to appeal starts running? The circuits are split. Some hold that all such orders, whether granting or denying a post-judgment motion, must be entered in accordance with FRCP 58 (i.e., on a separate document) before the time to appeal starts to run;

others hold that compliance with FRCP 58 is not required for orders *denying* post-judgment motions, but is required for orders *granting* such motions. The Eleventh Circuit holds that whether the order grants *or* denies the post-judgment motion, the time for appeal commences to run when the order is entered in the civil docket under FRCP 79(a), even though the order does not comply with FRCP 58 (i.e., is not on a separate document).

The problem is this: When courts dispose of the post-judgment motions listed in Rule 4(a)(4)(A) — one way or the other — they frequently do so in orders that describe the reasons for the disposition and thus do not comply with FRCP 58. (Also, courts often *deny* post-judgment motions by simply typing, writing, or stamping the word "denied" on the motion papers, a practice that, at least in the view of some courts, does not comply with FRCP 58). If an order disposing of a post-judgment motion must comply with FRCP 58 to start the appeal clock running, then we will have many cases that all concerned regard as concluded that, in fact, are not. For example, if FRCP 58 compliance is required, the denial of a timely motion for a new trial by an order which states its reasons will not start the appeal clock running, and the losing party can come back, perhaps years later, have the district court enter a FRCP 58 compliant order, and then appeal.

In order to guard against this result, the First Circuit has held that a party waives the right to request entry of a judgment or order on a separate document (which would trigger the 30 day time to appeal) three months after receiving notice of the judgment or order, if the judgment or order would have been final but for non-compliance with FRCP 58's separate document requirement. *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 236, 239 (1st Cir. 1992). However, several other circuits have declined to follow *Fiore*.

B. The "Prematurity" Question. FRCP 58 may or may not apply to orders disposing of the post-judgment motions listed in Rule 4(a)(4)(A), but it unquestionably applies to all *judgments* and to all *other* orders. As a result, the time to appeal those judgments and orders — and, in some circuits, the time to appeal orders that dispose of Rule 4(a)(4)(A) motions — does not begin to run until the judgment or order is entered in compliance with FRCP 58. What happens if a party brings an appeal *before* the time to appeal begins to run (i.e., before entry of the judgment or order in compliance with FRCP 58)?

The circuits have also split on this "prematurity" question. Some circuits dismiss the appeal and instruct the appellant to go back to the district court, ask the court to enter the judgment or order in a form that complies with FRCP 58, and then appeal again. Other circuits apply a "one way waiver" doctrine. If the party who lost below brings a "premature" appeal, the appeal is allowed to proceed, even if the appellee objects. *However*, if the party who lost below wishes to do so, he can choose not to appeal until the judgment or order is entered in compliance with FRCP 58. In theory, the party could wait forever, except in the First Circuit (which, as noted above, has its special *Fiore* three-month rule).

C. The "Timing" Question. When one of the post-judgment motions listed in Rule 4(a)(4)(A) is *granted* and the judgment is amended, does the time for appealing the amended judgment run from the date on which the district court orders the judgment to be amended or from the date on which the clerk actually enters the amended judgment? As presently written, Rule 4(a)(4)(B)(ii) suggests that the time to appeal an amended judgment runs from the date on which the district court *orders* the judgment to be amended rather than from the date on which

the amended judgment is actually entered.[1] In general, the time to appeal any judgment runs from the date on which the judgment is entered. *See* Rule 4(a)(1)(A). There is no reason why the time to appeal an *amended* judgment should run not from the entry of that judgment, but from the entry of the order directing the entry of that judgment.

II. ACTIONS TAKEN AT OCTOBER 1998 MEETING

At our October 1998 meeting, we resolved these three questions in the following ways:

A. The "Applicability" Question. First, we decided to amend Rule 4(a)(7) to adopt the approach of those courts which hold that FRCP 58 applies to an order which *grants* post-judgment relief, but not to an order which *denies* such relief. Our reasoning was set forth in the Committee Note as follows:

> The time to appeal an order *granting* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) does not begin to run until it is entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order usually alters or amends a judgment, the order should be entered with the same formality as a judgment. The time to appeal an order *denying* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) begins to run immediately upon entry of the order, whether or not the order has been entered on a separate document in compliance with Fed. R. Civ. P. 58. Because such an order does not disturb the original judgment, compliance with the separate document requirement of Fed. R. Civ. P. 58 should be unnecessary.

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[1]Rule 4(a)(4)(B)(ii) provides as follows:

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

Essentially the same language appears in Rules 4(a)(4)(A) and (B)(i).

B. The "Prematurity" Question. Second, we amended Rule 4(a)(7) to adopt the one way waiver doctrine. Under our amendment, if a party brings a "premature" appeal of a judgment or order that is required to be entered in compliance with FRCP 58 — i.e., if a party chooses to appeal such a judgment or order before it is entered in compliance with FRCP 58 — the appeal would be heard, even if the appellee objects to the lack of a FRCP 58 judgment or order. But the appellant could also choose to wait until the judgment or order is entered in compliance with FRCP 58 and appeal at that time, even if it is months or years later. Our Committee Note specifically rejects the First Circuit's three month *Fiore* rule.

C. The "Timing" Question. Third, we amended Rule 4(a)(4)(B)(ii) — as well as Rules 4(a)(4)(A) and 4(a)(4)(B)(i) — to provide that the time to appeal a judgment that is altered or amended in response to one of the post-judgment motions listed in Rule 4(a)(4)(A) runs from the entry of the order disposing of the post-judgment motion *or* from the entry of the judgment that is altered or amended in response to the post-judgment motion, "whichever comes later."

III. MY PROPOSALS

My proposals are relatively straightforward, although the reasons need some explanation:

A. The "Applicability" Question. I would not change our decision that an order that *denies* one of the post-judgment motions listed in Rule 4(a)(4)(A) does not have to be entered in compliance with FRCP 58 in order to start the appeal clock. However, I would go further and provide that an order that *grants* a motion listed in Rule 4(a)(4)(A) also does not have to be entered in compliance with FRCP 58 in order to start the appeal clock. Rather, under my proposal, the time to appeal an order that *grants* a motion listed in Rule 4(a)(4)(A) would run from the later of the following:

1. the date on which the order is entered in the civil docket in compliance with FRCP 79(a) (whether or not the order is also entered on a separate document in compliance with FRCP 58); or

2. if the order directs that the original judgment be altered or amended, the date on which the altered or amended judgment is entered in compliance with both FRCP 58 and FRCP 79(a).

Most of the post-judgment motions listed in Rule 4(a)(4)(A), when granted, result in a judgment being altered or amended. In such cases, the altered or amended judgment is entered in compliance with both FRCP 58 and FRCP 79(a). Under these circumstances, it seems to me that it does not create any meaningful risk of confusing parties as to when the case is final to eliminate the requirement that the *order* directing that the judgment be altered or amended *also* be entered on a separate document in compliance with FRCP 58.

Sometimes the granting of one of the post-judgment motions listed in Rule 4(a)(4)(A) does not result in a judgment being altered or amended, but results instead in, say, additional findings of fact being made under FRCP 52(b). In such cases, I see nothing wrong with having the time to appeal run from entry of the order in the civil docket under FRCP 79(a), even if the order is not on a separate document in compliance with FRCP 58. Again, the lack of a separate document creates no meaningful risk of confusion as to finality.

In short, my proposal will do no harm and, for reasons that I will describe in a moment, it will solve a significant problem that we've created with respect to the "timing" question.

B. The "Prematurity" Question. I would not change our basic decision to incorporate the one way waiver doctrine into Rule 4(a)(7). Of course, under my proposal, the one way

waiver doctrine would be irrelevant to orders that dispose of the motions listed in Rule 4(a)(4)(A), as FRCP 58 would no longer apply to those orders. But FRCP 58 would continue to apply to all *judgments*, as well as to all orders other than those disposing of the Rule 4(a)(4)(A) motions. If a party appeals such a judgment or order before it is entered in compliance with FRCP 58, I would — as we did in October — permit the appeal to proceed, even if the appellee objects. Consistent with our October approach, I consider it a waste of time to dismiss an appeal, only to have the appellant get a FRCP 58 order from the district court and appeal again.

Where my proposal differs from what we approved in October is that I would apply a modified version of the First Circuit approach and "cap" the one way waiver doctrine. The amendment that we approved in October incorporated the one way waiver doctrine in its pure form. A party would have two choices when confronted with a judgment or order to which FRCP 58 does apply but that has not been entered in compliance with FRCP 58. The party could, as noted, bring a "premature" appeal, and thereby waive his right to have the judgment or order entered in compliance with FRCP 58. Or the party could sit back and wait for the judgment or order to be entered in compliance with FRCP 58, without ever losing his right to appeal. In theory, the party could wait forever.

I've come to conclude that this approach is unwise, and that the First Circuit was right (as a matter of policy, not interpretation). Given that many district courts routinely dispose of both motions and cases in judgments or orders that do not comply with FRCP 58, I fear that our amendment would leave many "time bombs" waiting to explode. I am a strong believer in the

finality of judgments, and I think we cannot leave hanging indefinitely cases that everyone thought were concluded years or even decades earlier.[2]

I propose that we adopt a modified version of the First Circuit approach. Under my proposal, the time to appeal a judgment or order that is required to be entered in compliance with FRCP 58 begins to run *either* when the judgment or order is entered in compliance with both FRCP 58 and FRCP 79(a) *or* 180 days after the judgment or order is entered in compliance with FRCP 79(a), whichever comes first. In other words, a party who is on the losing end of a judgment or order that should have been entered pursuant to FRCP 58 but was not could no longer wait forever to appeal. Rather, the time to appeal would begin to run 180 days after the judgment or order was entered in the civil docket (unless, within that 180 day period, the district court corrects its omission and enters the judgment or order in compliance with FRCP 58).

I am not wedded to 180 days as the length of the period. I chose 180 days because it echoes the 180 day grace period in Rule 4(a)(6)(A), but I am certainly open to other suggestions.

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[2]This was forcefully brought to my attention not too long ago when speaking with an able and fairly experienced judge who told me that he never complied with FRCP 58 when dismissing a case for failure to prosecute, for failure to comply with some court order, or for some other non-merit reason, as he didn't think FRCP 58 applied in such instances, but only applied to merits judgments. This got me to thinking about how many such time bombs might be lying around. The problem may be especially acute in (but is certainly not limited to) IFP suits or prisoner suits where there is a dismissal before service, so that there is never another party in the case to be sure that a FRCP 58 judgment is entered.

I should mention that those courts that have rejected the First Circuit approach have not done so on the basis that it is undesirable or unworkable, but rather on the basis that it is contrary to Rule 4(a)(7) and FRCP 58. When, in October, I opposed the First Circuit approach, I was too reflexively in my "judge" mode of thinking, and not sufficiently in the "rulemaker" mode that is appropriate for our committee.

I want us to provide *some* cap so that these time bombs cannot tick away forever, but I don't feel strongly about how many days should pass before the cap is imposed.

C. The "Timing" Question. I would leave untouched the amendments we approved to Rules 4(a)(4)(A), 4(a)(4)(B)(i), and 4(a)(4)(B)(ii) to address the "timing" question. I should note, though, that the changes I have proposed would eliminate a substantial problem that those amendments otherwise create.

Consider the following scenario: After the return of a jury verdict, a district court enters judgment on the verdict against the defendant for both compensatory and punitive damages. The defendant makes a timely motion under FRCP 50(b), seeking, in effect, to amend the judgment to eliminate the award of punitive damages. The district court then issues an order — an order that does *not* comply with FRCP 58 (because it states its reasons in the order itself rather than in a separate document) — granting the defendant's motion and ordering that the judgment be amended to award only compensatory damages. A day later, the clerk enters the amended judgment in compliance with the district court's order.

It seems to me that, under the amendments to Rules 4(a)(4)(A), 4(a)(4)(B)(i), and 4(a)(4)(B)(ii) that we approved in October, the time for the plaintiff to appeal would never begin to run. Recall that, under those amendments, the time to appeal a judgment that is altered or amended in response to one of the post-judgment motions listed in Rule 4(a)(4)(A) runs from the entry of the order disposing of the post-judgment motion *or* from the entry of the judgment that is altered or amended in response to the post-judgment motion, "*whichever comes later.*" In my scenario, the amended judgment has been properly entered, but the *order* of the district court has not. Remember that, under the amendment to Rule 4(a)(7) that we approved in October, an order

granting a post-judgment motion must be entered in compliance with FRCP 58. In my scenario, the judge's order granting the FRCP 50(b) motion has not yet been entered in compliance with FRCP 58. Therefore, the time to appeal the order has not yet begun to run, and it will not begin to run until the order is entered in compliance with FRCP 58 — which might not occur until years later.

This is not a farfetched scenario. District courts often fail to enter orders granting post-judgment relief on separate documents, as is required by FRCP 58. Instead, when ordering that judgments be altered or amended, district courts often give reasons for their actions and discuss the relevant evidence and authorities in the order itself. Also, some district courts (and parties) no doubt assume that, because the amended judgment will be entered in compliance with FRCP 58, the order directing that the judgment be amended need not also comply with FRCP 58.

As I said, the proposal that I have outlined in § III(A) would solve this problem. Under my proposal, orders that *grant* any of the post-judgment motions listed in Rule 4(a)(4)(A) (as well as orders that deny those motions) would no longer have to be entered in compliance with FRCP 58. Therefore, in my scenario, the time to appeal the judge's order granting the FRCP 50(b) motion would begin to run on the later of (1) the date the order was entered in the civil docket pursuant to FRCP 79(a) or (2) the date the amended judgment was entered pursuant to FRCP 58 and FRCP 79(a).

Attached is a draft amendment and Committee Note that reflect my proposal. You will note that the only place I propose a change from what we did in October is to make the first sentence of Rule 4(a)(7) as proposed in October into two sentences, with all the changes I

propose being in those two sentences. The last sentence of 4(a)(7) is unchanged from our October proposal, as is the rest of 4(a).

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(4) **Effect of a Motion on a Notice of Appeal.**

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion or the entry of the judgment altered or amended in response to such a motion, whichever comes later:

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

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

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

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

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

(vi) for relief under Rule 60 if the motion is filed no later than 10 days (computed using Federal Rule of Civil Procedure 6(a)) after the judgment is entered.

(B) (i) If a party files a notice of appeal after the court announces or enters a judgment — but before it disposes of any motion listed in Rule 4(a)(4)(A) — the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such

remaining motion is entered or when the judgment altered or amended in response to such a motion is entered, whichever comes later.

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

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

* * *

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

Committee Note

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

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

Subdivision (a)(7) has been amended to adopt the position of the Eleventh Circuit. An order that grants, denies, or otherwise disposes of one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) is entered for all purposes of Rule 4(a) when the order is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a), whether or not the order is also entered on a separate document in compliance with Fed. R. Civ. P. 58. An order that *denies* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) does not disturb the original judgment, and thus compliance with the separate document requirement of Fed. R. Civ. P. 58 should be unnecessary. An order that *grants* one of the motions for post-judgment relief listed in Rule 4(a)(4)(A) usually does alter or amend the original judgment, but, given that the altered or amended judgment must itself be entered in compliance with Fed. R. Civ. P. 58, it should be

unnecessary to require that the order also be entered in compliance with that rule. Admittedly, an order granting one of the post-judgment motions listed in Rule 4(a)(4)(A) sometimes does not result in an altered or amended judgment, but such orders are unlikely to create the type of uncertainty that prompted the separate document requirement of Fed. R. Civ. P. 58, and thus compliance with the requirement should be unnecessary. *See* FED. R. CIV. P. 58, advisory committee's note to 1963 amendment.

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

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

V-B

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Associate Attorney General's Office
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DNL:HTByron
Douglas Letter
Deputy Associate Attorney General

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Fax: (202) 307-3904

March 15, 1999

The Honorable Will Garwood
United States Court of Appeals
for the Fifth Circuit
903 San Jacinto Boulevard
Austin, Texas 78701

Re: Advisory Committee Item Nos. 98-06, 98-08

Dear Judge Garwood:

You had written to me in December 1998, asking me to make a report, and possibly formal proposals, concerning four items that are before the Federal Rules of Appellate Procedure Advisory Committee. I am now reporting on those items.

The attached materials reflect recommendations concerning two of the captioned agenda items: a proposal that would permit immediate appeals of partial Tax Court judgments; and a proposal to amend FRAP 4 to address the effect of a motion under FRCrP 35(c). I will be happy to address these items further and answer any questions when the Advisory Committee meets in Washington, D.C. in April.

Item No. 98-08: This item involves a proposal to amend the FRAP to provide for possible immediate appeals from Tax Court judgments that resolve separate claims within a Tax Court case. As had been discussed, I consulted the Chief Counsel of the Internal Revenue Service and the Chief Judge of the Tax Court concerning this issue. Their responses are attached (they consented to me sharing their letters with you). Consistent with your suggestion at the October 1998 meeting, both the IRS Chief Counsel and Chief Judge Cohen believe that the Advisory Committee on Appellate Rules is not the appropriate forum to consider such a proposal. If such a change is to be made, they recommend (and we agree) that it should be considered instead by the Tax Court as an amendment to its own rules or by Congress as a legislative change. Their recommendations confirm the wisdom of your suggestion to remove Item No. 98-08 from the Advisory Committee's agenda.

Item No. 98-06: This item concerns whether and to what extent the filing of a FRCrP 35(c) motion tolls the time for a defendant to file a notice of appeal. We recommend amending FRAP 4(b)(5) to provide explicitly that the filing of a Rule 35(c) motion has no

effect on the time for filing a notice of appeal. There are two alternative possibilities that might merit discussion at the meeting. I have set forth the text of all three alternatives in the attached document, which discusses the merits of each.

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On the *amicus* brief filing issue, I wrote to 18 organizations that I believe file a significant number of such briefs in the courts of appeals, and I am also currently in the midst of consulting with all of the litigating divisions at the Department of Justice. I can give an oral report on this subject at our April meeting, but will likely have a formal presentation for the October meeting instead. On the habeas issue, I have learned that there may some complicated issues involved in this proposal. I am studying it further, and hope to give you a report on it before the April meeting. I look forward to seeing you next month. 98-03

Sincerely,

Douglas Letter

Douglas Letter
Deputy Associate Attorney General

Attachments

cc: Professor Patrick J. Schiltz
University of Notre Dame
325 Law School
Notre Dame, Indiana 46556

V-C

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Item No. 98-08: This item involves a proposal to amend the FRAP to provide for possible immediate appeals from Tax Court judgments that resolve separate claims within a Tax Court case. As had been discussed, I consulted the Chief Counsel of the Internal Revenue Service and the Chief Judge of the Tax Court concerning this issue. Their responses are attached (they consented to me sharing their letters with you). Consistent with your suggestion at the October 1998 meeting, both the IRS Chief Counsel and Chief Judge Cohen believe that the Advisory Committee on Appellate Rules is not the appropriate forum to consider such a proposal. If such a change is to be made, they recommend (and we agree) that it should be considered instead by the Tax Court as an amendment to its own rules or by Congress as a legislative change. Their recommendations confirm the wisdom of your suggestion to remove Item No. 98-08 from the Advisory Committee's agenda.

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98-06

effect on the time for filing a notice of appeal. There are two alternative possibilities that might merit discussion at the meeting. I have set forth the text of all three alternatives in the attached document, which discusses the merits of each. 98-06

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On the *amicus* brief filing issue, I wrote to 18 organizations that I believe file a significant number of such briefs in the courts of appeals, and I am also currently in the midst of consulting with all of the litigating divisions at the Department of Justice. I can give an oral report on this subject at our April meeting, but will likely have a formal presentation for the October meeting instead. On the habeas issue, I have learned that there may some complicated issues involved in this proposal. I am studying it further, and hope to give you a report on it before the April meeting. I look forward to seeing you next month.

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Douglas Letter

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Deputy Associate Attorney General

Attachments

cc: Professor Patrick J. Schiltz
University of Notre Dame
325 Law School
Notre Dame, Indiana 46556

Item No. 98-06

FRCrP 35(c) permits a district court to correct an erroneous sentence in a criminal case (when the sentence "was imposed as a result of arithmetical, technical, or other clear error"), if the court acts within seven days after imposition of the sentence. The courts of appeals have split on the question of whether and to what extent the filing of such a motion tolls the time for a defendant to file a notice of appeal.

FRAP 4(b) defines the time for filing a notice of appeal in a criminal case. Subsection (3)(A) provides that the time to appeal is tolled during the district court's consideration of certain post-conviction motions; a FRCrP 35(c) motion is not among the tolling motions listed. Subsection (5)(A) of FRAP 4(b) does address Rule 35 motions, and provides that a district court retains jurisdiction to grant such a motion and correct the defendant's sentence even after a notice of appeal has been filed; similarly, the pendency of a Rule 35 motion does not affect the validity of a later notice of appeal.

The First and Fifth Circuits have issued inconsistent decisions concerning the tolling effect of a Rule 35(c) motion. Both courts concluded that the filing of a Rule 35(c) motion does extend the time to file a notice of appeal, but the length of that extended time differs. In the Fifth Circuit, the time to appeal is suspended once the Rule 35(c) motion is filed and does not being to run again until the district court disposes of the motion. United States v. Carmouche, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam) (citing United States v. Moya, No. 94-10907 (July 25, 1995)). Two Fifth Circuit judges have recommended that the en banc court overrule that decision; they would hold that filing a Rule 35(c) motion has no effect on the time to appeal. Id. at 1022-1023 (Duhé and Garwood, JJ, specially concurring). The First Circuit concluded that the time to appeal begins to run again once seven days have passed after sentencing, even if the motion is still pending, because Rule 35(c) only permits the district court to correct the sentence within that seven-day period and any undecided motion must be deemed denied after that point. United States v. Morillo, 8 F.3d 864, 869 (1st Cir. 1993).

The Department of Justice recommends that the Advisory Committee on Appellate Rules propose an amendment to FRAP 4(b) that would address the uncertainty resulting from Carmouche and Morilla. As we see it, there are three possible alternatives. We discuss them in order of preference below.

(1) The best option, in our view, would be to provide expressly in FRAP 4(b) that the filing of a Rule 35(c) motion has no effect on the time for filing a notice of appeal. We recommend adding the following sentence to the end of FRAP 4(b)(5):

> The filing of a motion under Rule 35(c) does not suspend the time limit of this Rule 4(b) for filing a notice of appeal from a judgment of conviction.

This change would reject the premise underlying both Carmouche and Morilla -- that a motion seeking relief under Rule 35(c) is properly treated the same as an undifferentiated motion for reconsideration or rehearing. Like Judges Duhé and Garwood, we believe that premise is inconsistent with FRAP 4(b) for two reasons:

First, FRAP 4(b)(3)(A) specifically lists the kinds of motions that toll the time for appeal, and Rule 35(c) is notably absent from that list. That omission suggests that the framers of FRAP 4(b)(3)(A) considered the various motions authorized by FRCrP, and selected only certain ones that should have a tolling effect. Even if a non-specific motion for reconsideration can also toll the time for appeal, a motion that seeks the relief specifically authorized by Rule 35(c) should not be lumped into the same category. Otherwise, the limited enumeration of specific motions would have no effect and any post-conviction motion could be deemed to toll the time for appeal.

Second, FRAP 4(b)(5) specifically addresses the interaction between a Rule 35(c) motion and a notice of appeal, strongly suggesting that it is neither necessary nor appropriate for such a motion to toll the time for appeal. That provision specifically provides that a district court can exercise its Rule 35(c) power to correct a sentence even if a notice of appeal has already been filed, and also states that a notice of appeal is effective even if an unresolved Rule 35(c) motion is pending. There is thus no need to put the appeals process on hold just to allow the district court to consider whether to correct a sentence. The two procedures are compatible, and tolling is not necessary.

We believe these reasons counsel in favor of the conclusion that a Rule 35(c) motion does not toll the time for appeal at all. Such a rule has the benefit of simplicity, leaving no doubt when a notice of appeal must be filed. By contrast, the Morillo approach would require courts and counsel to calculate additional periods, with the certain result that some appeals will be filed too late. A bright-line rule is far preferable. (We recognize that FRAP 4(b)(3) already provides some exceptions to the bright-line rule in FRAP 4(b)(1), but believe that it is in the interests of litigants to keep these exceptions to a minimum.)

We believe that this bright-line rule we propose should clarify the deadlines and make defense counsel's job easier by removing any uncertainty about when to file a notice of appeal. If sentence correction is warranted under Rule 35(c), the district court must grant such relief within seven days. If the relief is not granted within that period, the district court's Rule 35(c) authority has expired, and counsel should file a notice of appeal at that point. Counsel would have no need to recalculate the filing deadline. FRAP 4(b)(5) already provides that a notice of appeal is valid even if it is filed before, or during the pendency of,

a Rule 35(c) motion. Thus, a defense counsel can file a notice of appeal earlier without suffering any prejudice. And, if in rare situations, the need for appeal is entirely eliminated by the grant of Rule 35(c) relief, the earlier appeal can be voluntarily dismissed.

* * * *

(2) A somewhat less attractive alternative would be to adopt the rule in Morillo. That could be achieved by adding the following sentence at the end of FRAP 4(b)(5):

> The timely filing of a motion under Rule 35(c) suspends the time limit of this Rule 4(b) for filing a notice of appeal from a judgment of conviction until the expiration of seven days after the entry of the judgment of conviction or until the district court enters an order disposing of the motion, whichever first occurs.

As we discussed above, this takes account of the objections to the Carmouche rule, although it would result in some uncertainty about the filing deadline.

* * * *

(3) Another way of achieving the same result would be to add a new subsection at the end of FRAP 4(b)(3):

> (D) If a defendant timely makes a motion under Rule 35(c) of the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within ten days after the entry of the order disposing of the motion, or within 17 days after the entry of the judgment of conviction, whichever period ends first.

That approach could have the unintended effect of depriving a criminal defendant of the right to file a notice of appeal within ten days after the government files a notice of appeal, as permitted by FRAP 4(b)(1)(A)(ii). The problem is that FRAP 4(b)(3) requires filing of a notice of appeal within ten days after denial of one of the listed motions, and does not specify that the defendant's notice can be filed after the government's notice (which in practice can extend the time to 40 days after the judgment). This potential problem also exists with respect to the motions listed in FRAP 4(b)(3)(A), although it does not appear to have created real difficulties in practice, as far as we are aware. Nevertheless, it seems unnecessary to introduce this additional complication, and this alternative should be least favored, for that reason.

V-D

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March 15, 1999

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for the Fifth Circuit
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Re: Advisory Committee Item Nos. 98-06, 98-08

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Douglas Letter

Douglas Letter
Deputy Associate Attorney General

Attachments

cc: Professor Patrick J. Schiltz
University of Notre Dame
325 Law School
Notre Dame, Indiana 46556

U.S. Department of Justice
Associate Attorney General's Office
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March 15, 1999

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Douglas Letter

Douglas Letter
Deputy Associate Attorney General

Attachments

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University of Notre Dame
325 Law School
Notre Dame, Indiana 46556

UNITED STATES TAX COURT

WASHINGTON, DC 20217

CHAMBERS OF
MARY ANN COHEN
CHIEF JUDGE

February 25, 1999

Mr. Douglas Letter
Deputy Associate Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, N.W.
Suite 5241
Washington, D.C. 20530-0001

Re: Proposed Change to FRAP

Dear Mr. Letter:

Thank for your letter of February 12, 1999. Prior to your letter, we were aware of the cases and some of the reasons for permitting, under limited circumstances, appeal of decisions that resolve separate claims within a Tax Court case. Research had been done previously in relation to motions by parties in certain cases and in response to certain appellate opinions. Our Rules Committee will be considering adoption of one or more rules dealing with the subject matter, along with other revisions to our rules. Rules that we propose are normally submitted to the Office of Chief Counsel of the Internal Revenue Service and to private bar groups for comment before we publish them in final form. Exceptions are interim rules published in response to legislation taking effect before the normal circulation can be accomplished. Our Rules Committee and staff have been very busy with the latter type of project because of substantial legislation enacted in 1997 and 1998 affecting our jurisdiction.

We do not feel that we can comment on the advisability of amendments to the Federal Rules of Appellate Procedure. We would respectfully note, however, that the most difficult aspect of fashioning the rule or rules under consideration would be defining what is a "separate claim". Our experience with the procedural and substantive aspects of tax litigation, and the significance of determinations affecting a single "tax year", may give us an advantage in drafting. Although I cannot make any promises about when we will complete and publish our rules project, I can assure you that we will be proceeding with it.

Your very truly,

Mary Ann Cohen

Mary Ann Cohen
Chief Judge

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

OFFICE OF
CHIEF COUNSEL

MAR - 2 1999

SPR-103794-99

Honorable Loretta C. Argrett
Assistant Attorney General
Tax Division
U.S. Department of Justice
P.O. Box 502
Washington, D.C. 20044

Attn: Gary R. Allen
Chief, Appellate Division

In re: Proposed change in Federal Rules of Appellate Procedure regarding the appealability of certain Tax Court decisions.

Your ref: LCA:GRAllen

Dear Ms. Argrett:

This is in response to your request dated February 11, 1999, for our views concerning a proposed change in the Federal Rules of Appellate Procedure, or perhaps the Rules of Practice and Procedure of the United States Tax Court, regarding the appealability of certain Tax Court decisions.

There is a conflict among the circuit courts regarding the timing of appeals of Tax Court decisions that do not resolve all claims of all parties or the liabilities for all taxable years in suit in the Tax Court proceeding. You suggest that either the Federal Rules of Appellate Procedure or the Tax Court's Rules should be amended to reflect the "finality" standards corresponding to those set forth in Fed. R. Civ. Proc. 54(b). As you note, at least three circuits, the Second, Sixth, and Seventh, have dismissed appeals from Tax Court decisions that resolved less than all of the claims of all parties or less than all of the liabilities for all taxable years involved in the Tax Court proceedings.

We believe that it would promote judicial economy by avoiding piecemeal appeals if there were a statute or rule applying the finality standards of Fed. R. Civ. Proc. 54(b) to cases appealable from the Tax Court. We, however, suggest that the only certain way to accomplish this goal is to amend I.R.C. § 7459 relating to what constitutes a final decision of the Tax Court appealable under section 7482 to the

United States Courts of Appeals. We recommend that the amendment to section 7482 require that the Tax Court withhold entry of decision until all taxable years and all taxpayers' liabilities are resolved, unless the Tax Court specifically determines that there is no just reason for delay and directs the entry of decision.

We believe that this approach ensures that litigants will know when a decision of the Tax Court is final and thus, appealable. The placement of the responsibility for directing the entry of decision on the Tax Court will help establish uniformity among the circuit courts concerning the time for appealing Tax Court decisions.

If you think it would be helpful, we will be pleased to provide you with further assistance in the preparation of your response to Judge Garwood's request, including the drafting of proposed statutory language for the change to section 7459 which we have suggested in this letter. If you have any questions, or desire any additional assistance, please contact Dan Wiles at 622-4510.

Sincerely,

for Daniel J. Wiles
Deputy Associate Chief Counsel
(Domestic field Service)

V-F

MEMORANDUM

DATE: March 10, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 99-03

All of the rules of practice and procedure — appellate, bankruptcy, civil, and criminal — include almost identically worded provisions authorizing the promulgation of local rules that permit electronic *filing*. *See* Fed. R. App. P. 25(a)(2)(D); Fed. R. Bankr. P. 5005(a)(2), 7005(e), 8008(a); Fed. R. Civ. P. 5(e); Fed. R. Crim. P. 49(d). In FRAP, the electronic filing provision is found in FRAP 25(a)(2)(D):

> (D) **Electronic Filing.** A court of appeals 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.

Even before these rules took effect, a few district courts and bankruptcy courts had begun experimenting with electronic case filing ("ECF"). Following enactment of the ECF rules in 1996, the Judicial Conference Committee on Automation and Technology developed the "ECF Initiative," under which those district and bankruptcy courts that had been experimenting with electronic filing agreed to serve as ECF "prototypes." The Committee on Automation and Technology hoped that the experiences of the prototype courts would help the Judicial

Conference to identify the legal, policy, and technical issues that would need to be addressed before ECF could be implemented on a nationwide basis.[1]

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

Prof. Cooper presented alternative proposals for amending the civil rules at a February 1999 meeting of the Subcommittee on Technology. (The reporters to the advisory committees also attended the meeting.) After considerable discussion, the Subcommittee made a few tentative decisions, and Prof. Cooper agreed to draft amendments implementing those decisions. Prof. Cooper's draft amendments are attached. All of the advisory committees are being asked to review the draft amendments during their spring 1999 meetings and to share their views on the draft amendments at the June 1999 meeting of the Standing Committee. The Subcommittee on

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[1]Unfortunately, no *appellate* court has yet agreed to serve as a prototype, and thus this advisory committee is not benefitting from the ECF Initiative as much as the advisory committees on the bankruptcy, civil, and criminal rules. Judge Garwood has asked the Administrative Office to advise us regarding what might be done to encourage the creation of at least a couple prototype appellate courts.

Technology hopes that the Standing Committee will be able to publish proposed amendments to the civil rules in August and that, after reviewing the comments, the Standing Committee will be able to approve amendments next year. Once language satisfactory to the Standing Committee emerges, the other advisory committees will be asked to use that language in drafting electronic service amendments to their own rules.

As you will see, Prof. Cooper's draft amendments are accompanied by considerable explanation. It may nevertheless be helpful if I highlight some of the tentative decisions that were made by the Subcommittee on Technology at the February 1999 meeting:

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

2. Although the Subcommittee did not want to permit district courts to *block* the use of electronic service by consenting parties, the Subcommittee recognized that the district courts must be free to use local rules to *regulate* such service. A number of difficult questions are likely to arise after parties begin serving each other electronically, and it is important that district courts have the flexibility to address those problems. For example, questions may arise concerning the scope of consent to electronic service. In theory, a party could agree to electronic service of a particular paper, or all papers in a particular case, or all papers in all cases — pending and future — filed by or against that party in that district. A local rule might provide that a party (or attorney) may file a general consent with the court, authorizing electronic service upon her in all

matters filed in that court. Local rules might also address whether and how consent to electronic service might be withdrawn.

I should note that the authority of courts to use local rules to regulate electronic service is not as clear in Prof. Cooper's draft amendments as it might be. The amendments themselves say nothing about local rules (with the exception of local rules permitting service by the clerk instead of by the parties, discussed below). Similarly, the Committee Note mentions local rulemaking only in connection with regulating the "means of *consent*" to electronic service; it says nothing about using local rules to regulate other aspects of electronic service.

3. Under the draft amendments, only "Rule 5" service may be made electronically; "Rule 4" service must continue to be made manually. Roughly speaking, Rule 4 (and Rule 4.1) service is the service that commences a lawsuit — that is, the service of "process" (the summons and complaint) — while Rule 5 service is essentially all of the service that occurs thereafter (e.g., service of answers, discovery requests, and motions). The Subcommittee was nervous about permitting electronic service of the summons and complaint.[2]

4. Under draft FRCP 5(b)(2)(D), service is authorized by "electronic or any other means" consented to by the parties. The phrase "any other means" appears to refer primarily to Federal Express and other third-party commercial carriers. Although inclusion of the words "electronic or" is, strictly speaking, unnecessary (as electronic service would presumably fall within "any

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[2]FRCP 4(d) permits a plaintiff to request certain defendants to waive formal service of the summons and complaint. The rules specifically state that such a request "shall be in writing," FRCP 4(d)(2)(A), and "shall be dispatched through first-class mail," FRCP 4(d)(2)(B). The Subcommittee decided that FRCP 4(d) requests should continue to be in writing, but I see that Prof. Cooper, on his own initiative, has provided a draft amendment to FRCP 4(d) that would permit such requests to be made electronically.

other means"), the Subcommittee wanted the rule specifically to mention electronic service in the hope of encouraging parties to use it. I should note that FRAP 25(c) already provides that "[s]ervice may be personal, by mail, or by third-party commercial carrier for delivery within 3 calendar days." In other words, FRAP already seems to authorize all likely modes of service other than electronic.

5. The Subcommittee struggled with the question of when electronic service will be deemed complete. The Subcommittee rejected a proposal that electronic service be deemed complete upon "receipt" because it is too vague (Is an electronic message "received" when it has reached the server of the recipient but not yet been downloaded to the recipient's personal computer? Is the message "received" when it has been downloaded to the recipient's personal computer but not yet opened by the recipient?) and manipulable (Can a party avoid service by keeping his computer turned off?). The Subcommittee also rejected a proposal that electronic service be deemed complete when the sender receives "confirmation" that his message has been received. Some e-mail programs do not confirm the receipt of messages, while others do. Also, any confirmation rule would be subject to manipulation.

The Subcommittee eventually decided that electronic service should be deemed complete upon "transmission" — roughly speaking, when the sender hits the "send" button on his computer and launches the message on its way through cyberspace. The transmission rule closely parallels the "mailbox" rule of FRCP 5(b), under which service by mail is deemed complete "upon mailing." (A similar rule appears in FRAP 25(c), which states that "[s]ervice by mail or by commercial carrier is complete on mailing or delivery to the carrier.")

6. The Subcommittee considered the question of whether the "three day" rule of FRCP 6(e) should apply to electronic service. FRCP 6(e) currently provides:

> **(e) Additional Time After Service by Mail.** Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period.

After much discussion, the Subcommittee decided that FRCP 6(e) should be redrafted so that three days are added to the prescribed period whenever service is made by *any* means — including electronic — other than personal service.[3] At first glance, it may seem strange to apply the three day rule to electronic service, which is instantaneous. But electronic service is not instantaneous as a practical matter if it is made at 8:00 p.m. on a Friday night and the recipient does not turn on her computer until 9:00 a.m. Monday morning.

7. Finally, the Subcommittee discussed the fact that, before long, it may make sense to require the clerk, rather than the parties, to serve all papers filed with the court. Software is apparently being developed that would permit the clerk, with a touch of a button, to serve an electronically filed paper on all parties. Under the draft amendment, a district court could, by local rule, authorize service by the clerk instead of by the parties. (For a circuit court to have the same authority, we would need to propose an amendment to FRAP 25(b), which presently requires party service of all papers unless FRAP expressly assigns the responsibility to the clerk.)

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[3]If this amendment is adopted, FRCP 6(e) will closely parallel FRAP 26(c), which adds "3 calendar days" to deadlines that begin to run upon service of a paper "unless the paper is delivered on the date of service stated in the proof of service."

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March 17, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON APPELLATE RULES

SUBJECT: *Revised Agenda Item*

As mentioned earlier in the accompanying memorandum, Professor Edward H. Cooper was asked to prepare a draft rule amendment that would authorize service by electronic means. The original draft was circulated among the committee reporters for comment. The attached agenda item on "Electronic Service: Civil Rules 5(b), 77(d)" includes revisions that account for comments submitted by the committee reporters. It was sent by Professor Cooper after Professor Schiltz had prepared the agenda material contained in this book, which refers to the original Cooper draft item. The major points made in the original version remain intact. Most of the revisions in the Cooper updated draft add possible alternatives suggested by the reporters for the consideration of the committees.

John K. Rabiej

Attachment

Electronic Service: Civil Rules 5(b), 77(d)

The Standing Committee Subcommittee on Technology has explored electronic service. This proposal to amend Civil Rule 5(b) grows out of Technology Subcommittee discussions. The proposal has been informally reviewed by the Advisory Committees for , with the thought that . It would be possible to recommend this proposal for publication in August if . These notes provide a brief summary of the background experience with electronic filing under Civil Rule 5(d) and a proposal that restyles present Rule 5(b) and adds a provision for electronic service.

Experience with Electronic Case Filing is gradually accumulating in the wake of the 1996 Rule 5(e) amendment authorizing local rules that permit papers to be filed, signed, or verified by electronic means. The basis of experience is in some ways narrow. Only a few courts are involved, including four district courts participating in a prototype program. The complaint is initially filed by traditional means; only when the case is later selected for electronic filing does the clerk "back-file" the complaint in the electronic record. Cases are individually selected for electronic filing, and consent of the parties is required. These limits suggest caution in seeking to extrapolate lessons for more general application. Nonetheless, the experience of those who engage in electronic filing is just what might be hoped: it is faster, more reliable, and less expensive. Still greater benefits can flow from electronic service. The benefits are likely to be greatest for small offices and for districts that are geographically broad. There is growing pressure to authorize development of electronic service. The lead has been taken by the Bankruptcy Rules Committee. Proposed amendments to Bankruptcy Rule 9013(c), published for comment in August, 1998, deal with "Application for an order." It provides that: "Service shall be made in the manner provided in Rule 7004 for service of a summons, but the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." A similar provision is included in the proposed amendments to Bankruptcy Rule 9014.

The first choice to be made, once the concept of electronic service is embraced, is how far to push it. For the moment, it seems safest to allow electronic service only with the consent of the person to be served. This limitation need not be a severe restraint. If the advantages of electronic service are as substantial as the enthusiasts believe, consent is apt to be given by an increasing number of parties and attorneys. The time to abandon the consent requirement will come as modern technology is developed still further and adopted more universally. Detailed provisions for implementing the consent requirement could be incorporated in the national rule. Among the questions that have been suggested are whether advance consent is required, whether consent can be sought in the process of making electronic service, whether failure to object to electronic service implies consent, and so on. The attached draft, however, does not include provisions for these questions. It has seemed better to avoid the risk of fossilizing specific details that would be difficult to adjust through the Enabling Act process. The draft Note suggests that local rules might address these questions.

A second choice is whether to authorize electronic service for the summons and complaint under Rule 4 and "other process" under Rule 4.1. Experience with electronic filing provides very little guidance for these situations. The Technology Subcommittee has agreed that the first step should be limited to service of papers that do not qualify as "process." Rule 5 is to be the sole focus in the Civil Rules, with comparable provisions in the Appellate and Criminal Rules. Bankruptcy Rules may be developed in more adventurous ways. Bankruptcy practice is not easily divided between "process" and other papers, and it has traditionally moved ahead of the other

rules in developing the benefits of advancing technology.

The task of excluding service under Rules 4 and 4.1 from Rule 5(b) is not quite as easy as it may seem. Exposition of the drafting issues is best supported by setting out the full text of present subdivisions 5(a) and 5(b).

Rule 5(a) provides:

> **(a) Service: When Required.** Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.
>
> In an action begun by seizure of property, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

Rule 5(b) is set out with superscripts designating the parts of the new draft that incorporate the present provisions:

> **(b) Same: How Made.** [5(b)(1)] Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. [5(b)(2)] Service upon the attorney or upon a party shall be made by [5(b)(2)(A)] delivering a copy to the attorney or party [5(b)(2)(B)] or by mailing it to the attorney or party at the attorney's or party's last known address or, [5(b)(2)(C)] if no address is known, by leaving it with the clerk of the court. Delivery of a copy within this rule means: [5(b)(2)(A)(i)] handing it to the attorney or to the party; or[5(b)(2)(A)(ii)] leaving it at the attorney's or party's office with a clerk or other in person in charge thereof; or, if there is no one in charge, leaving it at a conspicuous place therein; or, [5(b)(2)(A)(iii)] if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. [5(b)(2)(B)] Service by mail is complete upon mailing.

Rule 5(a) begins by excepting service "as otherwise provided by these rules." Separate service provisions appear in at least Rule 45(b) (subpoenas); 71A(d)(3) (notice in condemnation

proceeding); and 77(d) (notice by the clerk of the entry of an order or judgment). There may be other exceptions as well. Despite the formidable catch-all "every written notice * * * and similar paper" category at the end, at least one court has held that a trial brief is not included in the Rule 5(a) categories, see 4A C. Wright & A. Miller, Federal Practice & Procedure: Civil 2d, § 1143 p. 415. The puzzle of Rule 5(a) is important not in its own terms, however, but only as a challenge for drafting Rule 5(b).

Rule 5(b) does not now indicate whether it covers all service, only service of items covered by Rule 5(a), or some intermediate category. If it is limited to Rule 5(a), it is only by the catch-line ("Same: How Made") that we know it. The puzzle is aggravated by the first sentence, which refers only to service on an attorney, but is sweeping: "Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney * * * ." That language should cover, at the least, the clerk's service of notice of an order or judgment under Rule 77(d). It has been held, however, that Rule 45(b) requires service of a subpoena on the party, not the party's lawyer, see 9A Wright & Miller, § 2454, p. 24. This minor inconsistency should be addressed. More important, it is difficult to believe that Rule 5(b) supersedes the service provisions of Rules 4 and 4.1 whenever a party is represented by an attorney before the action is commenced, when an order of civil commitment is served, or the like. Rule 71A(d)(3), further, requires service in accord with Rule 4, and if — as seems probable — Rules 4 and 4.1 are impliedly excluded from the Rule 5(b) provision for serving an attorney, Rule 71A(d)(3) also should be excluded. These problems should be addressed in revising Rule 5(b), if only to define clearly the new provision for electronic service.

These problems with the first sentence of Rule 5(b) flow into the next sentence, which tells how service is made upon the attorney or a party. This sentence does not expressly invoke the first sentence reference to any service required by these rules. This is the point where it is necessary to draft in terms that clearly exclude service under Rules 4, 4.1, 45(b), and 71A(d)(3). (It is proposed below that Rule 77(d) be amended to incorporate revised Rule 5(b), so that the clerk can make service of orders and judgments by electronic means.)

The draft that follows addresses these questions by limiting the "service on the attorney" provision to service under Rules 5(a) and 77(d). This drafting deserves further study. The general service provisions are limited to Rule 5(a) service; the Rule 77(d) proposal simply incorporates Rule 5(b).

Although the immediate impetus arises from the desire to extend electronic filing to electronic service, it has seemed best to allow other means of service as well. Proposed Rule 5(b)(2)(D) includes any means consented to by the person served.

Electronic service raises questions that parallel the present Rule 5(b) provision that "[s]ervice by mail is complete upon mailing." The Technology Subcommittee concluded that it is better to follow this analogy for electronic service. Administrative Office staff active with electronic case filing believe that the best word to use is "transmit" or "transmission." Difficulties arise because the lack of a universal electronic mail system leaves it impossible, at times, to

provide an electronic confirmation that the message has been delivered. There also was concern that a person anxious to avoid service might close down its machinery, so as to obtain a de facto extension of time if service were made effective on receipt. A different drafting difficulty arises from the choice to include nonelectronic means of service. It is somewhat awkward to think of transmitting an envelope to an express service. The draft resolves this problem by making service complete on delivering the paper to the agency designated to make delivery. This language may be clear, but it is not aesthetically pleasing. The draft also includes an illustration of the alternative choice to make email service effective only on receipt.

The choice to make service effective on transmission or delivering the paper to the agency designated to make delivery raises the Rule 6(e) question of additional time. Even electronic means of communication may fail to achieve instantaneous communication. And even an instantly delivered facsimile or email message may arrive on a Saturday, Sunday, or other time when the recipient is not keeping watch. The Technology Subcommittee concluded that it is better to expand Rule 6(e) to allow an additional three days whenever service is made by means other than physical delivery. The draft incorporates this decision; alternatives are sketched with the draft.

A final question is whether responsibility for serving papers filed with the court should continue to fall on the parties. The next generation of filing software may enable courts to effect automatic service on all parties of any paper filed with the court. At least for cases in which all parties have consented to electronic service, it seems desirable to authorize experiments with service by the court. The final sentence of proposed Rule 5(d) would do this; authorization by local rule is required as a means of protecting unwilling courts against litigant requests.

Draft Rule 5(b)

(b) Making Service.

(1) Service under Rules 5(a) and 77(d) on a party represented by an attorney is made on the attorney unless the court orders service on the party.

(2) Rule 5(a) service is made by:

(A) Delivering a copy to the person served by:

(i) handing it to the person;

(ii) leaving it at the person's office with a clerk or other person in charge, or if no one is in charge leaving it in a conspicuous place in the office; or

(iii) if the person has no office or the office is closed, leaving it at the person's dwelling house or usual place of abode with someone of suitable age and discretion [then] residing there.

(B) Mailing a copy to the last known address of the person served. Service by mail is complete on mailing.

(C) If the person served has no known address, leaving a copy with the clerk of the court.

(D) Delivering a copy by [electronic or any other means]{any other means, including electronic means,}[1] consented to by the person served. Service by electronic means is complete on [transmission]{receipt by the person served}[2]; service by other consented means is complete when the person

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[1] Two votes have been expressed on the alternative choices. Professor Capra prefers "other means, including electronic means, consented to" because it defeats any argument that consent is not required for electronic means. Gene Lafitte, Chair of the Technology Subcommittee, prefers "electronic or any other means consented to."

[2] The first draft made service complete on receipt. This approach eliminates any need to provide extra time to act in response, see Rule 6(e). It also puts the risk of transmission on the party who wishes to rely on electronic service. It leaves the party effecting service in some uncertainty, since present technical advice is that it is not always possible to ensure delivery of an electronic "receipt" across different electronic mail delivery services. The consensus at the technology subcommittee meeting favored completion on dispatch by the party making electronic service. Technical advisers in the Administrative Office suggested "transmission" as the best single word to convey this idea.

making service delivers the copy to the agency designated to make delivery. If authorized by local rule, the court may make service [on behalf of a party][3] under this subparagraph (D).

Committee Note

Rule 5(b) is restyled.

Rule 5(b)(1) makes it clear that the former provision for service on a party's attorney applies only to service made under Rules 5(a) and 77(d). Service under Rules 4, 4.1, 45(b), and 71A(d)(3) — as well as rules that invoke those rules — must be made as provided in those rules.

Paragraphs (A), (B), and (C) of Rule 5(b)(2) carry forward the method-of-service provisions of former Rule 5(b).

Paragraph (D) of Rule 5(b)(2) is new. It authorizes service by electronic means or any other means, but only if consent is obtained from the person served. Early experience with electronic filing as authorized by Rule 5(d) is positive, supporting service by electronic means as well. Consent is required, however, because it is not yet possible to assume universal entry into the world of electronic communication. It is anticipated that the benefits of electronic service will become so apparent that in time consent will readily be given by parties and attorneys. Local rules may be adopted to describe the means of consent, including provisions that enable lawyers and parties who regularly engage in litigation to file general consents for all actions. Paragraph (D) also authorizes service by nonelectronic means such as commercial carriers. The Rule 5(b)(2)(B) provision making mail service complete on mailing is extended in Paragraph (D) to make service by electronic means complete on transmission; transmission is effected when the sender does the last act that must be performed by the sender. Service by other agencies is complete on delivery to the designated agency.

Finally, Paragraph (D) authorizes adoption of local rules providing for service by the court. Electronic case filing systems will include the capacity to make service by the court's transmission of all documents filed in the case. It may prove most efficient to establish an environment in which a party can file with the court, knowing that the court will automatically serve the filed paper on all other parties. Because service is under Paragraph (D), consent must be obtained from the persons served.

The expansion of authorized means of service is supported by the amendment of Rule 6(e). The additional three days for acting after service by mail are allowed for service by mail, by leaving a copy with the clerk of the court, or by electronic or other means.

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[3] This phrase, or some equivalent phrase, might be inserted to indicate that the court is acting in place of the party that is required to make service. It does not seem to interfere with the incorporation of Rule 5(b) as proposed for Rule 77(d).

Rule 6(e)

(e) Additional Time After Service ~~by Mail~~ under Rule 5(b)(2)(B), (C), or (D). Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party ~~by mail~~ under Rule 5(b)(2)(B), (C), or (D), 3 days shall be added to the prescribed period.

Committee Note

The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including — with the consent of the person served — service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Alternative 1

Do not change Rule 6(e). Electronic service is the speediest means available. Federal Express and other means also are likely to be speedier than the mails. Service by any of these means requires consent of the party to be served; consent should be given only if the party is prepared to monitor the addresses permitted for service.

Alternative 2

If additional time is provided for everything but "personal service" under Rule 5(b)(2)(A), there is an unreasoned distinction. Eliminate Rule 6(e), rather than add 3 days to every response-time period in the rules.

Alternative 3

(e) Additional Time After Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail or by a means permitted only with the consent of the party served, 3 days shall be added to the prescribed period.

This alternative was suggested by Alan N. Resnick as language that could be adopted by Bankruptcy Rule 9006(f). The Bankruptcy Rules do not adopt Civil Rule 6(e), and cannot effectively incorporate Civil Rule 5(b) by cross-reference. The proposed language could be adopted verbatim in Bankruptcy Rule 9006(f), effecting a clear parallel between the two sets of rules.

Rule 77(d)

(d) Notice of Orders or Judgments. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry ~~by mail~~ in the manner provided for in Rule 5(b) upon each party * * * . Any party may in addition serve a notice of such entry in the manner provided in Rule 5(b) for the service of papers.

Committee Note

Rule 77(d) is amended to reflect changes in Rule 5(b). A few courts have experimented with serving Rule 77(d) notices by electronic means on parties who consent to this procedure. The success of these experiments warrants express authorization. Because service is made in the manner provided in Rule 5(b), party consent is required for service by electronic or other means described in Rule 5(b)(2)(D). The same provision is made for a party who wishes to ensure actual communication of the Rule 77(d) notice by also serving notice. As with Rule 5(b), local rules may establish detailed procedures for giving consent.

Add-on: Electronic Request to Waive Rule 4 Service

Rule 4(d) requires that a request to waive service of process be made in writing. We may want to think about allowing the request to be made by electronic means. This change would be a first and very limited stop on the road to service of summons and complaint by electronic means. The Technology Subcommittee did not think it necessary to address this question in conjunction with electronic service. Two difficulties are apparent: providing assurance of actual receipt, and providing a clear means of response. A simple but probably inadequate approach would revise Rule 4(d)(2) by making a few additions:

* * * The notice and request

(A) shall be in writing or electronic form and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment of law to receive service of process) of a defendant subject to service under subdivision (h);

(B) shall be dispatched through first-class mail, electronic means, or other reliable means;

(C) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(D, E, F): Unchanged; and

(G) shall, if made in writing, provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing. * * *

IMPLICATIONS OF ELECTRONIC CASE FILING FOR THE FEDERAL RULES

INTRODUCTION

This memorandum describes some of the implications that filing court cases and documents electronically may have for the federal rules of procedure. It briefly discusses the context in which the courts are moving toward use of electronic case files and their reasons for doing so. Using examples drawn from the courts currently experimenting with electronic filing, this memo will describe, mainly from the litigator's perspective, how electronic filing can operate and how it relates to the federal rules of procedure. It will also highlight some related issues that may be of interest to the Rules Committees.

BACKGROUND

There is little question that the world in general, and American society in particular, is moving toward increasing use of electronic communications. Not only are growing numbers of Americans using e-mail and the Internet, but most attorneys are also at a minimum using computerized word processing to prepare legal documents. Courts, both federal and state, increasingly rely on computer technology to speed and improve their operations. Although court need for storage space and ready access to records may be among the driving forces for these efforts,[1] automated systems have many other advantages for court administrators and judges. For example, the amount of time spent moving and duplicating documents within the court, as well as providing copies to the public, could be reduced if documents were readily available in electronic form. Judges and their staff, who already have access to electronic research materials, docket sheets, and some case management information, could also access the case files themselves, with the text searching and copying opportunities such electronic access can bring.

As part of the judiciary's transition toward increased automation of court operations, the Judicial Conference Committee on Automation and Technology developed the Electronic Case Files (ECF) initiative.[2] The ECF initiative is a part of a broader Automation Committee effort to

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[1]For example, Ohio Northern, one of courts testing a prototype electronic case filing system, was motivated at least in part by the need to handle huge numbers of documents in asbestos litigation pending there.

[2]The ECF initiative includes (1) a project to replace the courts' present automated case management systems (ICMS, etc.) over the next few years with automated systems that perform the necessary case management functions and include electronic filing and case file capability that courts can implement at their discretion; and (2) ongoing efforts to study and resolve various legal, policy, and technical issues that arise in conjunction with electronic filing, e.g., privacy concerns, possible rules changes, questions involving the use of court personnel and other resources, and associated "cultural" issues. As part of the ECF initiative, the Administrative Office has produced a number of documents detailing a variety of aspects of the transition to electronic case file systems. See, e.g., *Electronic Case Files in the Federal Courts: A Preliminary Examination of Goals, Issues, and the Road Ahead, Discussion Draft* (March 1997); Staff paper for the Technology Subcommittee entitled Status of Electronic Filing in the Federal Courts -- Potential Issues and Topics (June 1998).

reduce the federal courts' primary reliance on paper as the medium for creating, storing and retrieving information. Alongside this initiative, nine courts (four district and five bankruptcy courts) are testing prototype ECF systems developed in conjunction with the Administrative Office, and other courts are either testing or at least considering similar prototype systems of their own design.[3]

The ECF prototypes (and other court-based experiments) are testing and refining various ways that electronic filing might operate in the federal courts and how it might mesh with electronic docketing and case management systems.[4] These experiments are not necessarily precise models for future expansion. Rather, the hope is that the judiciary will be able to draw from this early experience, taking advantage of successes and learning from both things that work and those that do not work as planned.

As presently set up, the ECF prototypes generally allow attorneys to file documents in certain cases by sending them over the Internet from their offices to the relevant courts, where the documents are filed, acknowledged, and automatically docketed.[5] These experimental programs currently permit pleadings (except civil complaints), motions, and some (but not all) accompanying documents to be filed in electronic form. The prototypes, which are evolving as they go, vary among themselves in a number of ways. Although this memo is not a detailed description of how the ECF prototypes operate, some specifics will be used as examples and described more fully as part of the discussion below. It is important to keep in mind that future electronic filing systems may or may not follow these models.

ECF systems clearly have implications for the federal rules of procedure. Those rules, developed beginning in the 1930s, and still largely hewing to their original structure, were naturally designed with paper in mind. Although some issues raised by electronic filing may have parallels in the paper world, others do not. This memo will discuss the extent to which the continued and expanding use of electronic filing in the federal courts may require adjustments to the existing rules.

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[3]The prototype courts are: New York Eastern; Ohio Northern; Missouri Western; Oregon; New York Southern (bankr.); Virginia Eastern (bankr.); Georgia Northern (bankr.); Arizona (bankr.); and California Southern (bankr.). The District of New Mexico has developed an Advanced Court Engineering (ACE) system that has been in use in civil cases in the district court for over a year, and is now being extended to cases in the bankruptcy court. The Court of Appeals for the Second Circuit is currently exploring possible use of electronic filing in its appellate proceedings.

The experience so far is that use of electronic filing in the prototype bankruptcy courts has generally been heavier than in the district courts.

[4]The ECF programs also provide capability to provide electronic notice, as well as expanded case file access.

[5]In at least some courts, documents can be filed on diskette and/or court personnel convert paper filings into electronically imaged form.

RULES ACTIVITY SO FAR

Electronic filing of documents in federal court may take place only to the extent that it is permitted under the applicable rules of procedure. In 1996, as a first step in the transition from all-paper systems, and in recognition of the need for local experimentation during that time, the federal rules were amended to 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.[6]

Thus, the federal rules of procedure currently offer considerable flexibility to individual courts that want to implement electronic case filing systems, by allowing them to use local rules to address relevant procedural issues. It should be noted that the amendment quoted above addresses filing documents with the court, but it does not provide authority to alter the manner of service, either of the original process or of subsequently-filed documents. Although the Judicial Conference has not issued any technical standards, the Committee on Automation and Technology has approved non-binding technical standards and guidelines.

In addition, amendments to the Federal Rules of Bankruptcy Procedure that would permit electronic service of certain types of documents are currently under consideration.[7]

The courts now testing prototype ECF systems have in some instances issued local rules specifically authorizing electronic filing, although many are instead using general orders to establish (and in some cases modify) the actual procedures.[8] In many cases, these have been supplemented with detailed "user guides" or "user manuals" that focus on the technical aspects of electronic filing.

Although this structure appears to be working for the prototype courts, the Rules Committees will need to consider whether this "localized" model is the most appropriate as increasing numbers of federal courts make the transition to electronic systems. The appropriate

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[6]FED. R. CIV. P. 5(e); see also FED. R. CRIM. P. 49(d); FED. R. APP. P.25(a)(2)(D); cf. FED.R. BANKR. P. 5005(a)(2), 7005(e), 8008(a).

[7]Proposed FED. R. BANKR. P 9013(c), currently out for public comment, provides that "the court by local rule may permit the notice to be served by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes." See also FED. R. BANKR. P 9014(c)(2)(identical language).

[8]See attached charts that summarize the local rules and procedures for the courts testing the AO-developed prototype and the District of New Mexico.

scope and timing of action on issues discussed below should be the subject of further consideration. In the short term, the Rules Committees should consider amending the relevant rules to allow electronic service. These questions will be discussed in more detail below.

LITIGATION IN THE ELECTRONIC WORLD

The next sections of this memo follow a hypothetical piece of litigation through an electronic filing process, noting some of the rules issues as it goes along. The discussion will be largely from an attorney's point of view, since attorneys are the primary users of the federal rules of procedure. As appropriate, however, issues relevant to judges and court staff will also be noted. This is intended not to be an exhaustive discussion of every possible issue, but rather to highlight the fact that the federal rules of procedure do come into play in some different ways in electronic and paper systems. It is useful to keep in mind that issues arising from electronic filing of documents often have parallels in the paper system, some of which issues are and some of which are not addressed in the rules.

I. Do all courts have electronic filing systems?

No. Although the 1996 amendments to the federal rules authorize courts to issue rules permitting electronic filing, at present, only a limited number of courts have done so and are set up to receive electronically filed documents.[9] Five bankruptcy courts and five district courts presently offer some sort of electronic filing.

A. Which cases are potentially eligible for electronic filing?

For courts with the technical capability to accept electronic filings, any or all types of cases could be deemed eligible to use the system. As courts first begin using ECF systems, however, electronic filing might well be limited by rule or practice to certain categories or types of cases. Judges might encourage certain cases or types of cases to use electronic filing. Or, courts could rely on parties to make the decisions among themselves.

All the courts testing prototype systems have initially limited the types of cases eligible to participate in the experiment, although actual practice is evolving beyond those limitations. Although a prototype is now being developed for use in criminal cases, none of the district courts currently permits electronic filing in criminal cases. Some bankruptcy prototype courts limit electronic filing to certain types of cases (e.g., Chapter 11 proceedings); in others, it is left to the judge's discretion on a case-by-case basis. Some prototype courts are urging particular types of cases into their ECF system, either by general order or on a case-specific basis. For example, Ohio Northern's general order mentions civil rights and intellectual property cases as an initial

[9]The 1996 amendments also authorize courts to permit filing by facsimile. This memo, however, focuses on systems that provide documents in electronic form.

focus, although the practice has not followed this suggestion. Judges in New York Eastern have urged a large number of student loan collection cases into the ECF system. In Missouri Western, the court retains discretion. In New Mexico, all court orders are now included in the ECF system, but any party may choose whether to file a given document in a case electronically.

Rules issues: *Should case eligibility for electronic filing be addressed by rule?*
If so, should categories of cases be limited?
Should selection criteria be set out?
Should parties' consent be a criterion?
How much discretion should there be, and who (court or parties) should exercise it?

B. Are there other limitations on ECF participation?

Most prototype courts limit electronic filing to members of the court bar. Few allow electronic filing in pro se cases. In the future, arrangements might be devised to allow pro se litigants to file electronically, using computer terminals in the courthouse or at other remote locations. Issues relating to prisoner cases will need to be considered, and some standards or limits on filing and docketing might need to be developed.

Rules issues: *Are there issues that should be addressed by rules?*

C. At what stage of the case may documents be filed electronically?

The federal rules in their present form authorize electronic filing of documents (but not electronic service). The rule language quoted above (at note 6) would appear to authorize electronic filing of a complaint or other initiating document, as well as subsequent papers. It does, however, leave some unanswered questions relating to filing complaints electronically; for example, questions relating to effecting personal service, payment of filing fees, and who is authorized to file electronically. (See further discussion in section IV below.)

Since none of the district courts testing prototype systems currently permits electronic filing of a complaint or electronic service of process, complaints are still filed "conventionally." Most of the local rules and orders do not address the issue of when a case can or should enter the electronic filing system. Several prototype courts currently use the initial case management or "Rule 16" scheduling conference to discuss whether ECF is appropriate for a particular case. In other courts, parties may use electronic filing whenever they are all willing to participate and the court approves.

Many of the bankruptcy prototype courts do provide for electronic filing of bankruptcy petitions. Since petitions need not be "served" for the purpose of obtaining jurisdiction on anyone, issues of personal service do not arise.

Because the initial pleading generally may not be filed electronically, courts are providing that the complaint, and any other documents previously filed in paper form, are to be "back-filed" electronically in cases put into the ECF process.

Rules issues: *Should courts be encouraged to permit electronic filing of complaints or other initiating documents?*
How would courts handle situations where one or more parties is not equipped (or willing) to file electronically?
How could and should personal service be accomplished electronically (see discussion below, section IV)?
At what stage in the litigation should decisions on ECF participation be made?
Should use of electronic filing be included in the issues set out in Fed. R. Civ. P. 16 and corresponding sections in other rules?

D. Is participation in ECF programs mandatory?

Courts have historically relied on paper-based records. They are, however, beginning to enter into a transition period. The key is how to manage that transition. Electronic case filing could be made universally mandatory, courts or the rules could require it in certain types of cases, it could be subject to agreement among the parties, or individual parties could make the decision for themselves without regard to whether other parties are filing electronically. If electronic filing were to be made mandatory, the issue of how to provide for those without their own access to the means to file electronically would have to be addressed.

Participation is voluntary in all the district court prototype programs. In many courts, all parties have to consent to participation. In the District of New Mexico, the court accepts electronic filing from single parties. In the bankruptcy courts, participation is voluntary, although the Southern District of New York has persuaded the bar to file electronically in all Chapter 11 cases.

Although paper-based and electronic filing systems will likely co-exist for a considerable time, courts will most likely at some time in the future choose to move to an electronic system for most if not all types of cases. Requiring litigants to participate in electronic filing would probably speed the transition. On the other hand, mandatory participation would impose a burden on those not prepared to use it.

Rule issues: *To what extent should the scope of participation in electronic filing be addressed in rules?*
Should courts be authorized to require parties to participate in electronic filing?
Should it be dependent on a finding that parties are capable of doing so?

II. What is needed to participate in electronic case filing programs?

As a practical matter, participating in an electronic case filing system requires certain hardware and software. The 1996 federal rules amendments authorize electronic filing subject to "technical standards, if any, that the Judicial Conference of the United States establishes." Although the Automation Committee has approved technical guidelines that recommend compliance with certain standards, they are not mandatory, and the Judicial Conference has not been asked to endorse them.

Obviously, technology is not static. It is not possible to predict exactly what hardware and software will be used over time.

The ECF prototypes are designed to let attorneys use "off-the-shelf" and readily available hardware and software to the extent possible. The prototypes all are based on using the Internet to transmit documents electronically from law offices to the court (and vice-versa in some situations). The technological options over the long term are hard to predict.

A. What kind of hardware is needed?

Participation in the prototype ECF programs generally requires a sufficiently powerful computer and a modem (for Internet access). Depending on what kinds of documents a user may want to file, and whether they are available in electronic form, a scanner may be necessary.

B. What kind of software is needed?

Documents are prepared on a basic word-processing program. Because the prototypes all are requiring filed documents to be converted into a particular format (called PDF (portable document format)) before they can be transmitted to the court, the software necessary to do that conversion must be purchased -- Adobe Acrobat PDF Writer is the currently-used software. The software for reading documents in PDF format, Adobe Acrobat Reader, can be downloaded free from the Internet. Because the Internet is used to transmit documents to the court, a connection through an Internet Service Provider (ISP) is needed. An Internet browser is usually available at no charge from the ISP, but users need to check to make sure it is one that is compatible with the court's program. Because certain notices are being transmitted over e-mail, an e-mail address (usually available through the ISP) is needed.

C. How can users learn how the system works?

All the ECF prototype courts provide training and education. They all have user guides or other instructional materials to help users understand how the process works. In addition, most have a "training" site as part of their court websites that offers potential users a fairly quick and straightforward opportunity to practice before they actually try to file a document. Some courts also have help lines, and all are currently providing some type of hands-on training.

D. Does it cost anything to participate?

None of the prototype courts is currently imposing any user or other ECF-specific fees, although this may change in light of the Judicial Conference's recently adopted policy on fees for Internet access.[10]

Normal document filing fees remain applicable. Because ECF programs involve filing documents without appearing at the courthouse, courts have to develop ways to get fees paid. Some prototypes, mostly in bankruptcy courts, have arranged for prior authorization of credit card charges, but others do not presently permit electronic filing of documents where fees are concurrently required (see discussion above). None currently provides for electronic payment by credit card.

Rules issues: Are there any issues that need to be addressed by rule?

E. What about document security issues?

At least two separate issues are involved here: (a) making sure that only people with the proper authorization are filing electronically; and (b) being able to detect any alteration to filed documents.

The prototype courts are providing approved users unique passwords and identifications, which must be used to enter documents into the system. (See discussion below (section V(D)) about signatures and verifications.) Users are warned not to share those numbers, since documents filed with those passwords and IDs are assumed to be authorized.

Courts also have to be concerned about post-filing alterations (by "hackers" or others). Document security is a widely applicable concern for users of Internet technology, and is being considered in a broad range of contexts.

All prototypes are attaching a unique electronic document identification to each filed document. Any change to that document will automatically change that ID, so that tampering can be detected.

III. What rules and other procedures apply in ECF cases?

As noted above, national rules (e.g., Fed. R. Civ. P. 5(e)) authorize local rules to deal with local electronic filing programs. Individual prototype courts have issued local rules, often in conjunction with general orders, to address the specifics of their programs. In addition, many

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[10]In September, 1998, the Judicial Conference approved an "Internet PACER fee" of $.07 per page for PACER information obtained through a federal judiciary website.

have issued user guides to help explain the program. For the most part, these rules and procedures are available on the individual court's web site, and can be downloaded.

However, as more courts offer or use electronic filing systems, and as more experience develops, a more uniform set of procedures may be preferable. Some combination of national and local rules is one alternative, particularly if individual courts or circuits retain discretion to decide when, and in what manner, electronic filing is permitted.[11] (See discussion below in section XI.)

Rules issues: *Should rules relating to electronic filing be part of a national rule, be dealt with in local rules, or be a combination?*
If national rules are developed, should provisions applying to electronic filing be incorporated into the appropriate existing rules, or should they be put together into one rule?
Should any rule continue to contain express authorization for the Judicial Conference to issue technical standards?

IV. How is a complaint or other initiating document filed and served electronically?

As noted above (section I(C)), the rules authorize electronic filing of any document (including a complaint), but do not currently authorize electronic service of process or of other documents. Courts could thus permit parties to file initiating documents with the court electronically. This raises issues of whether the plaintiff should be the one to decide whether a case will be part of the ECF system, fee issues, as well as issues relating to court control over the bar, e.g., who is authorized to file a case at all. Electronic service of process raises additional technical and due process issues, including whether the defendant or other parties can or ought to be required to accept electronic service of process, how electronic service of process would actually occur, how receipt could be verified, and separately, whether proof of service could be filed electronically.

As also noted above, none of the prototype district courts currently permits filing or serving the complaint in a civil case electronically. For cases that are ultimately put into the ECF system, the prototype courts require previously filed documents (including the complaint) to be "back-filed" electronically, so that the electronic case file is complete.

In the bankruptcy court prototypes, petitions may be filed electronically in some courts. These do not raise "service of process" issues.

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[11]Another relevant factor is the extent to which electronic filing is expected ultimately to completely replace paper files, as opposed to having parallel systems.

Rules issues (filing of complaint) (Fed.R. Civ. P. 5, Fed. R. Crim. P. 49, Fed. R. App. P. 25):
Should the rules treat the electronic filing of the complaint or other initiating documents differently from filing any other paper?
What if the other party consents?
How do fee payment issues get resolved?

Rules issues (service of process) (Civil Rule 4):
Should electronic service of process be authorized in Civil Rule 4?
How could receipt be ensured and verified?
Could companies be required to designate "electronic agents"?
Even if actual electronic service of process were not authorized, could proof of service be filed electronically?
Should there be a difference in the way service is handled under Civil Rules 4 and 5? See also Fed. R. Crim. P. 5, 9. See also section V(F), below.

V. How are documents actually filed in an ECF case?

The procedure for filing depends on how a particular court has set up its ECF program. It is likely that electronic filing systems will evolve over time, as technology changes and improves.

For the courts currently testing prototype systems, a document has to be in a specific format the court can accept. Prototype courts are currently requiring electronically filed documents to be in a specific electronic format, called "portable document format" or PDF. Thus, the document would first be created in the usual way on a word processor. Commercially available special software (such as Adobe Acrobat PDF Writer) is needed to convert the document to PDF. Once the document is in this format, a filer goes to the court's web site and follows the instructions. (As noted above, most of the courts have training sites that let users try out the system in advance.) Part of the instructions involve creating the docket entry. The last step involves attaching the document to be filed (in PDF form) and sending it off to the court.[12]

Most of the prototype courts' rules or orders specifically provide that electronically-filed documents are considered "filed" or "docketed."

Rules issues: *The rules authorizes electronic filing if permitted by local rule. Is this sufficient?*
Should a national rule address specific issues?
Does the rule need to be explicit about when a document is deemed filed?

[12]As noted above, some courts permit documents to be filed on disk.

A. How does the filing get docketed?

An advantage of electronic filing systems is that the docket entry can be prepared by the filer as part of the document transmission process, thus reducing the burden on the clerk of court. However, the clerk's role in monitoring the quality of docket entries needs to be considered.

The prototype court systems are designed so that the docket entry is prepared by the attorney as part of the filing process, using an approved list. The electronically filed document gets docketed automatically at the time it is filed.

The clerk of court in a prototype court therefore does not have to prepare a docket entry for documents filed electronically. Although the prototypes provide that the documents are considered docketed at the time they are electronically filed, some of the prototypes specifically provide that the clerk retains the ability to review and modify the docket entry as appropriate.[13]

Rules issues: *Are any rule changes needed to address docketing issues?*
Should attorneys expressly be given the authority to prepare docket entries?
When should an electronically filed document be deemed docketed?
Should documents intended for filing be "lodged" subject to clerks' determination that an entry is appropriate for docketing?
Should certain categories of cases (e.g., pro se cases) be treated differently?

B. Can electronic filing be acknowledged by the court?

Prototype courts provide an automatic computerized acknowledgment, which is the functional equivalent to a date-stamped paper copy of the filing obtained from the clerk.

C. How are technological glitches and format problems handled?

As with paper systems, technological or other glitches do occasionally occur. This may prevent documents from being filed in a timely way. Provision may need to be made for problems (e.g., failures with the court's computer system, Internet problems, ISP problems) that prevent documents from being filed (or perhaps retrieved). Other types of technical problems also need to be addressed; for example, documents that are "filed" but cannot be read, because they are in the wrong format or for other reasons.

Many of the prototype courts provide that documents that cannot be timely filed because of technical failures may be filed the next day. Some sort of affidavit, other evidence of attempts to file, and/or notice to the clerk of the problem is required. Documents are then filed and backdated.

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[13]Initial experience suggests that the error rate in lawyer-prepared docket entries has been quite low.

Only one of the prototypes' rules addresses the question of a document timely filed but in an unreadable format. In that court, the document may be re-transmitted within 24 hours of discovery of the problem.

Rules issues: *How, if at all, should the rules address failure to file timely because of technological glitches?*
Should it matter what type of problem it is (Internet congestion or other problems, court system problem, attorney office problem)?
What remedy, if any, would be appropriate?
Current rules (e.g., Fed. R. Civ. P. 5(e) and Fed. R. Crim. P. 49(a)(4)), preclude the clerk from refusing the filing of a document just because it is not in "proper form." Should there be a different rule if the electronically "filed" document is unreadable?

D. How does the court (or clerk) know who actually filed the document?

Because electronic documents cannot be "signed" in the traditional way, various technologies exist or are being developed that are capable of injecting a unique "signature" into a document. This raises a variety of complex issues, which are being considered in a wide range of other contexts.

The rules currently require signatures for several different purposes, including as an indication that a document was filed by someone entitled to file it, as verification of the truth of the contents (e.g., for affidavits), and for Civil Rule 11 certifications.

Prototype courts are issuing unique passwords and IDs for ECF system users. They treat

Many of the prototype courts require non-filing party-signatories to a document to file an electronic endorsement. However, most of the prototypes also ask that the filing party keep a paper original with all signatures on file. A similar process is used for documents requiring client or other third-party signatures.

In a few bankruptcy courts, a signed original of a bankruptcy petition must be filed with the clerk. In others, the original need only be retained by the party.

Rules issues: *What kind of authentication should be required for documents with multiple signatures or signatures of others than the filing attorney?*
What kinds of other record copies should be required and/or retained?

F. How are electronically filed documents served on other parties?

The federal rules require mail or personal service of filed documents. There is currently no authorization for electronic service. Most of the prototype courts operate on the parties' consent to accept electronic service.[14]

Were electronic service to be authorized, a variety of implementation mechanisms are available. These might include requiring the filing party to electronically transmit a copy of the document to each party, permitting electronic notice of filing to constitute service if it includes a "hyperlink" providing direct electronic access to the document being filed, or permitting electronic notice of filing to constitute service with the recipient then expected to go to the court's website to access the document. Another alternative is for the court itself to transmit notice of the filing automatically to all parties (with or without a hyperlink or the document itself attached). Provision must also be made for certificates of service.

In some of the prototypes, parties are also required to provide paper copies of filings to the presiding judge.

Rules issues: *The rules currently contain no authorization for electronic service of documents. The only basis on which it is being done is by consent of parties. Does it need to be authorized by national or local rule?*
Should there be different procedures for service of the complaint (e.g., Civil Rule 4) or other initiating document and for service of subsequently filed documents (e.g., Civil Rule 5)? (See discussion above, section IV.)
Who should have responsibility for service?
What needs to be sent (only a notice of filing, or the underlying document itself)?
What kind of proof or certification of service would be required?
What kind of verification of actual receipt, if any, might be required?

G. Are there any changes needed to the applicable filing deadlines or time computation rules when documents are electronically filed?

Electronic filing (and service) have the potential to be virtually instantaneous. Occasionally, however, problems with Internet access, court or private computer systems being out of service, or other technical problems can affect how quickly documents are transmitted. This raises questions about how to treat electronically filed documents for the purposes of deadlines and time computations. Electronic filing could be treated as service by mail (i.e., allowing three extra days), as needing no extra time, or as something else. In addition, because documents can be electronically filed from a remote location, time zone issues might even come into play.

A few of the prototype courts have made adjustments to the rules governing computations of time; in one court, one additional day is added for the purposes of Fed. R. Civ. P. 6(e); in another, electronic service is treated as service by mail, and the three-day addition remains in

permitted. On the other hand, technology permits a broad range of information to be presented electronically, including video and audio information.

In a few prototype courts, there are some limits on the size of documents that can be filed over the Internet. Larger documents in electronic form may be filed on disk in some prototypes. Documents that are not in electronic form, and cannot be converted, are filed conventionally in most prototypes. In at least one prototype court, an electronic "notice of manual filing" is required if the document is filed conventionally.

From the perspective of the clerk of court, non-electronic filings in cases where much of the case is in electronic form will require additional handling.

Rules issues: Are rules needed to address this? Would this always remain a local rule question?

I. How are documents handled that are (or may be) subject to a sealing or other protective order?

Because electronically filed documents are potentially readily and very publicly accessible, provision needs to be made for filing of documents that the court has put under seal, as well as for documents that a party seeks to, but has not yet been authorized to, put under seal. For the former, non-electronic filing might be permitted, and/or the document could be filed on disk for use in a non-public database. For the latter (e.g., motions to seal), the motion itself might be filed electronically, with provision made to keep the potentially sealed document out of the electronic database until the court has ruled.

The prototype courts prohibit electronic filing of documents that are to be filed under seal. Several courts provide that a motion to seal and any court order authorizing filing under seal are to be filed electronically. (See further discussion below, section X(C).)

Rules issues: No rule currently governs documents under seal. Should special provision be made for electronic filing of documents filed under seal?
Should such documents be filed electronically but with a mechanism to block public access?
How should documents not yet subject to a sealing order be handled?

J. How are discovery documents handled?

Most discovery documents are not currently filed with the court, unless a judge orders it; a proposed rule amendment would formalize this practice.[15] None of the prototype courts is

accepting electronic filing of discovery documents, except as ordered by a judge or to the extent that particular documents are filed as attachments or exhibits.

The prototypes also do not address parties' ability to exchange discovery material among themselves electronically.

Rules issues: *Should the courts accept electronic filing or lodging of discovery?*
Is there any reason why the courts should serve as conduits for electronic exchange of discovery?
Should the rules address electronic exchange of discovery material among parties?

VI. What are the ECF implications for the trial?

Trial exhibits, trial transcripts and other documents become part of the record during a trial. Should they become part of the electronic case file? [16]

A. Can trial exhibits be filed electronically?

Trial exhibits entered into evidence during the proceedings could be "filed" into the record either during the trial itself or subsequently, depending on the types of facilities available in the courtroom. Even prior to trial, proposed exhibits could be "lodged" with the court electronically. Exhibits could be available on CD-ROM. To the extent that exhibits involve items that are not available in electronic form, and cannot be scanned (or otherwise imaged into electronic form), more traditional forms of filing would be necessary. These issues could be addressed at the final pre-trial conference.

One of the prototype courts provides that trial exhibits admitted into the record can be placed into the electronic filing system. Some of the prototypes allow electronic filing of some trial-related documents (e.g., witness and exhibit lists), but do not address the electronic filing of trial exhibits. One requires conventional filing. Others do not address trial issues at all.

Rules issues: *Should the rules address whether trial exhibits can be filed electronically?*
Should they address issues of whether trial exhibits should be part of the case file or docket?

B. Does the trial transcript become part of the electronic file?

Court reporters are increasingly making transcripts available in electronic form after the hearing. In some cases, the transcripts are even being electronically displayed during the hearing.

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[16]Some similar issues will arise with respect to other documents relating to proceedings but not part of the record, such as arrest warrants.

Should transcripts be included in the electronic case file? Should they be publicly available? Should they automatically be available for the record on appeal? What is the impact on court reporters?

28 U.S.C. § 753(b) provides that the transcript of a court proceeding (in at least note form) is to be filed with the clerk and made part of the public record. This suggests that an electronic version could be put into the electronic docket.

One prototype court provides that transcripts are to be filed conventionally. None of the other prototypes addresses this issue.

Rules issue: *Does the fact that this is a statutory rather than a rules provision affect whether a rule should address issues relating to transcripts?*
Should this be addressed, if at all, by national rule?

VII. Are court orders and decisions part of the electronic record?

Court orders, judgments and other decisions can readily be made a part of an electronic case file system, since the documents are generally prepared in chambers on computer. Notice of such documents could be provided to parties electronically, as could copies of the documents themselves. Current rules require service of orders and judgments by mail.

Court orders and judgments for ECF cases in prototype courts are generally available as part of the electronic file. In most prototype courts, the rules provide that the court can give electronic notice of court orders and decisions, although the rules do not specifically state how the documents are accessed (e.g., by hyperlink, by accessing the court electronic file). It appears that prototypes are relying on the consent of the parties to overcome the continuing requirement of service by mail.

Courts may want to think about the implications for the distinctions between published and unpublished opinions.

Rules issues: *Do the service rules (Fed. R. Civ. P. 77(d); Fed. R. Crim. P. 49(c); Fed. R. App. P. 45(c); Fed. R. Bankr. P. 9022) for court orders and judgments need to be altered?*

VIII. How does electronic filing in the lower court affect an appeal?

Having the trial court record in electronic form has implications for the courts of appeals. To the extent that appellate courts accept the record in electronic form, transfer could be easy and quick. The record could be forwarded electronically from the lower court, or the appellate court could access or extract the information it needs directly from the trial court site. In situations

where the appellate court does not accept electronic files, the lower court or the parties would have to arrange for creating paper copies of the files for appeal purposes.[17]

Clerks of the courts of appeals and bankruptcy courts are currently required to serve notices of appeals by mail. See Fed. R. App. P. 3(d); Fed. R. Bankr. P. 8004.

There are currently no electronic filing experiments at the appellate court level, although the Administrative Office and at least one court are in the process of developing prototype systems. A few courts of appeals are accepting briefs in electronic form on disk. One of the prototype courts states in its order that it will provide either a paper or an electronic copy of the record, as requested by the appellate court.

Rules issues: *Should there be any change in where and how an appeal is initiated? (Appeals are currently initiated in district court so that the court can certify the record.)*
Should provisions for service of notices of appeals be amended?
How should record certification and labeling be handled?
How should record transmission be handled (if at all)?

IX. Is the official record in electronic or paper form?

The official record of a proceeding currently is derived from records in paper form. Should this be different for cases where the documents have been maintained in electronic form? Is a dual system feasible, and if so, for how long? How should issues relating to those without access to electronic technology be handled?

The District of New Mexico provides that for electronically filed documents, "the official document of record is the electronic document stored in the Court's data base." Other prototypes do not address the issue directly, indicating only that an electronically filed document is considered "filed" or "docketed."

Rules issues: *Is this a rules issue at all? See Fed. R. App. P. 10; Fed. R. Bankr. P. 8006.*

X. What other implications does electronic document filing have?

The existence of court case records in electronic form will have impacts on and implications for a variety of other rules-related matters. A few of those will be discussed below.

[17]Similar issues would arise with respect to appeals to the Supreme Court.

A. How will record retention be handled?

Until such time (if ever) that the courts have a totally electronic system, there will be questions about retaining paper copies of documents. During a transition period (and perhaps more long-term than that), what paper records should be retained, by whom, and for how long? The questions about length and form of retention will also arise for records in electronic form.[18] Unless and until there is a widely accepted method of transmitting signatures electronically, paper copies of documents with original signatures will probably need to be kept. They could be retained by the parties or by the courts.

As noted above (section IX), long-term answers to these questions will depend on the form in which the official record is determined to be kept.

Most of the prototypes require that paper copies of all electronically transmitted documents be retained by attorneys. Others require retention of paper versions of some documents (e.g., documents that were converted to electronic form via scanning, documents containing multiple signatures or signatures other than that of the filer).

Rules issues: *Who (clerks, parties) should be required to retain records, in what form and for how long?*
To what extent should this be addressed in rules?

B. How might electronic filing affect retention of other documents that might be used as evidence?

A wide variety of documents, prepared by government entities, businesses and others, are routinely entered into court records as exhibits and trial evidence. To the extent that the original documents are kept in electronic form, submitted versions (in electronic or written form) need to be authenticated. Authentication is also an issue where documents are converted from paper into electronic form. Decisions about the admissibility of official and other documents in court proceedings may well affect the routine document preparation and archiving practices of government entities and others.

None of the prototypes address these issues.

Rules issues: This is both an evidence issue (e.g., Fed. R. Evid. 902,1002-1005) and a question of procedure (see, e.g., Fed. R. Civ. P. 44).
How will documents (not pleadings) be authenticated when they are maintained in electronic form (i.e., when the creator of the document creates and stores it electronically), or when they are converted from paper to electronic form for submission?

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[18]Archiving requirements also come into play.

C. How might the existence of electronic case files affect access to those files?

Electronic documents have the potential to be easily accessible. In fact, this is generally considered to be one of their great advantages. They can be accessed from remote locations, and by more than one person at a time. Thus, a document in an electronic court file could be available at any time to anyone. This raises issues of what ought to be available, and to whom.

A court could make the entire electronic file available over the Internet, including all docket entries, party filings, and court actions. It could make subsets of the file available to different groups (e.g., court employees, parties, the public). For example, the docket sheets could be available to the public, with the party filings available only to parties. The court could permit public access to the entire electronic case file, or it could limit public electronic access to certain types of documents (e.g., ones that implicate privacy issues, such as medical records, tax returns, other very personal information), even though they are not subject to seal.

Most of the prototype courts are permitting public access to the entire electronic case file (party filings and court decisions). Some are permitting public access to the docket sheet, but limiting access to the underlying documents to registered ECF system users (and court employees).

Rules issues: *Is the scope of electronic access an issue that should be addressed in rules at all, given that rules do not govern the paper analog?*
Should access be broad, or more limited?
Should electronic access be co-extensive with what would be available at the courthouse, or do the privacy or other implications of potential unlimited access suggest that some additional limitations should be put on electronic access?
Should the rules address changes in what is actually filed by parties?

XI. What are the next steps?

This paper has sought to raise at least some of the rules issues that derive from use of electronic case filing. In addition to the substance of how those issues should be handled in specific rules, there are the threshold questions that need to be addressed:

(1) Should the national rules be amended to address the range of specific issues, should they be handled through local rules, or should there be some sort of combination?
(2) If the issues are handled at the national level, when should that happen? Is the time ripe to consider amendments to the national rules? Should all issues relating to electronic filing be addressed at one time?
(3) Should amendments addressing electronic filing be included as part of the various rules addressing the issue in the non-electronic context, or should they be put together in one rule addressing electronic filing?
(4) Should a model local rule be developed?

There are pros and cons to various approaches. A national rule promotes uniform practice across the country, and it is the direction that the Judicial Conference (and many others) believe is the best way to approach rules generally.[19] Particularly since technology eliminates some kinds of geographical barriers, a national rule may be appropriate. On the other hand, electronic filing is still in its relative infancy, and practice has certainly not gelled around a particular approach. It may not yet be appropriate to discourage local experimentation. Even if the ultimate goal is a national rule, the current approach of Rule 5 -- authorizing local rules -- may be the best approach for the present.

In the short term, the Civil Rule 5 authorization of local rules for electronic filing seems to be adequate to support current use. But, electronic service (Civil Rule 5 and perhaps Rule 4 service) should be addressed. Service issues are generally being handled in the prototype courts by consent. A provision in the federal rules allowing local rules to authorize electronic service (of pleadings and perhaps of process), would probably be sufficient as an interim measure to allow electronic filing programs to go forward. On the other hand, a national rule similar to the proposed amendments to Bankruptcy Rules 9013(c) and 901(c), specifically authorizing electronic service, might be appropriate.

A model local rule, perhaps containing various options, might also be helpful to courts that want to experiment with electronic filing. Such a model might help promote some consistency, or might be a way to test various approaches.

The Committee ought also to begin considering how and when to address the range of other rules discussed above. A preliminary list of rules potentially affected by electronic filing is attached.

CONCLUSION

The development of electronic case filing systems for federal court litigation has implications for the federal rules of procedure. The rules currently authorize local rules to permit electronic filing, and courts experimenting with prototype systems have developed local rules and orders to address a wide range of issues that arise when litigation documents are in electronic form. The Rules Committees should develop a strategy to address such issues as electronic filing becomes more widespread. In the short term, the committees should consider authorizing electronic service as a next step.

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[19]See, e.g., Judicial Conference of the United States, *Long Range Plan for the Federal Courts* 58 (Dec. 1995)(Implementation Strategy 28b).

ATTACHMENT

Local Rules and Procedures Governing Prototype Electronic Case File (ECF) Systems in the Federal District and Bankruptcy Courts

(As of December 7, 1998)

NOTE: To date, one court testing an ECF prototype system—the U.S. District Court for the District of Oregon—has not adopted a local rule or order generally prescribing special procedures for electronically filed cases. The electronic filing procedures in that court are presently established on a case-by-case basis.

December 7, 1998

Local Rules and Procedures Governing Prototype Electronic Case File (ECF) Systems in the District Courts

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
Source of ECF Procedures	• En Banc Order (Electronic Filing), dated Nov. 6, 1997 • ECF Procedures Manual, dated Nov. 18, 1997 • Electronic Case Files (ECF) User Manual, dated Oct. 20, 1998	• Administrative Order 97-12, dated Oct. 23, 1997 • User's Manual for ECF [Electronic Case Filing], dated Dec. 5, 1997	• Local Civil Rules 5.5, 5.6 & 83.6 • Local Bankr. Rules 5005-4b & 7005-1 • Administrative Orders 97-26 (dated Feb. 11, 1997) & 97-83 (dated June 9, 1997) • ACE User Documentation, dated Apr. 15, 1998 • Standing orders entered in individual cases when a party advises, at the first conference with a judge, that the party wishes to participate in the case electronically	• Local Rules 5.1, 16.3(b)(2)(B) • General Order 97-38, dated Oct. 6, 1997 • Electronic Filing Policies and Procedures Manual, dated Feb. 2, 1998 (adopted pursuant to Gen. Order 97-38)
Cases Accepted for Electronic Filing	Court selects cases for ECF and notifies the parties (En Banc Order ¶ 1)	• Electronic filing potentially authorized in any civil case assigned to a judge who agrees to participate in testing the prototype system (Admin. Order 97-12, ¶ 2(a)) • Cases become subject to electronic filing procedures if the judge approves and all parties consent at initial scheduling conference or any later time (*id.* ¶ 2(a)-(b))	• Any party in civil proceedings can file and serve any paper by electronic means in accordance with guidelines established by the court (Local Civil Rules 5.5 and 5.6) • Any party in bankruptcy proceedings can file any paper using electronic transmission in accordance with guidelines established by the court (Local Bankr. Rule 5005-4b)	• Electronic filing authorized if ordered by the court (Local Rule 5.1(b)) • Cases selected at initial case management conferences or other times if parties stipulate and presiding judge approves (Local Rule 16.3(b)(2)(B); Gen. Order 97-38, ¶ 5) • Potentially all civil cases included, but the initial focus on civil rights and intellectual

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		• Either upon application of a party or *sua sponte*, judge can modify or terminate application of electronic filing procedures at any time (*id.* ¶ 2(d))		property cases (Gen. Order 97-38, ¶ 1) • Cases best suited for electronic filing may include those in which: (a) the parties filing or requiring service are reasonably identifiable; (b) the parties filing or requiring service have or can acquire access to a computer, the World Wide Web and, where necessary, a scanner; and (3) the number and/or size of the documents likely to be scanned before electronic filing is not unreasonable (Pol. & Proc. Manual, ¶ 5).
Voluntary or Mandatory Participation	Not specifically addressed in the court's procedures	• Judge and parties must consent • Addressed at initial scheduling conference • In giving consent, parties also provide e-mail address of record; parties must exchange test e-mail messages (Admin. Order 97-12, ¶¶ 2, 3)	Participation in electronic filing is voluntary for any attorney/user/ participant in a case	In "early stages" of project, court will seek voluntary cooperation by parties and attorneys (Gen. Order 97-38, ¶ 1)
Outside Users (Eligibility and Registration)	Each member in good standing of the court bar is entitled to one ECF system login (account) and password, obtained by applying to	• Members of court's bar and pro se litigants with pending civil actions (for only as long as unrepresented by attorney) may	• Any attorney seeking access to the electronic filing system must meet the court's minimum requirements for participants/	• To utilize the electronic filing system, an attorney must be admitted to practice in the district, and must complete an

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	the clerk's office. The login and password cannot be used by anyone other than the attorney or any authorized employee of his/her law firm or organization (En Banc Order ¶ 2)	register as Filing Users (Admin. Order 97-12, ¶ 12) • Registration constitutes consent to service by electronic means as substitute for Fed. R. Civ. P. service (*id.* ¶ 6(c))	users and submit a "WWW Account Request Form" to clerk's office (Admin. Order 97-26, ¶ 3) • To obtain the necessary user identification number and password, an attorney must be admitted to practice in Federal Court and be in good standing (*id.* ¶ 2) • Registration constitutes consent to service by electronic means as substitute for Fed. R. Civ. P. service	"Electronic Filing System Attorney Registration Form" and file it with the clerk of court (Gen. Order 97-38, ¶ 8; Pol. & Proc. Manual, ¶ 12 & App. B) • Registered parties are assigned user identification names and passwords by the court, and are required to protect the security of their passwords, and to notify the clerk of court immediately if the password is compromised (Pol. & Proc. Manual, ¶ 12)
Filing/Service of Initial Case Papers	Complaints to be filed "conventionally and not electronically" unless the court specifically authorizes electronic filing (En Banc Order ¶ 6.a.1)	Initial complaint must be filed in paper form. It must be refiled electronically within 10 days after an action becomes subject to electronic filing (Admin. Order 97-12, ¶ 1, 2 (c))	Not specifically addressed in the court's procedures	Initial papers must be filed and served in the "traditional manner," not electronically (Gen. Order 97-38, ¶ 4). If a case is subsequently accepted for electronic filing previous paper filings must be provided to clerk of court in electronic form (*Id.* ¶ 6.b)
Fees	Credit card payment of fees may be authorized through the clerk's office financial officer (En Banc Order ¶ 3.e)	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures	Initial filing fees must be paid in "traditional manner" (Gen. Order 97-38, ¶ 4)

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Filing of Other Papers/Receipt from Court	• In cases designated for electronic filing, all motions, pleadings, legal memoranda, or other documents required to be filed with the court shall be filed electronically with the exceptions noted above and below (En Banc Order ¶ 3.a) • Electronically filed pleadings or other documents must be titled using one of the categories specified in the ECF Procedures Manual available from the clerk's office (*id.* ¶ 3.d)	Electronic transmission to web site plus receipt of "Notice of Electronic Filing" from court (Admin. Order 97-12, ¶ 4(c))	• Papers filed electronically via the Internet to court's web site. • Electronic document considered filed on the date received on the court's server (Local Civil Rule 5.6) • Printed copy of court's electronic file stamp serves as equivalent of court's mechanical file stamp (Admin. Order 97-26, ¶ 5) • Filers immediately receive an electronic acknowledgment that filing has occurred	• Unless the presiding judge orders otherwise, papers in cases selected for electronic filing must be filed with the court via the Internet with only the exceptions noted below (Gen. Order 97-38, ¶¶ 1, 6.a.) • Filing of discovery materials to be governed by the Case Management Plan adopted under Local Rule 16.1(b)(4); the judge determines whether or not such materials are filed electronically after consulting with the parties (Pol. & Proc. Manual, ¶ 20) • Filers immediately receive an electronic acknowledgment that filing has occurred (*id.* ¶ 9)
Filing of Court Orders and Judgments	All orders, decrees, judgments, and proceedings of the court in cases designated for electronic filing must be entered in accordance with the electronic filing procedures (En Banc Order ¶ 3.c)	Filed electronically by clerk (Admin. Order 97-12, ¶ 9)	Court-generated documents filed electronically in chambers and by the clerk in both civil and criminal cases	Filings by judges and court officers not specifically mentioned in the court's procedures, but might be subsumed under the general references to filing of "papers" in cases selected for electronic filing

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Attachments, Exhibits, Other Difficult-to-Handle Items	• Attachments (to motions and pleadings) not available in electronic form, transcripts, state court records, and proposed orders are not to be filed electronically (En Banc Order ¶ 6.a.(2), (4)-(6)). • However, exhibits to filed documents can be electronically imaged and filed in PDF format; attorneys are encouraged to extract and file electronically relevant portions of conventionally produced documents (ECF Proc. Manual, ¶ III.A.3.)	Filing user brings electronic media to court and files using highband equipment in clerk's office (Admin. Order 97-12, ¶ 4(g))	May be filed electronically if available in electronic form (either originally or as a scanned image); otherwise these items are to be filed conventionally	• Trial exhibits lodged with the court under Local Rule 39.1 (but not yet admitted into the official record) not filed electronically (Gen. Order 97-38, ¶ 6.a.), but the party "lodging" the exhibits may be required to submit them in electronic form once they are admitted into the record (Pol. & Proc. Manual, ¶ 19) • Other papers excludable from electronic filing by court order (Gen. Order 97-38, ¶ 6.a.), including protective orders under Fed. R. Civ. P. 26(c) (Pol. & Proc. Manual, ¶ 15) • Electronic filing may be excused under "limited circumstances," such as when the item cannot be reduced to an electronic format or it exceeds the file size limit (see below) (*id.*). A party who seeks to make a non-electronic filing must file electronically a "Notice of Manual Filing" setting forth the reasons (*id.*).

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Sealed Documents	Sealed documents are not to be filed electronically. Motions to file documents under seal and court orders authorizing filing of documents under seal must be filed electronically unless prohibited by law. Paper copy of court order must be attached to the sealed document (which is filed and retained in paper format) (En Banc Order ¶ 6.a.(3))	Material prohibited by order from filing except under seal to be filed under physical seal (Admin. Order 97-12, ¶ 4(i))	Sealed documents are not to be filed electronically	Papers under seal are not to be filed electronically (Gen. Order 97-38, ¶ 6.a.)
Status of Papers Filed Electronically	Pleadings or other documents filed electronically in accordance with the court's procedures are considered filed for all purposes under the Fed. R. Civ. P. and local rules (En Banc Order ¶ 3.b)	Papers filed electronically under the court's procedures considered filed for all purposes under Fed. R. Civ. P. and local rules (Admin. Order 97-12, ¶ 4(c))	Any case document that is filed electronically by the court or an authorized attorney/user/participant is the official document of record (Admin. Order 97-26, ¶ 97-26)	Papers filed electronically under the court's procedures are deemed "written papers" that are filed for purposes of Fed. R. Civ. P. and local rules (Local Rule 5.1(b); Pol. & Proc. Manual, ¶ 9)
Retention of Documents in Paper Form	See below under "Signature"	Filing user must retain documents in paper form until 1 year after final resolution of action, and in electronic form for 10 years after final resolution (Admin. Order 97-12, ¶ 4(f))	• When attorney/other user files electronically an affidavit or other document requiring a verified signature other than his or her own, he or she must retain original paper document so that it can be retrieved if the court so orders (Admin. Order 97-26, ¶ 6) • Attorneys/users/participants must maintain back-up copies of any transmissions to the court (*id.* ¶ 9)	Originals of documents requiring scanning to be filed electronically must be retained by the filer and made available, upon request, to the court or other parties until one year after expiration of all time periods for appeals (Pol. & Proc. Manual, ¶ 16)

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Signature	• Use of authorized login and password constitutes attorney's "signature" for all purposes (En Banc Order ¶ 4.a)
	• Any pleading, affidavit or other document in which the original paper contains handwritten signatures must indicate those signatures as "s/Jane Doe" in the electronic version; the original paper must be retained by the filer for five years after final resolution of the action, including any appeals (*id.* ¶ 4.b)
	• In case of a stipulation or other document to be signed by two or more persons:
	  • Filer confirms that document is acceptable to all signatories and obtains their physical signatures on a hard copy of the document (which must be retained as specified above)
	  • Document is then filed electronically, indicating the signatures as "s/Jane Doe, etc."
	  • No later than first business day after filing, each signatory files "Notice of Endorsement"
		• Every paper filed electronically must be signed for purposes of Fed. R. Civ. P. 11 and local rules (Admin. Order 97-12, ¶¶ 4(b), 5)
		(1) **"Filing User"** - use of user ID and password constitutes signature (*id.* ¶ 5(a))
		(2) **Others** - optically scanned page with physical signature; filing user retains executed original paper (*id.* ¶ 5(b))
		• **Where paper already filed electronically** - use "Notice of Endorsement" (*id.* ¶ 5(c))
		• **Multiple signatories** - can combine (1) and (2) in single transmission, or can provide signatures through two or more electronic filings via "Notice of Endorsements" (*id.* ¶ 5(d)-(e))
			• Attorney's identification number and password, when used to file documents in court's electronic system, constitutes his or her signature on such documents for purposes of Fed. R. Civ. P. 11 (Admin. Order 97-26, ¶ 1)
			• See above concerning retention of the original paper if a document filed electronically requires a verified signature other than that of the attorney/ other user of the ECF system
			• On orders initiated within chambers or in clerk's office, use of authorized login and password and attachment of graphical signature block is equivalent of written signature (Admin. Order 97-83, ¶ 3)
				• User identification name and password provided by the court to a registered user (see above) serves as the user's signature (if an attorney) under Fed. R. Civ. P. 11 and serves as the signature for all other purposes under local rules and Federal Rules of Civil Procedure (Gen. Order 97-38, ¶ 7)
				• Documents filed electronically must include a signature block with the typewritten name (preceded by "s/"), address, telephone number, and (where applicable) Ohio Bar registration number (Pol. & Proc. Manual, ¶ 17)
				• Documents requiring more than one party's signature are filed by submitting a scanned document containing all necessary signatures, by representing the consent of the other parties on the document, or by identifying in the document the parties whose signatures are required and submitting a notice of endorsement by the other

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	• Document considered fully executed when all Notices of Endorsement are filed (ECF Proc. Manual, ¶ II.C.2)			parties within three business days after filing the document (*id.*)
Service of Papers Filed Electronically	• Participants in the ECF prototype agree to notice and service as prescribed in the court's electronic filing procedures (En Banc Order ¶ 5.b) • "Notice of Electronic Filing" generated by the court's ECF system must be served by hand, facsimile, e-mail, or first-class mail on all parties entitled to service under Fed. R. Civ. P. and local rules. (En Banc Order, ¶ 5.a). Except for documents filed in paper form or on 3.5 inch disk, filers not required to serve any pleading or other document on parties entitled to electronic notice (ECF Proc. Manual, ¶ II.B.2) • Paper copy of any electronically filed document, together with the "Notice of Electronic Filing," must be delivered to the chambers of the judge assigned to the case (unless and until the judge orders	• **Parties consenting to electronic filing** - transmission of e-mail notice to e-mail address of record (Admin. Order 97-12, ¶ 6) • **Third-party defendants** - paper; answer must include consent to or motion for exemption from electronic filing (*id.* ¶ 7(a)) • **Others** - paper (*id.* ¶ 7(b)) • **Judge** - document requiring judge's signature must also be delivered to judge on paper (*id.* ¶ 4(h)); judges may also require paper courtesy copies of any paper required (*id.* ¶ 4 (j))	• Clerk of court or any other person may serve and give notice by electronic transmission, in lieu of service and notice by mail, to any person who has on file with clerk of court a written request (which can be withdrawn) to receive service and notice by electronic transmission on the court's system (Local Civil Rule 5.6; Admin. Order 97-26, ¶ 7; Local Bankr. Rule 7005-1) • Electronic service/notice is complete when the sender of document receives confirmation of receipt of transmission; service after 5:00 p.m. is effective the next business day (*id.*) • Electronic service equivalent to service by mail under Fed. R. Civ. P. 5(b) and 77(d) and Fed. R. Bankr. P. 7005 and 9022 (*id.*) • Attorneys/users/other participants in electronic filing project required to check their	• Parties to cases selected for electronic filing are deemed to consent to all service and other notices (including court notices) by electronic means, are required to make available electronic mail addresses for service, and are strongly encouraged to check the dockets of their cases in the electronic filing system at regular intervals (Gen. Order 97-38, ¶ 6.c.; Pol. & Proc. Manual, ¶ 13) • A certificate indicating that service was accomplished under the court's electronic filing procedures must be included with all electronically filed documents (Pol. & Proc. Manual, ¶ 13). • Service by electronic mail does not constitute service by mail under Fed. R. Civ. P. 6(e) (*id.*)

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	otherwise), and must be served, in accordance with Fed. R. Civ. P. and local rules, on parties not designated (or able) to receive electronic notice (En Banc Order, ¶ 5.a; ECF Proc. Manual, ¶ II.B.1) • Except as otherwise ordered by the court, pleadings and other documents that are not filed electronically (including those filed on 3.5 inch floppy disks) must be served in accordance with Fed. R. Civ. P. and local rules (En Banc Order, ¶ 5.a; ECF Proc. Manual, ¶ III.B.)		"electronic mailboxes" as they would regular mailboxes (Admin. Order 97-26, ¶ 8) • Attorneys and *pro se* parties with a written request on file to receive service and notice by electronic transmission have a continuing duty to notify the clerk of court in writing of any change in their electronic address (Local Civil Rule 83.6)	
Notice of Court Orders and Judgments	Clerk's office to follow above-described procedures for service of court orders and other documents that are electronically filed (En Banc Order ¶ 5.a)	• **Parties consenting to electronic filing** - transmission of notice of entry to e-mail addresses of record, with note of transmission in docket • **Others** - notice in paper form (Admin. Order 97-12, ¶ 9)	• See above under "Service of Papers Filed Electronically" • Court can also provide notice by fax, but only with consent of the party/attorney	See above under "Service of Papers Filed Electronically"
Docket Entries	• All electronically filed documents (including pleadings, other party-filed documents, and court orders, decrees and other proceedings) are considered entered on the docket kept by the	• Papers filed electronically considered entered on the docket kept by the clerk under Fed. R. Civ. P. 58 and 79 (Admin. Order 97-12, ¶ 4(c)) • Electronic docket to denote	Filer's description of electronically filed document is provisionally accepted as docket entry, subject to modification by the clerk	• Upon complete receipt by the clerk of court, the electronic transmission of a document under the court's procedures constitutes entry of that document onto the docket by the

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	clerk under Fed. R. Civ. P. 79(a) (En Banc Order ¶ 3.b-c) • Electronic filer responsible for designating a title for the filed document from a court-approved "Listing of Events" (ECF Proc. Manual, ¶ II.F.) • Documents forming part of the same pleading (e.g., a motion and supporting affidavit), if filed at the same time by the same party, may be electronically filed together as one docket entry; a suggestion in support of a motion should be filed separately and shown as a related document to the motion (ECF Proc. Manual, ¶ II.A.2.)	filings of paper in electronic filing case, regardless of whether filed electronically (*id.* ¶ 8) • The clerk of court is to make technical accommodations to permit access to electronic dockets through the existing PACER system (*id.*)		clerk under Fed. R. Civ. P. 58 and 79 (Pol. & Proc. Manual, ¶ 9) • Docket entry created using information provided by the filer, subject to modification by the clerk of court where necessary and appropriate to comply with quality control standards (*id.* ¶ 10)
Technical Failures	• Filings due on a given day that are not filed solely as a result of a technical failure are due the next business day (ECF Proc. Manual, ¶ V) • Delayed filing will be rejected unless accompanied by the filer's declaration/affidavit attesting to at least two failed attempts to file electronically (not less than one hour apart) occurring after 12	• Filings due next business day if web site unable to accept filings continuously or intermittently for more than one hour after 12:00 noon (Admin. Order 97-12, ¶ 10(a)) • May retransmit a copy if it is discovered within 24 hours after filing that the electronic version available for viewing through the ECF system does	Filer must inform clerk's office of problem by telephone and fax copy of document to be filed; and on the next day, filer must file document electronically, at which time it will be backdated by the clerk	If a party is unable to file electronically and, as a result, may miss a filing deadline, the party must contact the court's Help Desk to inform the clerk of court of the difficulty. If the deadline is missed due to an inability to file electronically, the party may file the document no later than noon of the court's first business day after the deadline

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	noon on each day the filing was delayed (*id.*) • Court's public web site subject to a "technical failure" on a given day if unable to accept filings continuously or intermittently for longer than one hour after 12 noon on that day (*id.*)	not conform to the document transmitted (*id.* ¶ 10(c))		passes, accompanied by a declaration stating the reason(s) for missing the deadline (Pol. & Proc. Manual, ¶ 11)
Public Access	• Docket and electronically filed documents accessible without a system password through the court's Internet site (ECF Proc. Manual, ¶ IV.A.) • Electronic access to docket and electronically filed documents at the clerk's office during regular business hours (*id.* ¶ IV.B.)	• Clerk to provide equipment and facilities to allow public electronic filing and public access to all court records (Admin. Order 97-12, ¶ 16(a)) • Internet site includes list of E-Mail Addresses of Record for cases subject to electronic filing (*id.* ¶ 3(c))	• Clerk to provide equipment and facilities to allow public electronic filing and public access to all court records	Not specifically addressed in the court's procedures
Other Special Provisions for Electronic Filing		• One day added to prescribed period re Fed. R. Civ. P. 6(e) for papers filed and served electronically • Parties must have stipulated and court authorized filing of discovery requests, responses, and materials; otherwise, can only be excerpted, quoted or used as selected exhibits with other filings (Admin. Order 97-12, ¶ 6(b))	In motion practice: • Standing order entered in any case with electronic participant waives "packet" submission rule • Notice is immediately generated (and placed in electronic "mailboxes" of all attorneys/ users/other participants in particular case who agreed to electronic filing) whenever document is filed in court's system; this constitutes service on	• Documents filed electronically must be broken into their component parts--a foundation document (e.g., a motion) and other supporting items (e.g., memorandum and exhibits)--each of which must be uploaded separately in the filing process (Pol. & Proc. Manual, ¶ 14) • No component exceeding 1.5 megabytes in size shall be filed electronically (*id.*)

Topics/Issues	District Courts			
	Missouri-Western (ecf.mowd.uscourts.gov)	**New York-Eastern** (ecf.nyed.uscourts.gov)	**New Mexico** (www.nmcourt.fed.us) [both district & bankruptcy]	**Ohio-Northern** (ecf.ohnd.uscourts.gov)
		• Internet site contains prominent notice of copyright and other proprietary rights (*id.* ¶ 13) • Provides for motion for protective order respecting proprietary rights or privacy interests (i.e., order prohibiting electronic filing of specific materials) (*id.* ¶¶ 14-15)	those parties, and is equivalent to mail service for purposes of "three-day mailing" rule under Fed. R. Civ. P. 6(e) • Attorney/user/other participant required to notify court of conventional service on non-electronic case participants • Timing of responses and replies must conform to local rule otherwise applicable to motion practice unless parties otherwise agree • Movant required to give court electronic notice that matter is either ready for a ruling or no longer requires a ruling. (Admin. Order 97-26, ¶ 7, as amended by Admin. Order 97-83, ¶ 2(b); Standing Order)	• Filing documents electronically does not alter any filing deadlines, and all electronic transmissions must be received completely by the clerk's office before midnight to be considered filed on a given day. Although filing can occur 24 hours a day, parties are strongly encouraged to file during normal clerk's office working hours when assistance is available (*id.* ¶ 9) • Electronically filed documents must meet the requirements of Fed. R. Civ. P. 10 (form of pleadings), the local rules governing general format of filed papers and designation of district judge and/or magistrate judge, and the local rule and any court order establishing page limitations (Pol. & Proc. Manual, ¶ 8)
Record on Appeal	Not specifically addressed in the court's procedures	Clerk to deliver complete paper copy of record on appeal or electronic reproduction until court advised otherwise (Admin. Order 97-12, ¶ 16(b))	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures

Local Rules and Procedures Governing Prototype Electronic Case File (ECF) Systems in the Bankruptcy Courts

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
Source of ECF Procedures	• General Order No. 69, dated Oct. 2, 1997, as amended by General Order No. 74, dated Aug. 11, 1998 (authorizes "[t]he filing of petitions and papers . . . by electronic means as established by an Interim Operating Order") • Interim Operating Order No. 2 (In re Electronic Case Filing Procedures), dated Aug. 11, 1998 (superseded Interim Operating Order No. 1, dated Oct. 2, 1997) • "Administrative Procedures for Electronically Filed Cases" (Exhibit 2 to Interim Operating Order No. 2), dated Aug. 3, 1998 • Electronic Filing System User's Manual, revised Aug. 11, 1998	• Local Bankr. Rule 9004-1 (provides that Fed. R. Bankr. P. 9004, read in conjunction with the applicable local rules, governs preparation and filing of papers "except as otherwise required by the court") • Bankruptcy General Order No. 162 (In re Provisions for Electronic Case Filing), dated June 17, 1998 (with effect from Mar. 25, 1998) • "Administrative Procedures for Filing, Signing and Verifying Pleadings and Papers by Electronic Means," dated June 17, 1998 • Online Electronic Case Filing Manual, updated through Aug. 13, 1998	• Local Bankr. Rule 5005-5 (authorizes clerk of court to receive for filing "documents submitted, signed, verified or served by electronic means that are consistent with technical standards, if any, that the Judicial Conference established and that comply with administrative procedures established by the Bankruptcy Court"), adopted Aug. 31, 1998 • [The bankruptcy court's administrative procedures are still in preparation]	• Local Bankr. Rules 1002-1, 5005-1, 5005-2, 5075-1, 9001-1(c), 9011-1, 9021-1, and 9070-1 • General Order No. M-182 (Electronic Case Filing Procedures), dated June 26, 1997 (entered *nunc pro tunc* to Nov. 25, 1996), as amended on May 1, 1998 • "Administrative Procedures for Electronically Filed Cases" (Exhibit to Gen. Order M-182), revised May 1, 1998 • Electronic Filing System Attorney User's Manual, revised July 21, 1998 • Order published in N.Y.L.J., Dec. 8, 1997, p. 42 • Order published in N.Y.L.J., Jan. 21, 1998, p. 35, col. 9	• General Order No. 97-1 (Order Adopting Electronic Case Filing Procedures), dated October 30, 1997 • "Administrative Procedures for Electronically Filed Cases" (Exhibit to Gen. Order 97-1), revised July 17, 1998 • In anticipation of expanding the ECF system beyond the Alexandria division (see below), the court, in February 1998, disseminated for public comment a series of amendments to the local bankruptcy rules relating to electronic filing

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Cases Accepted for Electronic Filing	Cases designated by court (Admin. Proc. ¶ I.A); cases filed under any chapter of the Bankruptcy Code in the Phoenix Division may be included in the electronic filing pilot program (Gen. Order 69, ¶ 2, as amended by Gen. Order 74))	• Cases designated by court (Admin. Proc. ¶ I.A) • Electronic filing procedures applicable only to Chapter 7 cases (including adversary proceedings and contested matters) until further order of the court (Gen. Order 162, ¶ 10)		• Cases designated by court (Admin. Proc. ¶ I.A) • As of Dec. 31, 1997, filings in all new Chapter 11 cases will be made electronically	Cases designated by court (Admin. Proc. ¶ I.A); limited until further order to Chapter 11 cases (including adversary proceedings and contested matters) filed in Alexandria Division (Gen. Order 97-1, ¶ 10)
Voluntary or Mandatory Participation	Not specifically addressed in the court's procedures	Parties and attorneys who are not participants in the court system (see below) not required to make electronic filings in cases assigned to the system (Admin. Proc. ¶ II.A.1)		Not specifically addressed in the court's procedures	Parties and attorneys who are not participants in the ECF system (see below) are not required to file papers electronically in cases assigned to the system (Admin. Proc. ¶ II.A.1)
Outside Users (Eligibility and Registration)	• Attorneys admitted to practice in the court (Admin. Proc. ¶ I.B)	• Attorneys admitted to practice in the court are entitled to one system password each upon registration using the prescribed form; except for out-of-state attorneys (who can make special arrangements), the system password must be picked up at the clerk's office by the registered attorney or		• Attorneys admitted to practice in court (Admin. Proc. ¶ I.B) • Password required for electronic filing to be used only by the attorney to whom it is assigned, or by authorized members and employee's of the attorney's law firm (Local Rule 9011-1(c)) • Participation constitutes	• Attorneys admitted to practice in court (Admin. Proc. ¶ I.B) • Participation constitutes request for service and notice electronically under Fed. R. Bankr. P. 9036, and agreement to accept such notice and service (Gen. Order 97-1, ¶ 8) • A registered attorney/

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		authorized representative (Admin. Proc. ¶¶ I.B & I.C.1-3) • A registered attorney participant in the court's system may withdraw from that participation upon written notice (*id.* ¶ I.C.4) • Participation (signified by receipt of password) constitutes request for electronic service and notice under Fed. R. Bankr. P. 9036, and agreement to accept notice and service by that means (Gen. Order 162, ¶ 8) • No attorney to knowingly permit or cause to permit anyone other than an authorized employee of his/her law firm to utilize his/her password; no person other than an authorized employee of the law firm to knowingly utilize or cause anyone to utilize a registered		waiver of conventional service, including notice under Fed. R. Bankr. P. 2002 and service under Fed. R. Bankr. P. 7004, and agreement to accept by electronic means (Gen. Order M-182 ¶ 10)	other participant may withdraw from participation upon written notice (Admin. Proc. ¶ I.C.5)

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		attorney's password (*id.* ¶¶ 3, 4)			
Filing/Service of Initial Case Papers	Petitions to commence cases under the Bankruptcy Code and complaints initiating adversary proceedings must be filed conventionally unless the court specifically authorizes electronic filing (Admin. Proc. ¶ III.A.1 & A.2)	Petitions in cases assigned to the court's electronic filing system must be filed electronically; but non-participants in the system are not required to file electronically even in assigned cases (Admin. Proc. ¶ II.A.1)		• No electronic filing unless specifically authorized; petitions to commence case under Bankruptcy Code and complaints initiating adversary proceedings are to be filed conventionally (Admin. Proc. ¶ III.A.1 & A.2) • If an exception is made to allow electronic filing of a petition, filer must provide the court with a diskette of creditor information for noticing purposes and immediately send paper copies of the petition to the U.S. trustee, SEC (2 copies), IRS, and the assigned judge (User's Manual pt. II.D.1)	Not specifically addressed in the court's procedures
Fees	• May apply to clerk's office for authorization of credit card payment (Admin. Proc. ¶ II.D)	For filings requiring a fee, application must be made to the financial administrator in the clerk's office for		May to clerk's office apply for authorization of credit card payment (Admin. Proc. ¶ II.D); payment by	May apply to clerk's office for authorization of credit card payment (Admin. Proc. ¶ II.D)

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	• When a document requiring a filing fee is filed, the clerk's office charges the fee to the lawyer/law firm's account by the next business day (User's Manual pt. I.G.) • If a document requiring a filing fee is filed before a credit card account is established with the court, the filing fee must be delivered to the clerk's office no later than the close of the next business day (i.e., 4:00 p.m.). Copy of the "Notice of Electronic Filing" for the filed document must be submitted with the fee (*id.*)	authorization to make payment by credit card (Admin. Proc. ¶ II.D)		credit card available as of January 1998	
Filing of Other Papers/Receipt from Court	• Papers in cases designated for electronic filing generally must be filed electronically (Admin. Proc. ¶ II.A.1) • An original declaration containing a verification of the schedules and	• All documents required to be filed with the court in cases assigned to the court's electronic filing system generally must be filed electronically; but non-participants in the system are not required to		• Papers in cases designated for electronic filing generally must be filed electronically (Admin. Proc. ¶ II.A) • Hard copies of all papers electronically filed with the court, other than	Papers in cases designated for electronic filing generally must be filed electronically; but non-participants in electronic filing not required to file papers electronically even in designated cases

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	statement of affairs must be filed conventionally with the clerk as separate document (Interim Order 2, ¶ 2; Admin. Proc. ¶ II.C.) • Delivery of paper copies of pleadings and documents for chambers required unless court orders otherwise (Interim Order 2, ¶ 7) • Whenever a pleading or other paper is filed electronically, the system generates a "Notice of Electronic Filing" (User's Manual pt. II.C., Exh. 5)	file electronically even in assigned cases (Admin. Proc. ¶ II.A.1) • When otherwise required, electronic filing is not required in exceptional circumstances that prevent an attorney/other participant from filing electronically (*id.*) • Whenever a pleading or other paper is filed electronically, clerk's office serves filer with "Notice of Electronic Filing" by electronic means at time of docketing (Gen. Order 162, ¶ 7.a; Admin. Proc. ¶ II.B.1)		proofs of claim, must be provided to the clerk of court for transmittal to the U.S. trustee (Local Rule 9070-1) • Hard copies of all papers electronically filed with the court must also be provided to chambers unless and until the judge deems it unnecessary (Local Rule 9070-1; Gen. Order M-182 ¶ 5)	(Admin. Proc. ¶ II.A.1)
Filing of Court Orders and Judgments	• Clerk enters all orders, decrees, and judgments in the electronic filing system; notation in the docket constitutes entry and docketing for all purposes (Interim Order 2, ¶ 9). • To facilitate electronic	For the time being, all orders will be submitted conventionally to the court; when orders are submitted through the court's system, procedures will be amended to reflect the change (Admin. Proc. ¶ II.E)		• Clerk of court enters all orders, decrees, and judgments of the court in the court's electronic filing system, which constitutes docketing for all purposes; clerk's notation of an order, judgment, or decree on	Filed electronically by judge; to facilitate, parties provide judge with proposed order (and related documents electronically filed) on disk with paper copy (Admin. Proc. ¶ II.E)

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	filing of orders, a party seeking an order must provide the judge with a proposed order on 3.5 inch diskette and a paper copy of any related, electronically filed document. A party may alternatively submit a proposed order and a copy of the Notice of Electronic Filing of the related document by e-mail (Admin. Proc. ¶ II.E; User's Manual pt. II.C.5)			the appropriate docket constitutes entry (Local Rule 9021-1) • Filed electronically by judge; to facilitate, parties provide judge with proposed order (and related documents electronically filed) on disk with paper copy (Admin. Proc. ¶ II.E)	
Attachments, Exhibits, Other Difficult-to-handle Items	• All documents forming part of a pleading may be filed together under one docket number (Admin. Proc. ¶ II.A.2) • Unless otherwise authorized, trial or hearing exhibits to be filed conventionally (*id.* ¶ III.A.4) • Court's copy of court hearing transcripts to be filed conventionally if not	• With the exception of a memorandum of law, all documents forming part of a pleading may be filed together under one docket number; memorandum of law must be separately filed and shown as related to the particular motion (Admin. Proc. ¶ II.A.2) • Exhibits not available in electronic form can be filed conventionally; but		• With the exception of a memorandum of law, all documents forming part of a pleading may be filed together under one docket number (Admin. Proc. ¶ II.A.2) • When an exhibit is not available in an electronically produced text form, only excerpts directly germane to the matter under the court's	• With exception of a memorandum of law, all documents forming part of a pleading may be filed together under one docket number (Admin. Proc. ¶ II.A.2) • Exhibits not available in electronic form can be conventionally filed and must be served per Fed. R. Bankr. P. and local rules (*id.* ¶ III.A.2 & B)

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	filed in acceptable electronic format (*id.* ¶ III.A.5)	such documents, or the relevant portions thereof, should be imaged and filed electronically wherever possible (*id.* ¶ III.A.2) • Proofs of claim must be filed conventionally unless specifically authorized by the court (*id.* ¶ III.A.3) • Emergency motions, supporting pleadings, and objections to be filed electronically, but the filer must advise the judge's law clerk of the filing by phone (*id.* ¶ II.A.3)		consideration should be filed conventionally (with complete exhibit made available in the courtroom and to the court and other counsel upon request) (Gen. Order M-182 ¶ 14; Admin. Proc. ¶ II.F.); if an exhibit not available in an electronically produced text format cannot be excerpted, it should be submitted as an electronically produced image (Admin. Proc. ¶ III.A.4.) • Conventionally filed documents must be served per Fed. R. Bankr. P. and local rules (*id.* ¶ III.B.)	
Sealed Documents	• Filed conventionally unless court authorizes electronic filing (Admin. Proc. ¶ III.A.3) • Motions to file documents under seal and court orders authorizing filing under seal are filed	• Filed conventionally unless electronic filing is specifically authorized by the court; paper copy of order authorizing filing under seal must be attached to the sealed document and delivered		• Filed conventionally unless court authorizes electronic filing, but also submitted on diskette so that it can be filed electronically if later unsealed (Admin. Proc. ¶ III.A.3)	• Filed conventionally unless court authorizes electronic filing (Admin. Proc. ¶ III.A.1) • Motion to file documents under seal and court orders authorizing filing under seal are filed

Topics/Issues	Bankruptcy Courts				
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	electronically, with paper copies of those orders attached to the sealed documents and delivered to the clerk or chief deputy clerk (*id.*)	to the clerk's office (Admin. Proc. ¶ III.A.1) • Motions to file documents under seal to be filed electronically (*id.*)		• Motion to file documents under seal and court orders authorizing filing under seal are filed electronically (*id.*)	electronically (*id.*)
Status of Papers Filed Electronically	Electronic filing constitutes entry on the docket (Interim Order 2, ¶ 8)	Electronic filing constitutes entry on the docket for purposes of Fed. R. Bankr. P. 5003 (pleadings and other papers) and 9021 (orders, decrees, judgments, and court proceedings) (Gen. Order 162, ¶¶ 5, 6)		Electronic filing constitutes entry on docket under Fed. R. Bankr. P. 5003 (Gen. Order M-182, ¶ 6); see also above under "filing of court orders and judgments"	Electronic filing constitutes entry on docket under Fed. R. Bankr. P. 5003 (Gen. Order 97-1, ¶ 5)
Retention of Documents in Paper Form	Attorney generally must maintain original signed copy of each filing (Interim Order 2, ¶ 1; Admin. Proc. ¶ II.C.1); see also below under "signatures"	See below under "signatures"		See below under "signatures"	Not specifically addressed in the court's procedures
Signature	• Use of initials and either state bar identification number or last four digits of social security number (Interim Order 2, ¶ 1) • Documents requiring original signatures, verifications under Fed.	• Electronic filing by a registered attorney/ participant in the court's system constitutes the attorney's signature for purposes of Fed. R. Bankr. P. 9011 and Local Rule 9004-3(b) (Gen.		• Initials of attorney's first and last names followed by the last four digits of attorney's social security number constitutes the attorney's signature for purposes of Fed. R. Bankr. P. 9011; attorney	• Electronic filing by registered attorney constitutes signature (Gen. Order 97-1, ¶ 2) • Documents requiring original signatures, verifications under Fed. R. Bankr. P 1008 and

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	R. Bankr. P 1008, and unsworn declarations under 28 U.S.C. § 1746 are filed electronically with signature indicated as "s/name"; filer maintains originally executed documents, except that originally executed verifications of schedules and statements of affairs are filed with the clerk (Admin. Proc. ¶ II.C.1)	Order 162, ¶ 2) • Petitions, lists, schedules and statements requiring the debtor's signature are filed electronically, with a paper "Declaration re: Electronic Filing" to be signed by the debtor and filed with the court within 15 days after the petition is electronically filed (*id.*; Admin. Proc. ¶ II.C.1) • Documents containing original signatures or requiring verification under Fed. R. Bankr. P. 1008, and unsworn declarations as provided in 28 U.S.C. § 1746, are filed electronically with the signature indicated as "/s/ Jane Doe"; original signed paper documents must be maintained by attorney of record or originating party for the maximum allowable time to complete the appellate process, and the original paper document must be		required to maintain an original signed copy of each filing (Local Rule 9011-1(b); Gen. Order M-182, ¶ 2) • Documents requiring original signatures, verifications under Fed. R. Bankr. P 1008 and unsworn declarations under 28 U.S.C. § 1746 are filed electronically with signature indicated as "s/name"; filer maintains originally executed documents (Admin. Proc. ¶ II.C.1)	unsworn declarations under 28 U.S.C. § 1746 are filed electronically with signature indicated as "s/name"; filer maintains originally executed documents until 3 years after case closing (Admin. Proc. ¶ II.C.1)

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		provided to other parties or the court upon request (*id.* ¶ II.C.2)			
Service of Papers Filed Electronically	• Electronic filer may serve the filed pleading or other document on an attorney or other registered participant in the court's electronic filing system by serving by e-mail, hand delivery, fax or, if e-mail, hand delivery and fax are impracticable, by overnight mail a "Notice of Electronic Filing" generated by the system; service by e-mail deemed made on the next business day (Interim Order 2, ¶ 10; Admin. Proc. ¶ II.B.1) • Paper copies must be served according to Fed. R. Bankr. P. and local bankr. rules when a pleading or other document is filed conventionally or on diskette, and when	• Filing party serves the document in accordance with applicable rules; but if service by first-class mail is permitted and the recipient is a registered participant in the court's system, service can be effected by serving the Notice of Electronic Filing (see above) by electronic means (Gen. Order 162, ¶ 7.b-c; Admin. Proc. ¶ II.B.2-3) • Except as otherwise ordered, documents filed conventionally or on 3.5 inch floppy disk must be served in the manner provided in, and to the parties entitled to notice under, Fed. R. Bankr. P. and local bankr. rules (Admin. Proc. ¶ III.B)		**Parties designated to receive electronic notice** - service of "Notice of Electronic Filing" generated by electronic filing system by hand, fax, or authorized e-mail, or by overnight mail if hand, fax, or e-mail service impracticable (Gen. Order M-182, ¶ 8; Admin. Proc. ¶ II.B.1) **Judge** - deliver by hand or overnight mail "Notice of Electronic Filing" with paper copy of document (Admin. Proc. ¶ II.B.1) **Others** - in accordance with Fed. R. Bankr. P and local rules (*id.*)	• Filing party serves "Notice of Electronic Filing" received electronically from Clerk on all persons in accordance with applicable rules (Gen. Order 97-1, ¶ 7; Admin. Proc. ¶ II.B.1-3) • If service by first class mail is permitted by applicable rules and party entitled to service is an electronic filing participant, service may be by electronic means (Gen. Order 97-1, ¶ 7; Admin. Proc. ¶ II.B.1-3)

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	service is required on the debtor as well as the debtor's attorney, on a Chapter 13 trustee (for schedules, statements, plans, or any amendments thereto), on a Chapter 7 trustee who is not a registered participant in the court's electronic filing system, on the United States Trustee (unless the U.S. Trustee otherwise directs), on a creditor (for notices required to be served on all creditors), and on all parties who are not registered participants in the court's electronic filing system (Interim Order 2, ¶ 11; Admin. Proc. ¶ II.B.1). • Unless the judge directs otherwise, paper copies of the Notice of Electronic Filing and electronically filed document must be delivered to the judge by means of hand delivery or				

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	mail to the clerk's office (Admin. Proc. ¶ II.B.1) • Attorney filing a pleading or other document electronically must include in the filing any fax number or Internet e-mail address at which the attorney can be reached (Interim Order 2, ¶ 12)				
Notice of Court Orders and Judgments	Upon docketing of an order, decree, judgment, or other court document, the clerk serves the proponent of the order or other document by e-mail, facsimile, or first class mail; the proponent, in turn, serves the parties as described above under "Service of Papers Filed Electronically" (Interim Order 2, ¶ 10)	Not specifically addressed in the court's procedures		Clerk serves proponent with "Notice of Electronic Filing" by e-mail; proponent serves on all parties entitled to electronic filing by fax or e-mail, and to other parties/attorneys by overnight or first class mail (Gen. Order M-182, ¶ 8)	Clerk electronically serves "Notice of Electronic Filing" on all persons in accordance with applicable rules. If service by first class mail is permitted by such rules and party is an electronic filing participant, service may be by electronic means (Gen. Order 97-1, ¶ 7; Admin. Proc. ¶ II.B.1-3)
Other Notices	See above	Not specifically addressed in the court's procedures		• Paper copies of Fed. R. Bankr. P. 2002(a) (1) (4) (5) (7) and (8) and (b) (1) and (2) notices required until recipient requests electronic notice under Fed. R. Bankr. P. 9036	Same as notice for court orders and judgments

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				(Gen. Order M-182, ¶ 9; Admin. Proc. ¶ I.A) • Fed. R. Bankr. P 2002 (a) (2) (3) and (6) notice may be served in manner outlined above under "service" (Gen. Order M-182, ¶ 9)	
Docket Entries	Electronic filer designates title of docket entry from a list of prescribed categories in the "Glossary of Events" (Admin. Proc. ¶ II.G)	Electronic filer designates title of docket entry from a list of prescribed categories (Admin. Proc. ¶ II.F)		Electronic filer designates title of docket entry from a list of prescribed categories (Admin. Proc. ¶ II.F)	Electronic filer designates title of docket entry from a list of prescribed categories (Admin. Proc. ¶ II.F)
Technical Failures	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures		Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures
Public Access	• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • "Read only" access to docket sheet and documents generally available via Internet only for those persons with a current PACER account in good standing who obtain a password (*id.*	• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • Public Internet "read only" access to docket sheet and documents via Internet (*id.* ¶ IV.A) • Conventional copies and certified copies of electronically filed documents may be		• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • Public Internet "read only" access to docket sheet and documents via Internet (*id.* ¶ IV.A) • May purchase conventional and certified copies of electronically filed documents (*id.*	• Public access to documents and docket at clerk's office (Admin. Proc. ¶ IV.B) • Public Internet "read only" access to docket sheet and documents via Internet (*id.* ¶ IV.A.1) • May purchase conventional and certified copies of electronically filed documents (*id.*

Topics/Issues	Bankruptcy Courts				
	Arizona (ecf.azb.uscourts.gov)	**California-Southern** (ecf.casb.uscourts.gov)	**Georgia-Northern** (ecf.ganb.uscourts.gov)	**New York-Southern** (ecf.nysb.uscourts.gov)	**Virginia-Eastern** (ecf.vaeb.uscourts.gov)
	¶ IV.A.; password application form posted on "www.azb.uscourts.gov") • Conventional copies and certified copies of electronically filed documents may be purchased at the clerk's office (*id.* ¶ IV.C)	purchased at the clerk's office (*id.* ¶ IV.C)		¶ IV.C)	¶ IV.C)
Other Special Provisions for Electronic Filing	If an electronically filed motion or other document is to be set for hearing, the date and time for the hearing can be obtained by sending the courtroom deputy an e-mail request for hearing that includes a copy of the Notice of Electronic Filing of the underlying document (Admin. Proc. ¶ II.F.; User's Manual pt. II.C.4)				
Record on Appeal	Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures		Not specifically addressed in the court's procedures	Not specifically addressed in the court's procedures

ATTACHMENT

Federal Rules Potentially Affected by Implementation of Electronic Filing

"Filing"—Method and Format

Fed. R. Bankr. P.:
- 5005 (filing and transmittal of papers)
- 7005 (applying Fed. R. Civ. P. 5 to adversary proceedings)
- 8008(a) (filing of papers related to appeals)
- 9004 (general requirements of form)

Fed. R. Civ. P.:
- 5 (filing of pleadings and other papers)
- 6 (time)
- 7(b) (form of motions and other papers)
- 10 (form of pleadings)
- 58 (entry of judgment)
- 79 (books and records kept by clerk and entries therein)

Fed. R. Crim. P.:
- 45 (time)
- 49(d) (filing of papers same as in civil cases)

§ 2254 R.:
- 2(c) (form of petition)
- 3(a) (place of filing petition; number of copies)

§ 2255 R.:
- 2(b) (form of motion)
- 3(a) (place of filing motion; number of copies)

Fed. R. App. P.:
- 12(a) (docketing the appeal)
- 21(d) (form of petitions for extraordinary writs; number of copies)
- 25(a), (e) (filing; number of copies)
- 26 (computation and extension of time)
- 27(d) (motions: form of papers; number of copies)
- 28-30 (briefs and appendices to briefs)
- 31(b) (number of copies of brief)
- 32 (form of briefs, appendices and other papers)
- 35(b), (d) (form and number of copies of petition for en banc determination)
- 40(b) (form of petition for panel rehearing)
- 45(b) (duties of clerks: docket; calendar; other records required).

"Signatures" and Document Authentication

Fed. R. Bankr. P.
- 1008 (verification of petitions and accompanying papers)
- 9011 (signing of papers by attorney or unrepresented party)

Fed. R. Civ. P.:
- 11(a) (signing of pleadings, motions and other papers by attorney or unrepresented party)
- 44 (proof of official record)
- 58 (entry of judgment signed by clerk)

Fed. R. Crim. P.:
- 4(c) (arrest warrant or summons upon complaint signed by magistrate judge)
- 7 (indictment or information signed by government attorney)
- 9(b)(1) (warrant or summons upon indictment or information signed by clerk)
- 32(d)(1) (judgment signed by judge)

§ 2254 R. 2(c) (petition signed by petitioner under penalty of perjury)

§ 2255 R. 2(b) (motion signed by movant under penalty of perjury)

Fed. R. App. P.:
- 36 (entry of judgment signed by clerk)
- 42 (dismissal of appeals upon stipulation of parties)

Fed. R. Evid.:
- 902 (self-authenticating documents)
- 1001-1004, 1006 (contents of writings, requirement of original, and admissibility of duplicates and other evidence of contents)
- 1005 (certification of public records)

Service/Notice of Process, Papers, and Court Orders

Fed. R. Bankr. P.:
- 7005 (applying Fed. R. Civ. P. 5 to adversary proceedings)
- 8004 (service of notice of appeal)

Fed. R. Civ. P.:
- 4 (service of summons)
- 4.1 (service of other process)
- 5 (service of pleadings and other papers)
- 77(d) (notice of orders and judgments)

Fed. R. Crim. P.:
4(d) (service of summons upon complaint)
9(c) (service of summons upon indictment or information)
49(a)-(c) (service of papers and orders)

§ 2254 R. 3(b) (service of petition)

§ 2255 R. 3(b) (service of motion)

Fed. R. App. P.:
3(d) (serving notice of appeal as of right—from district courts)
5(a) (service of petitions for discretionary appeals)
13(c) (serving notice of appeal—from tax court)
15(c) (serving petition for review or application for enforcement of agency orders.)
19 (serving proposed judgment when agency order is partially enforced)
21(a)(1) (petitions for extraordinary writs: proof of service on parties; copy for trial judge)
25(b)-(d) (service; manner and proof of service—generally)
27(a) (proof of service of motions)
31 (service of briefs)
36 (copies of opinion or judgment mailed to parties)
41 (proof of service of motion for stay of mandate pending petition for certiorari)
45(c) (notice of orders or judgments).

Types of Papers Filed Electronically

Fed. R. Bankr. P.:
1002-1004 (commencement of case by filing petition; involuntary petitions; partnership petitions)
1007 (lists, schedules, and statements)

Fed. R. Civ. P. 3 (commencement of action by filing complaint)
7 (pleadings, motions)

Fed. R. Crim. P.:
3 (complaint)
4 (arrest warrant or summons upon complaint)
7 (prosecution by indictment or information)
9 (warrant or summons upon indictment or information)
32(b) (pre-sentence investigation report)
41 (search warrant)

§ 2254 R. 3 (petition)

§ 2255 R. 3 (motion)

Fed. R. App. P.:
3, 4 (notice of appeal as of right—district courts)
5 (petitions for discretionary appeals)
6 (appeal in bankruptcy cases)
13 (notice of appeal—Tax Court)
15 (petition for review of agency order)
21 (petition for extraordinary writ)
22 (application for habeas corpus or § 2255 relief; certificate of appealability)
24 (proceedings *in forma pauperis*)
26.1 (corporate disclosure statement0
27 (motions)

Time

Fed. R. Bankr. P.:
8002 (time for filing notice of appeal)
9006 (time generally)

Fed. R. Civ. P. 6 (time generally)

Fed. R. Crim. P. 45(d)-(e) (timing of motions; additional time after mail service)

Fed. R. App. P.:
26 (computation and extension of time)

Fees

Fed. R. App. P. 3(e), 5(d) (filing fee for appeal paid to clerk of court from which appeal is taken)

Fed. R. Bankr. P.:
1006(a) (petition accompanied by filing fee)
8001(a) (filing fee for appeal paid to clerk of the bankruptcy court)

Clerks' Offices

Fed. R. Civ. P. 77(a) (courts are "always open" for the purpose of filing)

Fed. R. App. P. 45(a) (courts are "always open" for the purpose of filing)

Appeals

Fed. R. Bankr. P.:

8001 (manner of taking appeal; voluntary dismissal)
8003 (motion for leave to appeal under 28 U.S.C. § 158(a))
8006 (record and issues on appeal)
8007 (completion and transmission of the record; docketing of the appeal)

Fed. R. App. P.:

3, 4 (notice of appeal as of right)
5 (petitions for discretionary appeal)
6 (appeals for final judgments in bankruptcy cases)
10 (record on appeal)
11(transmission of the record)
12 (docketing the appeal; filing the record)
13 (review of Tax Court decisions)
16 (record on review or enforcement of agency order)
17 (filing of the record on petitions for review/applications for enforcement of agency orders)

V-G

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, 1999

Professor Patrick J. Schiltz
Reporter
Advisory Committee on Appellate Rules
University of Notre Dame Law School
Notre Dame, Indiana 46556

Re: Proposed Changes to FED. R. APP. P. 3 and 12.

Dear Professor Schiltz:

The appellate court clerks have reviewed the proposed changes to the FED. R. APP. P. 12 and 3 which are designated as Item Nos. 97-32 and 97-33 in Judge Garwood's December 9, 1998 letter. After considering the responses received, we offer the following:

1. Item No. 97-32 is a proposed amendment to FED. R. APP. P. 12. Patrick Fisher's September 15, 1997, letter discussing the Methods Analysis Program (MAP), comments that Rule 12 causes appellate clerks continuing difficulty in opening cases in the "AIMS" automated case docketing and management system. The problem is that current Rule 12(a) requires the appellate court to "docket the appeal under the title of the district court action". In practice, this means the clerk's office must account for every party and their designation in the district court action when they are before this appeals court. This becomes an exceptionally time consuming and confusing requirement when there are multiple parties. In this court's experience, we have had some cases which take over a day to docket because of the number of parties at the district court, only some of whom may be before this court on appeal. We propose to change the rule to allow the appeals court's case title to include only those parties who are actual appellants, appellees, cross-appellants, etc. Our suggested language follows with the new wording in italics:

97-32

(a) **Docketing the Appeal.** Upon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d), the circuit clerk must docket the appeal, *identifying in the title only the appellant or appellants and the appellee or appellees, omitting from the title party designations in the district-court action.*

97-32

2. Item 97-33 involves a MAP recommended change to either FED. R. APP. P. 3 or 12. The appellate courts' case docketing and management systems require the case opening clerks to enter the names and addresses of the appellants, the appellees if they appear pro se, and any counsel. The current Rule 3 dates from 1993 and intends to avoid the strict pleading rule of Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). Thus, the rule allows an attorney filing a notice of appeal to describe the parties taking the appeal in general terms, such as "all plaintiffs", "the defendants", etc. Likewise, neither Rule 3 nor 12 requires the party bringing the appeal to identify the appellees, their counsel, or addresses. As a result the burden of discovering the information needed to docket a case on appeal in automated case docketing systems falls on those who have the least direct access to the information - the case processors at the court of appeals. They must spend a great deal of time trying to ascertain the names and addresses of the appellants, the appellees, and any counsel.

Appellant's counsel or pro se litigants know best who are the actual appellants in a case. Yet the burden of determining the appellants falls on the clerk's office. The way this court solves docketing questions is to review the notice of appeal and the district court docket entries and then do investigative work. Attorney X's statement in the notice of appeal that he brings the appeal on behalf of "all plaintiffs" is not always as clear as it seems. If the docket entries show there were ten plaintiffs at the district court with Attorney X representing five, and Attorney Y representing five, what does Attorney X's notice of appeal mean? Has he mistakenly noticed that he is representing all ten plaintiffs, instead of only five? We call Attorney X to determine if he has made a mistake, or call Attorney Y to determine if he or she has withdrawn from representation of the remaining plaintiffs and to discover whether Attorney X now represents all ten plaintiffs. If Attorney X has made a mistake and only represents plaintiffs one through five, and the time for filing a notice of appeal for plaintiffs six through ten has not expired, do we contact Attorney Y to determine his or her intentions? In another scenario, we may get a notice of appeal from plaintiff number 6, now allegedly proceeding pro se. We must again check with him or her and the

counsel or former counsel to resolve several possibilities. The MAP desire is to place the burden on counsel or an unrepresented party to provide this information, rather than on the clerk's office which now has to do investigative work in docketing a case.

We face a similar problem identifying appellees because no rule requires counsel to identify them when the appeal is brought. In this court, docket clerks read the district court judgment and try to determine who the appellees are. In some cases this is not an easy task, particularly with multiple parties. For example, if the case involves five defendants in district court and the first defendant is not liable on a jury verdict, but defendants two and three are liable in varying amounts below the amount the plaintiff sought, and defendants four and five were dismissed earlier in the proceeding on the basis of qualified immunity, which defendants are appellees? To sort this out the clerk's office reads the notice of appeal and the judgment, and reviews the district court docket for prior rulings before trying to determine likely appellees. The MAP recommendations seek to place this burden on the counsel bringing the appeal. Admittedly, counsel may make errors in designating the appellees, and counsel at the district court may no longer represent a client on appeal. Nonetheless a good faith attempt by the appellant to identify all parties to the appeal will reduce the time and effort expended by docketing clerks.

Our draft rule is specifically intended not to affect the appeals court's jurisdiction. To reach this goal we suggest that the party bringing the appeal to submit a separate statement identifying and providing addresses for all appellants, appellees and last known counsel.

Accordingly, we recommend that Rule 3(c)(1)(A) be amended as follows with the new wording shown in italics:

> (1) The notice of appeal must:
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> > (A) specify the party or parties taking the appeal by naming each one in the caption or body of the notice, but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X". *In addition, at the time of filing the notice of appeal, the person or persons taking the appeal must submit a separate statement listing all parties to the appeal, the last known*

counsel, and last known addresses for counsel and unrepresented parties. Errors or omissions in this separate statement alone shall not otherwise affect the jurisdiction of an appeal if the notice of appeal itself complies with this rule.

As you may recall, I will be unable to attend the April meeting in Washington because I will be attending a meeting of circuit court clerks and chief deputies in Denver at the same time as the Appellate Rules Committee meeting. As we only have these clerks' meetings once every two years, I think I need to be there.

Please call me at (504) 589-6399 if you have any questions.

Sincerely,

Fritz Fulbruge

cc: Judge Will Garwood
John Rabiej

V-H

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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97-33

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Please call me at (504) 589-6399 if you have any questions.

Sincerely,

Fritz Fulbruge

cc: Judge Will Garwood
John Rabiej

V-I-1

MEMORANDUM

DATE: February 26, 1999

TO: Advisory Committee on Appellate Rules

FROM: Judge Will Garwood, Chair

RE: Item No. 99-02

I recently discovered, to my surprise, that no where in FRAP is there a rule requiring that briefs, motions, rehearing petitions, and the like be signed. I suspect that the reason for this omission is that FRAP used to be part of the Federal Rules of Civil Procedure, which have a signature requirement in FRCP 11. When FRAP was carved out of the FRCP in 1968, the drafters apparently forgot to bring a signature requirement along with them.

FRAP has worked well for 30-plus years without a signature requirement, so it might be that the omission is not worth our concern. At the same time, it would be relatively easy to insert a signature requirement in FRAP, and I think it would do some good. I do not propose incorporating into FRAP the equivalent of FRCP 11(b) (imposing a "good faith" requirement) or FRCP 11(c) (imposing sanctions for violating the "good faith" requirement). I believe that the courts of appeals already have authority to deal with briefs and motions filed in bad faith under, *inter alia*, FRAP 38, FRAP 46(b)(1)(B), and 28 U.S.C. § 1912. Also, FRCP 11 has been the source of endless headaches for the district courts and the Advisory Committee on Civil Rules, and I do not wish to visit similar pain upon the courts of appeals or this committee. What I propose is nothing more than adding a simple signature requirement to Rule 32.

A draft amendment and Committee Note are attached, to give you a sense of what I have in mind. I do not think this amendment would create an impediment to electronic filing, in light of Rule 25(a)(2)(D).

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

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

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

Committee Note

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, rehearing petition, and similar paper be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11(a) imposes a signature requirement on papers filed in district court. By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, *see, e.g.*, 28 U.S.C. § 1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11(b) and 11(c).

MEMORANDUM

DATE: March 15, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 99-01

Last year the Committee proposed an amendment to Rule 24(a)(2) to resolve a conflict between that rule and the Prison Litigation Reform Act of 1995 ("PLRA").[1] Judge Garwood asked me to do some follow-up research to determine whether there might be further conflicts between Rule 24(a) and the PLRA. Judge Garwood is concerned that if our proposed amendment to Rule 24(a)(2) is approved before we remedy any other conflicts, our silence as to the other conflicts might be interpreted in ways we do not intend.

I recommend that the Committee consider making additional changes to Rule 24(a). This memorandum will explain the reasons for my recommendation and suggest several options available to the Committee. After receiving guidance from the initial discussion of this matter at the April 1999 meeting, I will prepare amendments and Committee Notes for your consideration at the October 1999 meeting.

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[1]The PLRA was contained in Title VIII of the Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. 104-134, 110 Stat. 1321 (1996). Section 804 of the PLRA made several amendments to 28 U.S.C. § 1915, which governs the assessment of IFP status in federal litigation.

I. Comparing the Rule 24(a) Scheme With the PLRA Scheme

Before I identify specific conflicts between Rule 24(a) and the PLRA, it may be helpful if I provide a very general description of how in forma pauperis ("IFP") litigation proceeds under each of them.

A. The Rule 24(a) Scheme

Under Rule 24(a), a party who, in the district court, is permitted to proceed IFP (or, in a criminal case, is provided with court-appointed counsel) is *automatically* permitted to proceed IFP on appeal. Rule 24(a)(3). Such a party is authorized to proceed on appeal "without prepaying or giving security for fees and costs." Rule 24(a)(2).[2] No further information need be filed, and no further permission need be sought. Rule 24(a)(3). There are two exceptions: first, if the district court finds that the appeal is not taken in good faith and, second, if the district court finds that the party is no longer indigent. Rule 24(a)(3).

If either of these two findings are made, the clerk notifies the parties and the court of appeals of the finding. Rule 24(a)(4)(B) & (C). Technically, the finding is not subject to direct appellate review. Instead, within 30 days after receiving notice of the district court's finding, the party must move in the court of appeals for permission to proceed on appeal IFP. Rule 24(a)(5); *see Baugh v. Taylor*, 117 F.3d 197, 201-02 (5th Cir. 1997). The movant must attach to his motion an affidavit patterned after Form 4 that demonstrates his inability to prepay or give security for fees and costs. Rule 25(a)(5). The court of appeals then rules on the motion.

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[2]Being given permission to proceed IFP only excuses a litigant from the obligation of *prepaying* the filing fee. In theory, the litigant remains liable for the fee and must pay if and when he is able. *See Robbins v. Switzer*, 104 F.3d 895, 898 (7th Cir. 1997).

If the party did *not* proceed IFP in the district court (or, in a criminal case, the party paid for his own attorney) but the party wishes to proceed IFP on appeal, he must first move the district court for permission to do so. Rule 24(a)(1). The movant must attach Form 4 to his motion. Rule 24(a)(1)(A). If the district court grants the motion, then the movant is permitted to proceed on appeal "without prepaying or giving security for fees and costs." Rule 24(a)(2). If the district court denies the motion, the clerk notifies the parties and the court of appeals of the denial. Rule 24(a)(4)(A). Again, the unsuccessful movant does not appeal the district court's denial, but instead moves within 30 days in the court of appeals for permission to proceed on appeal IFP. Rule 24(a)(5). The movant must attach to his motion the Form 4 affidavit that he filed in the district court. Rule 24(a)(5). The court of appeals then rules on the motion.

Rule 24(a) does not in any way distinguish between prisoners who seek to proceed IFP and non-prisoners who seek to proceed IFP.

B. The PLRA Scheme

The PLRA is extremely poorly drafted — it contains typographical errors, grammatical mistakes, and internal inconsistencies, *see McGore v. Wrigglesworth*, 114 F.3d 601, 603 (6th Cir. 1997) — and courts have struggled with numerous ambiguities. For the purposes of this memo, I will focus only on those provisions of the PLRA that might be inconsistent with Rule 24(a). Judge Garwood is not seeking to use Rule 24(a) to fix all of the problems with the PLRA; he merely wants to make certain that nothing in Rule 24(a) conflicts with anything in the PLRA.

The PLRA authorizes "[a]ny court" to give a party permission to proceed IFP in any matter. § 1915(a)(1). Presumably, then, a party to a district court action who seeks to proceed on appeal IFP is still required (by virtue of Rule 24(a)(1)) to seek permission from the district

court before seeking it from the court of appeals. *See McGore*, 114 F.3d at 610; *Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997).

The PLRA does not authorize parties who have proceeded IFP in the district court *automatically* to proceed IFP on appeal. With respect to *non-prisoners*, the PLRA is simply silent on the matter. With respect to *prisoners*, the PLRA seems to require that permission to proceed on appeal IFP be sought anew when the appeal is filed, even if the prisoner was granted IFP status in the district court, and even if that status has not been revoked. *See McGore*, 114 F.3d at 610; *Mitchell v. Farcass*, 112 F.3d 1483, 1489 (11th Cir. 1997); *Morgan*, 112 F.3d at 789 ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court."); *In re Prison Litigation Reform Act ["PLRA"]*, 105 F.3d 1131, 1136 (6th Cir. 1997) (administrative order) ("Unlike the former concept of pauper status, an individual or prisoner granted pauper status before the district court is not automatically entitled to pauper status on appeal."); *Strickland v. Rankin County Correctional Facility*, 105 F.3d 972, 973 n.1 (5th Cir. 1997); *Jackson v. Stinnett*, 102 F.3d 132, 134 (5th Cir. 1996); *but see Celske v. Edwards*, 164 F.3d 396, 398 (7th Cir. 1999) ("a plaintiff who . . . was allowed to proceed in forma pauperis in the district court retains his IFP status in the court of appeals unless there is a certification of bad faith").

Any party — prisoner or non-prisoner — who seeks to proceed IFP on appeal must file Form 4 with the district court. § 1915(a)(1). A *prisoner* who seeks to proceed IFP must do more: First, he must file a certified copy of his "trust fund account statement . . . for the 6-month

period immediately preceding the filing of the . . . notice of appeal." § 1915(a)(2).[3] Second, he must "pay the full amount of [the] filing fee." § 1915(b)(1). His obligation to pay the filing fee attaches as soon as he files the notice of appeal, and he must pay that fee whether or not he is ultimately given permission to proceed IFP. *See McGore*, 114 F.3d at 605; *In re Tyler*, 110 F.3d 528, 529-30 (8th Cir.1997); *Robbins*, 104 F.3d at 897; *Jackson*, 102 F.3d at 136; *Martin v. United States*, 96 F.3d 853, 856 (7th Cir. 1996). The only question is whether the prisoner has to prepay the fee in full or whether instead he will be permitted to pay the fee in installments. If the prisoner is given permission to proceed IFP, he will be permitted to pay the fee in installments, calculated on the basis of recent deposits to and the recent monthly balances of his prison trust fund account. §§ 1915(b)(1) & (2). Only if the balance in the prisoner's trust fund account has been zero for the past six months and no deposits are made to the account while the appeal is pending can the prisoner proceed "without [*any*] prepayment of fees or security therefor." *See* §§ 1915(a)(1), (b)(1), (b)(2) & (b)(4).

The district court then makes a decision on whether the party should be permitted to proceed on appeal IFP. The district court must not only consider whether the party is indigent, but also must consider whether the appeal is "taken in good faith." § 1915(a)(3). (The Sixth Circuit holds that the "good faith" requirement applies only to *non-prisoners*. *See In re PLRA*, 105 F.3d at 1136; *Floyd v. U.S. Postal Service*, 105 F.3d 274, 277 (6th Cir. 1997).[4] All other

---

[3]The fact that, before a prisoner can proceed on appeal IFP, he must submit a trust fund account statement "for the 6-month period immediately preceding the filing of the . . . *notice of appeal*" implies, as courts have held, that a prisoner who has proceeded IFP in the district court is not automatically permitted to proceed IFP on appeal.

[4]The Sixth Circuit reasoned as follows:

(continued...)

circuits disagree. *See Wooten v. District of Columbia Metropolitan Police Dep't*, 129 F.3d 206, 207 (D.C. Cir. 1997); *Newlin v. Helman*, 123 F.3d 429, 432 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 707 (1998); *Baugh*, 117 F.3d at 200.[5])

1. If the district court finds that the party is indigent and is taking the appeal in good faith, then the party may proceed "without prepayment of fees or security therefor," § 1915(a)(1), except, as noted, prisoners must pay the filing fee (in installments, if necessary).

2. If the district court finds that the party (prisoner or non-prisoner) is not indigent, then the party can move in the court of appeals for permission to proceed IFP. Rule 24(a)(5).

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[4](...continued)
In cases brought by prisoners, such a certification is not required. Section 1915(a)(3) is modified by the provisions of § 1915(b)(1) (the section begins "[n]otwithstanding subsection (a)"). *See also* 28 U.S.C. § 1915(a)(1) ("[s]ubject to subsection (b)"). For a prisoner, the question of whether the appeal is taken in good faith is irrelevant. Under § 1915(b)(1), the prisoner must pay the required filing fees regardless of the merits of the appeal. Therefore, in prisoner cases, district courts are not required to make a good faith certification under § 1915(a)(3).

In re PLRA, 105 F.3d at 1136.

[5]The Seventh Circuit was succinct in rejecting the Sixth Circuit's unique holding:

> According to [the Sixth Circuit], this notwithstanding clause [in § 1915(b)(1)] makes *all* of subsection (a) inapplicable to prisoners, who therefore may appeal *in forma pauperis* even if the appeal is in bad faith. We join the fifth circuit . . . in disapproving this conclusion. The sentence does not say that *all* of subsection (a) is inapplicable to prisoners. It addresses a particular *element* of subsection (a), concerning the collection of the filing fee, and provides that prisoners (unlike other plaintiffs) always must pay in full, although other parts of subsection (b) permit much of the payment to be deferred.

Newlin, 123 F.3d at 432 (emphasis added). Some circuits have also pointed out that it would be bizarre for Congress, in a statute that was designed to control frivolous lawsuits filed by *prisoners*, to give *only* prisoners the right to seek review of bad faith determinations. *See, e.g.*, *Baugh*, 117 F.3d at 200.

3. If the district court finds that the party is not taking his appeal in good faith, then the statute provides that the appeal may not be taken IFP. § 1915(a)(3). However, according to all circuits except the Sixth (*see McGore*, 114 F.3d at 610-11; *In re PLRA*, 105 F.3d at 1137; *Floyd*, 105 F.3d at 277), the party can then move in the court of appeals for permission to proceed on appeal IFP and thus, as a *practical* matter, get appellate review of the district court's finding of bad faith. *See Pate v. Stevens*, 163 F.3d 437, 438-39 (7th Cir. 1998); *Henderson v. Norris*, 129 F.3d 481, 484 (8th Cir. 1997) ("[W]e hold that civil action prisoner-appellants who have been denied the right to proceed on appeal in forma pauperis by the district court because the district court has certified under § 1915(a)(3) that the appeal would not be taken in good faith, may still, by separate motion filed with this court pursuant to Federal Rule of Appellate Procedure 24(a), seek to proceed in this court under the provisions of § 1915."); *Wooten*, 129 F.3d at 207; *Newlin*, 123 F.3d at 432; *Baugh*, 117 F.3d at 201. If the court of appeals grants the motion, the party is permitted to proceed IFP (assuming that he's indigent), and the court of appeals eventually will consider the merits of the appeal. If the court of appeals denies the motion, the appeal can still proceed if the party prepays the fees, *see Newlin*, 123 F.3d at 434; *Baugh*, 117 F.3d at 199-200, 202, although it is hard to imagine why the party would do so, *see Wooten*, 129 F.3d at 208 ("If [the appellant] is foolish enough to pay $105 to have us say essentially what we have already said about his case, his appeal may proceed.").

II. Conflicts Between Rule 24(a) and the PLRA

"[C]ourts and commentators agree that a statute passed after the effective date of a federal rule repeals the rule to the extent that it actually conflicts." *Jackson*, 102 F.3d at 135. Thus, the conflicts between Rule 24(a) and the PLRA have not created a major problem for courts; where

courts have found a conflict, they have simply applied the PLRA. *Mitchell*, 112 F.3d at 1489; *Floyd*, 105 F.3d at 278; *Jackson*, 102 F.3d at 136. This is not to say that you should not act to eliminate the conflicts, but only that it is understandable why there has been no clamor for you to do so.

As best as I can tell, there are five conflicts or potential conflicts between Rule 24(a) and the PLRA. Some of these conflicts are direct and undeniable; others are arguable. You may want to amend Rule 24(a) to address the former but not the latter. Also, I should warn you that although I have read dozens of PLRA cases, there are hundreds more that I have not read. It is possible (although I hope unlikely) that I have missed a potential conflict or two.

The potential conflicts between Rule 24(a) and the PLRA are as follows:

A. Conflict No. 1: The PLRA requires prisoners who bring civil actions or appeals from civil actions to "pay the full amount of [the] filing fee," § 1915(b)(1), albeit sometimes in installments, § 1915(b). By contrast, Rule 24(a)(2) provides that, after any litigant (including a prisoner) receives permission to proceed on appeal IFP, the litigant may proceed "without prepaying or giving security for fees and costs." There is undoubtedly a conflict between Rule 24(a)(2) and the PLRA, *see Mitchell*, 112 F.3d at 1489; *Jackson*, 102 F.3d at 136, but we already addressed this conflict at our April 1998 meeting, when we agreed to seek the Standing Committee's permission to publish a proposed amendment to Rule 24(a)(2). Under that proposal, the phrase "unless the law requires otherwise" would be inserted after the phrase "fees and costs."

B. Conflict No. 2: Under Rule 24(a)(1), a party who moves the district court for permission to proceed on appeal IFP need file only the Form 4 affidavit. Under the PLRA, a *prisoner* must also file a trust fund statement. § 1915(a)(2). One could argue that Rule 24(a)(1)

and the PLRA are not in conflict, as Rule 24(a)(1) is silent on the question of submitting a trust fund statement. However, Rule 24(a)(1) at least *implies* that nothing besides the Form 4 affidavit need be filed, and thus *implicitly* conflicts with the PLRA. *See Strickland*, 105 F.3d at 973 n.1.

The Committee has at least three options for addressing this potential conflict. First, the Committee could do nothing, as the conflict is, at most, only implicit. Second, the Committee could add to Rule 24(a)(1) a requirement that a party moving for permission to proceed on appeal IFP must submit, in addition to Form 4, "any other information the law requires." Third, the Committee could add to Rule 24(a)(1) an explicit requirement that a party moving for permission to proceed on appeal IFP "must, if the party is a prisoner, submit a trust fund account statement in compliance with 28 U.S.C. § 1915(a)(2)."

C. Conflict No. 3: Under Rule 24(a)(3), a party who proceeds IFP in the district court is automatically entitled to "proceed on appeal in forma pauperis without further authorization," unless the district court finds that the appeal is taken in bad faith or that the party is no longer indigent. Rule 24(a)(3) thus seems to conflict with the PLRA in at least two respects:

First, to the extent "proceed on appeal in forma pauperis" is construed to mean "proceed on appeal without prepaying or giving security for fees and costs," Rule 24(a)(3) would be in conflict with the PLRA in precisely the same way as Rule 24(a)(2). (This conflict is described above, under the heading "Conflict No. 1.") However, this conflict may be illusory. Rule 24(a)(*2*) states that a party given permission to proceed IFP on appeal can proceed "without prepaying or giving security for fees and costs"; that is unquestionably in conflict with the PLRA, which requires prisoners to prepay at least a part of the filing fee. By contrast, Rule 24(a)(*3*) merely states that a party given IFP status in the district court "may proceed on appeal in forma

pauperis"; it says nothing explicitly about prepaying fees. Under the terminology of the PLRA, a prisoner can *both* be permitted to "proceed on appeal in forma pauperis" *and* be required to prepay the filing fee; in other words, being permitted to proceed IFP is not inconsistent with being required to prepay all or part of the filing fee. Thus, closely read, there does not appear to be a conflict between this provision of Rule 24(a)(3) and the PLRA.

The second (and more serious) conflict between Rule 24(a)(3) and the PLRA is that nothing in the PLRA authorizes a party who was permitted to proceed IFP in the district court to *automatically* be given the same status in the appellate court. The PLRA is silent on this issue with respect to *non-prisoners*, and thus one could argue that Rule 24(a)(3) and the PLRA are not in conflict.[6] But the PLRA fairly clearly provides that, before a *prisoner* can be given permission to proceed on appeal IFP, he must move for that permission and submit with his motion a copy of his trust fund statement.

The Committee has several options for addressing the potential conflict between Rule 24(a)(3) and the PLRA. The conflict arises only in cases involving prisoners, so one easy way of addressing the problem would be to insert a couple words into Rule 24(a)(3) to limit its application to non-prisoners; Rule 24(a)(3) would then be silent on the question of prisoner litigation. Another option would be to renumber what is now Rule 24(a)(3) as Rule 24(a)(3)(A),

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[6]Only the Sixth Circuit has even hinted — once in a lengthy administrative order issued by Chief Judge Martin and later in an opinion written by Chief Judge Martin that largely incorporated his administrative order (even though most of the order was not relevant to the case) — that, under the PLRA, it is unlawful to grant IFP status on appeal *automatically* to non-prisoners who proceeded IFP in the district court. *See McGore*, 114 F.3d at 610 ("In a departure from the former practice, *an individual* or prisoner granted pauper status before the district court is no longer automatically entitled to pauper status on appeal."); *In re PLRA*, 105 F.3d at 1136 (same). In neither instance was the issue briefed, argued, or even before the court. The Sixth Circuit did not elaborate on its hint, and it is possible that its hint simply reflected careless phrasing.

limit it to non-prisoners as I've just suggested, and add a subsection (B) that explicitly provides that prisoners are *not* entitled to "carryover" IFP status. A problem with this option is that not all litigation involving prisoners is covered by the PLRA. The PLRA applies only to civil matters, and even some arguable civil matters (such as petitions for writs of mandamus directed to judges conducting criminal trials, *see Martin*, 96 F.3d at 854; *In re Nagy*, 89 F.3d 115, 116-17 (2d Cir. 1996)) may be outside the scope of the PLRA. A third option would be to abrogate Rule 24(a)(3) and make all parties, prisoners and non-prisoners alike, request permission to appeal IFP, even if they proceeded IFP in the district court. Still other options are possible.

D. Conflict No. 4: Rule 24(a)(5) permits a party to move in the court of appeals for permission to proceed on appeal IFP after the district court has denied him that permission or found that his appeal is not taken in good faith. Such a motion need be accompanied by only the Form 4 affidavit (and a copy of the district court's statement of reasons for its action).

The PLRA does not preclude a party from moving the court of appeals for permission to proceed on appeal IFP, either before or after such permission has been denied by the district court. However, the PLRA clearly requires that a *prisoner* filing such a motion with a court of appeals must submit a trust fund statement, as well as a Form 4 affidavit.

This potential conflict is identical to "Conflict No. 2," and the Committee's options for addressing it are the same.

E. Conflict No. 5: Rule 24(a)(5) requires that a party seeking to proceed on appeal IFP first seek the permission of the district court and then, if that permission is denied for any reason (including a finding of bad faith), move the court of appeals within 30 days for permission to proceed on appeal IFP. However, the PLRA provides that "[a]n appeal may not be taken in

forma pauperis if the trial court certifies in writing that it is not taken in good faith." § 1915(a)(3). There is a potential conflict between the fact that Rule 24(a)(5) permits a party who has been found by the district court to be appealing in bad faith to file a *motion* in the court of appeals for permission to proceed on appeal IFP and the fact that the PLRA precludes a party who has been found by the district court to be appealing in bad faith from *appealing* that finding in the court of appeals.

Most of the courts of appeals do not see a conflict. As I discussed above, all of the courts of appeals that have addressed the issue (save the Sixth Circuit) have held that, after the district court makes a finding of bad faith, the party may, consistently with the PLRA, move in the court of appeals for permission to proceed IFP (and thus, as a practical matter, get appellate review of the district court's finding). The Fifth Circuit described the process as follows:

> [W]e now hold that (1) a district court may certify that an IFP appeal is not taken in good faith under section 1915(a)(3) and Rule 24(a); (2) if the trial court does so, it is required under Rule 24(a) to set forth in writing the reasons for its certification; and (3) within the time prescribed by Rule 4, the appellant either may pay the full filing fee and any relevant costs and proceed on appeal for plenary review, or contest the certification decision by filing a motion for leave to proceed IFP with the court of appeals. If the latter be done and the appellate IFP certification is secured, the motion therefor shall be deemed to be a timely notice of appeal. When the prisoner opts to challenge the certification decision, the motion must be directed solely to the trial court's reasons for the certification decision. The said motion and deemed notice of appeal shall be a filing for purposes of the PLRA and will trigger the financial screening and assessment procedures thereof.

Baugh, 117 F.3d at 202 (footnote omitted).

If one accepts the majority reading of the PLRA, then there is no conflict between Rule 24(a)(5) and the PLRA. However, if one accepts the Sixth Circuit's unique view that a non-

prisoner[7] who is found to be appealing in bad faith by the district court cannot move in the court of appeals for permission to proceed IFP, then Rule 24(a)(5) would have to be abrogated or rewritten.

Attached are copies of 28 U.S.C. § 1915 and Rule 24(a).

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[7]Recall that the Sixth Circuit is also alone among the circuits in holding that the "good faith" requirement applies only to non-prisoners.

§ 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.

Rule 23. Custody or Release of a Prisoner in a Habeas Corpus Proceeding

(a) Transfer of Custody Pending Review. Pending review of a decision in a habeas corpus proceeding commenced before a court, justice, or judge of the United States for the release of a prisoner, the person having custody of the prisoner must not transfer custody to another unless a transfer is directed in accordance with this rule. When, upon application, a custodian shows the need for a transfer, the court, justice, or judge rendering the decision under review may authorize the transfer and substitute the successor custodian as a party.

(b) Detention or Release Pending Review of Decision Not to Release. While a decision not to release a prisoner is under review, the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court, may order that the prisoner be:

(1) detained in the custody from which release is sought;

(2) detained in other appropriate custody; or

(3) released on personal recognizance, with or without surety.

(c) Release Pending Review of Decision Ordering Release. While a decision ordering the release of a prisoner is under review, the prisoner must—unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise—be released on personal recognizance, with or without surety.

(d) Modification of the Initial Order on Custody. An initial order governing the prisoner's custody or release, including any recognizance or surety, continues in effect pending review unless for special reasons shown to the court of appeals or the Supreme Court, or to a judge or justice of either court, the order is modified or an independent order regarding custody, release, or surety is issued.

(As amended Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

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. If the district court denies the motion, it must state its reasons in writing.

(3) **Prior Approval.** A party who was permitted to proceed in forma pauperis in the district-court action, or who was determined to be financially unable to obtain an adequate defense in a criminal case, may proceed on appeal in forma pauperis without further authorization, unless the district court—before or after the notice of appeal is filed—certifies that the appeal is not taken in good faith or finds that the party is not otherwise entitled to proceed in forma pauperis. In that event, the district court must state in writing its reasons for the certification or finding.

(4) **Notice of District Court's Denial.** The district clerk must immediately notify the parties and the court of appeals when the district court does any of the following:

(A) denies a motion to proceed on appeal in forma pauperis;

(B) certifies that the appeal is not taken in good faith; or

(C) finds that the party is not otherwise entitled to proceed in forma pauperis.

(5) **Motion in the Court of Appeals.** A party may file a motion to proceed on appeal in forma pauperis in the court of appeals within 30 days after service of the notice prescribed in Rule 24(a)(4). The motion must include a copy of the affidavit filed in the district court and the district court's statement of reasons for its action. If no affidavit was filed in the district court, the party must include the affidavit prescribed by Rule 24(a)(1).

(b) Leave to Proceed in Forma Pauperis on Appeal or Review of an Administrative-Agency Proceeding. When an appeal or review of a proceeding before an administrative agency, board, commission, or officer (including for the purpose of this rule the United States Tax Court) proceeds directly in a court of appeals, a party may file in the court of appeals a motion for leave to proceed on appeal in forma pauperis with an affidavit prescribed by Rule 24(a)(1).

(c) Leave to Use Original Record. A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part.

(As amended Apr. 1, 1979, eff. Aug. 1, 1979; Mar. 10, 1986, eff. July 1, 1986; Apr. 24, 1998, eff. Dec. 1, 1998.)

TITLE VII. GENERAL PROVISIONS

Rule 25. Filing and Service

(a) Filing.

(1) **Filing with the Clerk.** A paper required or permitted to be filed in a court of appeals must be filed with the clerk.

(2) **Filing: Method and Timeliness.**

(A) **In general.** Filing may be accomplished by mail addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) **A brief or appendix.** A brief or appendix is timely filed, however, if on or before the last day for filing, it is:

(i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or

V-I-3

98-11

Circuit Mediation Office
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
811 U.S. Courthouse, 1010 Fifth Avenue
Seattle, Washington 98104-1130
Telephone: (206) 553-6117
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Christopher A. Goelz
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San Francisco Office
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December 3, 1998

RECEIVED 12/11/98

98-AP-G

Peter G. McCabe, Secretary
Committee of Rules of
Practice and Procedure
Administrative Office of the
United States Courts
Washington DC 20544

Dear Mr. McCabe:

I am perplexed about the interplay of two of the new FRAPs and wonder whether there is a typo.

FRAP 5(c) requires that petitions for permission conform to FRAP 32(a)(1). FRAP 32(c) requires other papers, which I assume includes petitions for permission, to conform to FRAP 32(a). As a result, it's not clear whether a petition for permission need only conform to Rule 32(a)(1) or to all of Rule 32(a).

My assumption is that petitions for permission are governed by Rule 32(c). If that is so, then Rule 5(c) should be amended to delete the "(1)" or the first sentence should be left out altogether.

Thanks you for your attention to this matter.

Sincerely,

Chris Goelz

98-10

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
LEWIS F. POWELL, JR. UNITED STATES COURTHOUSE ANNEX
1100 EAST MAIN STREET, SUITE 501
RICHMOND, VIRGINIA 23219-3517

TELEPHONE (804) 771-2213

PATRICIA S. CONNOR
CLERK

November 25, 1998

Peter G. McCabe, Esq., Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

98-AP-F

Re: Federal Rule of Appellate Procedure 46

Dear Peter:

In two recent reciprocal discipline cases in the Fourth Circuit, the attorneys requested a hearing under Fed. R. App. P. 46(b) ("after hearing, if requested") before imposition of reciprocal discipline. Although neither attorney raised an issue warranting a hearing under the reciprocal standard set forth in *Selling v. Radford*, 243 U.S. 46, 50 (1917), the Court felt compelled to schedule rehearing in view of the language of Fed. R. App. P. 46(b).

Due process does not seem generally to require a hearing in a reciprocal case. The Supreme Court rules, for example, in such cases provide only for an opportunity to show cause why a disbarment order should not be entered, with possibility of response. Sup. Ct. R. 8.1. Even in an initial discipline case, the Supreme Court rules provide for a hearing only "if material facts are in dispute." Sup. Ct. R. 8.2.

We ask that the Committee consider modifying Rule 46 to permit the courts of appeals to conduct disciplinary hearings only when needed to resolve material factual disputes.

Thank you for your consideration.

Sincerely,

Tom Rowe

Thomas D. Rowe, Jr.
Chair, Fourth Circuit Rules Advisory Committee

Patricia S. Connor
Clerk, U.S. Court of Appeals, Fourth Circuit