ADVISORY COMMITTEE
ON
APPELLATE RULES

Tucson, Arizona
October 21-22, 1999

Agenda for Fall 1999 Meeting of
Advisory Committee on Appellate Rules
October 21-22, 1999

I. Introductions

II. Approval of Minutes of April 1999 Meeting

III. Report on June 1999 Meeting of Standing Committee

IV. Action 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 Nos. 97-05 & 99-01 (FRAP 24(a) — conflicts with PLRA)

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

D. Item Nos. 97-31 & 98-01 (FRAP 47 — uniform effective date for local rules/require filing with A.O.)

E. Final review of all items to be submitted to Standing Committee in January 2000

V. Discussion Items

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

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) motion 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. 97-32 (FRAP 12(a) — require caption to identify only the parties to the appeal) (Mr. Fulbruge)

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

G. Items Awaiting Initial Discussion

1. Item No. 99-04 (FRAP 32(a)(7) — Microsoft Word counting glitch)

2. Item No. 99-05 (FRAP 3(c) — failure explicitly to name court to which appeal taken)

3. Item No. 99-07 (FRAP 26.1 — broaden financial disclosure obligations)

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

VII. Schedule of Dates and Location of Spring 2000 Meeting

VIII. Adjournment

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Advisory Committee on Appellate Rules
Table of Agenda Items — Revised September 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 in 01/00
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 in 01/00
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 in 01/00
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 in 01/00
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 in 01/00
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 in 01/00
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 in 01/00
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 in 01/00

FRAP Item	Proposal	Source	Current Status
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 in 01/00
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 in 01/00
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 in 01/00
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1. (Related to No. 98-01.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Draft approved 4/98 for submission to Standing Committee in 01/00
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 Discussed and retained on agenda 04/99
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 Discussed and retained on agenda 04/99
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 in 01/00

FRAP Item	Proposal	Source	Current Status
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office. (Related to No. 97-31.)	Standing Committee	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee in 01/00
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 in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99
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. Discussed and retained on agenda 04/99; continue to await specific proposal from Department, 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 Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note
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 Discussed and retained on agenda 04/99; continue to await specific proposal from Department
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 Discussed and retained on agenda 04/99
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 Draft approved 04/99 for submission to Standing Committee in 01/00
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 Discussed and retained on agenda 04/99

FRAP Item	Proposal	Source	Current Status
99-02	Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.	Hon. Will Garwood (CA5)	Awaiting initial discussion Draft approved 04/99 for submission to Standing Committee in 01/00
99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	Awaiting initial discussion Discussed and retained on agenda 04/99
99-04	Amend FRAP 32(a)(7) to account for Microsoft Word 97 word counting method.	Advisory Committee	Awaiting initial discussion
99-05	Amend FRAP 3(c) to address failure of party explicitly to name court to which appeal taken.	Hon. Kenneth F. Ripple (CA7)	Awaiting initial discussion
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	Awaiting initial discussion
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	Awaiting initial discussion

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

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 15, 1999, at 8:35 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. 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, Mr. W. Thomas McGough, Jr., and Mr. Michael J. Meehan. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice was present representing the Solicitor General. Also present were Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office, Ms. Laural L. Hooper from the Federal Judicial Center, and Mr. Joseph F. Spaniol, Jr., from the Standing Committee's Subcommittee on Style.

Judge Garwood welcomed Mr. McGough to the Committee. Mr. McGough replaced Mr. Luther T. Munford on October 1, 1998, but was unable to attend the Committee's October 1998 meeting.

II. Approval of Minutes of October 1998 Meeting

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

1. In the seventh line of the third paragraph on page 5, insert "of" after "couple."

2. In the third line of the second paragraph following the draft amendment on page 11, change "misleading" to "misleadingly."

III. Report on January 1999 Meeting of Standing Committee

Judge Garwood reported on the Standing Committee's most recent meeting. Judge Garwood said that this Advisory Committee had no action items on the Standing Committee's agenda. Judge Garwood told the Standing Committee that this Advisory Committee intended to present a package of proposed amendments to the Standing Committee at its January 2000 meeting.

Judge Garwood communicated the sentiments of this Advisory Committee that the term "Advisory Committee Note" should continue to be used instead of "Committee Note," but the Standing Committee was not receptive to his comments. Judge Garwood also raised the question of whether prescribing a universal December 1 effective date for changes to local rules — as this Committee and other advisory committees are considering — would violate 28 U.S.C. § 2071(b). (That section provides that a local rule "shall take effect upon the date specified by the prescribing court.") Judge Garwood was not given any guidance in response to his question.

At Judge Garwood's request, Mr. Rabiej gave an update on the Standing Committee's consideration of possible Federal Rules of Attorney Conduct. Mr. Rabiej said that the ad hoc committee studying the issue would be meeting this spring and would meet again in September. The ad hoc committee hopes to have a proposal ready for the advisory committees to consider at their fall meetings. Mr. Rabiej pointed out that the McDade Amendment will take effect in a few days and that, under the Amendment, federal attorneys will be required to comply with state ethical rules. Mr. Letter described some of the ambiguities of the McDade Amendment that the Department of Justice is now studying.

At Judge Garwood's request, Mr. Rabiej also gave an update on the Standing Committee's consideration of financial disclosure statements by parties and the recusal of judges for financial interest. Mr. Rabiej said that, following a conference call involving Judge Anthony J. Scirica (Chair of the Standing Committee), the reporters to the advisory committees, and others, the Federal Judicial Center was asked to collect information about local rules and practices on this topic. No action is expected until next year.

IV. Action Items

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

The Reporter introduced the following proposed amendments and Committee Notes:

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));

(45) 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;

(56) a statement of the issues presented for review;

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

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

(89) 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;

(910) 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 references 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.

The Committee debated the proposed amendments at length. Those supporting the amendments argued that it was important to bring about uniformity in appellate practice, and that the current hodgepodge of conflicting local rules regarding requests for oral argument creates a hardship for attorneys with national practices. They also argued that statements regarding oral argument can be helpful to courts, particularly when attorneys do not believe that oral argument is necessary. One member who supported the amendments said that he would also support an amendment *forbidding* parties to request or waive oral argument in their briefs; his main concern was bringing about uniformity, one way or the other.

Those opposing the amendments argued that statements regarding oral argument are generally not helpful to courts, and that directing parties to include such statements in their briefs may force some attorneys who would otherwise remain silent on the question of oral argument to ask for oral argument — particularly if the attorneys feared that a waiver of oral argument would be interpreted as an implicit admission that their case was weak. Also, requiring statements regarding oral argument might exacerbate tensions between courts and litigants. As a general matter, attorneys resent not being given oral argument. Forcing an attorney to make a formal request for oral argument, only to have the request denied, might increase that resentment. Finally, although there is a lack of uniformity, that lack of uniformity is appropriate, given that individual circuit courts maintain very different cultures regarding oral argument.

A member moved that Item No. 97-22 be removed from the study agenda. The motion was seconded. The motion carried (6-2).

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)

Rule 26(a)(2) directs that, in computing periods of time under the Federal Rules of Appellate Procedure ("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 a proposed amendment to Rule 26(a)(2) that would extend the threshold 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 ("FRCP") and the Federal Rules of Criminal Procedure ("FRCrP"). *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 its October 1998 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

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

attorney will have 7 actual 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 actual days, and, in the absence of a legal holiday, no more than 11 actual 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."

The Reporter introduced the following proposed amendments and Committee Notes, which are designed to implement the changes approved by the Committee at its October 1998 meeting:

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 FRCP 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.

The Committee briefly discussed the merits of the proposed amendment to Rule 26(a)(2) that was approved at the October 1998 meeting, and all members of the Committee who spoke, save one, reaffirmed their support for that amendment.

A member moved that the implementing amendments be approved. The motion was seconded. The motion carried (unanimously).

The Reporter told the Committee that the Style Subcommittee had suggested changes to *unamended* parts of the rules under consideration. Several members expressed strong objections to "re-restylizing" unamended portions of rules. First, such a practice can create confusion about the scope of substantive amendments; in this instance, for example, it would camouflage the simplicity of changing a deadline from "x" days to "y" days. Second, such a practice creates a hardship for members of the bench and bar, who must pay close attention to any changes in the rules. Finally, such a practice risks unintended substantive consequences.

The Committee reached a consensus that it would not consider "re-restylizing" rules that were already restylized as part of the lengthy restylization project that culminated in last year's amendments to FRAP. By consensus, the suggestions of the Style Subcommittee were rejected.

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)

Judge Garwood introduced the following proposed amendments and Committee Notes:

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 FRCP 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 FRCP 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 FRCP 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 FRCP 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 FRCP 79(a), whether or not the order is also entered on a separate document in compliance with FRCP 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 FRCP 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 FRCP 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 FRCP 58, and thus compliance with the requirement should be unnecessary. *See* FRCP 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 FRCP 58 and FRCP 79(a), with one exception: If such a judgment or order is not entered in compliance with FRCP 58, the time to appeal begins to run 180 days after the judgment or order is entered in the civil docket in compliance with FRCP 79(a). Without such a provision, a party could wait forever to appeal a judgment or order that was not entered in compliance with FRCP 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 FRCP 58. If a party chooses to appeal such a judgment or order before it is entered in compliance with FRCP 58, the appeal should be heard, even if the appellee objects to the lack of a FRCP 58 judgment or order. The separate document requirement of FRCP 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).

Judge Garwood apologized for asking the Committee to reconsider this issue, after the Committee had discussed this issue and approved amendments to Rule 4(a) at its October 1998 meeting. However, for the reasons described in his March 12, 1999 memorandum to the Committee, Judge Garwood concluded that the amendments approved in October should be reconsidered in two primary respects:

First, under the amendments approved in October, the time to appeal an order disposing of one of the post-trial motions listed in Rule 4(a)(4)(A) would begin to run as soon as the order was entered on the docket pursuant to FRCP 79(a) if the order *denied* the motion, but would not begin to run until the order was both entered on the docket pursuant to FRCP 79(a) *and* entered on a separate document pursuant to FRCP 58 if the order *granted* the motion. Judge Garwood now proposes that Rule 4(a)(7) be amended so that an order disposing of one of the post-trial motions listed in Rule 4(a)(4)(A) would begin to run as soon as the order was entered on the docket pursuant to FRCP 79(a), *regardless* of whether the order granted or denied the motion. There is one exception: If the order directs that the original judgment be amended, the time to appeal would begin to run on the date on which the amended judgment is entered in compliance with both FRCP 58 and 79(a).

Second, under the amendments approved in October, a party could wait forever to bring an appeal from a judgment or order that *is* required to be entered on a separate document pursuant to FRCP 58 but is not. Judge Garwood now proposes that Rule 4(a)(7) be amended to incorporate an approach similar to the approach adopted by the First Circuit in *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229 (1st Cir. 1992): The time to appeal a judgment or order that is required to be entered in compliance with FRCP 58 would begin to run *either* when the judgment or order is entered in compliance with FRCP 58 (as well as FRCP 79(a)) *or* 180 days after the judgment or order is entered in compliance with FRCP 79(a), whichever comes first.

Judge Garwood summarized his reasons for suggesting these two changes, which reasons were described at length in his March 12 memorandum to the Committee.

A member said that it seemed to him that the problem was with the failure of district court judges to enter orders in compliance with FRCP 58, and thus that this problem should be addressed by the Advisory Committee on Civil Rules. Other members disagreed: FRCP 58, on its face, applies only to *judgments*. It is the rules of appellate procedure, not the rules of civil procedure, which provide that the time to appeal an *order* does not begin to run until the order is entered on a separate document in compliance with FRCP 58. In other words, it is the appellate rules, not the civil rules, which give parties forever to appeal an order (or, for that matter, a judgment) that is not entered in compliance with FRCP 58. Thus it is this Committee, and not the Civil Rules Committee, that has responsibility for addressing this problem.

A member expressed support for Judge Garwood's proposal. He said that it is extremely common for district court judges to *deny* Rule 4(a)(4)(A) motions in orders that are not entered in compliance with FRCP 58. He said that it is even more common for those motions to be *granted* in orders that do not comply with FRCP 58, because almost all such orders direct that a judgment be amended, and judges know that the amended judgment will itself be entered in compliance with FRCP 58. He is afraid that there are thousands of "time bombs" waiting to explode — that is, old orders that were not entered in compliance with FRCP 58 and thus could be appealed any time in the future.

Mr. Letter said that the Department of Justice also supports Judge Garwood's proposal. He pointed out that the proposal differs from the *Fiore* approach in an important respect: *Fiore* gives parties a certain amount of time within which to request that a judgment or order be entered in compliance with FRCP 58, and then runs the time to appeal from the date on which the judgment or order is so entered. By contrast, Judge Garwood's proposal would provide that the time to appeal a judgment or order that was not entered in compliance with FRCP 58 would begin to run a certain amount of time after the judgment or order was entered on the docket in compliance with FRCP 79(a). Judge Garwood responded that the difference between his proposal and *Fiore* was intentional; his approach is designed to be simpler and self-executing.

A member suggested that the first sentence of proposed Rule 4(a)(7) be deleted altogether. If it were, the time to appeal any judgment or order would begin to run either when it was entered in compliance with both FRCP 58 and 79(a) or 180 days after it was entered on the docket in compliance with FRCP 79(a), whichever comes first. Other members opposed this proposal. They pointed out that post-trial motions are often brought and usually denied in orders that do not comply with FRCP 58. If the first sentence of Rule 4(a)(7) were deleted, the time to appeal in *most* civil trials would not begin to run until 180 days after the case was concluded.

Judge Scirica joined the meeting at this point.

The remainder of the Committee's lengthy discussion of Judge Garwood's proposal focused on two issues:

First, several members argued that Rule 4(a)(7) should be amended so that the time to appeal *any* order — not just orders that grant or deny the motions listed in Rule 4(a)(4)(A) — would begin to run upon entry of the order on the docket in compliance with FRCP 79(a). In

other words, no order would have to be entered on a separate document before the time to appeal the order began to run. The "separate document" requirement of FRCP 58 would apply only to judgments.

Those favoring this proposal made several points: First, the proposal would be much cleaner and simpler. Rather than distinguishing among orders, some of which would have to be entered in compliance with FRCP 58 before the time to appeal began to run and some of which would not, all orders would be treated the same. Second, this proposal would harmonize the rules of appellate procedure with the rules of civil procedure; FRCP 58, by its terms, applies only to judgments, not to orders. Third, this proposal would harmonize the rules of appellate procedure with the practice of district courts; as noted, it is extremely common for district courts to enter orders in a manner that does not comply with FRCP 58, and it is extremely common for parties to appeal those orders (usually without anyone even noticing that the orders were supposed to be entered in compliance with FRCP 58).

Those opposing the proposal responded in several ways: First, there might be some types of orders — such as orders granting preliminary injunctions and contempt citations — that should be entered in compliance with FRCP 58 before the time to appeal those orders begins to run. Second, if Rule 4(a) were amended as proposed, the difference between "judgments" and "orders" would become important — and distinguishing between the two is sometimes quite difficult. Third, it is only orders granting or denying the motions listed in Rule 4(a)(4)(A) that have caused a problem for federal courts and created conflicting case law; the application of FRCP 58 to other types of orders simply has not been a problem. Finally, further research should be done before Rule 4 is amended to eliminate *all* orders from the requirement of compliance with FRCP 58. Such an amendment might have unanticipated consequences.

The second issue discussed by the Committee was the length of the cut-off for appealing orders or judgments that are required to be entered in compliance with FRCP 58 but are not. Under Judge Garwood's proposal, the time to appeal such an order or judgment would begin to run 180 days after the order or judgment was entered on the docket in compliance with FRCP 79(a) (unless, in the meantime, the court corrected its omission by entering the order or judgment in compliance with FRCP 58, in which case the time to appeal would begin to run on the date of the entry). Judge Garwood stressed that he is not wedded to 180 days as the length of the cut-off; he chose 180 days because it echoes the 180-day grace period in Rule 4(a)(6)(A).

Several members argued that 180 days was too long. They pointed out that, in fact, this would give most parties 210 days to appeal typical orders — 180 days before the time to appeal began to run, plus 30 days to bring the appeal once the time begins to run. Some Committee members suggested that the cut-off should be 60 or 90 days.

In the course of this discussion, the Committee voted on three motions:

First, a member moved that Rule 4(a)(7) be amended to provide that the time to appeal all orders that dispose of the motions listed in Rule 4(a)(4)(A) — that is, both orders that grant those motions and orders that deny those motions — would begin to run when the order is entered on the docket in compliance with FRCP 79(a). Entry on a separate document in compliance with FRCP 58 would not be required. The motion was seconded. The motion carried (unanimously).

Second, a member moved that Rule 4(a)(7) be amended so that it includes *a* cut-off on the time within which a party could wait to appeal a judgment or order that was required to be entered in compliance with FRCP 58 but that was not. The motion was seconded. The motion carried (unanimously).

Third, a member moved that the length of the cut-off be 150 days. The motion was seconded. The motion carried (5-4).

The Committee also agreed to consider further at its October 1999 meeting the question of whether Rule 4(a)(7) should be amended so that the time to appeal *any* order — that is, not merely orders disposing of the motions listed in Rule 4(a)(4)(A), but any other order as well — would begin to run when the order is entered on the docket in compliance with FRCP 79(a). Under this proposal, entry on a separate document in compliance with FRCP 58 would be required only for *judgments*. Committee members will give this matter some thought over the summer, and the Reporter will try to determine whether such an amendment would create any unforeseen consequences.

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

Mr. Letter introduced this item. Mr. Letter said that when the appellate rules were restylized, Rule 29 was amended so that, instead of an amicus brief being due at the same time as the principal brief of the party being supported, an amicus brief is now due 7 days after the filing of the principal brief of the party being supported. This change created two problems:

First, an appellant might have to file a reply brief before being able to read the brief of an amicus supporting the 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 its brief by mail, the appellant might not see it at all before its reply brief was due.

Second, an amicus supporting an appellee might not be able to see the appellee's brief until just before the amicus's brief is due, and thus the amicus might not be able to take account of the arguments made by the appellee in its brief. Suppose that the appellee does not permit the amicus to review drafts of its brief. If the appellee files its brief on June 1 and mails a copy of the

brief to the amicus, the amicus might not receive a copy of the brief until June 4 or 5, just a couple of days before the amicus's brief is due.

Mr. Letter said that he had written to 18 organizations that frequently file amicus briefs in the courts of appeals to solicit their suggestions about how Rule 29 might be amended to fix these problems. To date, only 3 organizations have responded. Mr. Letter hopes that further responses will be forthcoming and that the Department of Justice will be able to make a formal proposal for amending Rule 29 at the October 1999 meeting of the Committee.

A couple of members commented that they were sympathetic only to the first of the two problems described by Mr. Letter. After all, for many years amicus briefs were due on the same day as the principal brief of the party being supported, and amici seemed to manage successfully. It is hard to believe that amici cannot manage just as successfully now that their briefs are due 7 days after the filing of the principal brief.

C. Item No. 98-06 (FRAP 4(b)(3)(A)) — effect of filing of FRCrP 35(c) 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 them. However, some of the courts of appeals have held that the list of tolling 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"?

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? Should the time to appeal be tolled until the district court issues an order denying the motion, even though the district court loses the authority to grant the motion after 7 days? Or should a FRCrP 35(c) motion be deemed denied — and the time to appeal under Rule 4(b)(1) be deemed to begin to run — once the 7-day period expires?

At the October 1998 meeting, Mr. Letter agreed to look into these issues for the Committee. Mr. Letter presented three proposals on behalf of the Department of Justice. Under

the first proposal, Rule 4(b)(5) would be amended to provide that the filing of a FRCrP 35(c) motion would not toll the time for filing a notice of appeal *at all*. Under the second proposal, Rule 4(b)(5) would be amended to provide that the filing of a FRCrP 35(c) motion would toll the time for filing a notice of appeal, but only for 7 days after entry of judgment or until the district court rules on the motion, whichever comes first. Under the third proposal, Rule 4(b)(3) would be amended to achieve, in substance, the same result as the second proposal.

Mr. Letter said that the Department strongly preferred the first proposal. It would result in the clearest rule and the one most consistent with the rest of the appellate rules — which, as noted, do not include FRCrP 35(c) motions among the "tolling" motions listed in Rule 4(b)(3)(A), and which, in fact, specifically provide that the filing of a FRCrP 35(c) motion does not render the underlying judgment non-final (*see* Rule 4(b)(5)). Mr. Letter said that the Department could foresee only one problem with the first proposal: In a case in which a defendant wanted to appeal only his sentence — and then only if his sentence was not corrected in response to his FRCrP 35(c) motion — he might feel compelled to protect his appellate rights by filing a notice of appeal before the court rules on his FRCrP 35(c) motion, rather than simply waiting until the FRCrP 35(c) motion is granted or denied. Of course, even in that circumstance, the defendant could withdraw his notice of appeal if his FRCrP 35(c) motion is granted.

Most members of the Committee supported the Department's preferred approach, although a couple of members raised the following problem: Suppose that the *government* brings a FRCrP 35(c) motion and, on the seventh day after imposing sentence and entering a judgment, the district court grants the motion. Suppose further that the defendant, who did not plan to appeal the original judgment, now wants to appeal because, in his view, the government's FRCrP 35(c) motion was erroneously granted. Even if the defendant learns of the granting of the government's FRCrP 35(c) motion on the day the order is entered, he will have only 3 days to file a notice of appeal. If, as is likely, the defendant does not learn of the granting of the government's motion until a couple of days after the order is entered, he may find that the time to appeal the original judgment has run.

Mr. Letter said that his understanding is that, when a FRCrP 35(c) motion is *granted*, a new judgment is entered, and either party has 10 days to appeal that new judgment. Judge Garwood asked Mr. Letter to look into the issue so that the Committee can be sure. It may be that Rule 4(b) will have to be amended to explicitly provide that, when a FRCrP 35(c) motion is granted, a new judgment must be entered, and the time to appeal for both the government and the defendant begins to run upon the entry of that new judgment.

A member described another advantage of the Department's preferred approach: At present, there is a split in the circuits over when the 7-day period in FRCrP 35(c) begins to run. FRCrP 35(c) provides that the 7 days begins to run upon "imposition of sentence." Some courts hold that a sentence is "imposed" when it is orally pronounced in open court, while others hold that a sentence is "imposed" only when the formal judgment of sentence is entered. Under the Department's first proposal, the issue of when the 7-day period begins to run would be irrelevant, as FRCrP 35(c) motions would not toll the time to appeal *at all*.

A member moved that the Committee, in principle, adopt the first proposal of the Department. The motion was seconded. The motion carried (unanimously).

Mr. Letter agreed that the Department would draft an amendment and Committee Note in time for the Committee's October 1999 meeting and report to the Committee on whether the granting of a FRCrP 35(c) motion always results in the entry of a new judgment.

D. 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. He also points out that circuit judges have *statutory* authority to deny habeas petitions under 28 U.S.C. § 2241(a), but Rule 22(a) precludes them from using that authority. At the Committee's October 1998 meeting, Mr. Letter offered to have the Department of Justice study and report back on this issue.

Mr. Letter said that this issue had turned out to be far more complicated than he anticipated, and that the Department would not be prepared to present a formal proposal until at least the October 1999 meeting. The Department was not sympathetic to the notion that circuit judges should be permitted to rule on habeas petitions in criminal cases. In criminal cases, habeas petitions are generally not coupled with other motions that require circuit judges to review the merits of the case, so circuit judges can refer those petitions to district courts without even reading them. The immigration context is different. A person who has been ordered deported is authorized to move in a court of appeals for a stay of deportation. In ruling upon such a motion, a circuit judge must review the merits of the case, and thus it might make sense to permit the circuit judge to also rule upon an accompanying habeas petition. All of this is under discussion within the Department.

Mr. Letter said that one additional complicating issue was a circuit split that has developed over the question of whether district courts have authority to rule on habeas petitions filed by aliens who have been ordered deported. Mr. Letter said that it would not make sense for Rule 22(a) to require circuit judges to transfer habeas petitions to district courts if district courts do not have authority to rule on those petitions. A member disagreed. He said that the Department should not focus on the question of whether district courts have jurisdiction to rule on habeas petitions in immigration cases, but instead on the question of who should first make that determination. It might make sense to require circuit judges to transfer habeas petitions to district courts, district courts to decide in the first instance whether they have jurisdiction, and then circuit courts to review those decisions on appeal.

The Committee very briefly discussed the merits of Judge Ripple's suggestion. Some members opposed the suggestion, arguing that it was wise policy to require all habeas petitions to be reviewed by district courts before being presented to courts of appeals. Other members expressed some sympathy for the suggestion, stressing the inconsistency between Rule 22(a) and § 2241(a). In response, one member said that, although she was not certain, she thought that Rule 22(a)'s requirement that habeas petitions be transferred to district courts was inserted into Rule 22(a) by act of Congress.

Judge Garwood told Mr. Letter that the Committee would be grateful if the Department would continue to discuss this issue and be prepared to take a position on Judge Ripple's suggestion at the October 1999 meeting.

E. 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).

At its October 1998 meeting, the Committee reached a consensus that any such "54(b)-type" provision should appear in the rules of the Tax Court rather than in FRAP. But Mr. Letter asked the Committee not to remove this item from its study agenda until he had an opportunity to solicit the views of the Internal Revenue Service and the Tax Court.

Mr. Letter reported that he had consulted with the Chief Counsel of the Internal Revenue Service and the Chief Judge of the Tax Court, and both had agreed that this issue should not be addressed by this Committee. A member moved that Item No. 98-08 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

The Committee recessed for lunch and reconvened at 1:20 p.m.

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

Judge Garwood asked the Reporter to lead the discussion on this item.

The Reporter said that 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 case filing ("ECF"). *See, e.g.*, Rule 25(a)(2)(D). Following enactment of the ECF rules in 1996, the Judicial Conference Committee on Automation and Technology developed the "ECF Initiative," under which several 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.

The Reporter said that 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. 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 hope was that, after satisfactory language regarding electronic service is found for the civil rules, similar language can be incorporated into the appellate, bankruptcy, and criminal rules.

In February 1999, the Standing Committee's Subcommittee on Technology met, and Prof. Cooper presented various proposals for amending the civil rules. After considerable discussion, the Subcommittee made a few tentative decisions, and Prof. Cooper agreed to draft amendments implementing those decisions. The Reporter described Prof. Cooper's draft amendments and the decisions that they reflected:

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 use electronic service, a district court may not forbid electronic service to be used.

One member expressed disagreement with the Subcommittee's approach. He said that courts should be authorized to use their local rules to permit or not to permit electronic service, as those courts see fit. The Reporter responded that the Subcommittee had discussed and rejected that option. The Subcommittee wants to use the rules of practice and procedure to push courts to accept electronic service, and thus the Subcommittee intentionally drafted the rules so that courts could not forbid consenting parties from using electronic service.

A member said that nothing presently in the rules forbids parties from agreeing among themselves to serve electronically. Why are amendments to the rules of practice and procedure necessary? The Reporter responded that the Subcommittee wants to encourage the use of electronic service and, toward that end, it wants to establish a "substructure" of rules on such issues as when electronic service will be deemed complete and whether the 3-day rule of FRCP 6(e) should apply to electronic service. Without such a substructure, parties would have to discuss and try to reach agreement on each of these ground rules in every case, and that would discourage parties from using electronic service.

A member moved that the Committee agrees in principle that electronic service should not be imposed upon unwilling parties and that courts should not be able to forbid parties who have consented to electronic service from using it. The motion was seconded. The motion carried (7-1).

The Committee was asked by Prof. Cooper to consider two alternative formulations of an amendment to FRCP 5(b)(2)(D) — the "Capra" formulation and the "Lafitte" formulation. By consensus, the Committee decided that it preferred the "Capra" formulation. However, several members noted that under both formulations, FRCP 5(b)(2)(D) would require the consent of parties to "other means" of service — such as Federal Express or third party carriers. The members argued that such consent should not be necessary and pointed out that the appellate rules authorize such service without the consent of the parties. *See* Rule 25(c). By consensus, the Committee decided to recommend to Prof. Cooper that he redraft FRCP 5(b)(2) so that "electronic" service (to which parties must consent) is mentioned in one subsection and "any other means" of service (to which parties need not consent) is mentioned in another.

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 in their local rules.

Several members said that, while they agreed with the Subcommittee's approach, they were concerned that the amendments drafted by Prof. Cooper did not make explicit the authority of courts to use local rules to regulate electronic service. 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.

A member moved that the Committee agrees that, although courts should not be able to forbid the use of electronic service when the parties consent, they must have considerable discretion to use local rules to regulate that service. The member further moved that the Committee recommends that the ability of courts to use local rules to regulate electronic service be explicitly mentioned in the text of a rule. The motion was seconded. The motion carried (unanimously).

3. The Subcommittee determined that only "FRCP 5" service may be made electronically, while "FRCP 4" service must continue to be made manually. Roughly speaking, FRCP 4 (and FRCP 4.1) service is the service of process that commences a lawsuit, while FRCP 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. The Subcommittee also determined that requests to waive formal service made under FRCP 4(d) should continue to be in writing.

After a brief discussion, the Committee agreed by consensus with the proposals of the Subcommittee.

4. 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 and manipulable. The Subcommittee also rejected a proposal that electronic service be deemed complete when the sender receives "confirmation" that her message has been received. Some e-mail programs do not confirm the receipt of messages, while others do, and 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 her 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 member expressed two concerns about the transmission rule: First, what happens when an attorney is away from the office for a couple of weeks and not able to receive e-mail? Second, what happens when the sender of the e-mail gets back a message informing the sender that the message was not received? Several members responded that they were not sympathetic to the first concern; just as an attorney can arrange to have someone open her mail, she can arrange to have someone open her e-mail. At the same time, several members expressed agreement with the second concern.

A member moved that, although the Committee was not opposed in principle to using transmission as the effective date of electronic service, it believes that the text of a rule or a Committee Note should explicitly address the situation in which the sender of an electronic message is informed that the message was not delivered to its intended recipient. The motion was seconded. The motion carried (unanimously).

5. The Subcommittee considered the question of whether the 3-day rule of FRCP 6(e) should apply to electronic service. FRCP 6(e) currently provides that, "[w]henever 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 3 days are added to the prescribed period whenever service is made by *any* means — including electronic — other than personal service. Although it may seem strange to apply the 3-day rule to electronic service, which is instantaneous, electronic service might be made at 8:00 p.m. on a Friday night and the recipient might not turn on her computer until 9:00 a.m. Monday morning.

Several members expressed concern about extending the 3-day rule to electronic service. The practitioners on the Committee pointed out that, in choosing a means of service, lawyers often seek to give their opponents as little time to respond as possible. Extending the 3-day rule to electronic service will discourage its use, as attorneys will not want their opponents to have 3 extra days to respond to something that they are likely to receive instantaneously. Instead, attorneys will use the mail. These members argued that the 3-day rule should be restricted to service by U.S. Mail. Mail is distinguishable from electronic service, in that mail is completely out of the control of attorneys for several days, whereas attorneys can, if they wish, check their e-mail daily.

A member moved that the Committee does not agree with the Subcommittee's proposal to extend the 3-day rule to electronic service, but instead prefers to leave FRCP 6(e) unchanged — that is, to continue to limit the 3-day rule only to mail. The motion was seconded. The motion carried (6-2).

6. 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.

The Committee quickly reached a consensus that it agreed with the Subcommittee's proposal.

Judge Scirica asked whether it would be possible for the Reporter to work overnight to draft electronic service amendments to FRAP, so that the Committee could consider those amendments tomorrow, and the Standing Committee could consider them in June. After a lengthy discussion, Judge Scirica and the Committee agreed that drafting and approving electronic service rules and Committee Notes in such a short period of time would be impracticable. Instead, this Committee will, as originally planned, await action on the proposed amendments to the civil rules at the Standing Committee's June meeting, and then consider similar amendments to FRAP at this Committee's October meeting.

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

The circuit clerks have proposed an amendment to Rule 12(a), which currently requires that appeals be docketed under the caption used in the district court. Occasionally the district court caption includes hundreds of parties, many of whom are not parties to the appeal. This creates needless work for the clerks' offices. The clerks have proposed that Rule 12(a) be amended so that captions would identify only the parties to the appeal.

Two members expressed opposition to the clerks' proposal. They argued that there are advantages to using the same caption in both the trial court and the appellate court. Using the same caption sometimes gives judges helpful information about the case and aids judges in meeting their recusal obligations. One member wondered whether Rule 12(a) could be amended so appeals would continue to be docketed under the caption used in the district court, unless the number of parties identified in the district court caption exceeded a specific number, in which case some other method would be used. After further discussion, the Committee agreed by consensus to postpone action on this matter until the October 1999 meeting, when Mr. Charles R. "Fritz" Fulbruge, III, the liaison from the appellate clerks, could be present to answer questions.

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

Rule 12(b) presently requires only the attorney who files a notice of appeal to submit a representation statement and requires that attorney to identify only himself and his clients. The appellant's attorney is not asked to identify the appellees or their attorneys, and no other party is required to file a representation statement. This lack of information sometimes makes it difficult for the clerks to identify all of the parties and attorneys. To remedy this problem, the clerks have proposed amending Rule 3(c)(1)(A) to require a party filing a notice of appeal to simultaneously submit "a separate statement listing all parties to the appeal, the last known counsel, and the last known addresses for counsel and unrepresented parties."

The Reporter suggested that, rather than amend Rule 3's provisions on the filing of a notice of appeal, it might be better to amend Rule 12(b)'s provisions on the representation statement. A member agreed and said further that, if Rule 3 were to be amended along the lines suggested by the clerks, the Committee should add the provision as a new Rule 3(f) rather than adding it to Rule 3(c)(1)(A).

A member moved that the Committee amend Rule 12(b) to require that the representation statement filed by the appellant name not just the parties represented by the attorney who files the statement, but *all* parties and *all* attorneys. The motion was seconded.

The Committee discussed the motion at length. Members were not clear on whether amending Rule 12(b) in this manner would solve the problem identified by the clerks. The primary concern of the clerks appears to be the information available to them when they docket an appeal, but the representation statement does not have to be filed until 10 days after the notice of appeal is filed. Other members said that, in many cases, the attorney for the appellant cannot be expected to identify the appellees until he files his principle brief.

The Committee agreed, by consensus, to postpone further discussion of Item No. 97-33 until October, when Mr. Fulbruge would be present to answer questions.

I. Items Awaiting Initial Discussion

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

Judge Garwood introduced the following proposed amendment and Committee Note:

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).

(de) 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 FRCP 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 FRCP 11(b) and 11(c).

A member said that he agreed with Judge Garwood that a signature requirement should be added to the rules, but he thought that the first sentence of proposed Rule 32(d) could provide simply that "every brief, motion, or other paper 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." Rule 32(d) might also clarify either in its text or in its Committee Note that the signature requirement does not extend to appendices. Such a provision would match up well with the terminology of Rule 32: Rule 32(a) refers to the form of "a Brief," Rule 32(b) refers to the form of "an Appendix," Rule 32(c)(1) refers to the form of a "Motion," and Rule 32(c)(2) refers to the form of "Other Papers." Several members agreed with this suggestion.

A member moved that Rule 32 be amended as proposed, except that the first sentence of proposed Rule 32(d) be shortened as suggested. The motion was seconded. The motion carried (unanimously).

A member expressed fear that by incorporating the signature requirement of FRCP 11(a), but not the "good faith" requirements of FRCP 11(b) and 11(c), the appellate rules might be understood to imply that signing a paper submitted to a circuit court means less than signing a paper submitted to a trial court. He wondered whether FRAP should be amended to incorporate the "good faith" requirements of FRCP 11(b) and 11(c). Several members opposed this notion, pointing out that the district courts have had great difficulty interpreting and applying FRCP 11, and arguing that this Committee should not inflict similar problems on the appellate courts.

The Committee adjourned for the day at 4:30 p.m.

The Committee reconvened on Friday, April 16, 1999, at 8:29 a.m.

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

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"). Judge Garwood asked the Reporter to do some follow-up research to determine whether there might be further conflicts between Rule 24(a) and the PLRA. In a memorandum dated March 15, 1999, the Reporter described five potential conflicts between Rule 24(a) and the PLRA. At Judge Garwood's request, the Reporter briefly summarized the five potential conflicts:

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," 28 U.S.C. § 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, but this Committee already addressed this conflict at its April 1998 meeting, when it approved 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."

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, because Rule 24(a)(1) is silent on the question of submitting a trust fund statement, it implies that nothing besides the Form 4 affidavit need be filed, and thus implicitly conflicts with the PLRA.

A member reminded the Committee that Form 4, as amended on December 1, 1998, specifically directs: "If you are a prisoner . . . you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts." That being the case, there is no conflict between Rule 24(a)(1) and the PLRA. Other members agreed.

Conflict No. 3: Under Rule 24(a)(3), a party who proceeds IFP in the district court is automatically entitled to proceed IFP on appeal "without further authorization," unless the district court finds that the appeal is taken in bad faith or that the party is no longer indigent. By contrast, 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. 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 of 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), limit it to non-prisoners as just suggested, and add a subsection (B) that explicitly provides that prisoners are *not* entitled to "carryover" IFP status. A third option would be simply to insert the words, "Unless the law requires otherwise," at the beginning of Rule 24(a)(3).

A member said that he had a philosophical objection to treating prisoners and non-prisoners differently in the text of FRAP. He would prefer the third option. A member disagreed. He pointed out that it was Congress's decision to treat prisoners differently from non-prisoners; all the Committee is doing is implementing a Congressional directive. In addition, the phrase "[u]nless the law requires otherwise" is not particularly helpful. It leaves parties wondering to which of the thousands of statutes, regulations, and rules the phrase is referring.

Several other members agreed with the first member. They, too, wanted to avoid distinguishing between prisoners and non-prisoners in the rules, and they did not want Rule 24(a) to specifically incorporate the provisions of the PLRA, given that the PLRA is likely to be amended in the future. The Committee reached a consensus that Rule 24(a)(3) should be amended by inserting at the beginning the phrase, "Unless the law requires otherwise." Judge Garwood asked the Reporter to draft an amendment and Committee Note for the Committee's October meeting.

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 consensus of the Committee was that, just as Conflict No. 2 is adequately addressed by the language in the newly revised Form 4, so, too, is this conflict.

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. 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 (even though, as a practical matter, this permits the party to get appellate review of the district court's finding). After a brief discussion, the Committee reached a consensus that the majority interpretation of the PLRA is correct, and thus that there is no conflict between Rule 24(a)(5) and the PLRA.

Judge Garwood asked the Reporter to draft an amendment and Committee Note implementing the one additional change to Rule 24(a) agreed upon by the Committee.

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

The Reporter introduced this item.

Rule 5(c) requires that a petition for permission to appeal "must conform to Rule 32(a)(1)." Rule 32(c) requires that "other papers" — which includes petitions for permission to appeal — must conform to "Rule 32(a)," with two exceptions. It is thus not clear whether petitions for permission to appeal must conform only with the requirements of Rule 32(a)(1) (as Rule 5(c) seems to say) or with all of the requirements of Rule 32(a), save two (as Rule 32(c) seems to say).

A member said that the use of "Rule 32(a)(1)" in the restylized Rule 5(c) was an obvious mistake, and that the mistake could be correct by replacing "Rule 32(a)(1)" with "Rule 32(a)." Another member suggested that it would be better to replace "Rule 32(a)(1)" with "Rule 32(c)(2)," which would make it clear that petitions for permission to appeal are "other papers" for purposes of the rule. Also, amending Rule 5(c) in this manner would make it clear that the two exceptions to the Rule 32(a) requirements made for "other papers" apply to petitions for permission to appeal.

A member moved that Rule 5(c) be amended by replacing the reference to "Rule 32(a)(1)" with a reference to "Rule 32(c)(2)." The motion was seconded. The motion carried (unanimously). Judge Garwood asked the Reporter to draft an amendment and Committee Note for consideration by the Committee in October.

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

Under Rule 46(b), an attorney who has been suspended or disbarred by a state supreme court may request a hearing before being suspended or disbarred by a court of appeals. The

Fourth Circuit Rules Advisory Committee has recommended that Rule 46(b) be amended so that a hearing would be necessary only if material facts were in dispute.

A member asked how often attorneys request hearings in these "reciprocal discipline" cases. A member responded that such hearings were rare in the Fifth Circuit. Another member said that he could recall only one such hearing in the Third Circuit.

A member said that, in light of the extremely small number of hearings requested, he favored leaving Rule 46(b) alone. A member agreed and said that he also favored retaining the hearing requirement as a policy matter, as it served as a check on state supreme courts.

A member proposed restricting the ability to request a hearing to cases in which there was a dispute of fact or law. Several other members objected, saying that they saw no reason to amend Rule 46(b).

A member moved that Item No. 98-10 be removed from the study agenda. The motion was seconded. The motion carried (6-1), with 1 abstention.

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

No additional old business or new business was raised.

Judge Garwood noted that Mr. Meehan's term as a member of the Committee would expire on October 1. Judge Garwood expressed appreciation for Mr. Meehan's dedicated service to the Committee and said that he hoped Mr. Meehan would join the Committee at its October 1999 meeting.

VII. Scheduling of Dates and Location of Fall 1999 Meeting

The Committee agreed that it will meet in Tucson, Arizona, on October 21 and 22, 1999.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 9:30 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 Spring 1999 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 April 1999 meeting.

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 32. Form of Briefs, Appendices, and Other Papers

(d) Signature. Every brief, motion, or other paper 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).

(de) **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, or other paper filed with the court 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. (An appendix filed with the court does not have to be signed.) 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).

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.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of June 14-15, 1999
Newton, Massachusetts

Draft Minutes

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at the Boston College Law School in Newton, Massachusetts on Monday and Tuesday, June 14-15, 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.
Judge Phyllis A. Kravitch
Gene W. Lafitte, Esquire
Patrick F. McCartan, Esquire
Judge James A. Parker
Sol Schreiber, Esquire
Judge A. Wallace Tashima
Chief Justice E. Norman Veasey
Judge William R. Wilson, Jr.

Judge Morey L. Sear was unable to attend. The Department of Justice was represented at the meeting by Deputy Attorney General Eric H. Holder, Jr. and Associate Attorney General Raymond C. Fisher, both of whom attended the Monday portion of the meeting. Neal K. Katyal, Advisor to the Deputy Attorney General, also participated on behalf of the Department. Judge Robert E. Keeton, former chairman of the committee, and Francis H. Fox, former member of the Advisory Committee on Civil Rules, also attended the meeting.

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
Patrick J. Schiltz, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Adrian G. Duplantier, Chair
Professor Alan N. Resnick, Reporter

Advisory Committee on Civil Rules —
Judge Paul V. Niemeyer, Chair
Judge David F. Levi
Professor Edward H. Cooper, Reporter
Professor Richard A. Marcus, Special Reporter
Advisory Committee on Criminal Rules —
Judge W. Eugene Davis, Chair
Professor David A. Schlueter, Reporter
Advisory Committee on Evidence Rules —
Judge Fern M. Smith, Chair
Professor Daniel J. Capra, Reporter

Also participating in the meeting were: Joseph F. Spaniol, Jr. and Bryan A. Garner, consultants to the committee; Professor Mary P. Squiers, Director of the Local Rules Project; Patricia S. Channon, senior attorney from the Bankruptcy Judges Division of the Administrative Office; and Joe S. Cecil and Carol L. Krafka of the Research Division of the Federal Judicial Center.

INTRODUCTORY REMARKS

Judge Scirica reported that he and Judge Davis had appeared before the Judicial Conference in March 1999 to present the committee's proposed amendments to the criminal rules. He stated that most of the rules had been approved as part of the Conference's consent calendar. But the comprehensive new Rule 32.2, governing criminal forfeiture, had been placed on the Conference's discussion calendar. He added that the members of the Conference had been presented with a letter opposing the rule from the National Association of Criminal Defense Lawyers and a written response from Judge Davis.

Judge Scirica said that he described for the Conference the lengthy and meticulous process that the Advisory Committee on Criminal Rules followed in drafting the new rule, in soliciting comments and input, and in making appropriate revisions in light of the comments received from the public and the Standing Committee. He noted that several members of the Conference stated expressly that they had been very impressed by the careful nature of the work of the committees.

Judge Scirica reported that Judge Davis addressed the Conference on the merits of the proposed criminal forfeiture rule and was asked several penetrating questions. Some members, he said, expressed concern over the rule's explicit reference to the practice in some circuits of allowing courts to issue money judgments in lieu of the forfeiture of specific property connected to an offense. In the end, however, the Conference approved the new rule without change.

Judge Scirica also reported that the Federal Judicial Center was in the process of conducting a study for the Standing Committee to document the procedures used by individual district and circuit courts to obtain financial information from parties for purposes of judge recusal. He noted that Judge Bullock had agreed to serve as the committee's liaison to the Center in connection with the study.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee voted without objection to approve the minutes of the last meeting, held on January 7-8, 1999.

REPORT OF THE ADMINISTRATIVE OFFICE

Legislative Report

Mr. Rabiej reported that 20 bills had been introduced in the 106th Congress that would have an impact on the federal rules or the rulemaking process. He proceeded to describe four of the most significant bills.

He said that H.R. 771 would undo the 1993 amendments to FED. R. CIV. P. 30(b) and require, in essence, that depositions be taken down by a stenographer. He noted that the 1993 amendments had been designed expressly to save litigation costs by providing the parties with discretion to select the recording means that best suited their individual needs.

He reported that H.R. 755, the "Year 2000 Readiness and Responsibility Act," which had just passed the House of Representatives, would, among other things, federalize all "Y2K" class actions. He said that Judge Stapleton, chairman of the Judicial Conference's Federal-State Jurisdiction Committee, had written to the Congress expressing opposition to the class action provision of the bill on federalism grounds. He added, though, that Judge Stapleton had included in his letter a caveat that the judiciary's opposition to the Y2K legislation should not be construed as opposition to the extension of minimal diversity to every mass tort.

Mr. Rabiej reported that S. 353, the "Class Action Fairness Act of 1999," contained a provision that would undo the 1993 amendments to FED. R. CIV. P. 11, thereby making the imposition of sanctions mandatory for violations of the rule. He noted that several witnesses had testified against a return to the wasteful satellite litigation generated by the pre-1993 rule. He added that the Judicial Conference would continue to oppose repeal of the 1993 amendments, which focus on deterrence, rather than compensation, and provide courts with appropriate discretion to impose sanctions on a case-by-case basis.

Finally, Mr. Rabiej reported that comprehensive bankruptcy legislation had just passed the House of Representatives. H.R. 833, the "Bankruptcy Reform Act of 1999," he noted, contained several objectionable rules-related provisions. The Director of the Administrative Office had written to the Congress seeking deletion or modification of these provisions. But, he noted, except for adding a provision dealing with rules in bankruptcy appeals, the House passed the legislation without correcting the objectionable rules-related provisions.

Administrative Actions

Mr. Rabiej reported that the volume of staff work needed to support the rules committees had increased enormously in the last few years. This, he said, was due in large measure to: (1) increased legislative activity; and (2) the initiation of special projects and studies on such topics as mass torts, class actions, attorney conduct, discovery, and technology. He noted that the increased workload of preparing, printing, and distributing materials and of staffing committee and subcommittee meetings had placed considerable stress on the staff. He added, though, that technological improvements had provided some relief and that agenda books could now be sent to the members by electronic mail.

REPORT OF THE FEDERAL JUDICIAL CENTER

Mr. Cecil presented a brief update on the Federal Judicial Center's recent publications, educational programs, and research projects. (Agenda Item 4) He referred in particular to the ongoing project to survey the means used by courts to identify financial information about parties in order to avoid potential conflicts of interest for judges.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Garwood presented the report of the advisory committee, as set forth in his memorandum and attachments of May 13, 1999. (Agenda Item 5)

He reported that the advisory committee had no action items to present for approval or publication. Nevertheless, the committee was continuing to consider and approve necessary amendments to the appellate rules, and it would seek authority to publish a package of proposed changes at the January 2000 meeting of the Standing Committee.

Judge Garwood pointed out that the advisory committee had considered the proposed draft amendment to FED. R. CIV. P. 5(b) that would authorize service by electronic means. He noted that the committee had some reservations regarding certain specific provisions of the proposal, but it endorsed the approach taken by the Advisory Committee on Civil Rules. The advisory committee, moreover, believed that it was essential to provide the pilot electronic case files courts with legal authority to permit service by electronic means.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Duplantier and Professor Resnick presented the report of the advisory committee, as set forth in Judge Duplantier's memorandum and attachments of May 7, 1999. (Agenda Item 7)

Judge Duplantier reported that the advisory committee had decided not to proceed with the "litigation package" of proposed amendments that it had published for comment in August 1998. But, he said, parts of the package had been returned to the advisory committee's litigation subcommittee for further study, including proposals addressing the use of affidavits at trial and the scheduling of witnesses for hearings.

Judge Duplantier stated that the advisory committee was seeking final approval from the Standing Committee for amendments to five rules and authority to publish amendments to six rules. The advisory committee would also propose amendments to two other rules regarding electronic service, if the Standing Committee decided to publish the proposed amendment to FED. R. CIV. P. 5(b).

Action Items

FED. R. BANKR. P. 1017

Professor Resnick stated that the proposed amendment to Rule 1017(e) would permit the court to grant a request by the United States trustee for an extension of time to file a motion to dismiss a chapter 7 case under 11 U.S.C. § 707(b), even if the court actually rules on the request for an extension after the 60-day time limit specified in the rule for filing the request has expired. He added that the rule, as presently written, has been interpreted to require the court to issue its ruling before the end of the 60-day period.

FED. R. BANKR. P. 2002

Professor Resnick explained that the proposed amendment to Rule 2002(a)(6) was designed by the advisory committee as a cost-cutting measure and would take account of inflation. The current rule requires the clerk of court to send a notice of hearing to all creditors on any application for compensation or reimbursement of expenses that exceeds $500. The proposed amendment would raise the threshold amount — which has not been adjusted since 1987 — to $1,000. The clerk, however, would still have to send notices of applications of $1,000 or less, but only to the trustee, United States trustee, and creditors' committee.

FED. R. BANKR. P. 4003

Professor Resnick noted that the proposed amendment to Rule 4003(b) was similar to that proposed in Rule 1017. It would permit the court to grant a timely-filed request for an extension of time to object to a list of claimed exemptions, whether or not the court actually rules on the request for an extension within the 30-day period specified in the rule.

FED. R. BANKR. P. 4004

Professor Resnick stated that Rule 4004(c)(1) requires the court to issue a discharge by a certain time unless one or more specified events have occurred. The proposed amendment would add an additional exception to the rule. It would provide that a discharge not be granted if a motion is pending for an extension of time to file a motion to dismiss the case for substantial abuse under 11 U.S.C. § 707(b).

FED. R. BANKR. P. 5003

Professor Resnick reported that new subdivision 5003(e) was designed to facilitate the routing of notices to federal and state governmental units. He noted that debtors, especially consumer debtors, frequently provide incomplete or incorrect addresses for governmental creditors. As a result, the appropriate governmental unit may receive a notice too late for it to act in a bankruptcy proceeding.

Professor Resnick stated that the advisory committee had been working with the Department of Justice to devise a reasonable way to improve and expedite the processing of notices to government creditors. As a result, the proposed new Rule 5003(e) would require each clerk's office to maintain, and annually update, a register of federal and state governmental agencies. The clerk would not be required to include in the register more than one mailing address for each agency.

He noted that the amendment would specify that the mailing address set forth in the register is conclusively presumed to be a correct address. The debtor's failure to use that address, however, would not invalidate a notice if the agency in fact received it. In essence, then, using the address in the register would provide a "safe harbor" for debtors and would encourage use of the register.

Professor Resnick noted that a representative of state governments had urged the advisory committee to go further and require debtors use the register address. The committee, however, rejected that approach because it would be too harsh for consumer debtors. He pointed out, in addition, that the comprehensive bankruptcy legislation that had recently passed the House of Representatives contained a stronger notice requirement. It would require debtors to use the register address and require the clerks of court to update the registry quarterly, rather than annually. Judge Duplantier stated that if the legislation were to become law, the Judicial Conference would be advised promptly that the pending rule amendment would be mooted.

The committee approved the amendments to Rules 1017, 2002, 4003, 4004, and 5003 without objection.

Rules for Publication

FED. R. BANKR. P. 1007

Professor Resnick said that Rule 1007 instructs debtors as to what they must include in the list of creditors and schedules. The proposed new subdivision 1007(e) would add a requirement that if the debtor knows that a person on the list or schedules is an infant or incompetent person, the debtor must also include on the list or schedules the name, address, and legal relationship of any person on whom service should be made. The amendment would enable the person or organization that mails the notices in the case to send them to the appropriate guardian or other representative of an infant or incompetent person.

FED. R. BANKR. P. 2002

Professor Resnick stated that Rule 7001 currently requires a party to file an adversary proceeding in order to obtain an injunction. Effective December 1, 1999, however, the rule will be amended to specify that an adversary proceeding need not be filed if an injunction is provided for in a plan (i.e., an injunction enjoining conduct other than that enjoined by operation of the Bankruptcy Code itself). He explained that it is relatively common practice today for chapter 11 plans to include injunction provisions.

Professor Resnick reported that the Department of Justice originally had opposed the amendment to Rule 7001, expressing concern that affected parties would not normally become aware of an injunction in a plan unless they are served with process as part of an adversary proceeding. He noted that some government agencies had also complained that injunctions — some of which might be against the public interest — could be buried in lengthy, complex plans. He added, though, that the Department later withdrew its objection to the Rule 7001 amendment on the understanding that the advisory committee would work with it to devise appropriate solutions to the notice problem.

Professor Resnick explained that the proposed new Rule 2002(c)(3) — and companion amendments to Rules 3016, 3017, and 3020 — were designed to ensure that parties who are entitled to notice of a hearing on confirmation of a plan are provided with clear notice of any injunction included in a plan enjoining conduct not otherwise enjoined by operation of the Bankruptcy Code. The notice, for example, would have to be set forth in conspicuous language, such as bold, italic, or highlighted text.

Professor Resnick pointed out that the proposed amendments to Rule 2002(g) deal with a different problem. He explained that the clerk's office typically receives information on the addresses of creditors from three sources: (1) lists provided by the debtor; (2) proofs of claim; and (3) separate requests from creditors designating an address. He said that the proposed amendments would establish priorities or rankings to determine which address governs.

He said that the proposed new paragraph 2002(g)(3) was part of the package dealing with notice to infants and incompetent persons. (See Rule 1007 above.) It would provide that if the debtor lists the name of a guardian or legal representative in the notice, all notices would have to mailed to that guardian or representative.

FED. R. BANKR. P. 3016

Professor Resnick pointed out that the proposed new subdivision 3016(c) was a companion to the amendment to Rule 2002(c)(3) above — designed to assure that entities whose conduct would be enjoined under a plan are given adequate notice of the proposed injunction. The amendment would require that the plan and the disclosure statement describe all acts to be enjoined in specific and conspicuous language and identify all entities that would be subject to the injunction. Thus, Rules 2002(c)(3) and 3016 together would require specific and conspicuous language regarding the injunction to be included in the notice, the plan, and the disclosure statement.

FED. R. BANKR. P. 3017

Professor Resnick stated that the proposed new subdivision 3017(f) is also part of the injunction package. He noted that some chapter 11 plans contain injunctions against entities that are not parties in the case. The proposed amendment would require the court to consider providing appropriate notice to non-parties who are to be enjoined under a plan.

FED. R. BANKR. P. 3020

Professor Resnick pointed out that the proposed amendments to Rule 3020(c) are also part of the injunction package. They would require that the order of confirmation describe in reasonable detail all acts to be enjoined, be specific in its terms regarding the injunction, and identify all entities subject to the injunction. He added that notice of entry of the order of confirmation would have to be provided to all entities subject to an injunction provided for in a plan.

Professor Resnick stated that the Department of Justice was pleased with the package of amendments dealing with injunctions, and it had worked closely with the advisory committee in preparing them.

FED. R. BANKR. P. 9020

Professor Resnick reported that the advisory committee would delete the current, complex provision on contempt in Rule 9020 and replace it with a single sentence that would simply state that Rule 9014 applies to a motion for an order of contempt. Rule 9020, thus, would provide that a party seeking a contempt order proceed by way of a contested matter, rather than an adversary proceeding.

Professor Resnick explained that the current rule had been drafted soon after the bankruptcy courts had been restructured under the 1984 bankruptcy reform legislation. The 1984 legislation, in effect, deleted the explicit statutory contempt power granted to bankruptcy judges by legislation in 1978. He noted that, as a result of the 1984 legislation, it was unclear whether bankruptcy judges retained contempt power. Accordingly, the advisory committee drafted a rule, which took effect in 1987, specifying that a bankruptcy judge may issue an order of contempt, but the order may only take effect after 10 days. During the 10-day period, the party named in the contempt order may seek de novo review by a district judge.

Professor Resnick explained that a number of court of appeals decisions have been issued since Rule 9020 took effect in 1987, holding that bankruptcy judges do in fact have contempt power — either under 11 U.S.C. § 105 or as a matter of inherent judicial power. Thus, it was the opinion of the advisory committee that Rule 9020 is too restrictive and is no longer needed. He added that the committee note makes it clear that the advisory committee does not take a position on whether bankruptcy judges have contempt power or not. Issues relating to the contempt power of bankruptcy judges are substantive. The rule simply provides the appropriate procedure, i.e., through the filing of a contested matter under Rule 9014.

The committee approved the amendments to Rules 1007, 2002, 3016, 3017, 3020, and 9020 for publication without objection.

Resolution of Appreciation for Professor Resnick

Judges Scirica and Duplantier reported that Professor Resnick had just announced his intention to relinquish the post of reporter to the Advisory Committee on Bankruptcy Rules after 12 years of distinguished service. He asserted that it would be difficult to imagine anyone doing a better job than Professor Resnick and added that his personal experience in working with him had been immensely gratifying.

The committee unanimously approved the following resolution honoring Professor Resnick:

> Whereas, Alan N. Resnick, Benjamin Weintraub Distinguished Professor of Bankruptcy Law at Hofstra University, has served as Reporter to the Advisory Committee on Bankruptcy Rules for more than eleven years, beginning in late 1987, the Committee on Rules of Practice and Procedure wishes to recognize Professor Resnick for extraordinary service of the highest quality, marked in particular by
>
> - the complete revision of the Federal Rules of Bankruptcy Procedure to accommodate the creation by Congress of a national system of United States trustees to supervise the administration of bankruptcy estates and with statutory authority to raise and be heard on any issue in a case:

- the complete revision of the Official Bankruptcy Forms in conjunction with the revision of the rules;

- the drafting and rapid distribution to the courts following further amendments to the Bankruptcy Code of suggested interim rules for local adoption to provide procedural guidance during the period required to prescribe permanent national rules implementing the statutory changes;

- the drafting of rules to facilitate the use of technology in the giving of notice to parties in bankruptcy cases and initiating the drafting of rules to permit electronic filing of documents in all types of proceedings in federal courts;

- the providing of wise counsel on bankruptcy matters to the committee's working groups on mass torts and on attorney conduct; and

- the concise and lucid presentation to the committee of proposed amendments to the Federal Rules of Bankruptcy Procedure approved by the advisory committee.

And whereas Professor Resnick has requested that he be permitted to relinquish the post of Reporter, a request that the committee has reluctantly granted,

Be it RESOLVED that the committee hereby expresses its gratitude to Professor Resnick for his exemplary drafting of rules and related explanatory materials, for his patient answers to questions from committee members, and for his unfailing collegiality.

Professor Resnick expressed his appreciation for the resolution and the kind words of the chairman. He added that it had been his distinct honor to have served under four remarkable chairs — Judges Lloyd D. George, Edward Leavy, Paul Mannes, and Adrian G. Duplantier — and was grateful to the advisory committee for the intellectual stimulation and respect that they had provided to him over the past 12 years.

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 May 11, 1999. (Agenda Item 6)

Action Items

Judge Niemeyer reported that the advisory committee was seeking approval of three separate packages of amendments to the civil rules, dealing respectively with: (1) service on federal officers and employees sued in their individual capacity; (2) admiralty rules; and (3) discovery rules.

1. Service Package

FED. R. CIV. P. 4 AND 12

Judge Niemeyer reported that the proposed amendments to Rules 4 and 12 had been initiated at the suggestion of the Department of Justice and adopted by the advisory committee without opposition. He added that the thrust of the amendments was to entitle federal officers and employees who are sued in their individual capacity to the same rights that they would have if sued in an official capacity.

Professor Cooper explained that federal officers and employees are sued in their individual capacity for actions that have some connection to their functions as officers or employees of the United States. He noted that it is common for the United States, through the Department of Justice, to assume the burden of defending them and to move to have the government substituted as the defendant. He said that there was some uncertainty in the case law whether the United States must be served with process, as well as the individual defendant, when an officer or employee is sued for acts in connection with employment.

The amendments to Rule 4 would require service on the United States when a federal employee is sued in an individual capacity for acts occurring in connection with the performance of duties on behalf of the United States. Rule 12 would be amended to provide the same 60-day answer period in an individual-capacity action that the United States enjoys when an officer is sued in an official capacity.

Professor Cooper said that little public comment had been generated by the proposed amendments. The comments received were favorable to the amendments, and several suggested certain drafting improvements, As a result, the advisory committee made improvements in language after publication. For example, as revised, the amendments now use the term "officer or employee" consistently. Language was also added to make sure that no one reads the rule to mean that when the same individual is sued both in an individual capacity and an official capacity, both the individual and the United States must be served twice — once under subparagraph (a) and once under subparagraph (b).

The committee approved the amendments to Rules 4 and 12 without objection.

2. Admiralty Package

Judge Niemeyer reported that the proposed changes in the admiralty rules had been developed over a long period of time with the assistance of a special subcommittee chaired by Mark O. Kasanin, Esquire. He noted that the subcommittee had coordinated its work very closely with the Department of Justice and the Rules Committee of the Maritime Law Association.

Professor Cooper reported that the proposed changes in the Supplemental Rules for Certain Admiralty and Maritime Claims were designed to meet two goals. First, they reflected the increasing importance of civil forfeiture proceedings, which generally use admiralty procedure. The amendments adjust the admiralty rules, for the first time, to make certain necessary procedural distinctions between traditional maritime proceedings and civil forfeiture proceedings. Second, the changes would take account of the 1993 reorganization of FED. R. CIV. P. 4. In addition, the rules have been reorganized and restyled for purposes of clarity.

Professor Cooper stated that it was not necessary to describe the proposed amendments in substantial detail because the advisory committee had presented them to the Standing Committee in January 1998, when it sought authority to publish them for public comment. He noted that there had been little comment or testimony on the proposals and that minor drafting changes had been made by the advisory committee in light of the public comments.

SUPPLEMENTAL ADMIRALTY RULE B

Professor Cooper reported that the advisory committee had made a post-publication adjustment in the language of Rule B(1)(d) — and a companion amendment to Rule (C)(3)(b) — to substitute the passive voice for the active. As published, the amendment had provided that the clerk of court must deliver a summons or other process to the marshal for service if the property in question is a vessel or tangible property aboard a vessel. One of the public comments asserted that delivery of the papers to the clerk for forwarding to the person making service would occasion delay in cases when time is usually of the essence. It was pointed out, for example, that it was the practice in the Eastern District of New York for the clerk to deliver the process to the attorney for the plaintiff, who in turn arranges delivery to the person who will make service. Accordingly, the advisory committee changed the rule to provide broadly that process "must be delivered" to the person making service, without designating who is to effect the delivery. Professor Cooper added that the Maritime Law Association and the Department of Justice agreed with the change, which was made at three places in the amended rules.

Professor Cooper pointed out that FED. R. CIV. P. 4 had been reorganized in 1993. As part of the reorganization, former Rule 4(e) — which is incorporated in the current Admiralty Rule B(1) — has been replaced by Rule 4(n)(2), which permits use of state law to seize a defendant's assets only if personal jurisdiction over the defendant cannot be obtained in the district where the action is brought. The advisory committee, however, decided not to

incorporate Rule 4(n)(2) in the revised Admiralty Rule B because maritime attachment and garnishment are available whenever the defendant is not found within the district, including some circumstances in which personal jurisdiction can also be asserted.

Professor Cooper noted that Rule (B)(1)(e) expressly incorporates FED. R. CIV. P. 64 to make sure that elimination of the reference to state quasi-in-rem jurisdiction in former Rule 4(e) is not read as defeating the continued use of state security devices. Thus, subparagraph (e) reminds attorneys that it is consistent with the admiralty rules to invoke FED. R. CIV. P. 64, which allows the use of security provisions in the manner provided by state law. Professor Cooper said that a concluding sentence would be added to the committee note to Rule E(8) providing that: "if a state law allows a special, limited, or restrictive appearance as an incident to the remedy adopted from state law, the state practice applies through Rule 64 'in the manner provided by' state law."

SUPPLEMENTAL ADMIRALTY RULE C

Professor Cooper explained that the amendments to Rule C were designed in large measure to take into account meaningful distinctions between traditional admiralty and maritime proceedings and civil forfeiture proceedings. In paragraph (2)(c), for example, the complaint in an admiralty or maritime proceeding must state that the property is located within the district or will be within the district while the action is pending. On the other hand, paragraph (2)(d) reflects the variety of civil forfeiture statutes that now allow a court to exercise authority over property outside the district.

Professor Cooper noted that subdivision (6) explicitly provides for different procedures for forfeiture proceedings and admiralty seizure proceedings. In a maritime proceeding, for example, fewer people are entitled to appear and only 10 days are provided to file a verified statement of right or interest. In civil forfeiture proceedings, a person who asserts an interest or right against the property has 20 days to file a statement.

SUPPLEMENTAL ADMIRALTY RULE E

Professor Cooper stated that Rule E(3) provides that maritime attachment and garnishment may be served only within the district. But in forfeiture cases, in rem process may be served outside the district if so authorized by statute. He noted that subdivision E(10) is new and makes clear the authority of the court to preserve and prevent removal of attached or arrested property that remains in the possession of the owner or other person under Rule E(4)(b).

FED. R. CIV. P. 14

Professor Cooper pointed out that the only changes in Rule 14 were to replace the term "the claimant" with "a person who asserts a right under Supplemental Rule C(6)(b)(i)."

The committee approved the amendments to Supplemental Admiralty Rules B, C, and E and FED. R. CIV. P. 14 without objection.

3. Discovery Package

Judge Niemeyer reported that the advisory committee had studied discovery in a comprehensive manner over the past three years. The focus of its efforts was not to curb discovery "abuse" per se, but rather to examine broadly the whole architecture of discovery and to ask whether it can be made more efficient and less expensive — while still preserving the fundamental principle of providing full disclosure of relevant information to the litigants. Yet, he added, full disclosure — especially in the age of information technology — may not require the production of each and every document, regardless of the cost of producing it and the likelihood of its actual use in a case. What needs to be produced, he said, is "all the information that matters."

Judge Niemeyer pointed out that the package of proposed amendments to the civil rules was modest and well balanced. It was designed to make discovery cost less and work better. He said that the advisory committee and its discovery subcommittee would continue to study whether additional changes in the rules should be proposed in the future. He noted, for example, that he believed personally that the committee could explore a number of possibilities for establishing a very inexpensive, streamlined process that would result in prompt resolution of uncomplicated cases.

Judge Niemeyer stated that the impetus for considering changes in the discovery rules had come from several sources. He noted, for example, that the American College of Trial Lawyers and other bar groups had urged that the scope of discovery be narrowed. But, he said, the biggest impetus for change had come from the impact of the Civil Justice Reform Act of 1990 on the district courts. The Act urged each court to experiment locally with various procedural devices in an effort to reduce litigation costs and delay. The 1993 amendments to the Federal Rules of Civil Procedure, enacted in part to facilitate the local experiments sanctioned by the Act, allowed courts to "opt out" of certain provisions of the national rules — most notably the provisions on mandatory disclosure. He added that the combined effect of the Act and the 1993 rules amendments was a "balkanization" of federal pretrial procedure and the proliferation of local rules and procedures.

Judge Niemeyer reported that the advisory committee was firmly committed to returning to a uniform set of national procedural rules. He noted that the bar had been nearly unanimous in urging the committee to limit "opt outs" and local variations. He added, however, that opposition to the rules amendments would likely come from district judges, who are used to their own, carefully developed — and often very effective — local procedures.

Judge Niemeyer described the lengthy and careful process that the advisory committee had followed in developing the proposed amendments to the discovery rules. He noted that the committee had asked the RAND Corporation to take a fresh look at the enormous data base that it had developed under the Civil Justice Reform Act and to examine particularly the cost of discovery, the satisfaction of attorneys with discovery, and the extent to which discovery is actually used in federal civil cases. In addition, at the committee's request, the Federal Judicial Center polled a scientific cross-section of lawyers and received more than 1,200 responses regarding discovery practice and opinions.

He reported that the advisory committee had received numerous papers from academics on discovery topics. It had conducted two conferences involving judges, lawyers, and law professors, and several of the papers presented at its Boston conference were published in the Boston College Law Review. In addition, the committee sought out and heard the views of practitioners from practically every sector of the legal profession, federal and state judges, law professors, and former rules committee chairs and reporters. He added that he had never witnessed any legislative action or committee action that had involved as much participation, research, input, and support.

Judge Niemeyer reported that the research and input, among other things, had revealed that —

- Discovery accounts for about half of all litigation costs.
- Discovery is actually used in a relatively small percentage of federal civil cases. In 40% of the cases, for example, there is no discovery at all, and in another 25% of the cases, there is only minimal discovery.
- Discovery, however, is used extensively in an important minority of cases. It may cause serious problems in those cases and account for as much as 90% of the litigation costs.
- Both plaintiffs' lawyers and defense lawyers agree by very large margins that discovery costs in general are too high (although they tend to emphasize different factors as the principal reasons for the high costs).
- The bar overwhelmingly supports national uniformity in the rules.
- The bar also overwhelming supports early judicial involvement in discovery, early discovery cut-off dates, and firm trial dates.

Judge Niemeyer stated that the advisory committee had conducted its efforts through a discovery subcommittee chaired by Judge Levi, with the assistance of Professor Marcus as special reporter. He reported that the advisory committee had asked the subcommittee to

consider all reasonable proposals for improvement in the discovery process. The subcommittee, he said, had developed and presented the advisory committee with more than 40 possible recommendations for change. The advisory committee, over the course of several meetings, then debated each of the recommendations. It decided to proceed only with those proposals that commanded the support of a strong majority of the committee members. No measure was approved by a close vote.

Judge Niemeyer stated that the advisory committee then published the package of proposed amendments, conducted three public hearings, heard from more than 70 witnesses, and received more than 300 written comments. The committee concluded that the comments, while very informative and helpful, generally addressed the same policy issues and concerns that had been considered thoroughly before publication. Accordingly, the changes made by the committee following publication consisted of language and organizational improvements, rather than substantive changes. The committee, however, amended proposed Rule 30(f)(1) in light of the public comments to delete the requirement that the deponent consent to extending a deposition beyond one day.

Judge Niemeyer reported that three issues in the package had caused the greatest debate during the public comment period and the committee's deliberations: (1) mandatory initial disclosures under Rule 26(a)(1); (2) the scope of discovery under Rule 26(b)(1); and (3) cost bearing under Rule 26(b)(2).

1. Mandatory Initial Disclosures. Judge Niemeyer pointed out that the 1993 rule amendments, which had introduced mandatory initial disclosures, were very controversial. They had generated three dissents on the Supreme Court and came close to being rejected by the Congress. He noted that lawyers had complained strenuously that the revised Rule 26(a)(1) invades the attorney-client relationship by requiring the production of hostile documents and turning over to opposing parties documents that have not been asked for.

Nevertheless, he said, mandatory disclosure has worked well in the districts that have adopted it, and it has been used substantially even in many of the districts that have officially opted out of the national disclosure rule. The empirical data show general satisfaction with disclosure, but they are not conclusive on whether it reduces costs.

Judge Niemeyer explained that the advisory committee was committed to the principle of a single, uniform national rule, without local "opt outs." It therefore had three options: (a) to reject mandatory disclosure altogether; (b) to extend the existing mandatory disclosure regime to all districts; or (c) to mandate disclosure, but in a modified, less controversial form. He stated that the advisory committee decided upon the third course — requiring parties to disclose only that information that the disclosing party may use to support its own claims or defenses.

Judge Niemeyer pointed out that most of the criticisms that the advisory committee had received about disclosure were that it would not work in certain kinds of cases. In response, the

rule was amended to exclude certain categories of cases from the disclosure requirement. It also allows the attorneys to opt out of disclosure in individual cases. And the rule provides district judges with considerable discretion to dispense with disclosure in individual cases.

2. Scope of Discovery. Judge Niemeyer noted that the committee's proposed amendment to Rule 26(b)(1) would not narrow the scope of discovery. Rather, it would divide discovery into two distinct phases: (1) attorney-managed discovery, generally conducted without court involvement and embracing matters relevant to the claim or defense of any party; and (2) court-managed discovery, embracing — with court approval — any matter relevant to the subject matter involved in the action.

He said that opponents of the change had argued that the proposed amendment would cause substantial litigation regarding the scope of discovery. He agreed that some litigation would in fact occur initially, but the law would soon become clear.

3. Cost bearing. Judge Niemeyer stated that much of the opposition to the proposed amendment to Rule 26(b)(2) had been expressed in terms that it would favor rich litigants at the expense of poor ones. He explained that the present rules give a judge implicit authority to allow a party to obtain discovery that may be burdensome or duplicative, on the condition that the requesting party pay for it. The amended rule, he said, would make that authority explicit, and it would tell judges clearly that they have the tools they need to manage and regulate discovery.

FED. R. CIV. P. 5

Judge Niemeyer explained that the advisory committee had originally proposed — when it sought authority from the Standing Committee to publish the proposed discovery amendments — that Rule 5(d) be amended to provide that discovery and disclosure materials "need not" be filed with the court until they are used in a proceeding. The Standing Committee, however, voted to change "need not" to "must not." Judge Niemeyer said that the rule had attracted very little public comment, and the advisory committee on reflection agreed with the Standing Committee that "must not" is preferable language to "need not."

One of the members argued that discovery material not filed with the court should nevertheless be considered part of the court record. He recommended adding a sentence to that effect in the committee note in order to protect the press and the public. He explained, for example, that these materials, having the status of court records, would be privileged. Therefore, one who published them would be protected in the event of a defamation action. Another member agreed and added that if the materials were court records, they would also be available for public examination. He said that it was important to clarify the status of unfiled discovery materials, and the status should be specified in the rule itself, rather than the committee note.

Judge Niemeyer responded that the advisory committee had not studied this issue. Rather, its principal purpose in amending Rule 5 was to alleviate the storage burdens and costs

imposed on clerks' offices. Judge Levi added that the advisory committee also considered the amendment necessary to bring the national rule on filing into conformity with most of the present local rules and practices on the subject.

Professor Marcus pointed out that he had conducted considerable research on whether unfiled materials are "court records" and had concluded that it is a very complicated matter that cannot be addressed properly by simply adding a sentence to the committee note. Several other participants agreed with his analysis.

Professor Hazard recommended that the advisory committee undertake a study of whether discovery and disclosure materials are, or should be, part of the court record. **Mr. Lafitte moved to have the advisory committee study the issue and report back at the January 2000 meeting of the Standing Committee. The committee approved the motion by consensus without a formal vote.**

The committee approved the amendment to Rule 5 without objection.

FED. R. CIV. P. 26(a)

Judge Levi said that the Rules Enabling Act contemplates a set of national, uniform procedural rules to accompany national substantive law. He noted that the Judicial Conference, in its 1997 final report to Congress on the Civil Justice Reform Act, had asked the rules committees specifically to consider whether the advantages of national uniformity outweigh the advantages of allowing courts to develop their own local alternative procedures in such areas as initial disclosure and the development of discovery plans.

Judge Levi reported that well over half the district courts have some form of disclosure in place. Research conducted for the committee by the Federal Judicial Center, moreover, disclosed that some sort of disclosure had occurred in three-fifths of the federal cases surveyed. The Center study also showed that most of the 1,200 attorneys interviewed who had used disclosure liked it and said that it helps to reduce disputes, enhance settlements, and expedite cases. Judge Levi said that the Center study had confirmed that cases where disclosure occurs are concluded more quickly than cases without disclosure, and the RAND study came close to saying that attorney hours are reduced when there is disclosure. He added that the Federal Judicial Center had also found that a majority of the lawyers believe that the lack of procedural uniformity among districts causes problems for attorneys.

Judge Levi reported that the discovery subcommittee had been working on discovery for three years, had conducted several conferences with the bar, and had consulted with six major bar organizations. It had heard from both plaintiffs' attorneys and defense attorneys that national procedural uniformity was very important to them. Members of the bar, he said, report that it is difficult to keep up with changes in local rules, and the practical effect of the local rules is to create a preference for local counsel. Judge Levi added that although many of the rules are

posted on the Internet, they are not easy to find. Electronic postings, moreover, do not include standing orders and local interpretations of the local rules.

Judge Levi emphasized that national uniformity was a major matter. He noted that it had been a common theme voiced by the lawyers at the subcommittee's Boston College conference. In fact, he said, it was a fundamental premise of the federal rules and the Rules Enabling Act. Discovery and disclosure, he emphasized, are an important part of the pretrial process and should not be handled by different sets of rules determined by geography. Discovery and disclosure can affect notice pleading, motions to dismiss, and motions for summary judgment, and they may in certain instances affect the outcome of cases.

Judge Levi said that the subcommittee, in seeking national uniformity, had three options before it. The first was to retain the present disclosure requirements of Rule 26(a)(1), but to eliminate the authority of courts to opt out of the requirements. The second option was to eliminate disclosure entirely from the national rule, effectively preventing any court from using it. He noted that this approach would be very controversial because many courts now require disclosure and have achieved substantial benefits from it. The third choice — which the subcommittee adopted — was to retain disclosure as a national requirement, but to remove the "heartburn" from it by removing the present requirement that attorneys disclose information harmful to their clients without a formal discovery request.

Under the subcommittee's proposal, which the advisory committee eventually approved, parties would only have to disclose matters that support their own claims. Complex, or "high end," cases will be effectively removed from the rule by action of counsel, and eight categories of "low end" cases are explicitly exempted from the rule. The lawyers, moreover, may mutually opt out of the present disclosure requirements, and the court has discretion to dispense with disclosure in any case.

Judge Levi said that the proposal was moderate and based on fundamental fairness. He noted that it was similar to FED. R. CRIM. P. 16 in criminal cases, under which the government turns over documents that it intends to use at trial. Moreover, he said, it was similar to FED. R. CIV. P. 26(a)(3), which deals with documents and witnesses that parties intend to use at trial. He added that the bar, with some notable exceptions, supports the proposal. He noted that the Litigation Section of the American Bar Association, which had been adamantly opposed to Rule 26(a)(1) in 1993, supported the present proposal. In addition, endorsements had been received from the American College of Trial Lawyers and the Federal Magistrate Judges Association.

Judge Levi reported that many letters had been received from judges during the public comment period opposing any national rule that would impose mandatory disclosure in their districts or prescribe a form of disclosure different from that currently provided in their own local rules. The judges in the Eastern District of Virginia, in particular, expressed concern that the amendments would slow down the "rocket docket" used in that court. In response, the advisory committee added a sentence to Rule 26(f) after publication authorizing a court by local rule to

shorten the prescribed period between the Rule 26(f) attorney conference and the court's Rule 16(b) scheduling conference or order.

Judge Levi noted that 10 different federal judges had worked in the advisory committee on the discovery package over the past three years, and all 10 agree that the proposed Rule 26(a)(1) would both achieve national uniformity and benefit civil litigation. He emphasized that the rule provides judges with considerable discretion, but within the context of an overall national rule.

Mr. Schreiber argued against weakening the present mandatory disclosure requirements. He said that hostile information is the key to all discovery and that parties should be required to disclose pertinent information hostile to their clients' interests. He added that the language of the proposed amendment — requiring disclosure of matters "that the disclosing party may use to support its claims" — was meaningless. He said that a party could simply argue at the initial stages of the case that it simply has not yet made up its mind as to whether it will use any particular material in the case.

Mr. Schreiber moved to substitute the word "will" for the word "may." Thus, the amendment would require a party to disclose matters that it "will use to support its claims." Judge Tashima recommended an amendment to the motion to substitute the words "supports its claims or defenses." Judge Tashima said that the term "supports it claims or defenses" will lead to less gamesmanship among attorneys than "may use to support its claims or defenses" **Mr. Schreiber accepted the amendment to his motion.**

Judge Levi responded that the advisory committee had considered both formulations at considerable length. He noted that the agenda binder included a memorandum in which Professors Cooper and Marcus — who had different personal preferences regarding the appropriate terminology — describe the respective advantages and disadvantages of "may use to support" vis a vis "supporting." At Judge Levi's request, each of them presented his respective views orally to the committee.

Judge Levi stated that the advisory committee ultimately concluded that "may use to support" would be easier for lawyers to apply. It also has the advantage of generally tracking the language of Rule 26(a)(3), dealing with pretrial disclosures. In any event, he said, the court has authority to impose appropriate sanctions to prevent gamesmanship on the part of attorneys

The members discussed the merits of the two alternatives, how they compared to similar language in other parts of the Federal Rules of Civil Procedure (including Rule 11), and how lawyers and judges might apply them in practical situations.

The committee rejected Mr. Schreiber's motion by a vote of 8 to 3

Judge Tashima moved to amend Rule 26(a)(1) to allow a court by local rule either: (1) to opt out completely from its mandatory disclosure requirement; or (2) to narrow the categories of disclosure materials.

Some of the members expressed opposition to the motion on the grounds that it would undercut the goal of national uniformity. One member added that if the local bar does not need or want disclosure, the parties will mutually stipulate out of it.

The committee rejected Judge Tashima's motion by a vote of 11 to 1.

Judge Tashima moved to delete from the fifth paragraph of the committee note the sentence reading, "Clients can be bewildered by the conflicting obligations they face when sued in different districts." Professor Cooper agreed that the sentence was not essential. **The committee decided without objection to eliminate the sentence.**

Judge Wilson moved to repeal the 1993 amendments entirely and return to the pre-1993 procedures. He said that the single most important procedural requirement is to encourage judges to resolve disputes decisively and quickly. He added that if a judge is readily accessible to decide disputes, the disputes will arise less frequently and cases will be resolved promptly. He said that judges should also establish early cut-off dates for discovery and set early and firm trial dates.

Judge Levi responded that the 1993 rules authorized mandatory disclosure, and its repeal would deprive courts of the benefits derived from disclosure, as demonstrated by attorney surveys and other empirical data. He said that the present Rule 26(a)(1) proposal was very modest and was necessary to provide the district courts with continuing authority to require disclosure.

Associate Attorney General Fisher stated that the Department of Justice very much favors a uniform set of national procedural rules, although different parts of the Department may have different views as to specific parts of the proposed rules amendments. He said that the central concept of judge-managed discovery will work if the judges actually make it work by being readily accessible to resolve discovery problems.

Mr. Fisher added that Department attorneys, based on their experience, had identified several other categories of cases that should be exempted from the initial disclosure requirements of Rule 26(a)(1). As examples, he listed forfeiture cases, mandamus cases, FOIA cases, constitutional challenges to statutes, *Bivens* cases, and social security cases. He noted that the advisory committee was not inclined to expand the list at this point, but had promised to consider these suggestions promptly. One of the members responded that the list of exemptions was too long already and that it is generally not sound policy to encourage different procedural rules for different categories of cases. Mr. Fisher responded that the Department supported Rule 26(a)(1), as amended.

The committee rejected Judge Wilson's motion by a vote of 8 to 4.

The committee then approved the proposed amendments to Rule 26(a) by a vote of 11 to 1.

FED. R. CIV. P. 26(b)(1)

Judge Levi stated that the proposed amendment to Rule 26(b)(1) will not change the scope of discovery. He said that it will not keep litigants from obtaining appropriate discovery in any case. Parties will still be entitled — on request and without court approval — to a very broad range of information, *i.e.*, "any matter . . . relevant to the claim or defense of any party." The change occasioned by the amendment is to assign a portion of the discovery to the courts to manage, as judges for cause may make available "any matter relevant to the subject matter involved in an action."

Judge Levi said that the language of the amended rule is clearer than that of the present rule, which provides insufficient guidelines for limiting overbroad discovery. The district judges and magistrate judges who had reviewed the amendment believe that it will work well. In fact, he said, not a single judge had written or testified against the amendment. He noted that the proposal was supported by the American College of Trial Lawyers, the Litigation Section of the American Bar Association, and the Federal Magistrate Judges Association.

Judge Levi pointed out that the Department of Justice under the Carter Administration had urged the advisory committee to narrow the scope of discovery by removing the "subject matter" criterion. He read from a letter from Attorney General Griffin Bell to Judge Roszel Thomsen, chairman of the Standing Committee, in which the Attorney General reported that he "was particularly pleased with the . . . proposed change in Rule 26 which would narrow the scope of discovery to the 'issues raised.' It has been my experience as a judge, practicing lawyer and now as Attorney General that the scope of discovery is far too broad and that excessive discovery has significantly contributed to the delays, complexity, and high cost of civil litigation in the federal courts."

Judge Levi said, however, that the Department of Justice had submitted a memorandum to the committee opposing the proposed amendment, stating that it would have a deleterious effect on the Department's litigation and on civil cases generally.

Mr. Fisher pointed out that the Department of Justice sues on behalf of the public interest, and its career litigators have sincere objections to the proposed amendment, as do the American Trial Lawyers Association and civil rights and environmental organizations. In short, he said, Department lawyers are satisfied with the existing standards and believe that they work very well. The burden, presently, is placed on the defendant to come forward to limit discovery when it is seen as inappropriate or excessive. For the most part, judges do not intervene in the discovery process, and, as a consequence, a broad range of discovery is routinely provided today.

The Department believes, however, that the amended rule will shift the burden to plaintiffs and require them to seek judicial intervention to obtain information that they now receive regularly. He added that government attorneys fear that most judges simply will not have the time or inclination to become involved in discovery matters. They fear, moreover, that judges, individually and collectively, will construe the revised language of Rule 26(b)(1) narrowly and deny discovery on the merits. The net result, thus, will be a narrowing of the scope of discovery.

Mr. Fisher said that the amendment will cause particular problems in civil rights and environmental cases, and the public interests of the United States will not be served. He noted that defendants in these cases often resist producing essential records and information. He said that the Department lawyers, and plaintiffs' lawyers generally, believe that they will face even greater resistance under the amended rule.

Mr. Fisher concluded that the problems that the advisory committee attempted to address through the proposed amendment are important and difficult ones. He expressed the Department's appreciation for the committee's careful and thoughtful work. But, he added, the amendment simply was not needed. He suggested that the principal argument advanced in support of the change is that judges do not take appropriate steps under the current rule to limit the excessive discovery that occurs in some cases. But, he said, the current rule clearly gives judges sufficient authority to take an active role and limit inappropriate discovery requests.

He noted that the Department of Justice believed that there would be a good deal of costly litigation over the meaning of the amendment, at least for a while. There may well be inconsistent interpretations of the new rule, and, as a result, the scope of discovery will effectively be narrowed for some plaintiffs. In short, he said, the proposed amendment attempts to deal with a small group of troublesome cases, but will result in serious negative consequences. He suggested that, rather than recreating the whole landscape of Rule 26(b), the advisory committee should consider removing those troublesome cases from the general operation of the rule and regulating them with special rules.

Judge Niemeyer thanked Mr. Fisher and said that his points were very well taken. But, he said, the advisory committee had considered the same points at great length both before and during the public comment period. He noted that some members of the advisory committee agreed generally with Mr. Fisher's arguments, but a strong majority of the committee supported the proposed amendment. He noted that the advisory committee included in its report to the Standing Committee an April 14, 1999 "dissenting opinion" prepared by Professor Thomas D. Rowe, Jr., a member of the advisory committee.

Judge Levi added that the current law makes almost everything relevant to the claims or defenses in civil rights and environmental cases. The amendment, he said, would not limit the broad array of information that plaintiffs presently receive through discovery. They will, for example, still be entitled under the amended rule to information about the treatment of other employees, a pattern of discrimination, or a continuing violation, as well as information

extending beyond the statute of limitations. These types of information are all considered relevant to the claims and defenses under current law.

Judge Levi noted that the advisory committee disagreed that the proposed amendment would lead to costly motion practice. He emphasized that discovery disputes are usually decided on an expedited basis. In many courts they are resolved without the filing of written motions, and often by telephone. He added that discovery works well in most cases and will continue to work well under the proposed amendment. But there is a group of cases where it is very contentious and very expensive. He said that the courts need to take an active role in managing these cases, and the amended rule gives judges clear authority and direction to manage them.

Judge Niemeyer said that the discovery rules are designed generally for lawyers and litigants who do not abuse the process. They assume compliance and good faith for the most part. The existing rules, as well as the proposed amendments, expect judges to supervise discovery in those cases where there are problems. Thus, if a defendant "stonewalls" on discovery production in a case, plaintiffs' counsel or the Department of Justice, will have to litigate on the scope of discovery in any event — either under the present rule or the amended rule.

One of the members strongly opposed the proposed amendment to Rule 26(b)(1), calling it — along with the proposed cost-bearing amendment to Rule 26(b)(2) — the most radical change in the civil rules in 60 years. He said that every employment law group and civil rights organization was opposed to the change, because it would limit discovery and strongly tilt the playing field against them. Another member, however, responded that he could not think of a single piece of information obtainable under the current rule that would not be discovered under the new rule. Other members added that they supported the amendment because it would cause lawyers to focus their discovery efforts more effectively and require them to be more specific and responsible in what they request.

Mr. Schreiber questioned why the advisory committee had used the term "for good cause shown," instead of "on motion" or "for reasonable cause." He moved to delete "for good cause shown" and substitute the words "on motion." Thus, judges would have complete discretion to order broader discovery, without being bound to the "good cause" standard.

Judge Levi replied that the committee note states specifically that the good-cause standard is meant to be flexible. One of the members added that the rule had to prescribe a standard beyond that of mere discretion. Another member reminded the committee that "good cause" had been the standard required for the production of discovery documents before 1970.

Mr. Schreiber later withdrew his motion.

The committee approved the amendment to Rule 26(b)(1) by a vote of 10 to 2.

FED. R. CIV. P. 26(b)(2)

Judge Niemeyer noted that the proposed amendment to Rule 26(b)(2), governing cost bearing, had been published as an amendment to Rule 34. The advisory committee relocated it in Rule 26 after publication, but without any change in content. He said that its placement in Rule 26 would emphasize that it applies to all categories of discovery. He added that the proposed amendment would not change the law as it exists, but would make an existing judicial tool explicit. It would give district judges and magistrate judges clear authority to require a party seeking information not otherwise discoverable under Rule 26(b)(2)(i), (ii), or (iii) to pay part or all of the reasonable expenses incurred in its production.

Mr. Fisher stated that the Department of Justice was concerned that the proposed amendment might be applied by the courts to require requesting parties to pay for "court-managed" discovery, vis a vis "attorney-managed" discovery. He recommended inclusion of a clear statement that discovery of "any matter relevant to the subject matter involved in the action" would be provided without charge to the requesting party, in the same manner as discovery of "any matter . . . relevant to the claim or defense of any party." In other words, the cost-bearing provision explicitly would be applicable to both.

Judge Niemeyer responded that the proposed amendment did in fact apply equally to both and said that he would be pleased to work on improving the language. Mr. Fisher suggested including in the committee note to Rule 26(b)(1) language from page 74 of the agenda book declaring that the scope-expansion and cost-bearing provisions are not intended to operate in tandem and that ordinarily a request to expand the scope of discovery will not justify a cost-bearing order. Judge Niemeyer agreed to draft appropriate language to that effect, and his language was later incorporated in the revised committee note.

Judge Scirica stated that several public comments had suggested that the amendment would have the effect of distinguishing between plaintiffs who have resources and those who do not. Judge Niemeyer replied that the amendment would not change the current results. Plaintiffs will continue to receive, without charge, every document that relates to their claim or defense or that relates to the subject matter of the action. Cost-bearing will only be applied to discovery requests that are burdensome, duplicative, or unreasonable. Judge Levi added that a judge, in considering cost bearing, is required explicitly to take account of the parties' resources under Rule 26(b)(2). Accordingly, parties with limited resources may actually be treated better than well-healed parties under the amended rule. Moreover, a party who can afford to pay for marginal discovery, and is willing to pay for it, may not in fact receive it because the judge has discretion to deny the request entirely.

One of the members said that the amendment would cause havoc, especially in employment discrimination cases. He predicted that defendants would bring a motion for cost-bearing in every case in an effort to save money for their clients. One of the members responded that the prediction assumed that judges would act foolishly. He said that routinely-made motions will be routinely denied.

Judge Levi added that the cost-bearing amendment, by definition, deals only with material that is marginal to the case and is burdensome, duplicative, or unreasonable. Some members questioned why that type of material should be produced at all. Others responded that the amendment provides judges with a useful management tool and would permit a judge to determine how much a lawyer wants particular material and whether the lawyer is willing to pay for it. Others suggested that the amendment would allow judges to order discovery on condition that the requesting party pay only part of the cost of producing it. They said that it was not clear whether judges may apportion costs under the current rule.

One member asked why local rule authority had been removed from the provision of Rule 26(b)(2) dealing with the number of depositions and interrogatories and the length of depositions, but retained with regard to the number of requests for admissions. Professor Cooper responded that there were several local rules on the subject, and the advisory committee was reluctant to eliminate local rule authority to limit requests for admission without further study of local practices.

Another member pointed out that the committee note to Rule 26 referred to standing orders, as well as local rules, in some places, but not in others. He suggested that the note be reviewed in this respect for consistency of terminology.

The committee approved the proposed amendment to Rule 26(b)(2) by a vote of 11 to 1.

FED. R. CIV. P. 26(d) and (f)

Judge Niemeyer reported that the proposed amendments to Rule 26(f) would require the parties to confer at least 21 days, rather than 14 days, before the court's Rule 16 scheduling conference or scheduling order. He noted that the advisory committee had made a change in the amendments after publication to accommodate the expedited pretrial procedures used in the Eastern District of Virginia. The change would allow a court by local rule to require that the conference be held less than 21 days before the scheduling conference or order.

Judge Niemeyer pointed out that the amendments would no longer require the attorneys to meet face-to-face, but would allow a court by local rule or order to require that the attorneys attend the conference in person. Several members questioned the wisdom of allowing courts to issue local rules on this subject, especially since the authority of courts to opt out of national requirements was being eliminated in other parts of Rule 26. One added that the requirement for face-to-face meetings should be made in individual cases, rather than by local rule.

Judges Niemeyer and Levi agreed that local rules should be discouraged generally, but they noted that the advisory committee believed that differences in geography and local culture made it appropriate to allow courts to have local variations in this specific instance. They added that several commentators had informed the committee that face-to-face meetings between the

attorneys, as required by the 1993 amendments to Rule 26(f), had been instrumental in expediting cases and reducing costs.

One of the members stated that a court should not be allowed by local rule to require out-of-town counsel to appear in person. Professor Cooper replied that the committee note addressed the issue and provided that, "a local rule might wisely mandate face-to-face meetings only when the parties or lawyers are in sufficient proximity to one another."

Judge Kravitch moved to eliminate from the proposed amendments the authority of a court to require face-to-face meetings of counsel by local rule and replace it with language that would authorize a court to require that meetings be held face-to-face, but only by a judge's case-specific order. Her motion was approved by a vote of 8 to 2.

The committee approved the amendments to Rules 26(d) and (f) by a vote of 12 to 0.

FED. R. CIV. P. 30

Judge Niemeyer reported that the proposed amendment to Rule 30(d)(2) would establish a presumptive limit on depositions of one day of seven hours. But a longer period could be authorized by court order or stipulation of the parties. The amendment, he said, was designed to respond to an area cited by commentators — particularly plaintiffs' lawyers — as one of recurring abuse and excess cost. He noted that research by the Federal Judicial Center had demonstrated that depositions are often the single most expensive item of discovery.

Judge Niemeyer stated that the rule provides a norm to guide the bench and bar in measuring depositions. He said that the advisory committee had heard many comments at the public hearings that the new rule would be effective. He added that the most common response from lawyers was that they have little trouble in reaching accommodations with opposing counsel on making arrangements for depositions. The amendment, he said, tells lawyers what the norm is for a deposition, and they will plan their depositions accordingly. One member added that he had been strongly opposed to the amendment when it had been published, but the consistent testimony from lawyers at the hearings had convinced him that the rule would work well in practice.

Judge Tashima moved to exclude expert witnesses from the operation of the rule. He noted that many expert witness depositions simply cannot be completed within seven hours. He added that the Department of Justice supported his position in this regard, but the Department would go further and also exclude Rule 30(b)(6) witnesses and named parties.

One of the members spoke against the proposed amendment in general, saying that it simply was not necessary. He said that it is easier to demonstrate to a judge that abuse has occurred in a deposition than to convince the judge that additional time is needed for a deposition. Judge Niemeyer replied that many members of the advisory committee had been of

the same view, but were convinced by the hearings that the amendment to the rule would be beneficial.

Professor Marcus said that the advisory committee had included additional language in the committee note to guide lawyers and judges as to when it would be desirable to extend the time for the deposition. Mr. Katyal added that the Department of Justice appreciated the additional language in the committee note, but still believed that there was no need to apply the presumptive time limit to depositions of expert witnesses. He said that government attorneys feared that relying on the consent of a party or the court's management to waive the 7-hour limit would not be sufficient.

The committee rejected Judge Tashima's motion by a vote of 7 to 3.

One member said that it was essential that the deponent be required to read pertinent documents in advance in order to avoid wasting time and generating requests for extensions of time. He noted that language to that effect had been included in the committee note, but he would prefer to have a clear requirement included in the rule. He also suggested that the note provide additional direction to the bar regarding time limits for depositions in multiple-party cases. Judge Niemeyer responded that the discovery subcommittee would continue to study these matters, but it is simply not possible to address all potential problems in the rule or the note.

Judge Niemeyer reported that the advisory committee had amended Rule 30(f)(1), without publication, to eliminate the need to file a deposition with the court. The change merely conforms the rule to the published amendment to Rule 5(d), which provides that depositions not be filed with the court.

The committee approved the proposed amendments to Rule 30 by a vote of 10 to 1.

FED. R. CIV. P. 34

Judge Niemeyer reported that the advisory committee had added to Rule 34 a cross-reference to Rule 26(b)(2)(i), (ii), and (iii). He noted that, as published, the cost-bearing provision had been included as part of Rule 34(b), but the committee relocated it to Rule 26(b)(2) after publication. Because cost-bearing concerns often arise in connection with discovery under Rule 34, a reference was needed in Rule 34 to call attention to the availability of cost-bearing in connection with motions to compel Rule 34 discovery and Rule 26(c) protective orders in connection with document discovery.

Some members of the committee questioned the need for the cross-reference in Rule 34. Other members pointed out, however, that although the reference is not essential, it serves as a helpful flag to lawyers.

The committee approved the proposed amendment to Rule 34 without objection.

FED. R. CIV. P. 37

Judge Niemeyer reported that the proposed amendment to Rule 37(c)(1) closes a gap in the current rule and provides that the sanction of exclusion, forbidding the use of materials not properly disclosed, applies to a failure to supplement a formal discovery response.

The committee approved the proposed amendment to Rule 37 without objection.

The committee approved the package of amendments to the discovery rules by a vote of 10 to 0.

Rules for Publication

Electronic Service

FED. R. CIV. P. 5, 6, and 77 and FED. R. BANKR. P. 9006 and 9022

Judge Niemeyer reported that the Advisory Committee on Civil Rules had been asked to take the lead in drafting uniform amendments to the federal rules to authorize service by electronic means. The advisory committee, he said, had worked closely with the Standing Committee's Technology Subcommittee (which includes representatives from each of the advisory committees), and it had generally followed the advice of that subcommittee. He noted that the proposed amendments before the Standing Committee had been circulated to the other advisory committees for comment. Although many of the suggestions from the other committees had been incorporated in the draft, the advisory committees were not in complete agreement on all parts of the draft.

Professor Cooper pointed out that all the participants agreed that the time for electronic service had arrived, but they also agreed that it was premature to consider making its use mandatory — either by national rule or by local rule. Accordingly, the proposed amendments authorize electronic service with the consent of the party being served. He added that they authorize electronic service only for documents under Rules 5(a) and 77(d), and not for the service of initiating documents and process in a case, such as under FED. R. CIV. P. 4

Professor Cooper said that, as amended, Rule 5(b) specifies that service is complete upon "transmission." He noted that the Advisory Committee on Civil Rules had requested specific comment from the other advisory committees on this point. In response, the Advisory Committee on Appellate Rules asked what should happen if service is transmitted electronically, but the electronic system notifies the sender that the message has not in fact been delivered. As a result, language was added to the committee note specifying that: "As with other modes of service, . . . actual notice that the transmission was not received defeats the presumption of receipt that arises from the provision that service is complete upon transmission."

Professor Cooper pointed out that new subparagraph 5(b)(2)(D) provides that, if authorized by local rule, a party may make service through the court's transmission facilities. He explained that this provision contemplates eventual enhancements in the courts' electronic systems to allow a party to file a paper with the court and have it served simultaneously on all the required parties. Professor Cooper also pointed out that this is the only reference to local rule authority in the proposed amendments. In addition, a minor amendment would be made to FED. R. CIV. P. 77(d) to conform to the changes proposed in Rule 5(b).

Judge Niemeyer reported that electronic service raises the question of whether the party being served should be allowed additional time to respond, in the same way that FED. R. CIV. P. 6(e) currently provides an additional three days to respond when a party is served by mail. He said that differing views had been expressed on this subject. Accordingly, the Advisory Committee on Civil Rules had prepared a draft rule plus three alternatives for presentation to the Standing Committee. The draft rule would allow an extra three days for all service other than personal service. Alternative 1 would make no change in Rule 6(e), therefore providing no additional time when service is made electronically. Alternative 2 would eliminate Rule 6(e) and the three-day provision entirely. Alternative 3 would amend Rule 6(e) to allow an additional three days if service is made by mail "or by a means permitted only with the consent of the party served." Professor Resnick said that this formulation, which covers electronic service, could conveniently be incorporated by the Federal Rules of Bankruptcy Procedure.

Judge Niemeyer reported that 6 members of the Advisory Committee on Civil Rules had voted against allowing additional time for service by electronic means — or for any other types of proposed consensual service, such as commercial carrier. Professor Cooper added that the reasoning for this approach is that the rule specifically requires consent, and people will only consent to a type of service in which they have confidence. Accordingly, there is no need to provide them with additional time. He added that the Advisory Committee on Appellate Rules had expressed concern that if additional time were given, it would deter people from using electronic service.

Judge Niemeyer said that 4 members of the advisory committee had voted to allow three days additional time. He noted that those who favored allowing additional time urged that consent will be more likely to be given if it brings with it the reward of additional time. He added that the committee would describe the alternatives and solicit comment from the public on the advisability of applying the three-day rule to electronic service.

Judge Scirica emphasized the importance of publishing a uniform set of amendments if feasible. Professor Cooper agreed, but pointed out some practical differences between civil and appellate practice. Judge Garwood added that the Federal Rules of Appellate Procedure — unlike the Federal Rules of Civil Procedure and the Federal Rules of Bankruptcy Procedure — presently authorize service by commercial carrier, and that no consent is required from the party being served by commercial carrier. He noted that FED. R. APP. P. 25 and 26 give the party being served an extra three days unless the paper in question is delivered on the date of service specified in the paper.

Judge Garwood said that the time periods should generally be the same in all the federal rules. He would, however, distinguish the issue of the authority to use commercial carriers from the issue of whether an additional three days is provided for a response.

Professor Resnick said that the bankruptcy rules did not have to be amended to authorize electronic service in adversary proceedings because FED. R. CIV. P. 5 is applicable to those proceedings. He added that the Advisory Committee on Bankruptcy Rules believed that an additional three days should be allowed for electronic service, and for all other types of service except personal delivery. Therefore, it had prepared companion amendments to FED. R. BANKR. P. 9006, to extend the three-day "mail rule" to all service under FED. R. CIV. P. 5(b)(2)(C) and (D), and to FED. R. BANKR. P. 9022, to conform to the proposed amendment to FED. R. CIV. P. 77(d). He urged that the proposed amendments to the bankruptcy rules be published together with the proposed amendments to the civil rules.

The committee voted without objection to authorize publication of the proposed amendments to FED. R. CIV. P. 5(b) and 77(d) and to FED. R. BANKR. P. 9006 and 9022. As part of the package, an alternate amendment to FED. R. CIV. P. 6(e) would also be published for comment.

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 May 12, 1999. (Agenda Item 8)

He reported that the advisory committee had no action items to present. He noted that the committee was deeply involved in the project to restyle the body of criminal rules. The Style Subcommittee of the Standing Committee had prepared a draft of the entire criminal rules, and the advisory committee was close to completing its revision of the first 22 rules.

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 May 1, 1999. (Agenda Item 9)

Judge Smith reported that the advisory committee was seeking approval of amendments to seven rules. She noted that she had provided the Standing Committee with a detailed explanation of the proposed amendments at the January 1999 meeting. The advisory committee, she said, had conducted two hearings on the amendments and had received 173 written comments from the public.

FED. R. EVID. 103

Judge Smith said that the proposed amendment to Rule 103 would resolve a dispute in the case law over whether it is necessary for a party to renew an objection or an offer proof at trial after the court has made an advance ruling on the admissibility of the proffered evidence. She noted that the amendment had been considered by the Standing Committee on several occasions and that improvements in its language had been made. She added that the current proposal had received very favorable support during the public comment period.

Judge Smith pointed out that the proposed amendment, as published, had contained an additional sentence codifying and extending to all cases the principles of *Luce v. United States,* 469 U.S. 38 (1984). In that case, the Supreme Court held that a criminal defendant must testify at trial in order to preserve the right to appeal an advance ruling admitting impeachment evidence. The public comments on the addition, she said, had been negative, and several commentators had expressed concern over the potential and unpredictable consequences of applying *Luce* to civil cases.

Judge Smith said that the advisory committee had decided to eliminate the additional sentence in light of the public comments. But, she added, some members were concerned that elimination of the sentence might be interpreted as an implicit attempt to overrule *Luce.* Ultimately, the advisory committee decided to eliminate the sentence but to include explicit language in the committee note stating that nothing in the amendment is intended to affect the rule set forth in *Luce.*

The committee approved the proposed amendment to Rule 103 without objection.

FED. R. EVID. 404

Judge Smith reported that Rule 404(a)(1) would be amended to provide that when an accused attacks the character of an alleged victim, the accused's character also becomes subject to attack for the "same trait." She pointed out that the amendment, as published, had been broader in scope, allowing the accused to be attacked by evidence of a "pertinent trait of character." She added that the advisory committee had narrowed the amendment in light of negative public comments and comments from some members of the Standing Committee.

The committee approved the proposed amendment to Rule 404 without objection.

FED. R. EVID. 701

Mr. Holder reported that the litigating divisions of the Department of Justice, the United States attorneys, and other components of the Department had thoroughly reviewed the proposed amendment to FED. R. EVID. 701 and had concluded that it would have a serious and deleterious impact on the Department's civil and criminal litigation. He said that he was grateful that the

advisory committee had carefully considered his letter of January 5, 1999, to Judge Smith and had made changes in the amended rule and the accompanying committee note to accommodate the Department's concerns. But, he said, the revised amendments regrettably did not alleviate the core concerns of the Department's lawyers.

Mr. Holder explained that no bright line is presently drawn in Rule 701 between lay testimony and expert testimony. Witnesses are often put on the stand by counsel to testify as to facts, but their testimony inevitably includes opinions based on their occupation or personal experience.

He noted, for example, that the Department of Justice puts witnesses on the stand who testify as to drug transactions, food adulteration, or environmental cleanups. Many of these witnesses would not be considered "experts," in the common or legal use of the term, but their testimony is often based on specialized knowledge. The testimony cannot meaningfully be presented to the court or jury without the witnesses giving their opinions, which are based on specialized knowledge arising from their occupation or life experience.

Mr. Holder said that forcing these people to be considered "experts" under Rule 702 would lead to a number of unfortunate results. Under FED. R. CRIM. P. 16, for example, they would have to file a written summary of their testimony. In civil cases, FED. R. CIV. P. 26(a)(2) may require them to file expert reports. Also by brightening the line between lay and expert testimony, the amendment, he said, would subject the evidentiary rulings of trial judges to greater appellate review. This result would run counter to the thrust of the Supreme Court's decisions in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993), and *Kumho Tire Co. V. Carmichael,* 119 S. Ct. 1167 (1999), which confirmed the discretion of trial courts to weigh the reliability of testimony.

Finally, Mr. Holder said that the net effect of the amendment to Rule 701 would be to require the Department under FED. R. CRIM. P. 16 to disclose in advance of trial the identity of fact witnesses whom it intends to call if part of their testimony entails giving their opinion as to matters they have observed. Such disclosure might in a few cases pose a danger to the life or safety of prospective witnesses.

In conclusion, Mr. Holder urged the committee to reject the rule entirely. Alternatively, he recommended that it be deferred for further consideration by the civil and criminal advisory committees.

Judge Smith said that the Department, basically, objects to brightening the line between Rule 701 lay testimony and Rule 702 expert testimony. But, she said, although the line cannot be brightened completely, it can be clarified. There will always be some doubt, and judges will continue to have to exercise judicial discretion. She added that in light of the Supreme Court's decisions in *Daubert* and *Kumho,* it was necessary to provide judges and lawyers with some guidelines in this area.

Judge Smith said that there was a widespread belief among the bar that the lack of guidelines has led to increasing attempts by attorneys to evade the reliability requirements of Rule 702 by proffering experts in the guise of law witnesses under Rule 701. She added that the proposed amendment to Rule 701 was not intended in any way to change the status of lay opinion or opinion that is based on people's everyday life experiences. Rather, the advisory committee wanted to clarify for the bench and bar how the judicial gatekeeping function should operate. She explained that, as helpful as the *Kumho* decision had been, there still needed to be guidelines set forth in the rules to aid the bench and bar.

Judge Smith pointed out that Mr. Holder's letter of June 9 to the Standing Committee, in discussing FED. R. CIV. P. 26(b)(1), had expressed "grave substantive concerns, shared by the Department, about the Advisory Committee's proposal to modify the most essential element of the federal civil system — the complementary hallmarks of the Federal Rules of Civil Procedure: notice pleading and full discovery of relevant information." She said that full disclosure of information requires that a party give notice to the other party of any specialized knowledge on the part of a witness it intends to call. Only in this way can the court's gatekeeping function be handled properly, with appropriate input from both sides. She said that the basic needs of fairness outweigh the inconvenience of having to disclose more witnesses in some kinds of cases.

Judge Smith reported that the advisory committee had made changes in Rule 701 to ameliorate the concerns of the Department of Justice. She said that the words "within the scope of Rule 702" had been added to the rule after publication to show that witnesses need not be qualified as experts unless they are clearly found to be expert witnesses under Rule 702. She said that the committee had also added several examples to the committee note of the types of lay opinion witnesses who do not need to be qualified as experts. Professor Capra explained that the committee had incorporated the examples from the pertinent case law to help clarify the application of Rules 701 and 702 in light of the concerns of the Department and to assist attorneys in determining in advance how to avoid potential violations of FED. R. CRIM. P. 16.

Mr. Katyal said that the Department's principal concern with the amendment was not that its lawyers would be unable to introduce necessary testimony in court, but that testimony currently admitted under Rule 701 would now be classified as Rule 702 expert testimony. This would require compliance with FED. R. CRIM. P. 16, including pretrial disclosure of the names of witnesses. He noted that the Attorney General has had a long-standing policy on this matter and had written to the chief justice in the past firmly opposing proposed amendments to Rule 16 that would have required pretrial disclosure of government witnesses.

Mr. Katyal said that the United States attorneys and the Criminal Division of the Department of Justice believe strongly that the proposed amendment will threaten the safety of government witnesses and add to litigation costs. He added that *Kumho* did not require the proposed amendment, and that the bright line fashioned by the proposed amendment would actually undercut *Kumho*.

Several judges responded that, based on their experience, the potential problems pointed out by the Department of Justice were overstated. One judge, for example, said that the Department's views must always be taken very seriously, but the danger to witnesses cited by the Department was simply not realistic. He suggested that the proposed amendment was both modest and reasonable and added that the Department's concern over the safety of witnesses could be handled in appropriate cases by issuance of a protective order. Professor Capra noted that FED. R. CRIM. P. 16 does not require the government to disclose the identity of a witness. It only requires disclosure of statements.

Judge Scirica said that if the proposed rule were adopted, a United States attorney would in an appropriate case petition the court *ex parte* to protect any witness against whom there was a potential threat. Mr. Katyal responded that the Department had in fact discussed this suggested course of action with the United States attorneys, but they countered that the amended rule might not authorize that type of action. And, in any event, the district court might deny their request. Judge Smith added that the witnesses covered by the rule were, usually, law enforcement witnesses, rather than potentially endangered lay witnesses.

Judge Scirica asked Judges Davis and Niemeyer to comment on Mr. Holder's alternate recommendation that the proposed amendment to Rule 701 be deferred to obtain the views of the criminal and civil advisory committees. Judge Davis responded that the Advisory Committee on Criminal Rules would have no problem with the proposed amendment. He noted that his committee had consistently called for greater pretrial disclosure under FED. R. CRIM. P. 16 than the Department of Justice has been willing to provide. Judge Niemeyer commented that the Advisory Committee on Civil Rules had not considered the proposed amendment, but that he personally believed that it would be helpful in clarifying the distinction between lay witnesses and expert witnesses.

Mr. Katyal suggested that the committee note be amended to specify that the rule is not intended to require the disclosure of the identify of witnesses if the United States attorney personally avers to the court that the safety of a witness is at stake, or there are facts that tend to reveal that the safety of a witness may be at stake. Professor Capra responded that the additional language would be inappropriate because Rule 702 is an evidence rule, not a disclosure or discovery rule.

The committee approved the proposed amendment to Rule 701 by a vote of 9 to 1.

FED. R. EVID. 702

Judge Smith reported that the advisory committee had made minor changes in the rule following publication: (1) to delete the word "reliable" from Subpart 1 of the proposed amendment; (2) to amend the committee note in several places to add references to the Supreme Court's decision in *Kumho*, which was rendered after publication; (3) to revise the note to emphasize that the amendment does not limit the right to a jury trial or encourage additional

challenges to the testimony of expert witnesses; and (4) to add language to the note to clarify that no single factor is necessarily dispositive of the reliability inquiry mandated by Rule 702.

The committee approved the proposed amendment to Rule 702 by a vote of 9 to 0.

FED. R. EVID. 703

Judge Smith reported that the advisory committee had made a few minor, stylistic changes following publication.

The committee approved the proposed amendment to Rule 703 by a vote of 10 to 0.

FED. R. EVID. 803 AND 902

Professor Capra pointed out that the proposed amendments to Rules 803(6) and 902(11) and (12) were part of a single package, allowing certain records of regularly conducted activity to be admitted without the need for calling a foundation witness. He pointed out that two new subdivisions would be added to Rule 902 to provide procedures for the self-authentication of foreign and domestic business records. Professor Capra said that the advisory committee had made minor stylistic changes following publication and had added a phrase to specify that the manner of authentication should comply with any Act of Congress or federal rule.

The committee approved the proposed amendments to Rules 803 and 902 without objection.

REPORT OF THE ATTORNEY CONDUCT RULES SUBCOMMITTEE

Judge Scirica reported that Professor Coquillette and the subcommittee had accomplished a great deal since the last committee meeting. He noted that the subcommittee had held a meeting in Washington in May 1999 that included members of other Judicial Conference committees and a number of people interested and knowledgeable in attorney conduct matters. He said that recent federal legislation had made government attorneys subject to state ethical regulations, and that Chief Justice Veasey and Professor Hazard had been active in working with the Department of Justice in trying to fashion an acceptable rule to govern the subject matter of Rule 4.2 of the A.B.A. Code of Conduct, *i.e.*, contact by government attorneys with represented parties.

Chief Justice Veasey reported that additional progress had been made in the negotiations on this matter among the chief justices, the Department of Justice, and the American Bar Association. He added that two competing bills were pending in the Senate. One, sponsored by Senator Hatch, would preempt state bars from regulating federal prosecutors. The other, sponsored by Senator Leahy, would single out for Judicial Conference action the issue of government attorneys contacting represented parties. He reported that the Conference of Chief

Justices had written to Senators Hatch and Leahy informing them that work was proceeding on trying to reach a compromise. He added that Professor Hazard had been very active and very helpful in the negotiations.

Professor Coquillette said that the subcommittee was planning to hold one additional meeting, in Philadelphia in September.

He reported that there are literally hundreds of local federal court rules purporting to govern attorney conduct. Some of them, he said, just adopt the conduct rules of the state in which the federal court sits. Other local rules adopt the A.B.A. Code, and some adopt the A.B.A. canons. Many courts, moreover, appear to ignore their own rules in practice.

Professor Coquillette said that there appeared to be a consensus that attorney conduct obligations should, as a general rule, be governed by the laws of the states. If there are to be any special rules for federal attorneys, they should be limited to a very small core when clear federal interests are at stake. He noted that Professor Cooper was working on a draft "dynamic conformity" rule that would make state conduct rules applicable in the federal courts, but leave open a narrow door for such matters as Rule 4.2 conduct. He said that the draft would be circulated for comment to the subcommittee and the advisory committee reporters. He added that there was a possibility that a proposed resolution of the matter might be brought before the Standing Committee at the January 2000 meeting.

LOCAL RULES PROJECT

Professor Squiers explained in brief the manner in which she had conducted the original local rules project. She explained that in her original study she had gathered the rules of every court and had placed them in five categories: (1) those that were appropriate local rules; (2) those that were so effective that they should be publicized as model rules for the other courts to consider; (3) those that should be incorporated into the national rules; (4) those that were duplicative of the federal rules; and (5) those that were inconsistent with federal law or the national rules. She added that the courts were provided with the results of this work and asked to take appropriate action. Compliance, she said, was voluntary.

Professor Squiers pointed out that the federal rules had been amended in 1995 to require that local rules be renumbered, and most courts had redrafted their rules to meet that requirement. In addition, she said, the Civil Justice Reform Act had led to the adoption of many new local rules, and that some additional local rules changes had been made to take account of the expiration of the Act.

Professor Squiers reported that she planned to follow the same general approach in the new study of local rules, and she invited the members to provide input and guidance. She pointed, for example, to suggestions that she had received that the judicial councils of the circuits

should be involved early in the project since they have the authority to oversee and abrogate local rules.

Some of the members pointed out that some of the judicial councils appeared to be very active in reviewing and acting on local rules, while other councils appeared to be largely inactive in this area. Judge Scirica said that it might be useful for the committee eventually to suggest a model process for the judicial councils to follow in reviewing local rules.

REPORT OF THE STYLE SUBCOMMITTEE

Judge Parker reported that the style subcommittee's efforts had been directed to assisting the Advisory Committee on Criminal Rules in restyling the body of criminal rules. He noted that the style subcommittee had completed a preliminary draft of all the criminal rules, and that the advisory committee would take action on FED. R. CRIM. P. 1-22 at its June 1999 meeting.

NEXT COMMITTEE MEETING

Judge Scirica reported that the next committee meeting had been scheduled for January 6 and 7, 2000.

Respectfully submitted,

Peter G. McCabe,
Secretary

IV-A

MEMORANDUM

DATE: September 20, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 98-02

As you know, we have struggled for two years with various issues raised by the application of the separate document requirement of Rule 58 of the Federal Rules of Civil Procedure ("FRCP") to orders that dispose of the post-judgment motions listed in Rule 4(a)(4)(A) of the Federal Rules of Appellate Procedure ("FRAP"). After our April 1999 meeting, Judge Garwood asked me to thoroughly research these issues. I spent the entire summer working on this project and read just about every one of the 500 or so appellate opinions that relate in some way to the separate document requirement. The good news is that, for the first time, I think that I understand all of the dimensions of the problems that we have been studying. The bad news is that the problems are far more complicated than we anticipated.

In this memorandum, I will describe the problems that confront us and suggest possible solutions. I will start at "square one" and try to simplify as much as possible, while still giving you enough information to make informed decisions. For the most part, I will not include citations to cases that support or illustrate the assertions that I will make. Please be assured, though, that such authority exists (and was provided to Judge Garwood in a long research memorandum that I prepared for him this summer). For those of you who are interested, I have attached a lengthy appendix to this memorandum in which I analyze, on a circuit-by-circuit basis,

the various approaches that appellate courts have taken in deciding to what extent the separate document requirement applies to orders disposing of post-judgment motions.

Please put out of your minds prior memoranda and committee discussions on this topic. We have been laboring under some mistaken impressions, and we have failed to take into account some important information.

I. The Separate Document Requirement: Background

It is extremely important that litigants be able to identify precisely when a judgment has been "entered." Both the time to file post-judgment motions and the time to appeal begin to run upon entry of the judgment. A litigant who fails to recognize when a judgment has been entered may inadvertently forfeit its right to seek post-judgment relief or to appeal.

In the years immediately following the 1938 promulgation of the FRCP, parties had a great deal of trouble identifying when a judgment had been entered. In particular, parties had difficulty identifying the point at which a court had issued a "final decision" for purposes of 28 U.S.C. § 1291. Judges often conclude cases with lengthy opinions or memoranda that include dispositive language — such as "the defendant's motion to dismiss is granted." Sometimes judges follow up such opinions with formal judgments, and sometimes they do not. For that reason, a party who receives an opinion that seems to dispose of a case may be unclear about whether the opinion is itself the final decision of the court for purposes of § 1291, or whether the final decision is yet to come. If the party guesses wrong, the party can find itself foreclosed from appealing.

In the early 1960s, the Advisory Committee on Civil Rules decided to try to eliminate this confusion by amending FRCP 58 to provide that a judgment would not be "effective" until the judgment was issued in a way that clearly signaled to the parties that the time to bring post-

judgment motions or to appeal had begun to run. The committee had an infinite variety of signals from which to choose. The committee could have required that particular words be included in the judgment, or that the judgment be captioned in a particular way, or even that the judgment be issued on a particular size or color paper. The committee chose as its signal the requirement that the judgment be issued on a separate document — that is, on a document separate from any document in which the court describes the reasons for entering the judgment. Specifically, in 1963 the committee amended FRCP 58 to provide:

> Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered [in the civil docket] as provided in Rule 79(a).

In retrospect, the choice of entry on a "separate document" as the signal has proven unfortunate, in large part because courts have been unable to agree on what constitutes a "separate document." Circuit splits have developed over many questions, such as the question whether an order that incorporates a magistrate's report by reference can qualify as a "separate document." Fortunately, these conflicts are not the direct concern of this committee.

What *does* concern this committee is something that we have overlooked in our prior deliberations. In the past, we noted that FRCP 58 requires every "judgment" to be set forth on a separate document, but we assumed that FRCP 58 uses the term "judgment" in the way that lawyers use the term "judgment" in everyday conversation — that is, to refer to the piece of paper that concludes the litigation on the merits and grants or denies final relief to the parties. We were mistaken. "Judgment" is specifically defined in FRCP 54(a) to "include[] a decree and any order from which an appeal lies." Thus, the separate document requirement applies to much more than what are traditionally thought of as "judgments." True, what we normally refer to as "judgments"

must be set forth on separate documents. But so must every appealable order, such as orders granting, modifying, refusing, or dissolving injunctions under 28 U.S.C. § 1292(a)(1).

As of 1963, then, the law was reasonably clear. There were no Federal Rules of Appellate Procedure, so the Federal Rules of Civil Procedure were the only game in town. Under FRCP 73(a), a litigant had 30 days to appeal a judgment (60 days if the government was a party), measured from the date of "the entry of the judgment." The civil rules did not define when a judgment was "entered," but, as noted, they did define when a judgment was "effective." Neither the time to bring post-judgment motions nor the time to appeal began to run until the judgment was set forth on a separate document.

The situation became more murky in 1968, when the Federal Rules of Appellate Procedure were enacted. Like the former civil rules, the new appellate rules provided that a litigant had 30 days to appeal a judgment or order (60 days if the government was a party), measured from the date that the judgment or order was "entered." But unlike the civil rules, the new appellate rules specifically defined when a judgment or order was "entered." According to FRAP 4(a), a judgment or order was "entered" when it was "entered in the civil docket." No mention was made of the separate document requirement.

This created a conflict between FRAP 4(a) and FRCP 58. Under FRAP 4(a), the time to appeal a judgment began running with its "entry," and "entry"was defined to occur when the judgment was entered in the civil docket. By contrast, under FRCP 58, a judgment was not "effective" — and thus the time to appeal did not begin to run — until it was both entered in the civil docket *and* set forth on a separate document. In other words, under a literal reading of the

rules, the time to appeal a judgment could have expired under FRAP 4(a) before it even began to run under FRCP 58.

Courts resolved this conflict by ignoring it. Courts simply continued to apply FRCP 58 and gave no heed — indeed, gave no *mention* — to the definition of "entry" in FRAP 4(a). Just as they did before the 1968 enactment of FRAP 4(a), courts held that the time to appeal a judgment did not begin to run until the judgment was set forth on a separate document pursuant to FRCP 58. No court even noticed the conflict between FRAP 4(a) and FRCP 58.

In 1979, the Advisory Committee on Appellate Rules added the provision that has been the focus of so much of our attention. As part of a thorough revision of FRAP 4(a), the committee split the rule into several numbered subsections, put the sentence defining when a judgment or order was "entered" into subsection (a)(6) (which in 1991 was renumbered as (a)(7)), and changed the definition of "entered" so that it explicitly referred to the separate document requirement of FRCP 58. Specifically, FRAP 4(a)(6) (now FRAP 4(a)(7)) was amended to read:

> 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.

II. The Separate Document Requirement: Application to Orders Disposing of Post-Judgment Motions

There are at least two possible ways of reading FRAP 4(a)(7). Throughout the remainder of this memorandum, I will refer to the first as the "incorporation" approach and the second as the "independent" approach.

A. The "Incorporation" Approach. Several circuits seem to interpret FRAP 4(a)(7) to incorporate the separate document requirement *as it exists in FRCP 58*. Read in this manner, FRAP 4(a)(7) does not itself impose a separate document requirement. Rather, it simply provides that when — and only when — *FRCP 58* imposes a separate document requirement on a judgment or order, the judgment or order will not be considered entered for purposes of FRAP 4(a) until it is set forth on a separate document. FRCP 58, in turn, imposes the separate document requirement only upon those judicial actions that are defined as "judgments" by FRCP 54(a) — that is, upon judicial actions "from which an appeal lies."

Upon reflection, I've come to conclude that this is the most natural reading of FRAP 4(a)(7). The rule does not require that orders be set forth "on a separate document," but rather that orders be entered "in compliance with Rule[] 58." If an order is not appealable, then it does not have to be set forth on a separate document to be entered "in compliance with Rule[] 58." (By contrast, if an order *is* appealable, then it is not entered "in compliance with Rule[] 58" until it is set forth on a separate document.) By making "compliance with Rule[] 58" the touchstone, FRAP 4(a)(7) seems to require entry on a separate document only when FRCP 58 does.

B. The "Independent" Approach. There is a second way of reading FRAP 4(a)(7), one that seems to have been adopted by several circuits, and that has animated our past discussions of this topic. FRAP 4(a)(7) could be read *independently* to impose a separate document requirement, and not just when FRCP 54(a) and 58 would, but on *all* judgments and orders whose entry is of consequence under FRAP 4(a). In other words, every time that a deadline begins to run under FRAP 4(a) upon the entry of a judgment or order, the deadline does not begin to run until the judgment or order is set forth on a separate document.

On first glance, you may wonder what difference it makes whether a court adopts the "incorporation" approach or the "independent" approach. After all, under the "incorporation" approach, the separate document requirement is imposed on all *appealable* orders. Under the "independent" approach, the separate document requirement is imposed on *all* orders, but since unappealable orders are not appealable — that is, they do not come before appellate courts — what difference does it make whether the separate document requirement is deemed to apply to them?

The answer is that it makes a difference when the time to appeal an *appealable* judgment or order is tied to the entry of an *unappealable* order. And the one context in which this occurs is the context that has been our concern for the past two years. Under FRAP 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until "the entry of the order disposing of the last such remaining motion." Some orders that dispose of post-judgment motions are not themselves appealable. These orders, because they are not appealable, are not defined as "judgments" by FRCP 54(a), and therefore nothing in the Federal Rules of Civil Procedure imposes a separate document requirement on them. In this context, then, it makes a difference whether FRAP 4(a)(7) merely incorporates FRCP 54(a) and 58 or independently applies a separate document requirement. Under the "incorporation" approach, unappealable orders disposing of post-judgment motions do *not* have to be set forth on a separate document; under the "independent" approach, they do.

To illustrate: Suppose that judgment is entered against a defendant, and the defendant files a timely motion for a new trial. Under FRAP 4(a)(4)(A)(v), the time to appeal the underlying judgment is tolled until the district court enters an order disposing of the new trial motion.

Suppose further that, several weeks later, the district court issues an eight page opinion denying the new trial motion, and the clerk notes the court's action in the civil docket. Has the time to appeal the underlying judgment begun to run?

Under the "independent" interpretation of FRAP 4(a)(7), the answer is "no." All orders whose entry is of consequence under the appellate rules would have to be set forth on a separate document. The order denying the defendant's new trial motion was not set forth on a separate document, and thus the time to appeal has not yet begun to run.

Under the "incorporation" interpretation of FRAP 4(a)(7), the answer is "it depends." The circuits disagree about whether orders denying new trial motions are appealable. If, in a particular circuit, an order denying a new trial motion is deemed to be "an[] order from which an appeal lies," then the order would be defined as a "judgment" under FRCP 54(a), and therefore would have to be set forth on a separate document under FRCP 58. But if, in a particular circuit, an order denying a new trial motion is not deemed to be "an[] order from which an appeal lies," then the order would not be defined as a "judgment" under FRCP 54(a), and therefore would not have to be set forth on a separate document under FRCP 58. Such an order would be considered "entered" for purposes of FRAP 4(a) when it was entered in the civil docket (whether or not it was also set forth on a separate document).

There are two things to note about these conflicting interpretations of FRAP 4(a)(7):

First, it can be difficult to determine which (if either) of the two interpretations a court has adopted. Suppose, for example, that a court holds, without explanation, that an order denying a new trial motion is not "entered" until it is set forth on a separate document. If the circuit is one in which such orders are *not* appealable, then it is safe to assume that the court has adopted the

"independent" approach. But if the circuit is one in which such orders *are* appealable, then it can be impossible to tell whether the court has adopted the "incorporation" approach or the "independent" approach. Under either, the order would have to be set forth on a separate document.

Second, some of the courts of appeals adopt neither of these two approaches. There are two other approaches that some appellate courts have taken in deciding to what extent the separate document requirement applies to orders disposing of post-judgment motions. I will refer to these as the "policy" approach and the "Eleventh Circuit" approach.

C. The "Policy" Approach. A few circuits have held, more as a matter of policy than as a matter of interpretation, that the separate document requirement applies to orders that *grant* post-judgment motions, but not to orders that *deny* post-judgment motions. This position was first articulated by the Seventh Circuit in *Charles v. Daley*, 799 F.2d 343 (7th Cir. 1986). The court's entire explanation for its holding was as follows:

> A minute order [that does not qualify as a separate document] suffices when the judge denies a request to alter the judgment, for then the original judgment remains in effect. Here, however, the original judgment has been amended twice, and until the effective judgment is set forth on a separate sheet of paper, the time is suspended.

Id. at 347.

The result in *Charles* is certainly compatible with the "incorporation" approach, as most orders granting post-judgment relief are appealable in the Seventh Circuit, while most orders denying post-judgment relief are not. However, appealability did not seem to concern the Seventh Circuit. The court did not even cite FRCP 54(a) or FRAP 4(a)(7), and, on the whole, it

spent little time looking at the text of rules. The court seemed to reach its conclusion not as a matter of interpretation at all, but rather as a matter of policy.

The policy choice made by the Seventh Circuit has been questioned by the First Circuit, among others. The First Circuit wrote:

> Under Fed. R. App. P. 4(a), timely motions under Rules 50(b), 52(b) and 59 suspend the finality of the original judgment, and the time for appeal from both that judgment and denial of the motions runs from the entry of the order denying the motions. Thus, as in the 60(b) context, the separate document setting forth the original judgment is of no help in determining the precise date on which the time to appeal begins to run. The significant date is the date of the order denying the motion. Because Rule 58's purpose is to ensure that that date is precisely clear, the separate document requirement must apply to such orders.
>
> We recognize that the type of uncertainty that prompted the separate document rule is less likely to occur with respect to post-judgment orders than for initial judgments. . . . Because post-judgment motions typically will be narrowly focused and fairly specific in defining the relief sought, a brief order disposing of such motions more likely would be the court's last word on the case, and to be understood as such.
>
> Nonetheless, some risk of uncertainty always will exist. When a court denies a motion by an informal notation such as that used in this case, the parties may anticipate a memorandum explaining the court's ruling.

Fiore v. Washington County Community Mental Health Ctr., 960 F.2d 229, 234 (1st Cir. 1992) (en banc); *see also United States v. Haynes*, 158 F.3d 1327, 1329 (D.C. Cir. 1998) ("As an appealable event, denial of a Rule 60(b) motion generates, so far as we can see, no less risk of party confusion than does issuance of a garden-variety suit-terminating order, so the separate document requirement is as clarifying in the one context as in the other.").

D. The "Eleventh Circuit" Approach. In *Wright v. Preferred Research, Inc.*, 937 F.2d 1556 (11th Cir. 1991), the Eleventh Circuit held that the separate document requirement applies only to the original or underlying judgment. It does not apply to any order that grants or

denies a post-judgment motion, whether or not the order is one from which an appeal lies. Indeed, it does not even apply to an altered or amended judgment. *Id.* at 1560-61.

As I explain in the appendix to this memorandum, the *Wright* decision was poorly reasoned, the panel that decided *Wright* seemed unaware of the existence of either FRCP 54(a) or FRAP 4(a)(7) (its opinion conflicts with both), and no other circuit has followed its approach.

III. The Problems

With this background in mind, I now turn to the problems that confront this committee. There are five:

A. When, if ever, should the separate document requirement apply to orders that dispose of post-judgment motions? As I've just explained, the courts of appeals have taken four approaches in answering this question: the "incorporation" approach, the "independent" approach, the "policy" approach, and the "Eleventh Circuit" approach. We need to pick an approach, or to decide to do nothing. I will review the advantages and disadvantages of each option.

1. Do nothing. Doing nothing would leave the current mess untouched. The circuits would continue to be in conflict over what approach should be taken and thus would continue to be in conflict over such questions as whether the appealability of an order disposing of a post-judgment motion *matters* in deciding whether the order needs to be set forth on a separate document. As I noted earlier, the circuits are also in conflict over whether certain types of orders disposing of post-judgment motions *are* appealable. For example, some circuits hold that orders denying new trial motions are separately appealable, while other circuits hold that they are not.

As a result, even where two circuits agree on the "incorporation" approach, they may reach different results under that approach. Doing nothing leaves all of these conflicts in place.

At the same time, as I will discuss in a moment, adopting a *Fiore*-type cap would substantially ameliorate these problems. Suppose, for example, that we adopt the 150 day cap that we tentatively approved in April. In any case in which an order disposing of a post-judgment motion should have been set forth on a separate document but was not, the *worst* that would happen is that the appellant would get an additional six months to appeal. That would hardly be a disaster, and the appellee could always protect itself by making certain that the order is issued on a separate document. By the same token, there are lots of cases in which post-judgment motions are filed, and lots of cases in which those motions are disposed of in orders that are not set forth on separate documents, which means that there would be lots of cases in which appellants would get six months to appeal.

2. Adopt the "incorporation" approach. Under this approach, FRAP 4(a)(7) would not impose the separate document requirement on anything; rather, it would simply provide that, when *FRCP 58* imposes the separate document requirement on an order, that order will not be considered entered for purposes of FRAP 4(a) until the separate document requirement is met. There would continue to be many problems, but the problems would be the fault of FRCP 54(a) and 58, not FRAP 4(a)(7), and the most serious of the problems would be ameliorated by the *Fiore*-type cap. The circuit split over what approach should be applied would be resolved. Also, a policy argument could be made on behalf of this approach: Separate documents would be required for post-judgment orders that are *appealable* — which, in most circuits, are those orders that amend judgments — but not for orders that are not. A clear signal to appellants is needed

more in the former circumstance than in the latter. Finally, the "incorporation" approach would be consistent with the law of most circuits. If you review the cases that I discuss in the appendix, you will see that the *result* of very few of them would be changed by the adoption of the "incorporation" approach, although the *rationale* of many of them would be.

The disadvantage of the "incorporation" approach is that it embraces what is wrong with the FRCP 58 approach: It makes the separate document requirement turn upon the appealability of the order, which is often extremely difficult to determine, and which varies from circuit to circuit. Of course, this problem already exists under FRCP 58, so this is not a disadvantage vis-a-vis the status quo, but it is a disadvantage vis-a-vis the "independent" approach.

3. Adopt the "independent" approach. Under this approach, every order that is of consequence under FRAP 4(a) — whether or not appealable under the law of the relevant circuit — would not be considered "entered" until set forth on a separate document. This would maximize the policy benefits of the separate document rule, by requiring that parties have clear notice of each and every judicial action that starts the appellate clock running. It would also wipe out the circuit split on the approach to be adopted, and not make application of the separate document requirement depend upon the often impenetrable and conflicting law of appealability.

At the same time, the "independent" approach would create an inconsistency with FRCP 54(a) and 58, which impose the separate document requirement only on appealable decisions. This approach would also maximize the number of "time bombs," as it would maximize the number of orders that would have to be set forth on a separate document. Again, though, the adoption of a *Fiore*-type cap would substantially ameliorate this problem.

4. Adopt the "policy" approach. Under this approach, the separate document requirement would be imposed upon orders that grant post-judgment motions, but not upon orders that deny post-judgment motions. I recommend against this approach. First, I'm not convinced of the merits of the policy choice that this approach reflects. Second, adopting this approach would create a confusing mish-mash of rules:

- *Appealable* orders that *grant* post-judgment motions would have to be set forth on a separate document under both FRAP 4(a)(7) and FRCP 54(a) and 58.
- *Non-appealable* orders that *grant* post-judgment motions would have to be set forth on a separate document under FRAP 4(a)(7), but not under FRCP 54(a) and 58.
- *Appealable* orders that *deny* post-judgment motions would have to be set forth on a separate document under FRCP 54(a) and 58, but not under FRAP 4(a)(7).
- *Non-appealable* orders that *deny* post-judgment motions would not have to be set forth on a separate document under either FRAP 4(a)(7) or FRCP 54(a) and 58.

Few judges or litigants would figure this out. First, they would have to be aware that *a* separate document requirement existed, a hurdle that many judges and litigants cannot jump now. Second, they would have to be aware that there were actually *two* distinct separate document requirements — one in FRAP 4(a)(7) and the other in FRCP 58. Third, they would have to try to reconcile the separate document requirement of FRCP 58 with the inconsistent separate document requirement of FRAP 4(a)(7). Finally, they would have to figure out the law of appealability in the particular circuit in which they were litigating. Surely there's a better way.

5. Adopt the Eleventh Circuit approach. The Eleventh Circuit holds that *no* order disposing of a post-judgment motion (not even an amended judgment) needs to be set forth on a separate document. This approach is not only inconsistent with the policy behind the separate

document requirement (in that it deprives litigants of clear notice of when amended judgments and other clock-starting orders are entered), but it would also create a conflict between FRAP 4(a)(7), on the one hand, and FRCP 54(a) and 58, on the other. Under FRAP 4(a)(7), the time to appeal an order would begin to run when it was entered in the civil docket, while under FRCP 54(a) and 58, the time to appeal the order would not begin to run until it was set forth on a separate document. Keep in mind that, even if we adopted the Eleventh Circuit approach, FRCP 54(a) and 58 would continue to exist and courts would continue to apply them to orders disposing of post-judgment motions. Thus, adopting the Eleventh Circuit approach would simply be a confusing way of adopting the "incorporation" approach. If we want to adopt the "incorporation" approach, we should do so directly and clearly.

In my opinion, a respectable argument could be made for any of these options, save the Eleventh Circuit approach. I recommend that we adopt the "incorporation" approach, so that FRAP 4(a)(7) does nothing more and nothing less than what is already done by FRCP 54(a) and 58, and so that litigants do not have to worry about *two* somewhat inconsistent separate document requirements (one in FRAP and the other in the FRCP). The draft amendment and Committee Note that I have prepared embrace the "incorporation" approach.

B. Should a *Fiore*-type cap be adopted so that parties do not have forever to appeal when a judgment or order is required to be set forth on a separate document but is not? The separate document requirement is going to exist in some form, no matter what we do. Even if we eliminate any mention of the separate document requirement in the appellate rules, the courts will still find the requirement imposed upon judgments and appealable orders by virtue of FRCP 54(a) and 58.

The most serious problem with the separate document requirement is that it gives parties forever to appeal judgments and orders that should be set forth on a separate document but are not. Courts will stretch to find compliance with or waiver of the separate document requirement. But when a judgment is required to be set forth on a separate document and is not, courts have consistently held that the time to appeal never begins to run. "A party safely may defer the appeal until Judgment Day if that is how long it takes to enter the document." *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987).

In *Fiore*, the First Circuit addressed this problem by imposing a "cap" on the time that a litigant has to appeal an order that should have been set forth on a separate document but was not:

> If we were to hold without qualification that a judgment is not final until the court issues a separate document, we would open up the possibility that long dormant cases could be revived years after the parties had considered them to be over. We hasten to shut off that prospect. It is well-established that parties may waive technical application of the separate document requirement. We believe it appropriate, absent exceptional circumstances, to infer waiver where a party fails to act within three months of the court's last order in the case. When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties.

960 F.2d at 236 (citations and footnotes omitted).

The problem with this three month cap is that it is flatly inconsistent with the text of the rules. For that reason, several circuits have expressly rejected the *Fiore* approach. No court, however, has questioned its wisdom as a matter of *policy*.

It is true, as courts have repeatedly said, that winning litigants can protect themselves if they ascertain whether the judgment was set forth on a separate document and, if not, move the court to correct the omission. But there seems to be widespread ignorance of the separate document requirement among both judges and attorneys. Moreover, in some cases (such as prisoner cases that are dismissed by the district court before the government is served), the winning litigant does not even know that it has been sued, and thus cannot protect itself by insisting that judgment be entered on a separate document. Without question, there are many cases in which underlying judgments or orders disposing of post-judgment motions have not been set forth on separate documents. Thousands of "time bombs" are ticking away, and, if this committee does nothing else, it should defuse them by incorporating a *Fiore*-type cap into FRAP 4(a).

The amendment and Committee Note that I have drafted incorporate the 150 day cap that we tentatively approved at our April 1999 meeting. That cap works a bit differently than the *Fiore* cap. Under *Fiore*, a party is deemed to have waived its right to *request* entry of a judgment on a separate document after three months. Under our cap, the judgment is deemed to have been entered for appellate timetable purposes not later than 150 days after the judgment is entered in the civil docket. At that point, the 30 (or 60) day deadline for filing a notice of appeal begins to run.

C. Should FRAP 4(a) be amended to incorporate the one-way waiver doctrine? In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its

intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of § 1291, even if the order has not been set forth on a separate document for purposes of FRCP 58. *Id.* Such an order would not be "effective" — that is, the time to appeal the order would not begin to run, and thus the parties would not *have* to appeal. However, such an order would be a "final decision" — and thus, the parties *could* appeal if they wanted to.

One might think that whether to waive the separate document requirement would be the decision of the party for whose benefit the separate document requirement is imposed — the "loser" in the trial court. It is, after all, the potential appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the final decision on a separate document, then there is no reason why the *appellee* should be able to object. All that would result from honoring the appellee's objection would be delay. The appellant would return to the trial court, ask the court to enter the judgment on a separate document, and appeal again. "Wheels would spin for no practical purpose." *Id.* at 385.

As obvious as this may seem, many cases hold that an appellee can block an appellant's attempt to waive the separate document requirement, in large part because of careless language in the *Mallis* opinion. In *Mallis*, the Supreme Court repeatedly referred to the fact that "the parties" — plural — may waive the separate document requirement. *See id.* at 384, 386, 387. Also, in summarizing the reasons why it was holding that the separate document requirement had been waived in the *Mallis* case itself, the Supreme Court noted that the "[*appellee*] did not object to the taking of the appeal in the absence of a separate judgment." *Id.* at 387-88. Many courts have

treated this descriptive language as holding. These courts permit appellees to object to attempted *Mallis* waivers and to force appellants to go through the pointless exercise of returning to the trial court, requesting entry of judgment on a separate document, and appealing a second time. Other courts disagree and permit *Mallis* waiver even if the appellee objects, as long as the appellee would not be prejudiced by the lack of a separate document. (Several circuits have cases going both ways.)

I can think of no good reason why the appellee should be able to block the appellant — for whose benefit the separate document requirement is imposed — from waiving the requirement. If the committee agrees, FRAP 4(a) should be amended to make clear that the decision whether to waive the separate document requirement is the appellant's alone. The draft amendment and Committee Note that I have prepared attempt to do this.

D. Should FRAP 4(a) be amendment to resolve the "Townsend issue"? In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a § 2254 action on May 6, 1983, but failed to enter judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit held that the appeal was premature, in that the time to appeal the May 6 order had never begun to run because the May 6 order had not been set forth on a separate document. However, the Fifth Circuit said that it had to dismiss the appeal, rather than consider it on the merits, even though the parties were willing to waive the separate document requirement. The Fifth Circuit reasoned that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under FRAP 4(a)(1). By dismissing the appeal, the Fifth Circuit said, it was giving the

plaintiff the opportunity to return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934.

There are a few cases — in the Fifth Circuit and elsewhere — that have adopted the *Townsend* approach, and a law review article written by a staff attorney for the Second Circuit embraced it with some qualifications. *See* Michael Zachary, *Rules 58 and 79(a) of the Federal Rules of Civil Procedure: Appellate Jurisdiction and the Separate Judgment and Docket Entry Requirements*, 40 N.Y.L. SCH. L. REV. 409, 411-33 (1996). However, the courts adopting the *Townsend* approach are in a distinct minority. There are dozens of cases — including an unpublished decision of the Fifth Circuit itself — in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the order that should have been set forth on a separate document but was not. For example, the D.C. Circuit, after surveying the circuit split over the *Townsend* issue, "agree[d] with those courts which have found the rationale behind the Supreme Court's discussion in *Mallis* to require the exercise of jurisdiction over an appeal from a nonconforming judgment notwithstanding an appellant's failure to file a notice of appeal within the applicable period following entry of the [nonconforming] judgment." *Pack v. Burns Int'l Sec. Serv.*, 130 F.3d 1071, 1073 (D.C. Cir. 1997). Wright, Miller, and Cooper agree: The remand in *Townsend*, they write, is "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

I do not know whether you want to attempt to address the *Townsend* issue through an amendment to FRAP 4(a), but, even if you do not, you need to be careful that you do not address the issue inadvertently. I noticed that the draft amendment to FRAP 4(a)(7) that we considered in

April — which would have provided that "[t]he failure to enter a judgment or order under Rule 58 when required does not invalidate an *otherwise timely* appeal from that judgment or order" — almost certainly would have been interpreted as adopting the *Townsend* position. In the draft amendment that I have prepared, I have eliminated the phrase "otherwise timely," and in the draft Committee Note, I have expressed disapproval of *Townsend*.

E. Do FRAP 4(a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii) contain an ambiguity that needs to be corrected? This is both the most difficult and the least important problem that we face. At the outset, I should note that, to date, this problem is entirely theoretical. Luther Munford noted this problem while reading the rules, but, as far as I can tell, the problem has yet to arise in practice.

Let's start with FRAP 4(a)(4)(A). According to FRAP 4(a)(4)(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:

Our concern has been twofold: First, when an order *grants* post-judgment relief, the underlying judgment is almost always amended. The time to file an appeal should not run from the entry of the *order* granting the relief, but from the entry of the *amended judgment*. Second, when courts *grant* post-judgment relief, they rarely do so in orders that are set forth on separate documents, because they intend to follow up the orders by entering amended judgments on separate documents. Thus, in cases in which post-judgment relief is granted, the time to appeal often never begins to run. Or so we reasoned.

We have had a similar concern about FRAP 4(a)(4)(B)(i), which provides:

> 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.

Again, we have had two concerns about the operation of this provision in cases in which post-judgment relief is *granted*. First, when post-judgment relief is granted, the previously filed notice of appeal should become effective not when the *order* granting the relief is entered, but when the *amended judgment* is entered. Second, since orders granting post-judgment relief are rarely set forth on separate documents, the time to appeal in these cases rarely begins to run.

Finally, we have been concerned about FRAP 4(a)(4)(B)(ii), which provides:

> (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 — 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.

The concerns here are the same: If an order grants post-judgment relief, the time to file a notice of appeal should not run from the entry of the order, but from the entry of the amended judgment. And, given that orders granting post-judgment relief are rarely set forth on separate documents, the time to appeal such orders would rarely begin to run.

Our concerns about all three of these provisions have rested upon a couple of assumptions. First, we assumed that an order granting post-judgment relief is not "entered" until it is set forth on a separate document. This assumption was correct, except in the Eleventh Circuit. Under the "incorporation" approach, orders granting post-judgment relief must be set forth on separate documents, because they are appealable, and thus are "judgments" for purposes of FRCP 54(a). Under the "independent" approach, *all* orders, including orders granting post-

judgment relief, must be set forth on separate documents. And under the "policy" approach, orders *granting* post-judgment relief must be set forth on separate documents.

Second, we assumed that the entry of an order granting post-judgment relief is something separate and distinct from the entry of the amended judgment itself. In other words, we assumed that when a court orders that a judgment is to be amended, *both* the court's order *and* the amended judgment must be set forth on separate documents. We have assumed that the order granting post-judgment relief was not entered unless it was set forth on a separate document, even if the amended judgment was set forth on a separate document. As far as I can tell, though, no court has in fact taken this approach (even though it seems to be required by the text of FRCP 54(a) and 58), and thus our assumption appears to be incorrect. Let me explain:

Suppose that a district court issues an order granting summary judgment for a defendant and then later enters a formal judgment on the defendant's behalf. Read literally, FRCP 54(a) and 58 suggest that both the order and the judgment must be set forth on separate documents. After all, the rules provide that "[e]very judgment shall be set forth on a separate document," and they define "judgment" as including "any order from which an appeal lies." An appeal "lies" from the order granting summary judgment. There is no question that, under *Bankers Trust Co. v. Mallis,* the order is a final decision for purposes of § 1291 — and therefore can be appealed — even if it has not been set forth on a separate document. In the words of the Supreme Court, "a formal 'separate document' of judgment is not needed for an order to *become* appealable." *Shalala v. Schaefer*, 509 U.S. 292, 303 (1993) (emphasis in original). Therefore, one could argue that both the order and the judgment must be set forth on separate documents.

I am not aware of a single case that so holds — that is, I am not aware of a single case in which a court held that *both* the order directing that a judgment be entered *and* the judgment itself must be set forth on separate documents. When an order from which an appeal lies is one that directs that a judgment be entered, courts routinely hold that the time to appeal begins to run as soon as the *judgment* is set forth on a separate document; I am not aware of any case that has held that the order *also* must be set forth on a separate document.

The same is true in the context of orders granting post-judgment relief. Suppose, for example, that a district court issues a five page order that grants a FRCP 59(e) motion to amend the judgment and then later enters the amended judgment itself. Again, read literally, FRCP 54(a) and 58 suggest that both the order and the amended judgment must be set forth on separate documents. Under *Bankers Trust Co. v. Mallis,* the losing party could choose to waive the separate document requirement and bring an appeal from the five page order; thus, the order is one "from which an appeal lies," and thus it is a "judgment" for purposes of FRCP 54(a), and thus it must be set forth on a separate document under FRCP 58. Or so it might seem. Again, though, I am not aware of any case that has held that *both* the order directing that a judgment be amended *and* the amended judgment itself must be set forth on separate documents. Rather, once the amended judgment is set forth on a separate document, the time to appeal begins to run.

As a practical matter, then, the problem feared by Mr. Munford is unlikely to arise in practice. *When courts* grant *post-judgment relief, they will consider the "order disposing of the last such remaining motion" to have been "entered" when the amended judgment is entered.* And thus, as a practical matter, the rule is likely to work precisely as we intend.

For a problem to arise, a scenario like the following would have to occur: (1) The district court issues an order granting post-judgment relief not, as is typical, at the end of a memorandum, but on a separate document. Let us say this occurs on June 1. (2) Pursuant to the order granting post-judgment relief, an amended judgment is set forth on a separate document at least 24 hours later — say, on June 2. (3) The appellant assumes that the time for it to appeal began to run on June 2, when the amended judgment was entered. (4) The appellant waits until the last day — July 2 — to file its notice of appeal. (5) The appellee reads FRAP 4(a) carefully, interprets the rule in the way posited by Mr. Munford, and argues that the appeal is tardy, because the 30 days began to run when the *order* was set forth on a separate document (June 1), and not when the *amended judgment* was set forth on a separate document (June 2). (6) The appellate court agrees.

My own view is that these stars are so unlikely to align in this fashion that amending the rule to eliminate this "ambiguity" would create far more problems than it would solve. It would take several paragraphs of Committee Note just to explain the hypothetical problem that the committee was trying to address. I recommend that we avoid tinkering with FRAP 4(a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii) unless and until it becomes clear that a serious problem is being experienced in practice. Consistent with this recommendation, the amendment that I have drafted — unlike prior amendments that we have considered — does not touch FRAP 4(a)(4)(A), (a)(4)(B)(i), and (a)(4)(B)(ii). Rather, the amendment is directed solely to FRAP 4(a)(7).

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(7) **Entry Defined.**

(A) A judgment or order is entered for purposes of this Rule 4(a) when

(i) it is entered in the civil docket in compliance with Rules ~~58 and~~ 79(a) of the Federal Rules of Civil Procedure and,

(ii) if entry on a separate document is required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure,

- when it is set forth on a separate document as required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure, or
- 150 days after it is entered in the civil docket in compliance with Rule 79(a) of the Federal Rules of Civil Procedure,

whichever comes first.

(B) The failure to set forth a judgment or order on a separate document when required by Rules 54(a) and 58 of the Federal Rules of Civil Procedure does not invalidate an appeal from that judgment or order.

Committee Note

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

1. The first circuit split addressed by the amendment concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule

4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until "entry" of the order disposing of the last such remaining motion. Rule 4(a)(7) provides that a judgment or order is "entered" for purposes of Rule 4(a) "when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Fed. R. Civ. P. 58, in turn, provides that a "judgment" is not "effective" until it is "set forth on a separate document," and Fed. R. Civ. P. 54(a) defines "judgement" as including "any order from which an appeal lies."

Courts have taken at least four approaches in deciding whether an order that disposes of a post-judgment motion must be set forth on a separate document before it is considered entered under Rule 4(a)(7):

First, some courts seem to interpret Rule 4(a)(7) to incorporate the separate document requirement as it exists in the Federal Rules of Civil Procedure. *See, e.g., United States v. Haynes*, 158 F.3d 1327, 1329 (D.C. Cir. 1998); *Fiore v. Washington County Community Mental Health Ctr.*, 960 F.2d 229, 232-33 (1st Cir. 1992) (en banc); *RR Village Ass'n v. Denver Sewer Corp.*, 826 F.2d 1197, 1200-01 (2d Cir. 1987). Read in this manner, Rule 4(a)(7) does not itself impose a separate document requirement. Rather, it simply provides that when — and only when — Fed. R. Civ. P. 54(a) and 58 impose a separate document requirement, a judgment or order will not be treated as entered for purposes of Rule 4(a) until it is set forth on a separate document. Under this approach, then, whether an order disposing of a Rule 4(a)(4)(A) motion must be set forth on a separate document depends entirely on whether the order is one "from which an appeal lies." If it is, then the order is not entered under Rule 4(a)(7) until it is set forth on a separate document; if it is not, then the order is entered under Rule 4(a)(7) as soon as it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a).

Second, some courts seem to interpret Rule 4(a)(7) *independently* to impose a separate document requirement, and not just when Fed. R. Civ. P. 54(a) and 58 would, but on *all* judgments and orders whose entry is of consequence under Rule 4(a). *See, e.g., Hard v. Burlington N. R.R. Co.*, 870 F.2d 1454, 1457-58 (9th Cir. 1989); *Allen ex rel. Allen v. Horinek*, 827 F.2d 672, 673 (10th Cir. 1987); *Stern v. Shouldice*, 706 F.2d 742, 746 (6th Cir. 1983); *Calhoun v. United States*, 647 F.2d 6, 8-10 (9th Cir. 1981). Under this approach, all orders disposing of Rule 4(a)(4)(A) motions must be set forth on separate documents before they are considered entered under Rule 4(a)(7). Whether an appeal lies from such an order is irrelevant.

Third, some courts hold that the separate document requirement applies to orders that *grant* post-judgment motions, but not to orders that *deny* post-judgment motions. *See, e.g., Copper v. City of Fargo*, No. 98-2144, 1999 WL 516758, at *3 (8th Cir. July 22, 1999) (per curiam); *Marré v. United States*, 38 F.3d 823, 825 (5th Cir. 1994); *Hollywood v. City of Santa Maria*, 886 F.2d 1228, 1231-32 (9th Cir. 1989); *Charles v. Daley*, 799 F.2d 343, 346-47 (7th Cir. 1986). These courts reason that, when a post-judgment motion is denied, the original judgment remains in effect, and therefore entry of the order denying the motion on a separate document is unnecessary. When a post-judgment motion is granted, the original judgment is

generally altered or amended, and the altered or amended judgment should be set forth on a separate document.

Finally, the Eleventh Circuit holds that the separate document requirement does not apply to *any* order that grants or denies a post-judgment motion, whether or not the order is one from which an appeal lies. Indeed, according to the Eleventh Circuit, the separate document requirement does not even apply to an altered or amended judgment. *See Wright v. Preferred Research, Inc.*, 937 F.2d 1556, 1560-61 (11th Cir. 1991).

Rule 4(a)(7) has been amended to adopt the first of these four approaches. Under the amended rule, a judgment or order is treated as entered under Rule 4(a)(7) when it is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a), with one exception: If *Fed. R. Civ. P. 54(a) and 58* require that a particular judgment or order must be set forth on a separate document, then that judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or, as explained below, until 150 days after its entry in the civil docket). Thus, whether an order disposing of a post-judgment motion must be set forth on a separate document before it is treated as entered depends entirely on whether the order is one "from which an appeal lies" under the law of the relevant circuit. If it is, then Fed. R. Civ. P. 54(a) and 58 require that it be set forth on a separate document, and it will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth (or until 150 days after its entry in the civil docket). If it is not, then it will be treated as entered for purposes of Rule 4(a)(7) as soon as it is entered in the civil docket, whether or not it is also set forth on a separate document.

One additional point of clarification: When a court orders that a judgment be entered (or that a judgment be altered or amended), Fed. R. Civ. P. 54(a) and 58, read literally, would seem to require that *both* the order *and* the judgment be set forth on separate documents. Because the parties can waive entry of the judgment on a separate document (as discussed below), an order for judgment (or an order to alter or amend a judgment) would seem to be "an[] order from which an appeal lies," and thus Fed. R. Civ. P. 54(a) and 58 would seem to require that such an order — as well as any subsequently entered judgment (or altered or amended judgment) — be set forth on a separate document. However, the Advisory Committee is not aware of any case that so holds. Rather, all courts seem to assume that when an order directs that a judgment (or altered or amended judgment) be entered, only the judgment (or altered or amended judgment) needs to be set forth on a separate document. At that point, both the order and the judgment (or altered or amended judgment) should be treated as entered for purposes of Rule 4(a)(7).

2. The second circuit split addressed by the amendment concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58 but is not, does the time to appeal the judgment or order ever begin to run? According to every circuit except the First Circuit, the answer is "no." "A party safely may defer the appeal until Judgment Day if that is how long it takes to enter [the judgment or order on] the [separate] document." *In re Kilgus*, 811 F.2d 1112, 1117 (7th Cir. 1987). The First Circuit, fearing that "long dormant cases could be revived years after the parties had considered them to

be over" if Fed. R. Civ. P. 54(a) and 58 and Rule 4(a)(7) were applied literally, holds that parties will be deemed to have waived their right to have a judgment or order set forth on a separate document three months after the judgment or order is entered in the civil docket. *Fiore*, 960 F.2d at 236. Other circuits have rejected this three month cap as contrary to the relevant rules, *see, e.g.*, *Haynes*, 158 F.3d at 1331; *Hammack v. Baroid Corp.*, 142 F.3d 266, 270 (5th Cir. 1998); *Pack v. Burns Int'l Sec. Serv.*, 130 F.3d 1071, 1072-73 (D.C. Cir. 1997); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc), although no court has questioned the wisdom of imposing such a cap as a matter of policy.

Rule 4(a)(7) has been amended to impose such a cap. As noted above, a judgment or order is treated as entered for purposes of Rule 4(a)(7) when it is entered in the civil docket, unless Fed. R. Civ. P. 54(a) and 58 require the judgment or order to be set forth on a separate document, in which case the judgment or order will not be treated as entered for purposes of Rule 4(a)(7) until it is so set forth. There is one exception: A judgment or order will be treated as entered *for purposes of Rule 4(a)(7)* — notwithstanding anything to the contrary in Federal Rules of Civil Procedure — 150 days after the judgment or order is entered in the civil docket in compliance with Fed. R. Civ. P. 79(a). On the 150th day, the time to appeal the judgment or order will begin to run, even if the judgment or order is one that must otherwise be set forth on a separate document under Fed. R. Civ. P. 54(a) and 58, and even if the judgment or order has not been so set forth.

This cap will ensure that parties will not be given forever to appeal a judgment or order that should have been set forth on a separate document but was not. In the words of the First Circuit, "When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties." *Fiore*, 960 F.2d at 236.

3. The third circuit split addressed by the amendment concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the . . . order . . . represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. *Id.* Such an order would not be "effective" — that is, the time to appeal the order would not begin to run, and thus a potential appellant would not *have* to appeal. However, such an order would be a "final decision" — and thus, a potential appellant *could* appeal if it wanted to.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted *Mallis* waivers and to force appellants to return to the trial court, request entry of judgment on a separate document, and appeal a second time. *See, e.g., Selletti v. Carey*, 173 F.3d 104, 109-10 (2d Cir. 1999); *Williams v. Borg*, 139 F.3d 737, 739-40 (9th Cir.), *cert. denied*, 119 S. Ct. 353 (1998); *Silver Star Enters., Inc. v. M/V Saramacca*, 19 F.3d 1008, 1013 (5th Cir. 1994); *Whittington v. Milby*, 928 F.2d 188, 192 (6th Cir. 1991); *Wang Labs., Inc. v. Applied Computer Sciences, Inc.*, 926 F.2d 92, 96 (1st Cir. 1991); *Anoka Orthopaedic Assocs., P.A. v. Lechner*, 910 F.2d 514, 515 n.2 (8th Cir. 1990); *Long Island Lighting Co. v. Town of Brookhaven*, 889 F.2d 428, 430 (2d Cir. 1989). Other courts disagree and permit *Mallis* waivers even if the appellee objects. *See, e.g., Haynes*, 158 F.3d at 1331; *Miller v. Artistic Cleaners*, 153 F.3d 781, 783-84 (7th Cir. 1998); *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1006 n.8 (3d Cir. 1994); *Mitchell v. Idaho*, 814 F.2d 1404, 1405 (9th Cir. 1987).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive entry of a judgment or order on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without awaiting entry of the judgment or order on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay. The appellant would return to the trial court, ask the court to enter the judgment or order on a separate document, and appeal again. "Wheels would spin for no practical purpose." *Mallis*, 435 U.S. at 385.

4. The final circuit split addressed by the amendment concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days (60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to enter judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit held that the appeal was premature, in that the time to appeal the May 6 order had never begun to run because the May 6 order had not been set forth on a separate document. However, the Fifth Circuit said that it had to dismiss the appeal, rather than consider it on the merits, even though the parties were willing to waive the separate document requirement. The Fifth Circuit reasoned that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). By dismissing the appeal, the Fifth Circuit said, it was giving the plaintiff the opportunity to return to the district court, move for entry of judgment on a separate document, and appeal from that judgment within 30 days. *Id.* at 934. Several other cases have embraced the *Townsend* approach. *See, e.g., Armstrong v. Ahitow*, 36 F.3d 574, 575 (7th Cir. 1994); *Hughes v. Halifax County Sch. Bd.*, 823 F.2d 832, 835-36 (4th Cir. 1987); *Harris v. McCarthy*, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. *See, e.g.*, *Haynes*, 158 F.3d at 1330-31; *Pack*, 130 F.3d at 1073; *Rubin*, 110 F.3d at 1253; *Clough v. Rush*, 959 F.2d 182, 186 (10th Cir. 1992); *McCalden v. California Library Ass'n*, 955 F.2d 1214, 1218-19 (9th Cir. 1990); *Allah v. Superior Court*, 871 F.2d 887, 890 (9th Cir. 1989); *Gregson & Assocs. Architects v. Virgin Islands*, 675 F.2d 589, 593 (3d Cir. 1982) (per curiam). In the view of these courts, the remand in *Townsend* was "precisely the purposeless spinning of wheels abjured by the Court in the [*Mallis*] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

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

APPENDIX

Circuit-By-Circuit Analysis of the Extent to Which the Separate Document Requirement Is Applied to Orders Disposing of Post-Judgment Motions

Trying to determine the extent to which the circuits hold that orders disposing of post-judgment motions must be entered on separate documents is often quite difficult. To begin with, few cases address the question either directly or by implication; apparently, it does not even occur to most judges and litigants that an order disposing of a post-judgment motion might have to be set forth on a separate document. The vast majority of separate document cases involve disputes over underlying judgments. Only rarely do either the parties or the court pause to consider whether an order disposing of a post-judgment motion should be set forth on a separate document.

The few such cases that exist are usually not very helpful. Often, the court proceeds on an assumption — such as the assumption that an order denying a new trial motion must be entered on a separate document — without providing any authority or explanation for that assumption. Other times, the court offers a brief, cryptic explanation. Much of the scant discussion about applying the separate document requirement to orders disposing of post-judgment motions is found in footnotes or in unpublished or per curiam opinions. This is not an issue on which judges have lavished a great deal of attention.

That said, here is my best understanding of where the various circuits stand on application of the separate document requirement to orders disposing of post-judgment motions:

D.C. Circuit. In *United States v. Haynes*,[1] the D.C. Circuit held that an order denying a FRCP 60(b) motion had to be set forth on a separate document.[2] The D.C. Circuit did not look to FRAP 4(a)(7), but instead reached its result solely by parsing FRCP 54(a) and 58:

> The rules seem to compel the view that Rule 58 governs the denial of Haynes's motion for reconsideration. It sets out prerequisites for "judgments." The Rules in turn define "judgment" as including "[a] decree and any order from which an appeal lies." Fed. R. Civ. P. 54. Here, the order in question was the denial of a motion for reconsideration under Rule 60(b), and the government does not dispute the *amicus*'s contention that an appeal lies from a denial of a Rule 60(b) motion. It follows that the denial constitutes a "judgment" within the meaning of the rules.[3]

This excerpt suggests an inclination toward the "incorporation" view of FRAP 4(a)(7). However, later in the opinion, the court hinted that *all* orders that dispose of post-judgment motions might have to be entered on separate documents (a nod toward the "independent" view):

> [A]lthough we share the *amicus*'s doubt that disposition of Rule 4(a)(4) tolling motions should be exempt from Rule 58, that issue may be left for another day. We note in this connection that Fed. R. Civ. P. 4(a)(7) provides that judgments or orders are deemed entered under Rule 4 only when entered in compliance with Fed. R. Civ. P. 58.[4]

First Circuit. In *Fiore v. Washington County Community Mental Health Center*,[5] the First Circuit held that "the separate document requirement applies to all *appealable* post-

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[1]158 F.3d 1327 (D.C. Cir. 1998).

[2]*Id.* at 1329. The D.C. Circuit had previously reached the same conclusion in *Derrington-Bey*, 39 F.3d at 1226.

[3]*Haynes*, 158 F.3d at 1329 (citation omitted).

[4]*Id.* at 1330.

[5]960 F.2d 229 (1st Cir. 1992) (en banc).

judgment orders" by virtue of *FRCP 54(a) and 58*.[6] The First Circuit implied, in rather ambiguous dicta, that the separate document requirement might also apply to all *non-appealable* post-judgment orders by virtue of *FRAP 4(a)(7)*.[7] But the question was one that the First Circuit did not have to confront, because in the First Circuit *all* orders that dispose of post-judgment motions are appealable.[8] (As the First Circuit itself has recognized, its approach to appealability is inconsistent with the approach of most of the other circuits.[9]) In any event, the First Circuit holds that, because all orders disposing of post-judgment motions are appealable, all orders disposing of post-judgment motions must be set forth on separate documents.[10]

Because the First Circuit recognizes that, as a practical matter, judges often do not enter either underlying judgments or orders disposing of post-judgment motions on separate documents — and thus that, as a theoretical matter, the time to appeal has not yet begun to run on thousands

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[6]*Id.* at 231 (emphasis added).

[7]*Id.* at 232-33.

[8]*Id.* ("As with Rule 60(b) denials, we consistently have held that denials of other post-judgment motions challenging the judgment are appealable separately from the appeal of the underlying judgment. Such orders therefore also constitute 'judgments' subject to Rule 58's separate document requirement.") (citations omitted).

[9]*Id.* at 233 n.8 ("We recognize that this approach is at odds with some authority from other circuits, which generally allow review of orders denying post-judgment motions only as part of the appeal from the underlying judgment.") (citations omitted).

[10]*Id.* at 234 ("[W]e adopt a uniform approach applying Rule 58 to all final orders denying and, *a fortiori*, granting post-judgment motions under Rules 50(b), 52(b), 59(b) and (e), and 60(b)."). Several First Circuit cases have applied this approach. *See, e.g., Puerto Rico Aqueduct*, 169 F.3d at 74-75; *Credit Francais Int'l, S.A. v. Bio-Vita, Ltd.*, 78 F.3d 698, 704-05 n.12 (1st Cir. 1996); *Kersey v. Dennison Mfg. Co.*, 3 F.3d 482, 484-85 (1st Cir. 1993).

of cases long ago decided by district courts — the First Circuit imposes a "cap" on the time that a litigant has to appeal an order that should have been entered on a separate document but was not:

> If we were to hold without qualification that a judgment is not final until the court issues a separate document, we would open up the possibility that long dormant cases could be revived years after the parties had considered them to be over. We hasten to shut off that prospect. It is well-established that parties may waive technical application of the separate document requirement. We believe it appropriate, absent exceptional circumstances, to infer waiver where a party fails to act within three months of the court's last order in the case. When a party allows a case to become dormant for such a prolonged period of time, it is reasonable to presume that it views the case as over. A party wishing to pursue an appeal and awaiting the separate document of judgment from the trial court can, and should, within that period file a motion for entry of judgment. This approach will guard against the loss of review for those actually desiring a timely appeal while preventing resurrection of litigation long treated as dead by the parties.[11]

The problem with this three month cap is that it is inconsistent with both the text of the rules and with the Supreme Court's statements in *United States v. Indrelunas*[12] and *Shalala v. Schaefer*.[13] No court — not even the Supreme Court — has "power to rewrite the Rules by

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[11] *Fiore*, 960 F.2d at 236 (citations and footnotes omitted). The First Circuit has applied this cap in subsequent cases. *See, e.g., United States v. Podolsky*, 158 F.3d 12, 15-16 (1st Cir. 1998).

[12] 411 U.S. 216 (1973) (per curiam). In *Indrelunas*, the defendant waited almost two years after the jury returned its verdict, and over nine months after the plaintiff and defendant filed a stipulation specifying the amount of damages to which the plaintiff was entitled, before asking the district court to enter judgment against it on a separate document. *Id.* at 219. The Supreme Court held that the time for the defendant to appeal did not begin to run until that separate judgment was entered. *Id.* at 221-22.

[13] 509 U.S. 292 (1993). In *Schaefer*, the Supreme Court held that a decision of a district court "remained 'appealable'" over four years after the decision was issued because the decision had not been set forth on a separate document. *Id.* at 302-03.

judicial interpretations."[14] For that reason, several circuits have expressly rejected the *Fiore* approach, even though no circuit has disputed that it makes sense as a matter of policy.[15]

Second Circuit. In a recent opinion, the Second Circuit "express[ed] no views as to the application of the separate document requirement of Rule 58 to post-judgment rulings."[16] The court overlooked the fact that it already *had* expressed such views in an earlier case.

In *RR Village Association v. Denver Sewer Corporation,*[17] judgment was entered on April 28, 1986, a timely FRCP 59(e) motion was filed, the motion was granted in an opinion issued on October 6, 1986, an amended judgment was entered on October 23, 1986, and a notice of appeal was filed on November 17, 1986. The Second Circuit held that the notice of appeal was timely because the clock did not begin to run until the amended judgment was entered on a separate document. The Second Circuit's explanation was ambiguous:

> For purposes of the time limitations imposed by Fed. R. App. P. 4(a)(4), an "order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Fed. R. App. P. 4(a)(6). Rule 58 provides that "[e]very judgment shall be set forth on a separate document . . . [, and] is effective only when so set forth. . . ." Fed. R. Civ. P. 58. Rule 54 defines the term "judgment" to include "any order from which an appeal lies." Thus, under Fed. R. App. P. 4(a)(6), an order disposing of

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[14]*Harris v. Nelson*, 394 U.S. 286, 298 (1969).

[15]*See*, e.g., *Haynes*, 158 F.2d at 1331; *Hammack v. Baroid Corp.*, 142 F.3d 266, 270 (5th Cir. 1998); *Pack v. Burns Int'l Sec. Serv.*, 130 F.3d 1071, 1072-73 (D.C. Cir. 1997); *Rubin v. Schottenstein, Zox & Dunn*, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), *vacated on other grounds* 143 F.3d 263 (6th Cir. 1998) (en banc).

[16]*Cooper*, 83 F.3d at 35 n.3.

[17]826 F.2d 1197 (2d Cir. 1987).

a motion under Fed. R. Civ. P. 59 is not effective until set forth on a separate document.[18]

RR Village can be read as either an "incorporation" case or as an "independent" case.

The argument for the "independent" interpretation focuses on the use of the word "disposing" in the passage just quoted. "Disposing" describes both orders *granting* and orders *denying* FRCP 59 motions. While the former are appealable in the Second Circuit, the latter are not,[19] and therefore are not "judgments" for purposes of FRCP 54(a). Thus, in stating that orders "disposing" of FRCP 59 motions must be set forth on separate documents, the Second Circuit could not have been taking the "incorporation" approach, as FRCP 54(a) and 58 would not impose the separate document requirement on orders denying FRCP 59 motions. Two cases cited by the Second Circuit in support of its holding[20] — *Stern v. Shouldice*[21] and *Calhoun v. United States*[22] — bolster this interpretation. As is explained below, both *Stern* and *Calhoun*, although ambiguous themselves, seem to embrace the "independent" interpretation.

The argument for the "incorporation" interpretation focuses on the use of the word "thus" in the quoted passage. The Second Circuit carefully picked through the rules, ending with the definition of "judgment" in FRCP 54(a) as including "any order from which an appeal lies." The next word is "thus," which implies that, *because* the order that was actually before the court — an

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[18] *Id.* at 1200-01.

[19] *See Wheatley v. Beetar*, 637 F.2d 863, 864 n.1 (2d Cir. 1980); *Serzysko v. Chase Manhattan Bank*, 461 F.2d 699, 701 (2d Cir. 1972).

[20] *See RR Village*, 826 F.2d at 1201.

[21] 706 F.2d 742 (6th Cir. 1983).

[22] 647 F.2d 6 (9th Cir. 1981).

order granting a FRCP 59(e) motion — was an order from which an appeal lies, the separate document requirement applied. On this view, the use of the word "disposing" was probably just a poor choice of words; the court should have said "an order *granting* a [FRCP 59] motion" instead of "an order *disposing* of a [FRCP 59] motion." In any event, the court's statement was dicta.

Third Circuit. To my knowledge, the Third Circuit has not issued an opinion on the question whether orders disposing of post-judgment motions must be set forth on separate documents.

Fourth Circuit. In *Caperton v. Beatrice Pocahontas Coal Co.*,[23] an order denying a FRCP 60(b) motion for relief from a judgment was entered on a separate document. In the course of expounding on several "separate document" issues, the Fourth Circuit indicated that this was appropriate — that is, that orders denying FRCP 60(b) motions should be entered on separate documents.[24] Although the court was not entirely clear on the matter, it seemed to reason that because orders denying FRCP 60(b) motions are appealable, they must be entered on separate documents[25] — reflecting an "incorporation" influence.

In a subsequent unpublished opinion, the Fourth Circuit again seemed attracted to the "incorporation" approach. In *Ogle v. Cooke*,[26] the court held that an order denying a FRCP 60(b) motion must be set forth on a separate document. The court explained:

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[23]585 F.2d 683 (4th Cir. 1978).

[24]*Id.* at 691.

[25]*Id.* at 687-91.

[26]No. 88-2009, 1989 WL 5575 (4th Cir. Jan. 25, 1989).

> An order denying a Rule 60 motion, *because it is appealable*, is a judgment within the meaning of Federal Rule of Civil Procedure 54(a). The margin order denying Cooke's Rule 60 motion, however, does not comply with Federal Rule of Civil Procedure 58, which mandates that each judgment be "set forth on a separate document."[27]

Although *Caperton* and *Ogle* can be read as "incorporation" cases, other Fourth Circuit cases are more consistent with the "independent" approach. In several unpublished decisions, the Fourth Circuit has held or quite clearly implied that an order denying a FRCP 59 motion must be entered on a separate document.[28] These cases are inconsistent with the "incorporation" approach, as orders denying FRCP 59 motions are not appealable in the Fourth Circuit.[29] Rather, these holdings can be reached only under the "independent" approach. Thus, there is some inconsistency among Fourth Circuit cases.

Fifth Circuit. The Fifth Circuit's most recent case on the applicability of the separate document requirement to orders disposing of post-judgment motions is *Baker v. Mercedes Benz of North America*.[30] In *Baker*, the district court granted summary judgment to the defendant (Mercedes), but failed to enter judgment on a separate document. The plaintiff filed a notice of appeal more than 30 days after the court issued its opinion. The Fifth Circuit held that, because summary judgment had not been entered on a separate document, the time to appeal had not begun to run. Although the court's holding was straightforward, it dropped a strange footnote in

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[27]*Id.* at *1 n.1 (emphasis added).

[28]*Crawford v. Doe*, No. 87-7192, 1987 WL 39067, at *1 (4th Cir. Nov. 25, 1987); *Williams v. Carver*, No. 87-7220, 1987 WL 38682, at *1 (4th Cir. Sept. 28, 1987); *McDaniel v. Bechtold*, No. 86-7253, 1987 WL 37337, at *1 (4th Cir. Apr. 29, 1987).

[29]*See Campbell v. Hewitt, Coleman & Assocs., Inc.*, 21 F.3d 52, 53 n.1 (4th Cir. 1994).

[30]114 F.3d 57 (5th Cir. 1997).

which, in dicta, it discussed the applicability of the separate document requirement to orders disposing of post-judgment motions (none of which had actually been filed in *Baker*):

> Mercedes cites to *United States v. Kellogg*, 12 F.3d 497 (5th Cir. 1994), and *InterFirst Bank Dallas, N.A. v. F.D.I.C.*, 808 F.2d 1105 (5th Cir. 1987), for the proposition that an order combining an opinion and a ruling on a motion to dismiss satisfies the separate document requirement of Rule 58. We do not find the holdings in these cases dispositive of the issue before us today or inconsistent with our disposition. We have treated differently the cases in which no Rule 58 judgment was entered but which did involve certain Fed. R. App. P. 4(a)(4) post-judgment motions, from those which did not involve Rule 4(a)(4) motions. *Compare, e.g., United States v. Perez*, 736 F.2d 236 (5th Cir.1984) and *Ellison v. Conoco, Inc.*, 950 F.2d 1196 (5th Cir. 1992), *cert. denied*, 509 U.S. 907 (1993) (both apparently holding that appellate timetables begin to run from the granting or denial of certain post-judgment motions enumerated in Fed. R. App. P. 4(a)(4) even without a Rule 58 judgment) *with Theriot v. ASW Well Serv., Inc.*, 951 F.2d 84 (5th Cir. 1992) and *Whitaker v. City of Houston*, 963 F.2d 831 (5th Cir. 1992) (neither involving post-judgment motions and both recognizing that under *Mallis*, neither party is required to appeal from a judgment until a Rule 58 separate document judgment has been entered). The *Perez* and *Ellison* line of cases appears to rely on language in Rule 4(a)(4) to the effect that the time for filing an appeal runs from "the entry of the order disposing" of a post-trial motion, a result arguably inconsistent with Fed. R. App. P. 4(a)(7), which provides that judgments or orders are only deemed "entered" under Rule 4 when entered in compliance with Fed. R. Civ. P. 58.[31]

This footnote is confusing. The court *seems* to understand *Perez* and *Ellison* as holding that all orders disposing of post-judgment motions start the clock running even when they are not entered on separate documents. (This is the Eleventh Circuit's approach, discussed below.) The court also seems to disagree with this "holding," and to believe that all orders disposing of post-judgment motions must be set forth on separate documents before the time to appeal begins to run. (This is the "independent" approach.)

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[31] *Id.* at 60 n.12.

The problem with this footnote is that *Perez* and *Ellison* do not come close to holding what the footnote says they hold. *Ellison* was an extremely complicated case that I will not take the time to summarize, except to note, as the D.C. Circuit did, that "*Ellison* was primarily an application of Rules 4(a)(2) and 4(a)(4) of the Federal Rules of Appellate Procedure as they stood prior to amendment in 1993; ultimately the court saved the appeal by finding Rule 4(a)(2) applicable."[32] It is a stretch to read *Ellison* as holding that the separate document requirement never applies to orders that grant or deny post-judgment motions. *Baker*'s characterization of *Perez* is particularly mystifying, as no post-judgment motion was even *filed* in *Perez*, and the Fifth Circuit intimated no view whatsoever about post-judgment motions.[33]

The Fifth Circuit's position on the application of the separate document requirement to post-judgment motions is thus somewhat of a mystery. We are left with a footnote written by a panel that seemed to embrace the "independent" interpretation, but, based upon an incorrect reading of two prior cases, seemed to understand the Fifth Circuit already to have embraced the Eleventh Circuit approach.

What makes *Baker* even more strange is that it did not even cite a very recent case in which the Fifth Circuit clearly set forth its approach to applying the separate document

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[32]*Haynes*, 158 F.3d at 1330. *Ellison* arose under the former version of FRAP 4(a)(4), which provided that a notice of appeal filed before the "disposition" of a post-judgment motion "shall have no effect." The question for the court was whether a notice of appeal filed after the district court announced an order granting a motion for JNOV but before that new judgment was entered on a separate document was filed before the "disposition" of the JNOV motion. The court held that, at the time the notice of appeal was filed, the JNOV motion had been "disposed" of for purposes of former FRAP 4(a)(4) even though it had not been "entered" for purposes of FRAP 4(a)(6). *See Ellison v. Conoco, Inc.*, 950 F.2d 1196, 1199-1203 (1992).

[33]*See Perez*, 736 F.2d at 237-38.

requirement to orders disposing of post-judgment motions — an approach that is consistent with neither what the *Baker* court *understood* the Fifth Circuit's approach to be nor what the *Baker* court implied that the Fifth Circuit's approach *should* be. In *Marré v. United States*,[34] after judgment was entered, the plaintiffs, unhappy with the amount of the judgment, filed a motion for an amended judgment, or, in the alternative, for a new trial under FRCP 59. Those motions were denied in a minute order that was not set forth on a separate document. On appeal, the *appellee* (the government) sought to have the appeal dismissed as premature, citing the lack of a separate document denying the FRCP 59 motions. The court should have held that, since the separate document requirement was imposed for the benefit of appellants, and since the appellants had brought an appeal without waiting for a separate document, the separate document requirement, if applicable, was waived. Unfortunately, though, the Fifth Circuit is one of those circuits that permit appellees to block waiver of the separate document requirement. Thus, the court had no alternative but to address the question whether the separate document requirement applied. It wrote:

> The government contends that the lack of a separate, written order renders the appeal premature under Fed. R. Civ. P. 58. While Rule 58 clearly requires the entry of a separate, written order, courts generally distinguish between the *granting* of a post-trial motion and the *denial* of a post-trial motion. When the court grants a post-trial Rule 59 motion, it affects the judgment, and its new ruling becomes the final judgment. As such, Rule 58 requires a written order. By contrast, the denial of a post-trial motion leaves the pre-existing judgment unaffected. Thus, there is no need to issue a new judgment.
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> The Seventh, Ninth and Eleventh Circuits have recognized this distinction and do not require a separate, written order for the denial of a post-trial motion. [The court cited *Wright*, *Hollywood*, and *Charles* here, all of which are discussed

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[34]38 F.3d 823 (5th Cir. 1994).

below.] We agree with this approach and deny the government's motion to dismiss.[35]

A couple of things should be noted about *Marré*:

First, *Marré* seems to be what I refer to as a "policy" case — that is, it seems to be more concerned about what would make good policy than about what the rules provide. *Marré* is certainly not an "independent" case (as the separate document requirement was held *not* to apply). *Marré* is also not an "incorporation" case. The plaintiffs in *Marré* seem to have moved under both FRCP 59(a) and 59(e).[36] In the Fifth Circuit, an order denying a FRCP 59(a) new trial motion is not appealable, but an order denying a FRCP 59(e) motion to amend is.[37] Thus, *Marré* held that an order that was appealable (at least in part) did not have to be set forth on a separate document, a result that is at odds with the "incorporation" approach.

Second, even if one treats the question purely as a matter of policy, the Fifth Circuit's approach is debatable. The sole purpose of the separate document requirement is to ensure that the prospective appellant receives a clear signal that the time to appeal has begun to run. The denial of a post-trial motion should be signaled as clearly as the entry of an underlying judgment, as both trigger the time to appeal. However, just as is true with the entry of an underlying judgment, it is not always clear when a district court has finally disposed of a post-judgment

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[35]*Id.* at 825.

[36]*See id.*

[37]*See Government Fin. Serv.*, 62 F.3d at 774; *Osterberger v. Relocation Realty Serv. Corp.*, 921 F.2d 72, 73 (5th Cir. 1991); *Youmans*, 791 F.2d at 349; *Carpenter v. Klosters Rederi A/S*, 604 F.2d 11, 12 (5th Cir. 1979). I am not aware of another circuit that treats the appealability of orders denying FRCP 59(a) motions differently from the appealability of orders denying FRCP 59(e) motions.

motion. In *Chambers v. American Trans Air, Inc.*,[38] for example, Judge Posner had to struggle to determine which of two ambiguous orders "[wa]s the order denying the plaintiff's Rule 59 motions and hence starting the 30-day period for an appeal running."[39]

The First Circuit criticized the "policy" approach embraced by *Marré*:

> Under Fed. R. App. P. 4(a), timely motions under Rules 50(b), 52(b) and 59 suspend the finality of the original judgment, and the time for appeal from both that judgment and denial of the motions runs from the entry of the order denying the motions. Thus, as in the 60(b) context, the separate document setting forth the original judgment is of no help in determining the precise date on which the time to appeal begins to run. The significant date is the date of the order denying the motion. Because Rule 58's purpose is to ensure that that date is precisely clear, the separate document requirement must apply to such orders.
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> We recognize that the type of uncertainty that prompted the separate document rule is less likely to occur with respect to post-judgment orders than for initial judgments. . . . Because post-judgment motions typically will be narrowly focused and fairly specific in defining the relief sought, a brief order disposing of such motions more likely would be the court's last word on the case, and to be understood as such. . . .
>
> Nonetheless, some risk of uncertainty always will exist. When a court denies a motion by an informal notation such as that used in this case, the parties may anticipate a memorandum explaining the court's ruling.[40]

Finally, I should note that one of the three cases cited by *Marré* as supporting its holding does no such thing. In *Wright v. Preferred Research, Inc.*,[41] the Eleventh Circuit held that

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[38]990 F.2d 317 (7th Cir. 1993).

[39]*Id.* at 318.

[40]*Fiore*, 960 F.2d at 234; *see also Haynes*, 158 F.3d at 1329 ("As an appealable event, denial of a Rule 60(b) motion generates, so far as we can see, no less risk of party confusion than does issuance of a garden-variety suit-terminating order, so the separate document requirement is as clarifying in the one context as in the other.").

[41]937 F.2d 1556 (11th Cir. 1991).

nothing entered after the original judgment — not any order, not any amended judgment — has to be set forth on a separate document.[42] Thus, *Wright* actually conflicts with *Marré*.

Two other Fifth Circuit cases deserve mention. In *InterFirst Bank Dallas, N.A. v. FDIC*,[43] the court held that an order granting a FRCP 59(e) motion to amend the judgment must be entered on a separate document,[44] and in *Jones v. Celotex Corp.*,[45] the court held that an order granting a JNOV motion must be entered on a separate document.[46] Neither case explained it holding, and neither case intimated a view as the whether the separate document requirement applies when post-judgment motions are denied.

Sixth Circuit. The most recent published decision of the Sixth Circuit that addresses the application of the separate document requirement to orders disposing of post-judgment motions is *Whittington v. Milby*.[47] After the district court dismissed a complaint, the plaintiff filed various post-judgment motions, including motions to vacate the judgment and to make additional findings. The district court denied the motions in an order dated September 28, 1989. The Sixth Circuit held that the separate document requirement applied to the order denying the post-judgment motions, but its reasoning was murky: "[T]he district court failed to comply with the 'separate document' rule of Fed. R. Civ. P. 58 when it issued its September 28th order, thereby

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[42]*Id.* at 1560-61.

[43]808 F.2d 1105 (5th Cir. 1987).

[44]*Id.* at 1108.

[45]857 F.2d 273 (5th Cir. 1988).

[46]*Id.* at 274-75.

[47]928 F.2d 188 (6th Cir. 1991).

precluding that order from being an appealable 'judgment' within the meaning of the Federal Rules."[48]

This is incorrect. An order can be appealable — and therefore be a "judgment" — before it is entered on a separate document. Under *Mallis*, a court must look to jurisdictional statutes — such as § 1291 — to determine if an order is appealable. If it is, then an appeal can be brought at any time. However, if the order is appealable, it is also a "judgment" for purposes of FRCP 54(a), and therefore, under FRAP 4(a)(7) and FRCP 58, the parties do not *have* to appeal until the order is entered on a separate document. *Whittington* gets this wrong. Although the case clearly holds that the separate document requirement applies to an order denying post-judgment motions, it does not satisfactorily explain why.

The same could be said of an earlier Sixth Circuit case, *Stern v. Shouldice*.[49] After judgment was entered on a jury verdict, the plaintiff filed timely motions for prejudgment interest, costs, and attorneys fees. The district court, treating the motions as FRCP 59(e) motions to alter or amend the judgment, issued an opinion granting the motions on January 15, 1981, and an amended judgment on February 12, 1981. The Sixth Circuit held that the notice of appeal of the defendants, filed on March 6, 1981, was timely, because the time to appeal did not begin to run until the amended judgment was entered on February 12. The explanation of the Sixth Circuit seemed to embrace the "independent" interpretation of FRAP 4(a)(7):

> FRAP 4(a)(4) . . . provides in part that the thirty-day appeal period for all parties runs from the date of entry of the order granting *or denying* a Federal Rule of Civil Procedure (FRCP) 59 motion for amended judgment. FRAP 4(a)(6) states that

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[48]*Id.* at 192.

[49]706 F.2d 742 (6th Cir. 1983).

> such a judgment [sic] is "entered" when there is compliance with FRCP 58 and 79(a), *i.e.*, a separate document is entered on the docket. In the present case, the assessment of pre-judgment interest, costs and attorney's fees was entered for purposes of FRAP 4(a)(6) on February 12, 1981. The notice of appeal was filed on March 6, 1981. Consequently . . . defendant's appeal was timely.[50]

In the Sixth Circuit, an order *denying* a FRCP 59 motion is not appealable[51]; thus, if the Sixth Circuit meant what it said when it wrote that an order granting *or denying* a FRCP 59 motion must be set forth on a separate document, it must have embraced the "independent" interpretation of FRAP 4(a)(7). None of the other interpretations reach that result.[52]

A series of unpublished opinions issued in related cases by the Sixth Circuit are inconsistent with both *Whittington* and *Stern*. In each of these cases, the Sixth Circuit held that an order denying a post-judgment motion did not have to be entered on a separate document.[53] The court reasoned: "[O]nly the judgment in a case must be entered on a separate document. Fed. R. Civ. P. 58. The Federal Rules do not require the entry of orders on a separate

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[50]*Id.* at 746 (emphasis added).

[51]*See American Employers Ins. Co. v. Metro Reg'l Transit Auth.*, 12 F.3d 591, 594 (6th Cir. 1993); *Peabody Coal Co. v. Local Union No. 1734*, 484 F.2d 78, 81-82 (6th Cir. 1973); *Ford Motor Co. v. Busam Motor Sales, Inc.*, 185 F.2d 531, 533 (6th Cir. 1950).

[52]In *Megay v. Caldwell*, No. 83-3229, 1985 WL 13144, at *1 (6th Cir. Apr. 17, 1985), the Sixth Circuit likewise held that an order denying a timely FRCP 59(e) motion had to be set forth on a separate document.

[53]*See, e.g., May v. Challenger Communications Systems, Inc.*, No. 88-4072, 1989 WL 40166, at *1 (6th Cir. Apr. 18, 1989); *May v. Bertelsman*, No. 88-4111, 1989 WL 25263, at *1 (6th Cir. Mar. 22, 1989); *May v. Fleming Cos., Inc.*, No. 88-4068, 1989 WL 25261, at *1 (6th Cir. Mar. 22, 1989); *May v. Stern*, No. 88-4030, 1989 WL 25524, at *1 (6th Cir. Feb. 24, 1989).

document."[54] This is incorrect; under FRCP 54(a), appealable orders must be entered on separate documents, as the Sixth Circuit itself recognized in other unpublished opinions.[55]

Seventh Circuit. The Seventh Circuit made its position clear in *Charles v. Daley*[56]: Orders that grant post-judgment motions must be entered on a separate document; orders that deny post-judgment motions must not. The court's explanation for its holding — often cited but rarely elaborated upon — was as follows:

> A minute order [that does not qualify as a separate document] suffices when the judge denies a request to alter the judgment, for then the original judgment remains in effect. Here, however, the original judgment has been amended twice, and until the effective judgment is set forth on a separate sheet of paper, the time is suspended.[57]

The result in *Charles* is certainly compatible with the "incorporation" interpretation, as orders granting post-judgment relief are appealable in the Seventh Circuit, while orders denying post-judgment relief are not.[58] However, appealability did not seem to concern the Seventh Circuit. The court did not even cite FRCP 54(a) or FRAP 4(a)(7), and, on the whole, it spent little time looking at the text of rules. The court seemed to reach its conclusion not as a matter of interpretation at all, but rather as a matter of policy.

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[54]*May*, 1989 WL 25263, at *1.

[55]*See, e.g., Ware v. RCA Rubber Co.*, No. 92-3633, 1993 WL 113735, at *3 (6th Cir. Apr. 13, 1993) (holding that, because it is appealable, an order denying a FRCP 60(b) motion must be entered on a separate document).

[56]799 F.2d 343 (7th Cir. 1986).

[57]*Id.* at 347.

[58]*See Johnson v. University of Wisconsin-Milwaukee*, 783 F.2d 59, 61 (7th Cir. 1986); *Foster v. Continental Can Corp.*, 783 F.2d 731, 731 n.1 (7th Cir. 1986); *Bass v. Baltimore & O. Terminal R. Co.*, 142 F.2d 779, 780 (7th Cir. 1944).

The Seventh Circuit has applied *Charles* with little or no elaboration in several subsequent cases.[59]

Eighth Circuit. Until just a few weeks ago, the Eighth Circuit had not spoken on the question of the applicability of the separate document requirement to orders disposing of post-judgment motions. However, in *Copper v. City of Fargo*,[60] the Eighth Circuit held that "the denial of a motion for a new trial leaving the old judgment unaffected does not fall under Rule 58."[61] The Eighth Circuit's sole explanation for this holding was a citation to the Fifth Circuit's opinion in *Marré*. Although the result in *Copper* is consistent with the "incorporation" approach,[62] it appears more likely that the Eighth Circuit meant to signal its acceptance of the *Charles/Marré* "policy" approach.

Ninth Circuit. The position of the Ninth Circuit is incomprehensible. Indeed, Wright, Miller, and Cooper use two Ninth Circuit cases — *Hard v. Burlington Northern Railroad*

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[59]*See, e.g.*, *Chambers*, 990 F.3d at 318 ("There is no requirement in this circuit that the order denying the [FRCP 59 motions for a new trial and to alter or amend the judgment] comply with Rule 58."); *Wikoff*, 897 F.2d at 236 ("'A minute order [that does not qualify as a separate document] suffices when the judge denies a request to alter the judgment, for then the original judgment remains intact.' However, when the court grants a Rule 59(e) motion, thus rendering a 'new judgment,' Rule 58 requires that the new judgment be set forth on a separate document.") (citation omitted).

[60]No. 98-2144, 1999 WL 516758 (8th Cir. July 22, 1999) (per curiam).

[61]*Id.* at *3.

[62]In the Eighth Circuit, orders denying FRCP 59 motions are not appealable and therefore are not "judgments" under FRCP 54(a). *See Sanders v. Clemco Indus.*, 862 F.2d 161, 164-65 n.3 (8th Cir. 1988); *Champeau v. Fruehauf Corp.*, 814 F.2d 1271, 1273 n.1 (8th Cir. 1987); *McGowne v. Challenge-Cook Bros., Inc.*, 672 F.2d 652, 659 (8th Cir. 1982).

Company[63] and *Hollywood v. City of Santa Maria*[64] — to illustrate their assertion that "[t]he caselaw is in disarray on how the requirement of entry on a separate document is to be applied in the context of postjudgment motions."[65] Actually, the mess starts before *Hard* and *Hollywood*, at least as early as *Calhoun v. United States*.[66]

In *Calhoun*, a plaintiff filed a timely FRCP 59(e) motion after a judgment was entered against him. The district court denied the motion in a minute order that did not qualify as a separate document for purposes of FRCP 58. The plaintiff filed a notice of appeal over two months later. The Ninth Circuit held that the appeal was timely — indeed, premature — because the district court's failure to enter the order denying the FRCP 59(e) motion on a separate document meant that the time to appeal had never begun to run:

> A judgment or order is not entered within the meaning of Fed. R. App. P. 4(a)(1) or (4) unless it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure. Fed. R. App. P. 4(a)(6) expressly so provides. Thus, we must determine whether the district court's disposition of the Rule 59 motion is contained in a separate order . . . . We conclude [that it is not].[67]

Calhoun rather clearly held that an order denying a FRCP 59(e) motion must be set forth on a separate document. It is far from clear why, though. In the Ninth Circuit, denials of FRCP

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[63]870 F.2d 1454 (9th Cir. 1989).

[64]886 F.2d 1228 (9th Cir. 1989).

[65]16A WRIGHT ET AL., *supra note* 55, § 3950.2, at 122.

[66]647 F.2d 6 (9th Cir. 1981).

[67]*Id.* at 8-9 (footnote omitted).

59 motions appear to be appealable,[68] although there is authority to the contrary.[69] However, the appealability of orders denying FRCP 59(e) motions did not seem significant to the *Calhoun* court; the court didn't even mention the issue. Rather, the court seemed to adopt what I've called the "independent" interpretation of FRAP 4(a)(7) — that is, the court seemed to assume that all orders disposing of all post-judgment motions had to be entered on separate documents. The opinion is unclear, however.

Next comes *Hard*.[70] In *Hard*, the appellant filed a notice of appeal 33 days after the district court issued an order denying his motion for a new trial. The Ninth Circuit again held that the appeal was not barred — indeed, that it was premature — because the order denying the new trial motion had not been entered on a separate document and thus the time to appeal never began to run.[71] The new trial motion was based upon evidence that came to light after the original judgment had been entered, so under the case law of all of the circuits, the order denying the

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[68]*See Stephenson v. Calpine Conifers II, Ltd.*, 652 F.2d 808, 811 (9th Cir. 1981), *overruled on other grounds In re Washington Pub. Power Supply Sys. Sec. Litig.*, 823 F.2d 1349 (9th Cir. 1987) (en banc); *Walker v. Bank of Am. Nat'l Trust & Savings Ass'n*, 268 F.2d 16, 25 (9th Cir. 1959).

[69]*See State Farm Mut. Auto. Ins. Co. v. Palmer*, 225 F.2d 876, 877-78 (9th Cir. 1955), *rev'd on other grounds*, 350 U.S. 944 (1956); *Libby, McNeill & Libby v. Alaska Indus. Bd.*, 215 F.2d 781, 782 (9th Cir. 1954).

[70]Actually, next came *Taylor Rental Corp. v. Oakley*, 764 F.2d 720, 721 (9th Cir. 1985) — in which the Ninth Circuit held, without explanation, that an order denying a FRCP 59(a) motion for a new trial and a FRCP 52(b) motion to amend findings of fact must be set forth on a separate document "as required by Rule 58" — and *Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 753-55 (9th Cir. 1986) — in which the Ninth Circuit clearly assumed, without explanation, that an order denying a FRCP 59(a) motion had to be set forth on a separate document.

[71]870 F.2d at 1457-58.

motion was appealable.[72] However, the fact that the order was itself appealable was not mentioned by the Ninth Circuit. Rather, the court seemed to assume that, under FRAP 4(a)(7), all orders disposing of post-judgment motions had to be entered on separate documents. This appears to be another "independent" case, but again the analysis was both brief and cryptic.

After twice holding that an order denying a FRCP 59 motion had to be set forth on a separate document, the Ninth Circuit reversed course in *Hollywood*. The court seemed to take the "policy" approach of *Charles* and *Marré*, holding, more as a matter of policy than as a matter of interpretation, that when a FRCP 59(e) motion is granted, the time to appeal does not begin to run until the altered or amended judgment is entered on a separate document. However, when a FRCP 59(e) motion is denied, the time to appeal begins to run when the order is entered in the civil docket, whether or not the order is also set forth on a separate document.[73] The court explained:

> In the context of final judgments, the requirement that the dispositive document be distinct from any opinion serves to eliminate confusion as to which order ends the litigation. No comparable risk of confusion exists with respect to an order denying a motion for a new trial where the order is properly entered on the docket sheet.
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> In this case, as is generally the case in the Rule 59 context, the order denying the motion for a new trial definitively signaled the end of the litigation.[74]

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[72] *See supra* note 65.

[73] 886 F.2d at 1231-32.

[74] *Id.* at 1232 (citation omitted).

The *Hollywood* panel did not even mention *Hard*, and it mentioned *Calhoun* only briefly, in passing, in connection with an unrelated point. The omission is baffling, as *Calhoun* and *Hard* directly controlled the issue before the court in *Hollywood*.

As it stands, the three cases cannot be reconciled. If the Ninth Circuit had adopted the majority rule regarding the appealability of orders denying FRCP 59 motions (such orders are not appealable, unless based on evidence that comes to light after entry of the underlying judgment), then *Hollywood* and *Hard* could be reconciled under the "incorporation" interpretation of FRAP 4(a)(7). The FRCP 59 motion in *Hollywood* was not based on newly discovered evidence, and thus the order denying the motion was not appealable (under the majority view), while the FRCP 59 motion in *Hard* was based upon newly discovered evidence, and thus the order denying the motion was appealable. Under FRCP 58, the separate document requirement would apply to the latter but not the former.

There are two problems with this attempted reconciliation of *Hard* and *Hollywood*. First, it doesn't account for *Calhoun*, which would be inconsistent with *Hollywood* even if the Ninth Circuit had adopted the majority rule on the appealabilty of orders denying FRCP 59 motions. Second, the Ninth Circuit appears *not* to have adopted the majority rule. Instead, like the First Circuit, it seems to hold that *all* orders denying FRCP 59 motions are appealable.[75] If that's true, then it is impossible to reconcile *Hollywood* with either *Calhoun* or *Hard*. All three involved the question of when the time to appeal an underlying judgment began to run in a case in which a timely FRCP 59 motion was filed. *Calhoun* and *Hard* held that the time did not begin to run until

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[75] *See supra* note 140.

the order denying the motion was set forth on a separate document; *Hollywood* held that the time began to run before the order denying the motion was set forth on a separate document.

A couple of other Ninth Circuit cases deserve mention. First, in *Baker v. Southern Pacific Transportation*,[76] a case that preceded *Calhoun*, *Hard*, and *Hollywood*, the Ninth Circuit found that an order denying a FRCP 60(b) motion for relief from judgment must be entered on a separate document.[77] Once again, little explanation was provided, although the court seemed to imply that because such an order was appealable, the separate document requirement applies.[78] If that was the basis of the court's decision, then *Baker* was an "incorporation" case with which the later cases of *Calhoun* and *Hard* were consistent but *Hollywood* inconsistent. (*Baker* was not cited in any of the three cases.) Second, in *Pacific Employers Insurance Company v. Domino's Pizza, Inc.*,[79] a very recent case, the Ninth Circuit held that an order granting a FRCP 59(e) motion to amend a judgment was required to be set forth on a separate document.[80] No explanation was given.

Tenth Circuit. In *Woods v. Wal-Mart*[81] (an unpublished decision), the Tenth Circuit held that the separate document requirement applied to an order denying a FRCP 60(b) motion, and, in

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[76]542 F.2d 1123 (9th Cir. 1976).

[77]*Id.* at 1127. The Ninth Circuit indicated likewise in *Reliance Ins. Co. v. Lipke*, No. 89-15724, 1991 WL 27330, at *2 (9th Cir. Mar. 4, 1991).

[78]542 F.2d at 1127.

[79]144 F.3d 1270 (9th Cir. 1998).

[80]*Id.* at 1278.

[81]No. 96-1381, 1997 WL 527668 (10th Cir. Aug. 27, 1997).

dicta, suggested that the separate document requirement applies to all other orders denying post-judgment relief: "There is some controversy whether Rule 58 even applies to orders denying post-judgment relief. But we have applied it to the denial of a new trial motion, and, '[b]ecause the underlying principles are closely analogous,' there is good reason 'to adopt a uniform approach for all orders denying post-judgment motions.'"[82]

In *Allen ex rel. Allen v. Horinek*,[83] the Tenth Circuit clearly held that an order denying a FRCP 59 motion must be set forth on a separate document, but did not explain why.[84] Because orders denying FRCP 59 motions do not appear to be appealable in the Tenth Circuit[85] (and thus application of the separate document requirement is not compelled by FRCP 54(a) and 58), the Tenth Circuit seems to have adopted the "independent" interpretation of FRAP 4(a)(7).[86]

I should note that the Tenth Circuit, alone among the circuits, holds that the separate document requirement does not apply to *anything* — including underlying judgments — unless

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[82]*Id.* at *1 n.2 (citations omitted).

[83]827 F.2d 672 (10th Cir. 1987).

[84]*Id.* at 673.

[85]*See Grubb v. FDIC*, 868 F.2d 1151, 1154 n.4 (10th Cir. 1989); *Jones v. Nelson*, 484 F.2d 1165, 1167 (10th Cir. 1973); *Marshall's U.S. Auto Supply, Inc. v. Cashman*, 111 F.2d 140, 141 (10th Cir. 1940) ("An order granting or denying a new trial is not an appealable order.").

[86]One caution: In *Phelps v. Hamilton*, 122 F.3d 885 (10th Cir. 1997), the Tenth Circuit expressly left open the question whether, when the underlying judgment is not set forth on a separate document, a post-judgment motion is nevertheless filed, and that motion is denied in an order that is not set forth on a separate document, the time to appeal the *underlying judgment* begins to run. It did not seem to occur to the Tenth Circuit that the *order denying the post-judgment motion* might itself have to be set forth on a separate document.

there is "uncertainty" about whether the decision is final for purposes of § 1291.[87] The question whether there is uncertainty about the finality of the decision — and therefore whether the separate document requirement even applies — is a question that the Tenth Circuit treats as quite distinct from the question whether the separate document requirement has been met (or waived) if it *does* apply. The Tenth Circuit's position cannot be reconciled with the text of FRCP 54(a) or 58, nor with any of the Supreme Court decisions on the separate document provision.

Eleventh Circuit. In *Wright v. Preferred Research, Inc.*,[88] the Eleventh Circuit held that the separate document requirement applies only to the original or underlying judgment. It does not apply to any order that grants or denies a post-judgment motion, whether or not the order is one from which an appeal lies. It does not even apply to an altered or amended judgment.[89]

Wright involved a complicated set of facts. Only the following is important for our purposes: (1) After a jury trial, judgment was entered (on a separate document) in favor of the plaintiff. (2) The defendant filed timely post-judgment motions. (3) The district court denied the motions, on condition that the plaintiff consent to remittuter. (4) The plaintiff both consented to remittuter and filed a timely FRCP 59 motion challenging the remittuter order. (5) On January 31, 1989, the district court issued an order — not on a separate document — denying the

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[87]*See, e.g., Ladd v. McKune*, No. 95-3264, 1997 WL 153775, at *3 (10th Cir. Apr. 3, 1997); *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1536 (10th Cir. 1995); *Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992); *Slade v. United States Postal Serv.*, 952 F.2d 357, 359 n.1 (10th Cir. 1991).

[88]937 F.2d 1556 (11th Cir. 1991).

[89]*Id.* at 1560-61. The Eleventh Circuit did not cite, much less distinguish, an earlier case that pretty clearly assumed — if not actually held — that an order denying a post-judgment "motion for clarification" (best characterized as a FRCP 59(e) motion) had to be entered on a separate document. *See Kent*, 815 F.2d at 1397.

plaintiff's FRCP 59 motion. (6) Several months later, the parties, recognizing that the district court had never entered an amended judgment reflecting the remittuter, jointly requested entry of such a judgment on a separate document. (7) On December 1, 1989, the district court complied with the parties' request and entered the amended judgment on a separate document. (8) On December 21, 1989, the defendant filed a notice of appeal from the amended judgment.

The Eleventh Circuit held that the notice of appeal was untimely. According to the court, the time to appeal the amended judgment began to run on January 31, 1989, long before the amended judgment was entered.[90] The Eleventh Circuit first found that nothing in either the FRCP or FRAP addressed the question whether the separate document requirement applied to amended judgments. The court quoted FRCP 58 — including the sentence that provides that "*[e]very* judgment shall be set forth on a separate document" — but found that FRCP 58 did not answer the question. Indeed, the Eleventh Circuit said, "The absence of any mention of *remittted* or *amended* judgments is one indication that the rule does not apply to amended judgments."[91]

This is akin to quoting a rule providing that "every truck driver must be licensed" and concluding that "the absence of any mention of truck drivers named 'Larry' is one indication that the rule does not apply to them." More importantly, it ignores the fact that "judgment" is defined in FRCP 54(a), and defined in such a way that clearly includes amended judgments. The Eleventh Circuit did not give any indication that it was aware of FRCP 54(a). Likewise, the Eleventh Circuit did not give any indication that it was aware of FRAP 4(a)(7), which also directly

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[90]937 F.2d at 1560-61.

[91]*Id.* at 1558 (emphasis added).

addressed the question before the court. As a example of interpreting rules, *Wright* leaves much to be desired.

Having found no help in either the FRCP or FRAP, the *Wright* court decided that it was free to take "a practical, common sense approach" to the question whether amended judgments should be set forth on separate documents.[92] It saw itself as having three choices. First, it could hold that an amended judgment must always be entered on a separate document, even if it differs in only minor respects from the original judgment. It rejected this approach because it "potentially would revive litigation long considered dead by the litigants."[93] Importantly for our purposes, the Eleventh Circuit said:

> [W]e suppose one could argue that requiring a second separate document for all changes, however inconsequential, enhances certainty because it provides a clear signal to the litigants that the time for appeal has begun to run anew. That is, that such a requirement will notify even the most dilatory litigant that it is time to file his notice of appeal. The logical extension of that reasoning, however, is that Rule 58 requires a new separate document even when the district court *denies* a post-judgment motion, since such a requirement would provide a signal that the time for appeal has begun to run again. This interpretation goes far beyond the scope and purpose of Rule 58 and we decline to adopt it.[94]

The Eleventh Circuit did not explain why providing a clear signal that the time to appeal has begun to run — which the Supreme Court has characterized as the "sole purpose of the separate-document requirement"[95] — "goes far beyond the scope and purpose of Rule 58."

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[92]*Id.* at 1560.

[93]*Id.*

[94]*Id.*

[95]*Mallis*, 435 U.S. at 384 .

The second option that the Eleventh Circuit rejected was requiring that amended judgments be entered on separate documents only when they represent a significant change from the original judgment. This rule, the court said, would create too much uncertainty, as courts and litigants would have to speculate about what changes were significant enough to require a separate document.[96]

That left the Eleventh Circuit with a third option: holding that amended judgments never need to be entered on separate documents. This, the court decided, was the preferable approach. The Eleventh Circuit assumed (without explanation) that orders *denying* post-judgment motions never have to be set forth on separate documents and argued that it would promote certainty to treat orders *granting* post-judgment motions the same way.[97] Thus, "we think the proper rule is that Rule 58 does not require a district court to enter another separate document whenever it amends, remits or in any way alters a judgment that has already been entered once in accordance with Rule 58."[98]

To my knowledge, no decision of any court has adopted the *Wright* approach. Several courts have expressly disagreed with it.[99]

Federal Circuit. As far as I can tell, the Federal Circuit has not expressed a view on the applicability of the separate document requirement to orders disposing of post-judgment motions.

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[96]937 F.2d at 1560.

[97]*Id.* at 1561.

[98]*Id.*

[99]*See, e.g.*, *Fiore*, 960 F.2d at 231 n.2, 233.

In sum, the courts of appeals seem to have taken four different approaches in determining whether orders disposing of post-judgment motions must be entered on separate documents: the "incorporation" approach, the "independent" approach, the "policy" approach, and the Eleventh Circuit approach.

MEMORANDUM

DATE: August 25, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item Nos. 97-05, 99-01

Attached is a draft amendment to Rule 24(a)(2), which was approved by the Committee at its April 1998 meeting, and a draft amendment to Rule 24(a)(3), which is designed to implement a decision made by the Committee at its April 1999 meeting. Both amendments attempt to resolve conflicts between Rule 24 and the Prison Litigation Reform Act ("PLRA"). The precise nature of the conflicts is described in the draft Committee Notes.

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, unless the law requires otherwise. 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

(A) 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~~ and states in writing its reasons for the certification or finding; or

(B) the law requires otherwise.

Committee Note

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

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

Subdivision (a)(3). Rule 24(a)(3) has also been amended to eliminate an apparent conflict with the PLRA. Rule 24(a)(3) provides that a party who was permitted to proceed in forma pauperis in the district court may continue to proceed in forma pauperis in the court of appeals without further authorization, subject to certain conditions. The PLRA, by contrast, provides that a prisoner who was permitted to proceed in forma pauperis in the district court and who wishes to continue to proceed in forma pauperis on appeal may not do so "automatically," but must seek permission. *See, e.g.*, *Morgan v. Haro*, 112 F.3d 788, 789 (5th Cir. 1997) ("A prisoner who seeks to proceed IFP on appeal must obtain leave to so proceed despite proceeding IFP in the district court.").

Rule 24(a)(3) has been amended to resolve this conflict. Again, recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(3) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

IV-C

MEMORANDUM

DATE: August 26, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 98-11

Attached is a draft amendment to Rule 5(c), which implements a change approved by the Committee at its April 1999 meeting. The purpose of the amendment is described in the draft Committee Note.

Rule 5. Appeal by Permission

(c) Form of Papers; Number of Copies. All papers must conform to Rule ~~32(a)(1)~~ 32(c)(2). An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case.

Committee Note

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

IV-D

MEMORANDUM

DATE: August 31, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

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

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

The Committee approved this amendment and Committee Note at its April 1998 meeting for submission to the Standing Committee in January 2000. However, Judge Garwood would like to discuss whether the amendment should be held back. He has several concerns. First, Judge Garwood and others have suggested to the Standing Committee that amending any of the rules of practice and procedure to prescribe a uniform effective date for changes to local rules might violate 28 U.S.C. § 2071(b), which provides that a local rule "shall take effect upon the date specified by the prescribing court." Second, a couple members of this Committee have been troubled by the Administrative Office's assertion that conditioning the enforcement of local rules upon their receipt by the A.O. would trigger a flood of inquiries to the A.O. Finally, this Committee has moved more quickly on these issues than the other advisory committees, and thus the other advisory committees have not yet considered the § 2071(b) issue or other possible problems.

For all of these reasons, Judge Garwood intends to ask the Committee whether the amendment to Rule 47(a)(1) should be presented to the Standing Committee in January, as originally planned, or instead be held back pending further action by the other advisory committees and/or the Standing Committee. If the amendment is held back, Judge Garwood would inform the Standing Committee of that fact and of the reasons for that action.

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) **Adoption and Amendment.**

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

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

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

Committee Note

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

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

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

IV-E

MEMORANDUM

DATE: August 31, 1999

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Items to Be Submitted to Standing Committee in January 2000

Attached are all of the amendments and Committee Notes that this Committee approved at its September 1997, April 1998, October 1998, and April 1999 meetings, with the exception of an amendment to Rule 47(a)(1) (which is discussed in a separate memorandum). Judge Garwood intends to ask the Committee to formally approve these amendments and Committee Notes for submission to the Standing Committee at its January 2000 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.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

Committee Note

Subdivision 4(a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations in Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character

as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, ___ (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

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 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.

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 27. Motions

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

(1) **Format.**

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

Committee Note

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

Rule 28. Briefs

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

Committee Note

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

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

Rule 31. Serving and Filing Briefs

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

Advisory Committee Note

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

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

(a) Form of a Brief.

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

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

(B) the name of the court;

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

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

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

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

Committee Note

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

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

(a) Form of Brief.

(7) **Length.**

(C) **Certificate of compliance.**

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

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(i).

Committee Note

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

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

(c) Form of Other Papers.

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

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

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~; and~~. If a cover is used, it must be white.

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

Committee Note

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

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

(d) Signature. Every brief, motion, or other paper 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).

(de) 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, or other paper filed with the court 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. (An appendix filed with the court does not have to be signed.) 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).

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.

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

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

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

Committee Note

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

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

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

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

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

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

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

□ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

□ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

□ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

V-A

Memorandum

To: Subcommittee on Attorney Conduct Rules

From: Daniel R. Coquillette, Reporter

Date: September 8, 1999

Re: Update Since May 4, 1999 Meeting

Introduction

This Committee was established by the Standing Committee for two purposes: 1) to see if the hundreds of inconsistent federal local rules on attorney conduct can be reduced to one or more uniform rules (returning most of the regulated issues to state control), and 2) to address concerns raised in Congress about attorney conduct in federal courts.

Recent events have emphasized both concerns. At its meeting on June 14-15, 1999, in Boston, the Standing Committee reconfirmed its prior unanimous vote to address the growing number of federal local rules by reestablishing the Local Rules Project. A full time Director, Mary P. Squiers, has been appointed. This was partly in response to growing pressure from professional groups, particularly the American Bar Association Section on Litigation. This important group is preparing a report to the ABA House of Delegates strongly criticizing adoption of inconsistent local rules "except under circumstances involving logistics that manifestly call for local deviation." Draft Recommendation 4. Hundreds of these local rules concern attorney conduct.

There has also been heightened activity in Congress. Two bills were filed earlier in the year: Senate Bill 250 (January 19, 1999) and Senate Bill 855 (April 21, 1999). See Appendices 1 and 2, attached. In June there was nearly a third and tougher bill, the "Professional Standards for Government Attorneys Act of 1999," to have been attached to the Omnibus Appropriations Bill, without discussion. Section 3 of that bill would have required the Judicial Conference to file two reports on attorney conduct issues. See Appendix 3, Section 3. Section 3(a) of the bill would have stated that: "to encourage the Supreme Court to prescribe, under Chapter 131, a uniform national rule for Government attorneys with respect to communication with represented persons and parties, not later than one year after the date of the enactment of this Act, the Judicial Conference of the United States shall submit to the Chief Justice of the United States a report,

Procedure to provide for such a uniform national rule." *Id.* Section 3(a). The bill would also have required a second, more sweeping report:

> "(b) Not later than 2 years after the date of enactment of this Act, the Judicial Conference of the United States shall submit to the Chairmen and Ranking Members of the Committees on the Judiciary of the House of Representatives and the Senate, a report, which shall include–
>
> (1) a review of any areas of actual or potential conflict between specific Federal duties related to the investigation and prosecution of violations of Federal law and the regulation of Government attorneys (as that term is defined in section 530B of title 28, United States Code) by existing standards of professional conduct; and
>
> (2) recommendations with respect to amending the Federal Rules of Practice and Procedure to provide for additional rules governing attorney conduct to address any areas of actual or potential conflict pursuant to the review under paragraph (1)."
>
> *Id.* Section 3(b).

This bill was never formally filed, but we have been reliably informed that a similar bill will be filed this fall.

Recommended Action

Based on the discussion at the Committee's last meeting on May 4, 1999, Professor Cooper has drafted a uniform federal rule, designed to be adopted through the Rules Enabling Act procedures, 28 U.S.C. § 2073-2074. This draft rule is attached behind *Materials*, tab 4. The rule would supercede most federal local rules and, with narrow exceptions relating to procedures in federal courts, would adopt a "dynamic state standard" to regulate attorney conduct in all federal courts. Thus, it would return to state regulation most attorney activities in federal courts, and would remove from the rule books several hundred problematic and inconsistent local federal rules. See full discussion in *Working Papers of the Committee on Rules of Practice and Procedure: Special Studies of Federal Rules Governing Attorney Conduct*, September, 1997, 1-96.

But Professor Cooper's draft rule would also permit for limited federal regulation in certain core procedural areas of special concern to federal courts. The specific content of such additional rules could be established by local rules, federal common law, or by additional uniform rules. This would address the concerns raised by Judge Roll's thoughtful letter of August 9, 1999, "Concerns regarding Referral of All Attorney Misconduct Matters to the State Bar," included as Appendix 5 to these *Materials*. This would also provide the "space" necessary to address the Congressional concerns outlined in senate Bills 250 (January 19, 1999) and 855

(April 21, 1999) and even to perform the reports and recommend the rules suggested by the draft "Professional Standards for Government Attorneys Act of 1999" circulated in June.*

There has been a recent example of the consequences of failure to act. The United States District Court for the District of Colorado has been a model of good rulemaking conduct. The Colorado District Court local rules were promptly renumbered pursuant to the new F.R. Civ. P. 83 in the uniform way, and the District adopted a "dynamic state conformity" rule that is consistent with many other districts and, of course, ensures consistency within the state itself. See D.C. Colo. LR 83.6. On June 30, 1999, however, the Court adopted an Administrative Order 1999-6, attached as Appendix 4 to these *Materials*. This Order carved out four important exceptions to dynamic state conformity. According to the Court, recent changes in the Colorado rules by the Colorado Supreme Court "are not consistent with Fed. R. Civ. P. 11 and are also inconsistent with the view of the judges of this court concerning the ethical responsibility of members of the bar of this court." See *Materials*, Appendix 4. Now practitioners consulting the uniformly numbered local rule D.C. Colo. LR 83.6 will be actually misled as to the true state of the law in the Colorado District Court. More importantly, the concerns of the Colorado District Court are far better addressed within the parameters of Professor Cooper's draft rule, rather than in this *ad hoc* manner.

Proposed Schedule

If this Committee can reach a consensus about some version of Professor Cooper's proposed rule, the draft could be informally discussed at the Civil Rules Advisory Committee Meeting in Kennebunkport, Maine, on October 14-15, 1999 and at the Appellate Rules Advisory Committee Meeting in Tuscon, Arizona, on October 21-22, 1999. These advisory committees are, of course, the ones most closely concerned by Professor Cooper's draft. Input could also be obtained from the other Reporters and Chairs, although the Bankruptcy Advisory Committee was required to meet before this Committee. Of course, Professor Daniel Capra, Reporter to the Evidence Rules Advisory Committee, Professor Patrick Schlitz, Reporter to the Appellate Rules

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* As Professor Cooper has observed,

> "The reasonable procedural needs of federal courts are not likely to collide with reasonable state rules of professional responsibility. When a collision does occur, however, federal control of federal procedure should prevail."
>
> Memorandum of June 11, 1999, page 6.

Professor Cooper also notes that uniform federal rules can be adopted in the future within the parameters set out by his proposed rule, but that this should be done with caution. In particular, concerns of the Department of Justice that directly relate to judicial procedure could be addressed in this way, but might be better handled by direct Congressional action. Further, in some cases it might be better to have additional Federal Rules of Attorney Conduct, beyond the proposed Rule 1, and in others it would be better to add a rule within the existing rule systems.

> "The Criminal Rules, for example, seem the obvious place to address problems of disclosing information that favors a grand jury target or of subpoenaing attorney information for a grand jury. Candor to the tribunal, on the other hand, might fit better in FRAC, recognizing that the rule might include a specific provision for presenting a perjuring criminal defendant."
>
> Memorandum of June 11, 1999, page 7.

Advisory Committee, Professor David Schlueter, Reporter to the Criminal Rules Committee, and Gerald K. Smith of the Bankruptcy Committee, have already been of great assistance.

Following these discussions, the Standing Committee could consider the draft at its January 6-7, 2000 meeting. If all went well, the final draft would go out for consideration on the formal agendas of all of the Advisory Committees at their spring meetings. At this time special concerns relating to the Bankruptcy and Criminal Committees could be discussed and incorporated, with a report back to the Standing Committee at its June, 2000 meeting. Then, and only then, would publication of the rule be approved.

This is a conservative and deliberate schedule, appropriate for a topic of importance. If required, however, the schedule could be expedited, particularly in response to Congressional needs.

Conclusion

In any area of controversy, there is a temptation to do nothing. The result in this case would be to reverse the Standing Committee's wise decision in 1988 to address local rules on attorney conduct as a single, special task. The alternative, dealing with these local rules on a district by district basis through the Local Rules Project, is a tremendous task of doubtful effectiveness. Doing nothing will also encourage Congress to legislate directly on attorney conduct issues, rather than to proceed through the Rules Enabling Act. In the meantime, hundreds of inconsistent and poorly drafted local rules will remain on the books, largely ignored in practice, confusing to the conscientious lawyer, and, in most instances, regulating matters best left to the traditional state jurisdictions.

Dan Coquillette

Daniel R. Coquillette
Reporter, Committee on Rules of
Practice and Procedure,
Judicial Conference of the United States

September 8, 1999

Preface

My charge was to draft a model Civil Rule 83(c) establishing dynamic conformity with state rules of professional responsibility. I have chosen instead to frame this draft as a revised Rule 1, FRAC. It will be easy to revise it as a Civil Rule provision if that is the course to be taken in the end.

It may make sense to have a single Federal Rule of Attorney conduct even if it is decided not to have any additional rules; the "except as provided in these rules" preface in Rule 1(a)(1) and (2) is easily deleted. One reason not to have any additional rules may be that only clear procedural policies justify adoption of specific federal rules. These procedural policies might better be reflected in specific procedural rules — grand-jury problems, for example, could be addressed in the Criminal Rules. Bankruptcy problems provide a general example. On the other hand, there may be specific topics that cut across the various bodies of procedural rules and that should become FRAC 2 et seq.

The approach taken in this draft includes a thought that may not hold up to close scrutiny by professional responsibility experts. The starting point must be identification of the needs that prompt federal courts to ignore state rules of professional responsibility. As near as I can make out, the needs are procedural. The decisions that have been examined in depth do not involve efforts by federal courts to impose professional discipline. Instead, they involve procedural problems — a conflict of interests is asserted as a basis to disqualify counsel, confidential information arguments are advanced in addressing problems of evidentiary privilege, and so on. It seems to me that federal courts have some interests in these questions that should not be controlled by state rules of professional responsibility. And so, even when local rules invoke state rules of professional responsibility, federal courts often undertake an independent examination of the procedural problems they confront. At the same time, federal judges do not license attorneys, do not want to license attorneys, and have no interest in establishing independent disciplinary bureaucracies.

A recent Law Week summarizes a case that seems a good illustration. Roughly rendered: A law firm (1) is counsel in a subrogation action brought for the insurance company in the name of the insured, and (2) is counsel for the insurance company in a coverage action against the insured. Acting in the coverage action, a federal court refused to disqualify the firm. Although there is a per se rule that bars a lawyer from participating in an action against a client, the relationship to the insured as nominal plaintiff in the subrogation action is too attenuated to invoke the rule. Whether the ruling is wise or not, the federal court's interest in controlling its own proceeding justifies an independent determination. This interest increases as the length and complexity of the proceedings increases the costs of changing counsel. The federal court's ruling, moreover, should protect the law firm against state discipline. See Commercial Union Ins. Co. v. Marco Internat. Corp., S.D.N.Y. No. 98 Civ. 6424 (LAK), 3/30/99, 15 ABA/BNA Lawyers' Manual on Professional Conduct 156, from 67

FEDERAL RULES OF ATTORNEY CONDUCT

Rule 1. Applicable Rules.

(a) Rules of Professional Responsibility

(1) District court. Except as provided in these rules, the professional responsibility of an attorney for conduct in connection with any action or proceeding in a United States District Court is governed by the rules that apply to an attorney admitted to practice in the state where the district court sits.

(2) Court of Appeals. Except as provided in these rules, the professional responsibility of an attorney for conduct in connection with any appeal or proceeding in a United States Court of Appeals is governed:

(A) With respect to any appeal from a district court, and any other proceeding directed to a district court, by the rules that apply to an attorney admitted to practice in the state where the district court sits.

(B) With respect to any other action or proceeding:

(i) if the attorney is admitted to practice only in one state, by the rules of that state, or

(ii) if the attorney is admitted to practice in more than one state, by the rules of the state in which the attorney principally practices, but the rules of another state in which the attorney is licensed to practice govern conduct that has its predominant effect in that state.

(b) Enforcing Professional Responsibility. The rules of professional responsibility that govern under subdivision (a) are enforced by the proper state authority. A United States District Court or Court of Appeals may initiate an investigation of an alleged infraction of a rule of professional responsibility, and — with or without an investigation — may refer any question of professional responsibility to the proper state authority.

(c) Procedure. Federal law governs all matters of procedure in the United States District Courts and Courts of Appeals[, whether addressed by the Federal Rules of *Attorney Conduct*, Appellate Procedure, Bankruptcy Procedure, Civil Procedure, Criminal Procedure, or Evidence; by judicially developed

rules; or by the court in its inherent power]. The court may, after notice and opportunity to be heard, enforce the procedural rules and its orders by all appropriate sanctions, including forfeiture of fees, reprimand, censure, or suspension or revocation of the privilege to appear before the court.

(d) State Sanctions Preempted. No state authority may impose any sanction or other consequence on an attorney for conduct in connection with an action or proceeding in a United States District Court or Court of Appeals if the conduct is authorized by order of the United States court or by the federal rules of procedure that apply under subdivision (c).

Committee Note

The purpose of these rules is to separate issues of professional responsibility from control of the procedure in the United States District Courts and Courts of Appeals. Matters of professional responsibility are allocated to state law. Matters of procedure are controlled by federal law.

Attorneys are licensed by state authorities, not by the United States nor by United States courts. By continuing tradition, rules of professional responsibility have been a matter of state responsibility, not federal responsibility. This tradition has become threatened, however, by the adoption of hundreds of local rules in the district courts and courts of appeals. These rules provide a crazy-quilt pattern that defeats any possibility of national uniformity and that often defeats uniformity within a state. See the extensive studies by the Reporter of the Standing Committee and the Federal Judicial Center published as: *The Working Papers of the Committee on Rules of Practice & Procedure: Special Studies of Federal Rules Governing Attorney Conduct*, September, 1997. [Hereafter *"Working Papers."*] Some local rules are drafted in opaque terms that defy understanding and — if enforcement is attempted — threaten to deny due-process principles of fair notice. See *Working Papers* 3-121. When the time comes for enforcement, moreover, some courts invoke authority outside their local rules and on occasion simply ignore the local rules. See *Working Papers* 3-44, 99-121, 187-193, 235-244. This rule preempts all of these local rules by occupying the field of professional responsibility in the district courts and courts of appeals.

Subdivision (a). The rules that apply with respect to a district court are the rules of the state in which it sits. This approach means that all attorneys involved in any proceeding are governed by the same rules; there is no risk that an attorney for one party may win an advantage over an attorney for another party by exploiting differences in the rules of the different states by which the attorneys are licensed.

This rule does not address all choice-of-law questions. An attorney's involvement with the issues that eventually appear in

litigation commonly begins before litigation. This rule does not choose the law that governs before an action comes to the federal court. Local state rules apply from the moment an action or proceeding comes before the district court. Removal from a state court presents no difficulty — the same rules carry over. If a case is transferred to a district court from another federal court, the rules of the receiving court's state apply when the transfer becomes effective. If actions are consolidated in a single district for pretrial purposes under 28 U.S.C. § 1407, the rules of the multidistrict court's state apply to all proceedings in the multidistrict court. Other situations must be addressed as they arise.

The rules that apply with respect to a court of appeals depend on the nature of the proceeding in the court of appeals. If the proceeding is an appeal or is otherwise directed to a district court, as on petition for an extraordinary writ, the rules are those that apply in the district court. This approach prevents the confusions that might arise when there is a change of counsel or when the parties choose attorneys from different states. Some proceedings in a court of appeals, however, are not directed to a district court. Review of an administrative agency is the most common example, but there are other examples such as contempt proceedings arising from an order entered by the court of appeals. A three-part test applies to these proceedings. If the attorney is admitted to practice in only one state, that state's rules apply. If the attorney is admitted to practice in more than one state, the rules that apply are those of the state where the attorney principally practices, unless the attorney's conduct has its principal effect in another state where the attorney is also licensed.

Subdivision (b). Enforcement of state rules of professional responsibility remains with the proper state authority. Ordinarily the state will be the state whose rules apply under subdivision (a). Only that state can provide an expert and authentic interpretation and application of the controlling rules. If the attorney is licensed in that state, other states should defer to its enforcement decisions to the same extent as they would defer if the attorney's conduct had been undertaken in connection with a court of that state. If another state initiates disciplinary proceedings because the attorney is not admitted to practice in the state of the district court, or does so even though the attorney is admitted to practice in the district court's state, the enforcing state is bound by the choice-of-law rule in subdivision (a).

In considering whether to investigate or refer a professional responsibility question, a district court must be sensitive to the consequences that flow even from an investigation or referral. The court should make its investigation as discreet as possible, and should seize every opportunity for confidentiality in state referral procedures.

Subdivision (c). Subdivision (c) recognizes the fundamental imperative that the federal government must be able to control the procedure in federal courts. A state may not regulate federal procedure through the guise of state rules of

professional responsibility. The distinction between matters of procedure and matters of professional responsibility is as clear at the core, and as uncertain at the edges, as the familiar distinctions that draw lines between procedure and substance. The distinction between procedure and substance reflects different policies, and may yield different results, in such separate contexts as state-state choice of law, federal-state choice of law, and determining the retroactivity of legislation. The policies that separate federal control of federal procedure from state regulation of professional responsibility also are different, although quite similar to the policies that distinguish "substance" from "procedure" under the doctrine of *Erie R.R. v. Tompkins*, 1938, 304 U.S. 64.

Although a federal court is free to regulate its procedure in ways that require departure from the state rules of professional responsibility that govern under subdivision (a), the state rules should be considered in making procedural rulings. Needless affront to state principles should be avoided.

A federal court may enforce procedural requirements by all appropriate sanctions. The sanctions may be those expressly provided in a rule of procedure, such as Appellate Rule 38, or Civil Rules 11, 26(g), and 37. The sanctions also may be contempt sanctions or other sanctions supported by inherent power. These sanctions may include those that often are invoked for professional-responsibility violations, including disqualification, fee forfeiture, reprimand, censure, or suspension or revocation of the privilege to appear before the federal court. These sanctions are appropriate remedies for procedural violations, necessary to deter such violations and to protect the court against recidivism by attorneys whose conduct has threatened to disrupt or subvert proper procedure.

Requirements of notice and opportunity to be heard apply to the imposition of procedural sanctions. Such requirements are already familiar through the developed procedures used to adjudicate contempt issues or to impose procedural sanctions.

Subdivision (d). The principle that federal law must control federal procedure must not be defeated by imposition of state standards for attorney conduct authorized or required by federal procedure. This preemption of state sanctions includes conduct undertaken to comply with a specific federal court order.

The need to preempt state sanctions can be illustrated by one example. Thirty months into a complex litigation, a motion is made to disqualify opposing counsel for violations of professional responsibility rules relating to confidential client information and conflicts of interest. The federal court determines that there is no violation, or that a violation does not warrant disqualification in light of the costs that disqualification would entail. The federal court's interest in regulating its own proceedings supersedes the interest of any state in imposing sanctions for the conduct approved by the federal court.

98-03

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September 17, 1999

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

Re: Proposed Change to Rule 29(e), Concerning *Amicus Curiae* Briefs

Dear Judge Garwood:

You had asked me to study and report on a February 19, 1998 letter from Paul Alan Levy (enclosed with this letter) of the Public Citizen Litigation Group concerning possible changes to Rule 29(e), which governs filing of *amicus curiae* briefs. For the reasons discussed below, the Department of Justice recommends that Rule 29 not be changed. (The Solicitor General has reviewed and approved this statement of the Justice Department's position.)

Under the new version of Rule 29(e), an *amicus* brief is due no later than seven days after the principal brief of the party being supported. In the past, an *amicus* brief was due at the same time as the party being supported. It is our understanding that the rule was changed in order to make it easier for an *amicus* to minimize the duplication with the brief of the party being supported.

Mr. Levy perceived two problems with the new version of the rule. First, he noted that in some instances, when the party being supported is not cooperative, a potential *amicus* might not be able to obtain the party's brief until several days after it is filed, which leaves little time for the *amicus* to tailor its brief. Second, Mr. Levy explains that a problem can arise when an *amicus* files a brief in support of an appellee. In that circumstance, the appellant will not necessarily anticipate an *amicus* brief, and will have a very short time after receiving it before his or her reply brief is due (14 days after the appellee brief). Indeed, Mr. Levy notes that in some instances an appellant might file his reply brief early before even realizing that an *amicus* brief has been filed. Mr. Levy suggests that the second problem can be solved if the time for filing an appellee brief or a reply brief runs from the time of the filing of an *amicus* brief, rather than from the time of the other party's brief.

When you asked me to study this proposal, I consulted with various appellate practitioners within the Department of Justice, and we sent Mr. Levy's letter to a group of organizations that file *amicus* briefs in the federal appellate courts, seeking their views.[1/] Very few of these groups responded.

Having considered the nature of the problems raised by Mr. Levy, we at the Department of Justice do not believe that any change in Rule 29(e) is appropriate. Rather, because Rule 29(e) is quite new, we think it makes good sense to see if problems actually develop in practice.

Thus far, the Department of Justice, which is the largest litigant in the federal appellate courts, has not found Rule 29(e) to be a problem, either as a party or as an *amicus*. As a party, our experience has been that we have been receiving *amicus* briefs in sufficient time for us to take them into account as we prepare appellee or reply briefs. If in an odd situation an *amicus* brief arrives late in the process of preparing an appellee brief or a reply brief, we believe that the party can seek, and under such circumstances likely obtain, a short extension of time to deal with the new brief. With regard to the potential problem that a reply brief will be filed before an *amicus* brief is even received, we note that, in our experience, counsel very rarely file reply briefs early enough for this to be a real problem.

As an *amicus*, we have not encountered new problems in obtaining party briefs in order to prepare our own *amicus* brief. Indeed, the current Rule 29(e) provides more time than was previously allowed for *amicus* briefs, and we do not think it warranted to give even more time for them. (Although Mr. Levy describes possible difficulty in timely preparing an *amicus* brief, he does not suggest that more time be given for them.) Again, if unusual circumstances arise, an *amicus* could seek a short extension of time in order to complete the process of finalizing an *amicus* brief that avoids duplication with the party's brief.

In sum, we believe that the problems identified by Mr. Levy are more likely to be theoretical than real, and in those rare instances when they arise they can be dealt with through reasonable motions practice. The absence of any concern expressed by the groups we consulted supports this belief. Accordingly, we believe it is not appropriate to change Rule 29(e) so shortly after its recent amendment; instead, over the next several years, if

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[1/] We sent copies to the following: National Association of Broadcasters; Media Access Project; Washington Legal Foundation; American Civil Liberties Union; NAACP Legal Defense Fund; National Association of Attorneys General; Sierra Club; Environmental Defense Fund; Lawyers Committee for Civil Rights; Anti-Defamation League; AARP; National Womens Law Center; Chamber of Commerce; AFL-CIO; National Association of Manufacturers; People for the American Way; and Consumer Federation of America.

problems actually develop, we will likely hear from practitioners and clerks, and the Committee can consider necessary changes at that time.

Sincerely,

Douglas Letter

Douglas Letter
Appellate Litigation Counsel

Enclosure

cc: Professor Patrick J. Schiltz
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Notre Dame, Indiana 46556

1 98-03

PUBLIC CITIZEN LITIGATION GROUP
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98-AP-B

February 19, 1998

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

Thank you for your letters of September 11, 1997, and February 10, 1998, acknowledging our comments on various proposed amendments to the Federal Rules of Appellate Procedure. It has been gratifying to receive such specific accounts of the Advisory Committee's disposition of the items on which we had made comments.

It has come to our attention, however, that an amendment has been proposed for Rule 29(e) that had not, so far as I have been able to reconstruct, previously been issued for public comment. Specifically, the Advisory Committee on Appellate Rules recommended a revision in the time for filing amicus briefs, so that instead of being due at the same time as the deadline for the party whom the amicus is supporting, the brief is due seven days after that party's brief is due. That recommendation was subsequently adopted by the Judicial Conference and forwarded to the Supreme Court for adoption.

We have both procedural and substantive comments on this proposal. First, because the package of proposed changes that you included with your September 11 letter included only those rules on which we had provided comments, we did not receive notice of this change, and in fact it is not clear to me that the Advisory Committee ever published this specific change for public comment before adopting it. We recognize that when a new proposal, made in response to public comments, is similar to the originally published proposal, there is little reason to reissue it for public comment. But the previously published proposals for changing Rule 29 were entirely stylistic, and we believe that, had this proposed change been published, it could have attracted some worthwhile comments. But as it is, commenters must send their suggestions to the Supreme Court, which rarely modifies Judicial Conference proposals and never engages in the fine-tuning that might be needed here.

Had the proposals been published for comment, we would have made the following points. First, we wholeheartedly endorse the idea behind the change, because it encourages amici to tailor their arguments to those already being made by the party they are supporting, hopeful avoiding duplication of argument. Although we have a national appellate practice, we file more often in the D.C. Cir-

cuit than anywhere else, and our experience with the D.C. Circuit's similar rule has uniformly been positive.

We have two concerns, however. First, in the D.C. and Fifth Circuits, local rules give amici 14 or 15 days, respectively, after the deadline for the party they are supporting. Proposed Rule 29(e) states that a court "may grant leave for later filing," but does not make clear whether local rules on amicus briefs override the Federal Rules in this regard. For example, Proposed Rule 31(a)(2) allows a court which holds arguments promptly after briefs are submitted to use either local rules or specific orders to shorten the normal time for filing briefs, as established by Proposed Rule 31(a)(1); does this rule also override Proposed Rule 29(e)?

Second, we appreciate the desire to avoid having the change in time for filing amicus briefs disrupt the schedule for filing the parties' briefs. However, we are not confident that the Committee's schedule is workable, especially in light of the fact that filing deadlines are based entirely on when the brief "is filed" (that is, received in the Clerk's office), as the Advisory Notes are careful to observe. In part, we are worried about whether the amicus will have sufficient time, although of course because the amicus is not directly a party to the case, it is not unreasonable to give it a more onerous schedule. But problems will arise if the party supported is not cooperating with the proposed amicus, as sometimes happens for various reasons. In such circumstances, the amicus may not have the party's brief until a few days after it is filed, which leaves little time for tailoring the brief and thus for fulfilling the purpose of the Proposed Rule.[1]

Even more serious is the potential impact on the party whom the amicus opposes. If the amicus is supporting the appellant, we see no problem -- the appellee ordinarily has thirty days after the service of the appellant's brief, and even if the amicus brief arrives ten or fourteen calendar days later, that should pose no problem. But when the amicus supports the appellee, the appellant may face a very serious time problem. The appellant must file its reply brief fourteen days after service of the appellee's brief. Assume, for example, that the appellee and appellant are located in the same city on the East Coast, but the amicus is on the West Coast. The appellee hand-delivers its brief to the appellant, but mails its brief to the court; the deadline for filing the brief of the amicus may be ten days after the appellant's time for filing

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[1] For example, the United States has adopted the policy of refusing to provide copies of draft briefs, as a way of avoiding the appearance of having succumbed to political pressure over the content of its briefs. Or there may be institutional rivalries between the party and a supporting amicus.

its reply brief has begun to run. This scenario leaves only four days for the appellant to confront arguments filed by an entity that has not previously been involved in the case, and whose arguments may be quite different from those of the appellee. And if the amicus sends its brief to both the court and the appellant by first class mail, without first having contacted the party to request consent for filing, it is quite possible for the appellant to have finished its reply brief, even to have filed it, before it learns of a whole new set of arguments to which it must prepare a response.

In these circumstances, we believe that the extension of time for filing an amicus brief, with no adjustment of the time to file the parties' briefs (especially the time for filing reply briefs), is not realistic. The problem of the amicus brief that is unanticipated and arrives after the reply brief has been finished can be avoided if, as in the Fourth Circuit, Circuit Rule 29, a motion for leave to file must recite that the parties have been informed of the filing. But we do not believe that there is any reason to avoid having the normal rule be that the time for parties to file their briefs run from the filing of an amicus brief instead of from the time of the opposing party's brief. Given the amount of time that it takes in most circuits between the filing of the briefs and the holding of oral argument, automatically extending the parties' time for filing would not add significantly to the time required to decide appeals. And, in those circuits which argue very soon after filing, a general rule allowing such courts to set special briefing schedules (including the time for amicus briefs) would allow them to calibrate briefing schedules in a manner that accommodates all the relevant interests.

We would ask that you circulate this letter to the Advisory Committee on Appellate Rules and to the Reporters of the Advisory Committee and the Standing Committee, and that you let me know whether any action is contemplated with respect to the suggestions that we have made in this letter.

Sincerely yours,

Paul Alan Levy

V-C

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98-06

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September 17, 1999

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

Re: Proposed Amendment to FRAP 4(b)(5)

Dear Judge Garwood:

As you recall, at our Spring 1999 meeting, I had submitted a proposal for an amendment to FRAP 4(b)(5), to make clear that the filing of a motion under FRCrP 35(c) to correct an arithmetical, technical, or other clear error in a criminal sentence does not toll the time for a defendant to file a notice of appeal. Thus, the Department of Justice had proposed adding the following sentence to 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."

The Committee was amenable to this proposal, but wanted to know if, when a motion under FRCrP 35(c) is granted, does the sentencing court enter a new judgment. The Committee members were concerned that a defendant's ability to appeal his/her sentence not be hamstrung since a defendant has only ten days in which to file a notice of appeal from the judgment or order at issue. See FRAP 4(b)(1)(A). A defendant's time to appeal would be very short if the district court granted a Rule 35(c) motion by the Government for sentence correction on the seventh day, and no new judgment were entered.

In light of the Committee's inquiry, I consulted attorneys in the Department of Justice Criminal Division Appellate Section. That office handles and monitors appeals from all of the districts in the United States. I spoke in particular with Patty Merkamp Stemler, the Chief of that section. Ms. Stemler has informed me that, indeed, district courts do enter new judgments when a sentence is corrected under FRCrP 35(c). Ms. Stemler's information makes sense since, otherwise, federal authorities responsible for convicted persons would not have final, correct instructions regarding the proper treatment of such individuals. In addition, the notes to the 1991 amendment to FRCrP 35(c) state that "the Committee contemplates that the court will act in accordance with Rules 32 and 43 with regard to any

corrections in the sentence." FRCrP 32(d) states: "A judgment of conviction must set forth the plea, the verdict or findings, the adjudication, and the sentence." Thus, this provision seems to indicate that, if the sentence is changed, the judgment should be changed also since the sentence is part of the judgment.[1/]

Thus, my understanding is that an order granting a motion under FRCrP 35(c) setting a new sentence results in a new judgment by the district court, which can be appealed by a defendant. Accordingly, I believe that the proposal we made for amendment of FRAP 4(b)(5) is a sound one.

Sincerely,

Douglas Letter

Douglas Letter
Appellate Litigation Counsel

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

[1/] Ms. Stemler did point me to a recent decision from the First Circuit in United States v. Ticchiarelli, 171 F.3d 24, 36 (1st Cir. 1999), where that court noted that, under FRCrP 35(a), the imposition of a legally erroneous sentence is not a legal nullity and that the act of resentencing after a sentence has been vacated on appeal "involves mere 'correction' of the sentencing judgment and not the entry of an entirely new judgment." However, this statement does not appear relevant here because an order under FRCrP 35(c) occurs within seven days of the original sentence and not after a sentence has been vacated on appeal.

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98-06

DNL:HTByron
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March 15, 1999

The Honorable Will Garwood
United States Court of Appeals
for the Fifth Circuit
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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

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

There are two other agenda items you had asked me to study: Item 98-03, which arises from concerns raised by the Public Citizen Litigation Group concerning the timing of the filing of *amicus curiae* briefs; and Item 98-07, concerning Judge Ripple's suggestion that FRAP 22(a) be amended so that Circuit Judges themselves can deny habeas applications, rather than be forced to transfer such applications to the district courts.

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.

Sincerely,

Douglas Letter

Douglas Letter
Deputy Associate Attorney General

Attachments

cc: Professor Patrick J. Schiltz
University of Notre Dame
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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.

UNITED STATES of America,
Plaintiff–Appellee,

v.

Eric CARMOUCHE, Defendant–Appellant.

No. 97–30130.

United States Court of Appeals,
Fifth Circuit.

April 14, 1998.

Defendant was convicted following guilty plea in the United States District Court for the Western District of Louisiana, John M. Shaw, Chief Judge, of unlawful possession of a short barrel shotgun. The same court subsequently denied his motion to correct sentence. Defendant appealed. The Court of Appeals held that: (1) filing of motion to correct sentence suspended ten-day time period for filing appeal; (2) detached shotgun barrel found in defendant's house was "short barrel shotgun" for purposes of Sentencing Guideline; (3) application of 1995 version of Sentencing Guidelines was not reversible error; (4) defendant was not entitled to hearing regarding increase under Sentencing Guidelines based on his offense involving "destructive devices"; and (5) Court of Appeals had no jurisdiction to review refusal to depart downward based on defendant's offense falling outside heartland of offenses contemplated by applicable Guideline.

Affirmed.

DeMoss, Circuit Judge, specially concurred and filed opinion.

Duhé, Circuit Judge, specially concurred and filed opinion in which Garwood, Circuit Judge, joined.

1. Criminal Law ⇐1069(1)

Defendant's filing of motion to correct sentence suspended ten-day time period for filing his appeal. Fed.Rules Cr.Proc.Rule 35(c), 18 U.S.C.A.; F.R.A.P.Rule 4(b), 28 U.S.C.A.

2. Criminal Law ⇐1237

Detached shotgun barrel found in defendant's house was "short barrel shotgun" for purposes of Sentencing Guideline applicable to possession of such weapon; parties' factual stipulation recited that police found shotgun

and shotgun barrel, which was "made to fit the shotgun" and was less than 13 inches long, in close proximity, defendant received sentence reduction because he accepted responsibility for conduct described in pre-sentence report (PSR) including that he knowingly possessed short barrel shotgun, and defendant pleaded guilty to indictment as charged. 26 U.S.C.A. § 5845(a)(1), (d); U.S.S.G. § 2K2.1, 18 U.S.C.A.

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

3. Criminal Law ⇐1177

District court's application of 1995 version of Sentencing Guidelines, following plea agreement stating that 1993 version would be used, was not reversible error; provisions of the two versions were substantially identical for all purposes relevant to defendant's appeal, and, thus, no ex post facto concerns were implicated. U.S.C.A. Const. Art. 1, § 9, cl. 3.

4. Criminal Law ⇐273.1(2)

Not every breach of plea agreement requires reversal.

5. Weapons ⇐17(8)

Defendant who had pled guilty to possession of short barrel shotgun was not entitled to hearing to explore his contention that explosives found at his home belonged to another person and that he thus was not subject to two-level increase under Sentencing Guidelines based on his offense involving "destructive devices"; subject offense was possession and there was no dispute that items were found in his possession, and he was required to accept responsibility for all relevant conduct, including possession of explosive devices, to receive reduction for acceptance of responsibility. 26 U.S.C.A. § 5861(d); U.S.S.G. § 2K2.1(b)(3), 18 U.S.C.A.

6. Criminal Law ⇐1023(11)

District court's refusal to depart downward based on defendant's offense falling outside heartland of offenses contemplated by applicable Sentencing Guideline was based on determination that departure was not warranted under facts of case, rather than on mistaken belief that court lacked authority to depart, and Court of Appeals thus had no jurisdiction to review refusal; district court's statement that it had no choice because government had not filed motion requesting departure was not directed to any particular objection, and district court expressly found that there was no reason to depart inasmuch as facts were of a kind contemplated by Sentencing Commission. U.S.S.G., Ch. 1, Pt. A, 4(b); § 2K2.1, 18 U.S.C.A.

7. Criminal Law ⇐1023(11)

District court's refusal to grant downward departure under Sentencing Guidelines is not reviewable on appeal unless refusal is violation of law. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

8. Criminal Law ⇐1023(11)

Court of Appeals has no jurisdiction to review district court's refusal to depart under Sentencing Guidelines when refusal is based upon determination that departure is not warranted on facts of case. U.S.S.G. § 1B1.1 et seq., 18 U.S.C.A.

Josette Louise Cassiere, Asst. U.S. Atty., Shreveport, LA, for Plaintiff–Appellee.

Stephen Spring, Pensacola, FL, for Defendant–Appellant.

Appeal from the United States District Court for the Western District of Louisiana.

Before GARWOOD, DUHÉ and DeMOSS, Circuit Judges.

PER CURIAM:

Eric Carmouche pleaded guilty to unlawful possession of a short barrel shotgun in violation of 26 U.S.C. § 5861(d). Carmouche was sentenced to 27 months imprisonment to be followed by a 24 month period of supervised release. Carmouche appeals his sentence. We affirm.

BACKGROUND

Police searched Carmouche's rural property after receiving a tip that Carmouche was involved in the disappearance of a cow. Two separate searches uncovered, not only the remains of the dead cow, but also a United States Army blasting machine, a .45 caliber automatic handgun, a sawed off shotgun ac-

companied by an extra barrel less than 18 inches in length, a .223 caliber rifle accompanied by parts to make it fully automatic, bomb detonation cords, a blasting cap, and numerous boxes of small ammunition and gun powder. Carmouche was subsequently charged with unlawful possession of: (1) a machine gun; (2) a short barrel shotgun; and (3) an explosive device.

Carmouche agreed to plead guilty to count 2, which alleged unlawful possession of a short barrel shotgun, as defined in 26 U.S.C. § 5845(a)(1) and (d) and in violation of 26 U.S.C. § 5861(d). Counts 1 and 3 were dismissed pursuant to Carmouche's plea agreement. Carmouche was sentenced using a base offense level of 18 because his offense involved a firearm defined in 26 U.S.C. § 5845(a). *See* U.S.S.G. § 2K2.1(a)(5). The district court imposed a one-level increase because the offense involved three weapons, *see* U.S.S.G. § 2K2.1(b)(1)(A), and a two-level increase because the offense involved a "destructive device," *see* U.S.S.G. § 2K2.1(b)(3). The district court also granted a three-level reduction for acceptance of responsibility. Thus, Carmouche was sentenced using a net base offense level of 18. On November 12, 1996, the district court entered judgment against Carmouche.

Six days later, on November 18, 1997, Carmouche filed a pleading entitled "Motion to Correct Sentence Pursuant to Rule 35(c) Fed.R.Crim.P. and for Evidentiary Hearing." Carmouche argued that the district court erred by: (1) imposing sentence for possession of a shotgun barrel, rather than a shotgun; (2) applying the 1995 version of the sentencing guidelines; (3) imposing a three-level adjustment for the possession of other firearms and explosive devices; and (4) refusing to depart downward. More than sixty days later, on January 22, 1997, the district court entered an order denying Carmouche's November 18 motion. The following day, Carmouche filed a notice appealing his sentence and the district court's January 22 order denying the November 18 motion to correct his sentence.

On appeal, Carmouche urges again the arguments presented in the November 18 motion to correct his sentence. The government responds that this Court is without jurisdiction because Carmouche failed to file a timely notice of appeal. Prior to oral argument, the government also filed a motion to dismiss for lack of jurisdiction, which has been carried with the case.

DISCUSSION

1. Appellate Jurisdiction

[1] The threshold issue in this case, and one that is determinative of our jurisdiction, is whether Carmouche's November 18 motion to correct his sentence suspended the ten-day time period for filing an appeal. *See* FED. R.APP. P. 4(b). We conclude that it did and that we therefore have jurisdiction to entertain Carmouche's appeal. *See United States v. Moya*, No. 94-10907, 66 F.3d 319 (5th Cir. July 25, 1995)(unpublished), *and* 5th Cir. R. 47.5.3.

Moya construed a motion labelled as a Rule 35(c) motion as "one of the species of motions for reconsideration" which suspend the running of the 10-day period of FRAP 4(b). *See Moya*, No. 94-10907, at 3-4. Although unpublished, *Moya* is binding precedent in this Circuit because it was issued before January 1, 1996. *See* 5th Cir. R. 47.5.3. Carmouche filed his November 18 motion, captioned as authorized by Federal Rule of Criminal Procedure 35(c), six days after the court entered judgment and thus within the time period allowed for filing an appeal. Once filed, that motion prevented the running of the 4(b) period, and extended the time for filing an appeal until the district court disposed of that motion on January 22, 1997. Therefore, Carmouche's notice of appeal, which was filed one day after the district court denied his motion, was timely. We have jurisdiction to consider the merits of Carmouche's appeal.

2. The Shotgun Barrel

[2] Carmouche pleaded guilty to count 2, which charged possession of a short barrel shotgun, as defined in 26 U.S.C. § 5845(a)(1) and (d) and in violation of 26 U.S.C. § 5861(d). Carmouche was sentenced using sentencing guideline § 2K2.1, the guideline applicable when the firearm is one defined by § 5845(a). Carmouche argues on appeal that his conviction for violation of § 5861(d) is invalid because the detached barrel found at his house does not meet the technical defini-

tion given for a short barrel shotgun in 18 U.S.C. § 5845(a)(1) and (d). As a result, Carmouche contends that the district court's application of guideline § 2K2.1(a)(5) was error.

By disputing the district court's decision that Carmouche's offense involved a § 5845(a) firearm, and the district court's subsequent reliance upon guideline § 2K2.1(a)(5), Carmouche hopes to reap the benefit of § 2K2.1(b)(2). Section 2K2.1(b)(2) specifies a total base offense level of six when the firearm is possessed solely for lawful sporting purposes or collection. The favorable offense level provided in § 2K2.1(b)(2) is made expressly unavailable when the offense involves a firearm defined in § 5845(a). U.S.S.G. § 2K2.1 application note 10.

Carmouche's plea is supported by a sufficient factual basis. The parties' joint Rule 11(f) factual stipulation recites that the police found the shotgun and the shotgun barrel, which was "made to fit the shotgun" and was less than thirteen inches long, "[i]n close proximity." The PSR reports that Carmouche knowingly, intentionally and unlawfully possessed a shotgun with a barrel length of twelve and one-half inches. Carmouche received a three-level reduction in his base offense level because he accepted responsibility for the relevant conduct described in the PSR. Of equal importance, Carmouche pleaded guilty to the indictment as charged and has not formally challenged his plea, either in the district court or in this Court, where his notice of appeal is limited to sentencing issues. The district court did not err by applying § 2K2.1(a)(5), the guideline applicable to Carmouche's offense, or by refusing to apply § 2K2.1(b)(2) to reduce Carmouche's sentence.

3. The Applicable Guidelines

[3] Carmouche next contends that the district court erred by applying the 1995 version of the sentencing guidelines instead of the 1993 version, which the plea agreement stated would be used to derive Carmouche's sentence. Carmouche did not object to the district court's application of the 1995 version until he filed his motion for reconsideration of sentence.

[4] The district court's application of the 1995 guidelines was not reversible error. Although the plea agreement recites that the 1993 guidelines will be used, not every breach of a plea agreement requires reversal. *United States v. Hooten*, 942 F.2d 878, 884 (5th Cir.1991). The guidelines in effect at the time of sentencing are to be used unless application of the current guidelines would implicate the ex post facto clause. U.S.S.G. § 1B1.11. Carmouche claims that the ex post facto clause is implicated here because § 2K2.1(b)(2), providing a base offense level of six when firearms are possessed for hunting or collection purposes, was deleted from the guidelines in 1994. Carmouche is incorrect. Section 2K2.1(b)(2) appears in identical form in both the 1993 and 1995 version of the guidelines. Indeed, an examination of the 1993 and 1995 versions of the guidelines yields the conclusion that the provisions are substantively identical for all purposes relevant to this appeal. There are, therefore, no ex post facto concerns requiring application of the 1993 guidelines. In addition, because Carmouche was not prejudiced by the district court's application of the 1995 guidelines, any error was also harmless.

4. Failure to Hold Evidentiary Hearing

[5] The district court increased Carmouche's base offense level by two levels because the offense involved "destructive devices" seized from Carmouche's house. *See* U.S.S.G. § 2K2.1(b)(3). The guidelines define destructive devices as including any of a variety of destructive or explosive items, and any firearm that will, or can be readily converted to, "expel a projectile by the action of an explosive or other propellant," or any combination of parts designed or intended for converting a device into a destructive device. U.S.S.G. § 2K2.1 application note 4. On appeal, Carmouche argues that the district court erred by failing to grant an evidentiary hearing to explore Carmouche's contention that the explosive devices seized from his home belonged to another person, who was storing the items at Carmouche's house.

An assortment of firearms and explosive materials were found at Carmouche's residence, including explosive RDX, explosive FFGg black powder, Hercules Red Dot double base explosive shotgun powder, Winchester Western explosive double base powder,

and a section of explosive detonating cord .20 inches in diameter containing explosive PETN. Even if some of these items belonged to another individual, the subject offense is possession and there is no dispute that the items were found in Carmouche's possession at his rural residence, where he lived alone. Additionally, Carmouche was required to accept responsibility for all relevant conduct, including possession of the additional firearms and explosive devices, in order to receive a three level reduction for acceptance of responsibility. Having reviewed the record, we cannot conclude that the district court erroneously failed to conduct an evidentiary hearing to consider whether Carmouche had both title and possession of these dangerous destructive devices.

5. Failure to Depart

[6] Carmouche contends that the district court erred by refusing to depart downward because this case falls outside the heartland of those offenses contemplated by § 2K2.1. *See* U.S.S.G., Ch. 1, Pt. A, 4(b).

[7, 8] A district court's refusal to grant a downward departure is not reviewable on appeal unless the refusal is a violation of law. *United States v. Palmer*, 122 F.3d 215, 222 (5th Cir.1997). We have previously held that a refusal to depart violates the law when the district court's refusal is based upon the mistaken belief that the court is without authority to depart. *Id.* at 222. We have no jurisdiction, however, when the district court's refusal to depart is based upon the determination that departure is not warranted on the facts of the case. *Id.*

The district court concluded the sentencing hearing with the remark that it did not consider Carmouche to be a menace, but that it had "no choice" with respect to Carmouche's sentence because the government had not filed a motion requesting departure. Thus, Carmouche maintains that the district court failed to recognize its authority to depart on the theory that Carmouche's conduct was outside the heartland defined by the applicable guidelines.

We disagree. The district court's concluding remarks were not directed to any particular objection or argument of the defendant. With respect to Carmouche's "heartland" argument, the district expressly found that there was "no reason to depart from the sentence called for by the application of the guidelines inasmuch as the facts as found are of a kind contemplated by the Sentencing Commission." We have no jurisdiction to review the district court's determination that a departure was not warranted on the facts of Carmouche's case. *Id.*

For the foregoing reasons, the government's motion to dismiss is DENIED and the district court is in all respects AFFIRMED.

DeMOSS, Circuit Judge, specially concurring:

The members of the panel are in agreement that we have appellate jurisdiction to consider the merits of Carmouche's appeal because his November 18 motion suspended FRAP 4(b)'s ten-day time period for filing an appeal until such time as the district court ruled on that motion. We disagree, however, about why Carmouche's motion had that effect. My colleagues have written separately to emphasize that they feel reluctantly bound by this Court's unpublished disposition in *United States v. Moya*, No. 94–10907, 66 F.3d 319 (5th Cir. July 25, 1995). They have urged the en banc Court to reconsider its precedent in *Moya*. I write separately because I do not read *Moya* to decide any bold new issue of law that requires the Court's en banc attention. Rather, *Moya* is premised upon sound Fifth Circuit authority, authority which I believe to be rightly decided and which I am not inclined at this juncture to question.

FRAP 4(b) AND THE *HEALY* DOCTRINE

Federal Rule of Appellate Procedure 4(b) provides that an appeal must be filed within ten days after the entry of judgment. FED. R.APP. P. 4(b). That time period can be suspended, however, by the timely filing of certain post-judgment motions within the time period allowed for the filing of a notice of appeal. FRAP 4(b) includes a list of rule-based motions that effectively suspend the ten-day time period for filing an appeal. *Id.* In addition to those rule-based motions listed in FRAP 4(b), the Supreme Court allows a common law "motion for reconsideration" to

suspend the time period for filing an appeal in a criminal matter. *E.g., United States v. Healy*, 376 U.S. 75, 78–82, 84 S.Ct. 553, 556–57, 11 L.Ed.2d 527 (1964). The *Healy* doctrine is applied notwithstanding the absence of any statutory or rule-based authority for allowing the judicially created motion for reconsideration to have a suspensory effect. *United States v. Dieter*, 429 U.S. 6, 7–9 & n. 3, 97 S.Ct. 18, 19–20 & n. 3, 50 L.Ed.2d 8 (1976); *Healy*, 376 U.S. at 78–80, 84 S.Ct. at 556; *United States v. Brewer*, 60 F.3d 1142, 1143–44 (5th Cir.1995), *corrected without substantive change*, 60 F.3d 1142 (5th Cir. 1995); *United States v. Greenwood*, 974 F.2d 1449, 1466 (5th Cir.1992). Rather, Supreme Court decisions premise the *Healy* doctrine upon long-standing criminal practice and the judicial efficiency achieved by allowing the district court to correct possible errors prior to a time consuming and potentially unnecessary appeal. *Dieter*, 429 U.S. at 7–9, 97 S.Ct. at 19–20; *Healy*, 376 U.S. at 78–80, 84 S.Ct. at 556; *Greenwood*, 974 F.2d at 1466–67.

Our Court has been "quite permissive about what qualifies as a 'motion for reconsideration.'" *Id.* at 1466. When making that determination, the suspensory effect of a particular motion does not depend upon the caption selected by the movant. *E.g., Dieter*, 429 U.S. at 7–8, 97 S.Ct. at 19 ("[i]t is true that the Government's post-judgment dismissal motion was not captioned a 'petition for rehearing,' but there can be no doubt that in purpose and effect it was precisely that"); *Moya*, No. 94–10907 at 3–4, 66 F.3d 319 (5th Cir. July 25, 1995) (construing criminal defendant's Rule 35(c) motion to be a motion for reconsideration); *Greenwood*, 974 F.2d at 1465–66 (construing government's motion for resentencing to be a motion for reconsideration). To the contrary, "any request, however phrased, that a district court reconsider a question decided in the case in order to effect an alteration of the rights adjudicated," should be construed as a motion for reconsideration. *Greenwood*, 974 F.2d at 1465–66 (internal quotations and alterations omitted); *see also United States v. Ibarra*, 502 U.S. 1, 7, 112 S.Ct. 4, 7, 116 L.Ed.2d 1 (1991); *Dieter*, 97 S.Ct. at 19–20, 429 U.S. at 7–9.

MOYA APPLIES ESTABLISHED PRECEDENT

I do not read *Moya* to hold that a motion filed under Federal Rule of Civil Procedure 35(c) suspends the appellate timetable. Instead, *Moya* rejects the Rule 35(c) caption employed by the defendant and construes the defendant's motion to be a common law motion for reconsideration. *Moya* then applies the well-established *Healy* doctrine to permit the defendant's motion for reconsideration to have a suspensory effect on FRAP 4(b)'s time period. As demonstrated above, *Moya*'s rejection of the caption selected by the defendant and its liberal construction of the subject motion as a motion for reconsideration are well supported by existing precedent.

FRAP 4(b) was amended in 1993 to add a list of motions that are capable of having a suspensory effect on the ten-day time period for filing an appeal. My colleagues find significance in the fact that Carmouche's motion is not among those listed in FRAP 4(b). But our application of the *Healy* doctrine is not derived from or dependent upon any rule-based or statutory authority. *Dieter*, 429 U.S. at 9 n. 3, 97 S.Ct. at 19 n. 3; *Healy*, 376 U.S. at 78–80, 84 S.Ct. at 556; *Brewer*, 60 F.3d at 1144; *Greenwood*, 974 F.2d at 1466. We have therefore held that the 1993 amendment to FRAP 4(b) does not prevent us from permitting a common law motion for reconsideration of a type not articulated in FRAP 4(b) to have a suspensory effect on the appellate time table. *E.g., Brewer*, 60 F.3d at 1143–44.

Neither is this the first time that our Court has applied the *Healy* doctrine to a criminal defendant's request for reconsideration of a sentencing decision. *See Greenwood*, 974 F.2d at 1464–71. Even *United States v. Morillo*, 8 F.3d 864 (1st Cir.1993), which my colleagues cite as guiding extra-circuit authority, begins its analysis with an inquiry to determine whether the defendant's motion, styled in that case as a "motion to correct sentence," is in substance a motion for reconsideration, or instead, a motion properly brought under Federal Rule of Civil Procedure 35(c). *Id.* at 867–68. Relying upon the "numerical" nature of the error alleged, the Court construed the relief requested to be within the ambit of Rule 35(c). *Id.* at 868.

I have no problem concluding in this case that Carmouche's motion is, in subject and effect, a motion for reconsideration of the district court's sentencing decisions. Rule 35(c) is intended to redress technical or obvious sentencing error that is so clear that the case would "almost certainly be remanded" for correction. FED. R.CRIM. P. 35(c) advisory committee note. Rule 35(c) is not an appropriate vehicle for requesting that the district court reconsider its application or interpretation of the sentencing guidelines. *Id.* (Rule 35(c) "is not intended to afford the court the opportunity to reconsider the application or interpretation of the sentencing guidelines or for the court simply to change its mind about the appropriateness of the sentence").

Carmouche's motion presents several arguments, most of which were argued to the district court and rejected at sentencing. Carmouche's request that the district court apply Rule 35(c) to lower his sentence based upon substantive errors argued at sentencing is inappropriate. The errors Carmouche identified are neither technical nor inadvertent, but instead reflect the considered judgment of the district court that Carmouche was not entitled to relief. Carmouche's motion is appropriately construed as a request that the district court reconsider its sentencing decisions. That being the case, there is no need in this case to decide, as the First Circuit did in *Morillo*, whether a Rule 35(c) motion can or should suspend FRAP 4(b)'s ten-day time period.

Moya does nothing more than construe Carmouche's sentencing motion to be a motion for reconsideration, which suspended the time for filing an appeal until the district court decided the motion. Such motions have been liberally construed to suspend the time for filing an appeal, without regard to the caption selected by the parties, and without regard to whether the relief requested falls within the scope of those motions listed in FRAP 4(b). I conclude that *Moya* is premised upon sound authority and does not by itself create any new or objectionable rule of law.

GREENWOOD CONTROLS THE REAL ISSUE

The real sticking point in this case is the possible tension between the district court's limited authority to either grant or deny a defendant's post-judgment sentencing motion and this Court's authority under the *Healy* doctrine to permit a motion requesting such relief to suspend the ten-day time period for filing an appeal.

The district court's jurisdiction to correct a sentence pursuant to Rule 35(c) ends seven days after judgment is entered. *See United States v. Bridges*, 116 F.3d 1110, 1112 (5th Cir.1997); *United States v. Lopez*, 26 F.3d 512, 518–20 (5th Cir.1994) (both holding that Rule 35(c)'s seven day time limit for action by the district court is jurisdictional). However, and although neither the government nor my colleagues raise this point, the district court's authority to correct an erroneous sentence is also limited by statute. *See* 18 U.S.C. § 3582. Neither Rule 35(c) nor 18 U.S.C. § 3582 authorize the district court's order denying Carmouche's post-judgment sentencing motion. Thus it is clear that the district court lacked authority, and perhaps jurisdiction, to decide Carmouche's motion when it was denied on January 22.[1]

There is a distinction, however, between the district court's authority to either grant or deny Carmouche's motion, and our authority under the *Healy* doctrine to permit that motion a suspensory effect. My colleagues would follow the First Circuit's lead in *Morillo* by holding that the district court's authority to correct an erroneous sentence is necessarily coextensive with the suspensory effect given a motion for reconsideration of sentencing issues. My response is that we considered and rejected that precise contention in *United States v. Greenwood*, 974 F.2d 1449 (5th Cir.1992).

Greenwood grappled with the relationship between the district court's authority to grant the subject sentencing motion and this Court's application of the *Healy* doctrine. The Court expressly avoided deciding whether the district court had any "inherent" authority to correct a sentence, and held instead that simple application of the *Healy* doctrine rendered any inquiry into the extent

1. The Court has not clearly resolved whether the limitations specified in 18 U.S.C. § 3582 are exclusive and jurisdictional. *See Lopez*, 26 F.3d at 515 n. 3.

of the district court's corrective powers unnecessary. *Greenwood*, 974 F.2d at 1470–72. Thus, the Court recognized that the scope of the district court's corrective powers and the suspensory effect that Supreme Court authority permitted a common law motion for reconsideration are distinct. *Id.* As a result, *Greenwood* applied the *Healy* doctrine notwithstanding an apparently valid contention that the district court lacked continuing authority to grant or deny the motion that was permitted to have suspensory effect. *Id.* at 1470–71; *United States v. Carr*, 932 F.2d 67 (1st Cir.1991) (holding that a timely motion for reconsideration suspends the time period for filing an appeal until the motion is decided, without regard to whether the district court retains authority to correct the sentence as requested).[2]

MORILLO IS INCONSISTENT WITH *GREENWOOD*

Morillo, which my colleagues now urge upon the en banc Court, takes a contrary view. In *Morillo*, the First Circuit concluded that Rule 35(c) motions should be accorded a suspensory effect, but that the appellate time period would begin to run again at the expiration of seven days after entry of judgment, rather than when the district court decided the motion. *See Morillo*, 8 F.3d at 869. That holding in *Morillo* equates the district court's jurisdiction to grant or deny a particular motion with the effect that motion will have on FRAP 4(b)'s appellate timetable. *Id.* Thus, *Morillo*'s holding is in direct conflict with this Circuit's authority in *Greenwood*. I conclude that *Greenwood*, and its holding that our authority under *Healy* can be distinguished from the district court's authority to grant the relief requested, presents the principal source of disagreement in this case. For the sake of clarity, any reconsideration of the issues raised by this case should focus upon *Greenwood*, which articulates at length the basis of its holding, rather than *Moya*, which merely applies the rule.

Neither am I persuaded that *Greenwood* is wrongly decided. My colleagues cite *Ibarra* for the proposition that the Court should adopt a "bright-line rule" that any motion filed under a Rule 35(c) caption is ineffective to suspend the time period for filing an appeal more than seven days past judgment. But the "bright-line" rule announced in *Ibarra*, and invoked in *Greenwood*, requires liberal construction of any post-judgment pleading that comes close to requesting reconsideration of a question decided in the case as a common law motion for reconsideration that is effective to suspend FRAP 4(b)'s time period. *Ibarra*, 502 U.S. at 6–7, 112 S.Ct. at 6–7; *Greenwood*, 974 F.2d at 1466–67.

The Supreme Court has emphasized that when making that liberal construction, we are not bound by the caption selected by the parties, and should examine the substance of the motion filed to determine whether the relief requested fits within the framework of a common law motion for reconsideration. *E.g., Dieter*, 429 U.S. at 7–9, 97 S.Ct. at 19–20. Clearly, the Court is not free to condone an approach that would effectively circumvent Rule 35(c) by construing every Rule 35(c) motion to be a common law motion for reconsideration. But I fail to see how the language cited by my colleagues, which reads as a command to liberally construe post-judgment pleadings to achieve the judicial efficiency justifying the *Healy* doctrine, can be used as a sword to deny appellate review because counsel has selected the wrong caption for the motion.

Litigants have no control over when or if the district court will decide a pending post-judgment motion. The "bright-line" rule established by the Supreme Court accords a post-judgment motion suspensory effect whenever it requests reconsideration of a question decided at trial that will effect an

2. *Ibarra* is consistent with this approach. In that case, the government appealed the district court's adverse ruling on a motion to suppress drugs. *Ibarra*, 502 U.S. at 3, 112 S.Ct. at 4–5. The government originally sought to justify the objectionable search on a theory of continuing consent, but abandoned that theory in subsequent pleadings. *Id.* The government attempted to revive the continuing consent theory in a timely filed motion for reconsideration. *Id.* The Tenth Circuit held that a motion for reconsideration premised upon a disavowed theory is ineffective to suspend the time period for filing an appeal. *Id.* at 5–6, 112 S.Ct. at 6. The Supreme Court rejected that analysis, holding that the likelihood of success on the merits is immaterial to the *Healy* doctrine's "bright-line" approach. *Id.* at 5–7, 112 S.Ct. at 6–7.

alteration of the rights adjudicated. *Ibarra*, 502 U.S. at 6–7, 112 S.Ct. at 7; *Dieter*, 429 U.S. at 7–9, 97 S.Ct. at 19–20; *Greenwood*, 974 F.2d at 1466–67. I do not agree that denying review in a criminal case because there is a debatable issue about whether the district court's jurisdiction may have expired before it decided a pending motion that would otherwise suspend the time for filing an appeal will serve to "protect" the interests of the parties. I would therefore adhere to the Court's holding in *Greenwood*.

DUHÉ, Circuit Judge, with whom GARWOOD, Circuit Judge, joins specially concurring:

While recognizing that we are bound by our unpublished decision in *Moya*, *supra*, we write separately to urge this Court to reconsider *en banc* *Moya*'s holding that a pending Fed.R.Crim.P. 35(c) motion will postpone running of the Fed. R.App. P. 4(b) time period for filing a notice of appeal until the judge disposes of the motion. We believe *Moya* was incorrectly decided for the following reasons.

Moya held that a defendant's motion to correct his sentence under Fed.R.Crim.P. 35(c) was "one of the species of motions for reconsideration" that prevent running of the ten-day 4(b) time period until disposition of the motion. *Moya*, No. 94–10907, at 4. The *Moya* panel recognized that a Rule 35(c) motion was not one of those listed in Fed. R.App. P. 4(b) as postponing commencement of the ten-day period. *Id.* at 3. Nevertheless, the panel included *Moya's* 35(c) motion within the class of "motions for reconsideration" which the jurisprudence has traditionally given suspensory effect. *Id.*, *citing United States v. Greenwood*, 974 F.2d 1449, 1466 (5th Cir.1992). Finally, the panel found that the rule in *Greenwood* had survived the 1993 amendment to Rule 4(b). *Moya*, No. 94–10907, at 4, *citing United States v. Brewer*, 60 F.3d 1142, 1144 (5th Cir.1995).

We believe the *en banc* Court should overrule *Moya* because it disregarded the language and implications of Rule 4(b), and because it overlooked the effect of the 1991 amendment to Fed.R.Crim.P. 35 and Rule 35's accompanying Advisory Committee Notes. We also urge the *en banc* Court to clarify the effect of a timely-filed Rule 35(c) motion on the running of the 4(b) period, in order to give appellants a "bright-line" standard for determining when the ten-day limitation on filing a notice of appeal begins to run. *See, e.g., United States v. Morillo*, 8 F.3d 864, 869 (1st Cir.1993).

Fed.R.Crim.P. 35 was amended in 1991[1] to codify a district court's "inherent authority" to correct an erroneous sentence. *See* Fed. R.Crim.P. 35(c), advisory committee notes (1991 amendment). The Advisory Committee Notes indicate that, while the Committee wanted to explicitly recognize such authority, it also "believed that the time for correcting such errors should be narrowed within the time for appealing the sentence to reduce the likelihood of jurisdictional questions in the event of an appeal...." *Id.* To that end, the Committee

> contemplat[ed] that the [district] court would enter an order correcting the sentence and that such order must be entered within the seven (7) day period so that the appellate process (if a timely appeal is taken) may proceed without delay and without jurisdictional confusion.

Id.[2]

In light of new Rule 35(c), Fed. R.App. P. 4(b) was amended to read, in pertinent part:

> The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Fed.R.Crim.P. 35(c), nor does the filing of a motion under Fed.R.Crim.P. 35(c) affect the validity of a notice of appeal filed before entry of the order disposing of the motion.

See Fed. R.App. P. 4(b)(amendment eff. Dec. 1, 1993) *and* advisory committee notes (1993 amendment). Rule 4(b), as discussed above, does not list a Rule 35(c) motion as one that postpones running of the ten-day period for filing a notice of appeal.

1. Rule 35(c), eff. December 1, 1991, reads: "The 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."

2. We so recognized in *United States v. Lopez*, 26 F.3d 512, 518–19 (5th Cir.1994), where we also cited *Morillo* with approval. *See also United States v. Early*, 27 F.3d 140, 141–42 (5th Cir. 1994).

Both of these statutory changes were in effect when *Moya* was decided in 1995. Nonetheless, *Moya* summarily decided that a defendant's Rule 35(c) motion to correct his sentence, based on an asserted error in imposing supervised release under 18 U.S.C. § 3565(a)(2), was a "motion for reconsideration" that effectively postponed running of the 4(b) period until disposition of the motion. *Moya*, No. 94–10907, at 3–4. The *Moya* panel did not mention the Advisory Committee Notes to amended Rule 35(c), nor did it consider the combined effect of amended Rule 35(c) and amended Rule 4(b), except to observe that the *Greenwood* rule survived the 1993 amendments to Rule 4(b).[3] *Id.*, at 4.

Although we recognize that amended Rules 4(b), 35(c) and their accompanying notes are subject to more than one interpretation, we believe that the most reasonable construction is the one given by the First Circuit in *United States v. Morillo*, 8 F.3d 864, 867–70 (1st Cir.1993). There the First Circuit, guided by the erudite pen of Judge Selya, held that:

> (1) a motion under Rule 35(c) interrupts the [4(b)] appeal period and renders a judgment nonfinal only if it is brought within seven days following the imposition of sentence; and (2) the appeal period is restarted when the district court decides a timeous[4] Rule 35(c) motion or at the expiration of seven days next following imposition of sentence, whichever first occurs.

Id. at 869. *Morillo* thus recognized two different aspects of the issue: first, that the *Healy* doctrine continued to apply to a Rule 35(c) motion, notwithstanding the absence of a 35(c) motion from the list of motions in Rule 4(b) that interrupt the ten-day appeal period;[5] and second, that application of the *Healy* doctrine is, however, limited to the seven-day period imposed by amended Rule 35(c). After seven days, the 35(c) motion is deemed denied, even if still pending. *Id.*; *see also United States v. Turner*, 998 F.2d 534, 536 (7th Cir.1993). In our view, the First Circuit's approach rationally effects the Advisory Committee's desire to balance judicial efficiency with a concern that "the appellate process ... proceed without delay and without jurisdictional confusion." Fed. R.Crim.P. 35, advisory committee notes (1991 amendment).

To the extent that *Moya* can be interpreted as holding that *all* Rule 35(c) motions indefinitely postpone running of the 4(b) period (that is, until the court disposes of the motion), we would urge the *en banc* Court either to overrule the decision, or at least to clarify its holding. The Supreme Court itself has observed, in refusing to accord suspensory effect only to meritorious motions for reconsideration, that "[w]ithout a clear general rule litigants would be required to guess at their peril the date on which the time to appeal commences to run." *United States v. Ibarra*, 502 U.S. 1, 7, 112 S.Ct. 4, 6, 116 L.Ed.2d 1 (1991). For the same reason, we would decline to adopt Judge DeMoss's approach (*see supra* at 1018) that a court accord suspensory effect only to those 35(c) motions that are more appropriately styled common-law "motions for reconsideration." Such an approach, while it may find some support in case law antedating the amendments to Rules 4(b) and 35,[6] would fail to accord to potential *appellants* (whom, after all, the "bright line" rule is here intended to protect) a sufficient yardstick by which to measure the time within which to file a notice of appeal.

For the moment, however, we bow our heads to *Moya*'s precedential force and find that Carmouche's appeal was timely.

3. *Moya* cited *Brewer*, *supra*, for the proposition that *Greenwood* was unaffected by the 1993 amendments to Rule 4(b). *See Brewer*, 60 F.3d at 1144. We merely observe here that *Brewer* did not deal with a Rule 35(c) motion at all—instead, *Brewer* addressed the effects on the 4(b) period of a motion to set aside a *conviction* rather than a sentence. *See id.* at 1144–46.

4. "timely"—Webster's Third New World Dictionary 2395 (3d ed.1981).

5. *See United States v. Healy*, 376 U.S. 75, 78–80, 84 S.Ct. 553, 555–57, 11 L.Ed.2d 527 (1964). *See also United States v. Ibarra*, 502 U.S. 1, 6–7, 112 S.Ct. 4, 6–7, 116 L.Ed.2d 1 (1991); *United States v. Dieter*, 429 U.S. 6, 8, 97 S.Ct. 18, 19, 50 L.Ed.2d 8 (1976)(per curiam); *Greenwood*, 974 F.2d at 1470–71.

6. *See, e.g., Greenwood*, 974 F.2d at 1464–1471.

V-D

98-07

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
219 SOUTH DEARBORN STREET
CHICAGO, ILLINOIS 60604

Telephone 312-435-5840
Facsimile 312-435-7530

Gino J. Agnello
Clerk

August 11, 1998

Hon. Will L. Garwood
Chair , Advisory Committee on
Appellate Rules
Judicial Conference of the United States
Washington, D.C. 20544

Dear Judge Garwood:

I am writing to call the Appellate Rules Committee's attention to an opinion of this court addressing a tension between 28 U.S.C. § 2241, which gives an individual circuit judge the authority to entertain a petition for a writ of habeas corpus and Federal Rule of Appellate Procedure 22 which requires the transfer of the petition to a district court, precluding the circuit judge from deciding the matter.

Attached is the opinion in *Ruben Olaquez-Garcia v. I.N.S.*, No. 98-8074, slip op. (7th Cir. August 5, 1998)(Ripple, J., in chambers). The opinion transfers a habeas petition to the district court as required by Rule 22 but suggests that "[p]erhaps it is time for a reassessment of the categorical language of Rule 22 which quite clearly negates the flexibility that the Congress intended the courts to have in order to dispatch efficiently their business." *slip op.* at 2.

I am forwarding a copy of the opinion in this matter for your committee's consideration. If I can provide anything further, please let me know. Thank you.

Sincerely,

Gino J. Agnello

cc: Peter McCabe

98-07

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 98-8074

RUBEN OLAGUEZ-GARCIA,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

DECIDED AUGUST 5, 1998*

RIPPLE, *Circuit Judge* (in chambers). The petitioner has presented to me a pleading styled an emergency writ for a petition for a writ of habeas corpus. He has also presented to the motions panel of

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* Because of time considerations, this opinion is released initially in typescript form.

this court another pleading cast as an emergency motion for a stay of deportation. The motions panel has denied this later motion. It is clear that the deportation order is based on a finding by the Board of Immigration Appeals that the petitioner has been convicted of a drug offense which, under current law, precludes review in this court. See Turkhan v. INS, 123 F.3d 487, 489-90 (7th Cir. 1997).

Under these circumstances, the common-sense disposition of the emergency petition for a writ of habeas corpus would be a simultaneous denial. Section 2241 of the Judicial Code gives an individual circuit judge the authority to entertain a petition for a writ of habeas corpus. The statute further requires that the order of the circuit judge be entered in the records of the district court "wherein the restraint complained of is had." 28 U.S.C. § 2241.

Rule 22 of the Federal Rules of Appellate Procedure appears, however, to preclude this common-sense solution. It categorically precludes the entertainment of a petition for a writ of habeas corpus and requires its transfer to the district court. The result is to require the time and energy of a district court to review essentially the same matter that has already been ruled upon by the motions panel of the court of appeals. Perhaps it is time for a reassessment of the categorical language of Rule 22 which quite clearly negates the flexibility that the Congress intended the courts to have in order to dispatch efficiently their business. No doubt it would also be prudent to make explicit, perhaps

by statutory amendment, that the decision of the individual circuit judge ought to be subject to review by the entire court. Cf. Hohn v. United States, 118 S. Ct. 1969, 1974 (1998).

Accordingly, the emergency petition for habeas corpus is transferred to the United States District Court for the Northern District of Illinois, the district in which the alleged place of incarceration is located. The Clerk also is directed to transmit to that court a copy of this court's order denying the emergency motion for a stay of deportation.

IT IS SO ORDERED

V-E

97-32
97-33

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
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TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70130

July 30, 1999

Professor Patrick J. Schiltz
University of Notre Dame Law School
Notre Dame, IN 46556

Dear Professor Schiltz:

This letter responds to your May 13, 1998 invitation to address the proposed changes to FED. R. APP. P. 3 and 12, and to answer the questions the committee members may have.

I have consulted with the appellate court clerks and I met with Judge Garwood in mid-June to discuss some of these matters.

As to the proposed change to Rule 3, the consensus of the clerks is that we would like to have the appellant bear the initial burden of identifying the probable appellees in a case. The Fifth Circuit practice in determining the parties to a case was summarized in an earlier submission. Additional information is found at enclosure 1. At present most appellate courts shoulder the burden of trying to determine who the parties to an appeal are from reading the district court docket entries, or the district court judgment, or where necessary, by calling the appellant's counsel for information. Once we have docketed the case, we send appearance forms to the probable parties. We then must be prepared to answer inquiries from counsel or deal with their objections if they are or are not included as a party in the appeal. After those sometimes contentious issues are resolved, we then have to change the information in our database and modify the case caption. This is not an efficient process and puts deputy clerks in an awkward position of debating with attorneys who the proper parties to a case are. While the appellant may not know for certain who all the appellees and their counsel are, they certainly have a better idea than the appellate clerk's office personnel. Further, the attorneys involved should resolve their differences without putting the clerk's offices in the middle of the debate. Finally, because we need the information as to parties when we docket the appeal, having counsel submit documentation at a later time is not a viable alternative.

As to Rule 12, background on three points will be helpful. First, what is the district court "title" which must be used when an appeal is docketed? Second, what is a "short title"? Third, what caption appears on an appellate court decision?

1. In pertinent part, FED. R. APP. P. 12(a) provides that the "circuit clerk must docket the appeal under the title of the district-court action". FED. R. CIV. P. 10(a) provides that the "title" of a civil complaint shall "include the names of all the parties". In my conversations with several district court clerks, they affirm that the district court "title" of a case is taken from the complaint filed in a civil action and lists all parties named in the complaint as plaintiffs and defendants. Similarly, in a criminal case, the United States and all defendants in the district court are listed in the district court "title". When an appeal is filed and docketed, FED. R. APP. P. 12(a) literally requires appellate clerks to enter into our automated docketing and case management system all the parties identified in the district court action, even if some of them are not involved in the appeal.

For some of the appeals courts, any change in the language of Rule 12(a) will not affect their practice of entering all the district court parties into their docketing system. In part, the reason may be that these courts enter all the district court parties and run the recusal software module found in the Appellate Information Management system (AIMS). Many other courts do not use the AIMS recusal module and do not enter all the district court parties into the appellate database. Instead, they enter in their databases only those parties to the appeal. As noted in 3 below this is often the "title" that appears on an opinion.

2. Some Rules Committee members are familiar with federal appellate court practice, and are used to seeing case "captions" or "titles" which include the names of the first plaintiff and the first defendant and the words "et al." This caption is a "short title" which the AIMS generates, essentially for convenience, instead of listing all the parties to a case. The short title does not reflect the level of difficulty and the amount of work needed to put all the district court parties into the AIMS database.

3. The "title" or "case caption" which appears on a court's opinion varies among the circuits, but generally, the title only lists those entities who were parties on appeal. Again this may give a distorted view of the volume of information contained in the database and the amount of work required if all parties in the district court are entered into AIMS.

Because some courts would not change their practices regardless of a change in rule 12(a) we could make a slight modification in the language originally proposed to make the change permissive. As modified, Rule 12(a) would read:

> (a) **Docketing the Appeal.** Upon receiving the copy of the notice of appeal and the docket entries from the district court clerk under Rule 3(d), the circuit clerk must docket the appeal, *but need only identify in the title the appellant or appellants or the appellee or appellees, and may omit from the title party designations of the district-court action.*

If you have any questions before the meeting, please do not hesitate to call me.

Sincerely,

Fritz Fulbruge

enclosure

cc: Judge Will Garwood

PROCEDURES FOLLOWED TO DETERMINE PARTIES ON APPEAL

1. Within our court, the goal is to docket a case within 24 hours after we receive the notice of appeal and the district court docket entries. If the notice of appeal is not specific as to the parties on appeal, a deputy clerk reviews the district court docket sheet entries to see if those entries are specific enough to allow us to identify the probable appellees and to docket the case. After docketing we then are prepared to change the information depending on the results of steps 5, 6 and 7 below.

2. If the district court docket sheet entries are inconclusive, the deputy clerk must obtain a copy of the district court opinion or order from that court. The deputy clerk then reads the judgment and attempts to determine what portions of the judgment the appellant is appealing and who the likely appellee is. The case is then docketed, subject to revision following steps 5, 6 and 7 below.

3. If the deputy clerk cannot determine the appellee from the district court opinion or order, the clerk calls the appellant's attorney and asks against whom the appeal is being taken. The deputy clerk then dockets the case subject to revision following steps 5, 6 and 7.

4. If we are unable to reach the attorney, or if the appellant is an incarcerated pro se litigant, we use our discretion in naming the appellee and docket the case subject to revision following steps 5, 6 and 7.

5. After the appeal is docketed, the deputy clerk sends a copy of the docketing notice to all counsel listed in the district court docket entries whether or not we have identified their clients as a party to the appeal. We also send an appearance of counsel form.

6. When counsel returns the appearance form, they often will state that they represent a party who should be added to the appeal, or argue that the party we have named as an appellee should not have been so designated.

7. We then modify the case in our database to add to the appeal those parties who now state they should be parties to the case. Where a party we have designated as an appellee objects, we remove them from the case and send a copy of our action to the opposing side requesting any objection they have to our deletion of a party.

8. If debate ensues we attempt to solve the issue.

97-32
97-33

United States Court of Appeals

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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:

(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.*

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:
>
> > (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,

Patty Fulbruge

cc: Judge Will Garwood
John Rabiej

97-32
97-33

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

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TEL. 504-589-6514
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July 30, 1999

Professor Patrick J. Schiltz
University of Notre Dame Law School
Notre Dame, IN 46556

Dear Professor Schiltz:

This letter responds to your May 13, 1998 invitation to address the proposed changes to FED. R. APP. P. 3 and 12, and to answer the questions the committee members may have.

I have consulted with the appellate court clerks and I met with Judge Garwood in mid-June to discuss some of these matters.

As to the proposed change to Rule 3, the consensus of the clerks is that we would like to have the appellant bear the initial burden of identifying the probable appellees in a case. The Fifth Circuit practice in determining the parties to a case was summarized in an earlier submission. Additional information is found at enclosure 1. At present most appellate courts shoulder the burden of trying to determine who the parties to an appeal are from reading the district court docket entries, or the district court judgment, or where necessary, by calling the appellant's counsel for information. Once we have docketed the case, we send appearance forms to the probable parties. We then must be prepared to answer inquiries from counsel or deal with their objections if they are or are not included as a party in the appeal. After those sometimes contentious issues are resolved, we then have to change the information in our database and modify the case caption. This is not an efficient process and puts deputy clerks in an awkward position of debating with attorneys who the proper parties to a case are. While the appellant may not know for certain who all the appellees and their counsel are, they certainly have a better idea than the appellate clerk's office personnel. Further, the attorneys involved should resolve their differences without putting the clerk's offices in the middle of the debate. Finally, because we need the information as to parties when we docket the appeal, having counsel submit documentation at a later time is not a viable alternative.

As to Rule 12, background on three points will be helpful. First, what is the district court "title" which must be used when an appeal is docketed? Second, what is a "short title"? Third, what caption appears on an appellate court decision?

1. In pertinent part, FED. R. APP. P. 12(a) provides that the "circuit clerk must docket the appeal under the title of the district-court action". FED. R. CIV. P. 10(a) provides that the "title" of a civil complaint shall "include the names of all the parties". In my conversations with several district court clerks, they affirm that the district court "title" of a case is taken from the complaint filed in a civil action and lists all parties named in the complaint as plaintiffs and defendants. Similarly, in a criminal case, the United States and all defendants in the district court are listed in the district court "title". When an appeal is filed and docketed, FED. R. APP. P. 12(a) literally requires appellate clerks to enter into our automated docketing and case management system all the parties identified in the district court action, even if some of them are not involved in the appeal.

For some of the appeals courts, any change in the language of Rule 12(a) will not affect their practice of entering all the district court parties into their docketing system. In part, the reason may be that these courts enter all the district court parties and run the recusal software module found in the Appellate Information Management system (AIMS). Many other courts do not use the AIMS recusal module and do not enter all the district court parties into the appellate database. Instead, they enter in their databases only those parties to the appeal. As noted in 3 below this is often the "title" that appears on an opinion.

2. Some Rules Committee members are familiar with federal appellate court practice, and are used to seeing case "captions" or "titles" which include the names of the first plaintiff and the first defendant and the words "et al." This caption is a "short title" which the AIMS generates, essentially for convenience, instead of listing all the parties to a case. The short title does not reflect the level of difficulty and the amount of work needed to put all the district court parties into the AIMS database.

3. The "title" or "case caption" which appears on a court's opinion varies among the circuits, but generally, the title only lists those entities who were parties on appeal. Again this may give a distorted view of the volume of information contained in the database and the amount of work required if all parties in the district court are entered into AIMS.

Because some courts would not change their practices regardless of a change in rule 12(a) we could make a slight modification in the language originally proposed to make the change permissive. As modified, Rule 12(a) would read:

> (a) **Docketing the Appeal.** Upon receiving the copy of the notice of appeal and the docket entries from the district court clerk under Rule 3(d), the circuit clerk must docket the appeal, *but need only identify in the title the appellant or appellants or the appellee or appellees, and may omit from the title party designations of the district-court action.*

If you have any questions before the meeting, please do not hesitate to call me.

Sincerely,

Fritz Fulbruge

enclosure

cc: Judge Will Garwood

PROCEDURES FOLLOWED TO DETERMINE PARTIES ON APPEAL

1. Within our court, the goal is to docket a case within 24 hours after we receive the notice of appeal and the district court docket entries. If the notice of appeal is not specific as to the parties on appeal, a deputy clerk reviews the district court docket sheet entries to see if those entries are specific enough to allow us to identify the probable appellees and to docket the case. After docketing we then are prepared to change the information depending on the results of steps 5, 6 and 7 below.

2. If the district court docket sheet entries are inconclusive, the deputy clerk must obtain a copy of the district court opinion or order from that court. The deputy clerk then reads the judgment and attempts to determine what portions of the judgment the appellant is appealing and who the likely appellee is. The case is then docketed, subject to revision following steps 5, 6 and 7 below.

3. If the deputy clerk cannot determine the appellee from the district court opinion or order, the clerk calls the appellant's attorney and asks against whom the appeal is being taken. The deputy clerk then dockets the case subject to revision following steps 5, 6 and 7.

4. If we are unable to reach the attorney, or if the appellant is an incarcerated pro se litigant, we use our discretion in naming the appellee and docket the case subject to revision following steps 5, 6 and 7.

5. After the appeal is docketed, the deputy clerk sends a copy of the docketing notice to all counsel listed in the district court docket entries whether or not we have identified their clients as a party to the appeal. We also send an appearance of counsel form.

6. When counsel returns the appearance form, they often will state that they represent a party who should be added to the appeal, or argue that the party we have named as an appellee should not have been so designated.

7. We then modify the case in our database to add to the appeal those parties who now state they should be parties to the case. Where a party we have designated as an appellee objects, we remove them from the case and send a copy of our action to the opposing side requesting any objection they have to our deletion of a party.

8. If debate ensues we attempt to solve the issue.

97-32
97-33

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:

(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.*

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:
>
> > (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

99-04

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 99-1754 & 99-1769

Anthony DeSilva, Albert DeSilva,
Anthony J. LoBue, and Thomas Kulekowskis,

Petitioners-Appellants,

v.

Joseph G. DiLeonardi, United States Marshal
for the Northern District of Illinois,

Respondent-Appellee.

On Order to Show Cause

Decided July 21, 1999

Before Coffey, Easterbrook, and Rovner, Circuit Judges.

Per Curiam. Our opinion in this case directed appellants' counsel to show cause why they should not be sanctioned for filing a brief that exceeded the type-volume limit. Counsel's attempt to incorporate some other document by reference led us to check whether this had been done in order to dodge the limit. Here's what we found: "The certificate under Fed. R. App. P. 32(a)(7)(C) represents that the brief contains 13,824 words, only 176 short of the maximum. Our check reveals that the certificate is false. The brief actually includes 15,056 words, substantially over the maximum. Appellants counted only the words in the text of the brief, although Rule 32 provides that '[h]eadings, footnotes, and quotations count toward the word and line limitations.' Fed. R. App. P. 32(a)(7)(B)(iii). Appellants' brief has 20 footnotes with a total of 1,232 words."

Appellants' brief was prepared with Microsoft Word 97, and an unfortunate

interaction occurred between that software and the terms of Rule 32. All recent versions of Microsoft Word (Word 97 for Windows, Word 98 for Macintosh, and Word 2000 for Windows), and some older versions that we have tested, count words and characters in both text and footnotes when the cursor is placed anywhere in the document and no text is selected. In recent versions on both Windows and Macintosh platforms, choosing the Word Count function brings up a window listing the number of characters and words in the document. A checkbox at the bottom of the window reading "Include footnotes and endnotes," when selected, yields a word count for all text and notes. But if the user selects any text in the document this checkbox is dimmed, and the program counts only the characters and words in the selected text. Microsoft Word does not offer a way to count words in those footnotes attached to the selected text.

This complicates implementation of Fed. R. App. 32(a)(7), which limits the allowable length of a brief to 14,000 words, and of a reply brief to 7,000 words. Under Rule 32(a)(7) (B)(iii), footnotes count toward this limit, but the "corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation." To determine the number of words that are included in the limit, counsel selects the "countable" body portions of the brief--which causes Microsoft Word to ignore countable footnotes. Counsel who do not notice that the count-footnotes box has been dimmed out may unintentionally file a false certificate and a brief that exceeds the word limits. That's what happened to appellants' lawyers. Older versions of Word have separate columns for text and footnote counts (plus a summation column), giving a visible cue that footnotes were not being counted when text had been selected, but current versions give only a consolidated count. When the count-footnotes checkbox is dimmed, even counsel who are aware that

the brief contains footnotes may suppose that the software included these automatically.

Current versions of Corel WordPerfect (for both Windows and Macintosh platforms) do not have this problem. WordPerfect does what lawyers may suppose that Word does (or should do): it automatically includes footnotes in its word and character counts. If no text is selected, the word count feature includes all words anywhere in the document; if text is selected, then WordPerfect includes words in footnotes that are attached to the selected text. We have not tested other programs, because the vast majority of briefs filed with the court are prepared using either Word or WordPerfect, but law firms that use other programs must find out how their software treats footnotes attached to selected text.

Lawyers who produce their documents with WordPerfect software have an easy job of things under Rule 32. They select the "countable" portions of the brief, and the program tells them how many words are in both text and footnotes. Lawyers who use Word, by contrast, must infer from the dimmed checkbox that footnotes have been omitted from the count. They must open a separate footnote window, select the footnotes attached to "countable" body text, and have the program count the words in these notes. Then they must add the text and footnote counts manually in order to determine compliance with Rule 32(a)(7).

Long-run solutions to this problem must come either from Microsoft Corporation--which ought to make it possible to obtain a count of words in footnotes attached to selected text--or from the national rulemaking process. We will send copies of this opinion to those responsible for such design decisions. In the meantime, we will flag this issue in the court's Practitioner's Guide and in materials distributed to counsel when an appeal is docketed. Law firms should alert their staffs to the issue pending a resolution at the software level. Our clerk's office will spot-check briefs that have been

prepared on Microsoft Word, are close to the word limit, and contain footnotes. Noncomplying briefs will be returned, and if the problem persists after there has been ample time for news to reach the bar we will consider what else needs to be done. (Counsel who use Word are not entitled to a litigating advantage over those who use WordPerfect.) For now, however, sanctions are inappropriate, and the order to show cause is discharged.

□

V-G-2

Thomas J. DILLON, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 97-3138.

United States Court of Appeals, Sixth Circuit.

Argued June 9, 1999.

Decided July 21, 1999.

Appeal from the United States District Court for the Southern District of Ohio at Columbus. No. 96-00354--John D. Holschuh, District Judge.

ARGUED: Douglas A. Trant, Knoxville, Tennessee, for Appellant. Louis M. Fischer, Department of Justice, Criminal Division, Appellate Section, Washington, D.C., for Appellee. Galen J. White, Jr., Louisville, Kentucky, for Amici Curiae. ON BRIEF: Douglas A. Trant, Knoxville, Tennessee, for Appellant. Louis M. Fischer, Department of Justice, Criminal Division, Appellate Section, Washington, D.C., for Appellee. Galen J. White, Jr., Louisville, Kentucky, Brian Wolfman, Alan B. Morrison, Public Citizen Litigation Group, Washington, D.C., for Amici Curiae.

Before: MARTIN, Chief Judge; MERRITT, KENNEDY, NELSON, RYAN, BOGGS, NORRIS, SUHRHEINRICH, SILER, BATCHELDER, DAUGHTREY, MOORE, COLE, CLAY, and GILMAN, Circuit Judges.

NORRIS, J., delivered the opinion of the court, in which MARTIN, C. J., MERRITT, KENNEDY, NELSON, BOGGS, SILER, DAUGHTREY, MOORE, and COLE, JJ., joined. RYAN, J., (pp. ---- n ----), delivered a separate dissenting opinion, in which SUHRHEINRICH and BATCHELDER, JJ., joined. CLAY, J. (pp. ---- - ----), delivered a separate dissenting opinion, in which GILMAN, J., joined except for Part I, with GILMAN, J. (p. ----), also delivering a separate dissenting opinion.

OPINION

ALAN E. NORRIS, Circuit Judge.

*1 Pursuant to Fed. R. App. P. 35(a), a majority of the active judges of this court voted to rehear en banc Dillon v. United States, No. 97-3138, (6th Cir. Nov. 10, 1998) (unpublished), in an attempt to set forth the precise requirements imposed by Fed. R.App. P. 3(c) (contents of the notice of appeal). Relying upon another recent decision of this court, United States v. Webb, 157 F.3d 451 (6th Cir.1998) (per curiam), cert. denied, --- U.S. ----, 119 S.Ct. 2019, --- L.Ed.2d ---- (1999), the Dillon panel had dismissed petitioner's appeal for lack of jurisdiction because the notice of appeal failed, as specified by Rule 3(c)(1)(C), to "name the court to which the appeal is taken." We now hold that, while the requirements of Rule 3(c) are jurisdictional, see Torres v. Oakland Scavenger Co., 487 U.S. 312, 315-16, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), in the sense that a notice of appeal must explicitly name the court to which an appeal is taken when there is more than one potential appellate forum, where only one avenue of appeal exists, Rule 3(c)(1)(C) is satisfied even if the notice of appeal does not name the appellate court. Under the latter circumstances, filing the notice of appeal with the clerk of the district court from whose judgment the appeal is taken has the practical effect of designating the appropriate court of appeals and thereby eliminating any possible confusion with respect to the appellate forum.

In the case now before us, the Sixth Circuit represented the only appellate court available to petitioner. See 28 U.S.C. § 2253(a) (in a proceeding under section 2255 before a district judge, the appeal shall lie in the court of appeals for the circuit in which the proceeding is held). Under our holding today, therefore, the notice of appeal was not defective because petitioner did not have a choice of forum and filed his notice of appeal in the district court that rendered judgment. Accordingly, we remand to the original panel for further

proceedings.

In 1993, Rule 3(c) was amended in order to "reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988)." Advisory Committee Notes to 1993 Amendments. While Torres specifically concerned the proper construction of Rule 3(c)(1)(A), it made clear that the entire rule was jurisdictional in nature. Id. at 315-16. The 1993 amendments were implemented in an attempt to soften the practical effect of this holding. Rule 3(c)(4) now reads:

> An appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

As the Advisory Committee Notes to the 1993 amendments observe, "if a court determines it is objectively clear that a party intended to appeal, there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward." See also Wright, Miller & Cooper, Federal Practice and Procedure, Jurisdiction 3d § 3949.4 ("These new provisions should ... reduce substantially the number of appeals aborted for no reason.").

***2** Although the 1993 amendments were aimed at ameliorating the effect of Rule 3(c)(1)(A), we see no reason why their underlying rationale does not apply with equal force to Rule 3(c)(1)(C). When there is only one appellate forum available to a litigant, "there are neither administrative concerns nor fairness concerns that should prevent the appeal from going forward" if, through inadvertence, an appellant has failed to name the court to which the appeal is taken.

In reaching this conclusion, we are mindful that the Court in Torres cautioned, "although a court may construe the Rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." Torres, 487 U.S. at 317. It is not our intention in any way to "waive" the jurisdictional requirement that a notice of appeal designate the court to which the appeal is taken. However, when there is only one possible appellate forum, and no information or action contrary to the proper forum appears on the face of the papers, the filing of a notice of appeal has the practical effect of "naming" that forum. In contrast, when an appeal may be taken to more than one appellate court, failure to designate the court of appeal will result in dismissal of the appeal for lack of jurisdiction. [FN1]

Petitioner's appeal is re-instated and this cause is remanded for further proceedings to the panel of this court that originally considered it.

RYAN, Circuit Judge, dissenting.

I respectfully dissent from the majority opinion, although I must do so separately because my fellow dissenters have said some things with which I cannot agree.

Federal Rule of Appellate Procedure 3(c)(1)(C) explicitly and unambiguously requires that a notice of appeal "name the court to which the appeal is taken." And, it is incontrovertibly settled that the rule is jurisdictional. See Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988). So, if the rule announced in Torres means anything, it means that the failure to "name the court to which the appeal is taken" in the notice of appeal deprives the appellate court in which the appeal is filed of jurisdiction in the case.

Dillon did not, in his claim of appeal, state the name of the court to which the appeal was taken. Therefore, this court is without jurisdiction to entertain the appeal. In syllogism form, the proposition would go something like this:

> Major premise: No appellate court has jurisdiction of an appeal in which the notice of appeal fails to name the court to which the appeal is taken.
> Minor premise: But Dillon's notice of appeal

fails to name the court to which the appeal is taken.
Conclusion: Therefore, no appellate court has jurisdiction of Dillon's appeal.

But the members of the majority dislike the idea that subrule (C), like (A) and (B), should be jurisdictional; some think the rule is unnecessarily harsh, unjustly restrictive, and ill-considered; others think we ought to ignore failure to comply with the rule because many lawyers have been ignoring it. And so the majority has today suspended the requirement of (C) that the notice of appeal must "name the court to which the appeal is taken" if it turns out that the flawed appeal is filed in the only court to which a proper appeal could properly have been taken. If the United States Supreme Court had not declared in Torres that compliance with all of Rule 3(c)(1) is jurisdictional, the majority's strained effort to substitute its own rule for the plain English requirements of Congress's rule might be defensible. But the Supreme Court has said that compliance with the rule is jurisdictional and, therefore, noncompliance with it must necessarily defeat jurisdiction.

***3** This is not rocket science; it is plain English. We do not "apply" a rule that establishes a condition precedent to our exercise of jurisdiction by exercising jurisdiction despite noncompliance with the rule when in our judgment the condition precedent is burdensome, unwise, and ignored by some members of the bar. In doing that, we "misapply" the rule.

To the credit of the signors of the majority opinion, they do not claim that there was "substantial compliance" with the rule in this case or that Dillon's notice of appeal contained some language somewhere that is the "functional equivalent" of naming the court to which his appeal was to be taken. My colleagues simply hold in a remarkable ipse dixit that compliance with subrule (C), albeit jurisdictional, may hereafter be ignored and excused in the vast majority of all appeals in this circuit; that is, appeals in which the defective appeal is taken to the proper court. That kind of "reasoning" is known in forums less august than this United States Court of Appeals as an "800-pound gorilla rule." That is to say, even though this court has no authority whatever to excuse compliance with Rule 3(c)(1)(C), it nevertheless has the "power" to do so because more active judges on this court are willing to excuse noncompliance with the rule than are unwilling to do so.

This is not an attractive thing that the court does today. Not only does it make a hash of the venerable principle of judicial self-restraint, it also sends an unmistakable signal to the bench and bar that it is open season in Cincinnati on the rules of practice a majority of judges here might think excessively harsh, unnecessary, widely ignored in practice, or just plain "dumb."

I would enforce the rule and, therefore, respectfully dissent.

CLAY, Circuit Judge, dissenting.

I respectfully dissent from the majority's ruling. The majority, in pursuit of an approach that would permit it to circumvent the requirement that notices of appeal must set forth the jurisdictional prerequisites of Federal Rule of Appellate Procedure 3(c)(1), has invented a rationale lacking in persuasiveness and unsupported by the prior decisions of this circuit, and more importantly, that is contrary to the express dictates of Supreme Court case law. [FN1]

In an effort to abrogate the clear and express requirement of Rule 3(c)(1)(C), which explicitly requires that "[t]he notice of appeal must ... name the court to which the appeal is taken," the majority creates out of thin air the proposition that the rule's requirement does not apply, or is waived, if there is only one court available to which the appeal can be taken. The majority thereby essentially concludes that the mandatory jurisdictional requirement of the rule as interpreted by the Supreme Court need not be complied with merely because there exists only a single appellate tribunal to which the appeal can be taken. Simply put, there exists no legal authority for this judicial rewriting of the rule

by which the majority blithely repudiates the requirement that the notice of appeal must set out the name of the court to which the appeal is taken--without any discernibly cogent reason, explanation or basis for its decision to do so.

*4 One can search the majority's opinion in vain for any reason or explanation grounded in the language of the rule itself or in the accompanying commentary for the majority's decision to dispense with the rule's express requirement of naming the court of appeals. In rewriting the rule to render it more compatible with the majority's view of what the rule should say, the majority engages in a two-step process: (i) it removes the express requirement of the rule that the notice of appeal must name the court to which the appeal is taken; and (ii) it audaciously rewrites the rule to provide that a notice of appeal need not name the court to which the appeal is taken so long as the failure to name the court occurs in a case in which there exists only one tribunal to which the appeal can be taken. (Apparently, it is of no moment to the majority whether the litigant seeking to pursue the appeal is aware of whether there is only a single avenue of appeal or multiple forums to which an appeal can be taken.)

The majority's decision to rewrite the rule to render it more compatible with its notions of equity and the appropriate functioning of the appellate process is in one sense understandable. No one wishes to prevent litigants from perfecting their appeals or from having their appeals heard on the merits. I would prefer that no appeal be dismissed for failure to comply with the jurisdictional prerequisites of the Federal Rules of Appellate Procedure if that were possible; however, it would be wholly inappropriate for me as a judicial officer to attempt to rewrite the rules, as the majority does, to comport with my own sense of how the rules should best be made to function. However much one might agree with and sympathize with the goals sought to be attained by the majority, one must conclude that the majority's actions are wholly inappropriate. If the rules are to be revised or redrafted, that task should be accomplished through the appropriate channels and not as a result of this court undertaking, without appropriate legal authority, the task of itself rewriting the rules.

To the extent that the majority believes that by undertaking the task of rewriting or recasting Rule 3(c) to suit its own objectives that this court is correcting some perceived injustice resulting from the dismissal of cases setting forth defective notices of appeal, the majority is misguided. If the court were willing to enforce the rule as written and to dismiss cases when the notices of appeal fail to include the required jurisdictional elements, I believe that litigants and their attorneys would begin to comply with the requirements of the rule within a very short time frame. The consequences of failing to do so would be unpalatable to them. For all of these reasons, I respectfully dissent.

I.

On November 10, 1998, a panel of this court dismissed Thomas J. Dillon's appeal from the district court's order denying his 28 U.S.C. § 2255 habeas corpus petition. In an unpublished per curiam opinion, the panel dismissed the appeal for lack of jurisdiction upon discovering that the notice of appeal failed to name the court to which the appeal was taken, in violation of Fed. R.App. P. 3(c). The panel in Dillon did no more than follow this court's published decision in United States v. Webb, 157 F.3d 451 (6th Cir.1998) (per curiam), cert. denied, --- U.S. ----, 119 S.Ct. 2019, --- L.Ed.2d ---- (1999), issued little over a month earlier, which held that a notice of appeal that fails to name the court to which the appeal is taken, in violation of Rule 3(c), does not confer jurisdiction on this court. Id. at 452-53. The Webb court reasoned:

*5 In light of Rule 3(c)'s clear mandate that a notice of appeal must name the court to which the appeal is taken, coupled with the well-established principle that the requirements of Rule 3(c) are jurisdictional in nature, we conclude that we lack jurisdiction over Webb's appeal. Although timely filed under Rule 4(b), Webb's Notice of Appeal neglects to name the court to which his

appeal is taken as required under Rule 3(c). Under these circumstances, Webb's Notice of Appeal failed to confer jurisdiction on this court, notwithstanding any absence of prejudice to the government.

Id. at 453. Because Dillon's notice of appeal suffered precisely the same defect as in Webb, the Dillon panel simply applied Webb in dismissing Dillon's appeal for lack of jurisdiction.

Significantly, after Webb was issued, the deadline for a petition for a rehearing en banc expired without any calls for review. Accordingly, under the Federal Rules of Appellate Procedure, Webb was no longer subject to en banc review. See Fed. R.App. P. 35(c), 40(a). However, by designating Dillon for rehearing--a case factually indistinguishable from Webb that did nothing more than simply comply with the requirements of Webb--this court has managed to subject Webb to en banc review seemingly in circumvention of its own procedures. I disagree with this approach, which allows for the collateral attack of controlling (and heretofore unquestioned) precedent for an open-ended period of time rather than focusing on the case before the court. This open- ended and ad hoc approach, even if not contrary to this court's rules, is hardly likely to earn this court the respect and confidence of the public we are obligated to serve.

A rehearing en banc is permissible only where (i) the panel decision directly conflicts with prior decisions of this court or of the Supreme Court, and, therefore, consideration by the full court is necessary to secure and maintain uniformity of decisions; or (ii) the appeal involves one or more questions of exceptional public importance. 6th Cir. R. 35(c); see also Fed. R.App. P. 35(a). The rules thus recognize that en banc review is an extraordinary measure to be used sparingly:

The decision to grant en banc consideration is unquestionably among the most serious non-merits determinations an appellate court can make, because it may have the effect of vacating a panel opinion that is the product of a substantial expenditure of time and effort by three judges and numerous counsel. Such a determination should be made only in the most compelling circumstances.

Bartlett v. Bowen, 824 F.2d 1240, 1242 (D.C.Cir.1987) (Edwards, J., concurring in denials of rehearing en banc where the appeals at issue did not present those "rarest of circumstances when a case should be reheard en banc").

Notably, in his petition for a rehearing en banc, Dillon claimed that the panel's decision was contrary to a prior decision of this court, and that en banc review was required to maintain uniformity of decisions. Our subsequent review of the case law exposed his claim as meritless, because Dillon, like Webb, was not an abrupt departure from Sixth Circuit precedent, but instead represented the continuation of a line of cases dating back to the full court's decision in Minority Employees v. Tennessee Dep't of Employment Sec., 901 F.2d 1327 (6th Cir.1990) (en banc), and including such more recent opinions as Brooks v. Toyotomi Co., Ltd., 86 F.3d 582 (6th Cir.1996) and Mattingly v. Farmers State Bank, 153 F.3d 336 (6th Cir.1998). Nor could any claim be made that the Dillon or Webb opinions contravened any prior decisions of the Supreme Court, thus necessitating en banc review.

***6** Nonetheless, even though Dillon had not raised the issue in his petition for rehearing, a majority of this court decided that the appeal raised a question of exceptional public importance. As I expressed to my colleagues at the time, I think it wrong for this court, absent any change in the legal landscape, to reverse course and rethink an opinion delivered such a short time ago. Once we embark on a course of legal precedents, I see no reason to abruptly dispense with an established opinion simply because some judges have belatedly, and quite suddenly, decided that they now disagree with it. See Bartlett, 824 F.2d at 1243 (Edwards, J., concurring in denials of rehearing en banc) (rejecting the "view that every time a majority of the judges disagree with a panel decision, they should get rid of it by rehearing the case en banc"); Gilliard v. Oswald, 557 F.2d 359 (2d Cir.1977) (Kaufman, C.J., concurring in denial

of petition for rehearing en banc) (stating that "a judge should [not] cast a vote for reconsideration by the entire court merely because he disagrees with the result reached by the panel").

Such an abrupt shift in the court's holding as that proposed by the majority here is inexplicable unless accompanied either by changed circumstances (which in this case have not occurred) that would justify the shift in the court's thinking, or by a mistake or misapprehension of fact or law that requires correction. In the absence of changed circumstances, or misapprehension of fact or law, such conduct is suggestive of unseemly judicial activism on the part of jurists eager to overturn rulings that they, personally, would have decided differently. Significantly, in the instant case, some of the members of the en banc court who now vote to overturn Webb and its controlling precedent are the very judges who as panel members voted in favor of Webb and the cases leading to Webb only a short time ago. Again, the confidence of the public in the court system is not likely to be encouraged by such behavior.

Indeed, I believe that the court exhibits confusion and indecisiveness when it overturns a prior decision without permitting time and experience to make manifest any deficiencies in the decision. Rather, change should come through a carefully-considered evolutionary jurisprudential process, where issues and ideas are developed over the entire course of litigation. See, e.g., United States v. Crawley, 837 F.2d 291, 293 (7th Cir.1988) (noting that courts are best equipped to rule on issues that have been "refined by the fires of adversary presentation").

II.

The majority opinion seems concerned only with reaching the end result of overruling Webb, without regard for the controlling legal authority. There can be no dispute that Rule 3(c) requires appellants to name in the notice of appeal the court to which the appeal is taken. Fed. R.App. P. 3(c)(1)(C). Nor is there any doubt that this requirement is jurisdictional, so that noncompliance is fatal to an appeal. "The requirements of Rule 3(c) are jurisdictional in nature, and the court of appeals may not waive or diminish the rule's requirements." Maerki v. Wilson, 128 F.3d 1005, 1007 (6th Cir.1997). Today, however, the majority blatantly ignores both this court's and the Supreme Court's prior pronouncements to do precisely that.

A.

*7 Beginning with the full court's decision in Minority Employees v. Tennessee Dep't of Employment Sec., 901 F.2d 1327 (6th Cir.1990) (en banc), we have consistently held that an appellant's failure to satisfy the requirements of Rule 3(c) is fatal to his appeal because the requirements of Rule 3 are jurisdictional in nature. See, e.g., Mattingly, 153 F.3d at 337 (holding that, because the requirements of Rules 3 and 4 are jurisdictional in nature, the appellant's failure to sign the notice of appeal pursuant to Rule 4(a)(1) was fatal to the appeal); Maerki, 128 F.3d at 1007-08 (holding that the notice's failure to specify one of the parties taking the appeal deprived the court of jurisdiction to hear the unnamed party's appeal); Minority Employees, 901 F.2d at 1331-33 (holding that the notice's failure to name each and every party taking the appeal divested the court of its jurisdiction to hear the claims of the unnamed appellants because the defect was jurisdictional in nature). Thus, Webb did no more than reiterate this court's long-held understanding that the requirements of Rule 3(c) are jurisdictional in nature, and, therefore, failure to meet these requirements requires dismissal of the appeal.

This understanding itself is rooted in the express language of two Supreme Court decisions: Torres v. Oakland Scavenger Co., 487 U.S. 312, 108 S.Ct. 2405, 101 L.Ed.2d 285 (1988), and Smith v. Barry, 502 U.S. 244, 112 S.Ct. 678, 116 L.Ed.2d 678 (1992). In Torres, the notice of appeal listed fifteen plaintiffs as appellants, but omitted a sixteenth plaintiff because of a clerical error. Even though the appellees set forth no proof of actual prejudice, the Court held that the defect was fatal

because it divested the appellate court of jurisdiction to hear the appeal: "But although a court may construe the Rules liberally in determining whether they have been complied with, it may not waive the jurisdictional requirements of Rules 3 and 4, even for 'good cause shown' under Rule 2, if it finds that they have not been met." Torres, 487 U.S. at 317. Because the requirements of Rule 3(c) are jurisdictional in nature, the omission of the name of the sixteenth appellant was fatal to his appeal. Id. at 315-18. The Court concluded: "We recognize that construing Rule 3(c) as a jurisdictional prerequisite leads to a harsh result in this case, but we are convinced that the harshness of our construction is 'imposed by the legislature and not by the judicial process.' " Id. at 318 (quoting Schiavone v. Fortune, 477 U.S. 21, 31, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986)).

Four years later in Smith, the Court held that an appellate brief filed in a court of appeals could serve as a notice of appeal if it contained all three elements required under Rule 3(c). Smith, 502 U.S. at 248-49. Although the Court in that case found that Rule 3 had been complied with, the Court again emphasized that "Rule 3's dictates are jurisdictional in nature, and their satisfaction is a prerequisite to appellate review." Id. at 248 (citing Torres, 487 U.S. at 316-17).

B.

***8** To be sure, the majority purports to disclaim an "intention to in any way 'waive' the jurisdictional requirement that a notice of appeal designate the court to which the appeal is taken." But then the majority does just that. The majority now proclaims that "where only one avenue of appeal exists, Rule 3(c)(1)(C) is satisfied even if the notice of appeal does not name the appellate court." The reader will find no such exception in the text of Rule 3(c), which, in the plainest language imaginable, requires simply that the notice of appeal name the court to which the appeal is taken--regardless of the number of available appellate forums.

The naming requirement set forth in Rule 3(c) remains constant no matter the number of possible avenues for appeal. It is far from unusual for an appellant, like Dillon, to have a single avenue for appeal; rather, it is the rare appellant who has multiple avenues open to him. Indeed, when Rule 3 was originally adopted in 1967, appellants had even fewer avenues of appeal open to them than they do now, yet the drafters still included the requirement that the notice of appeal name the court to which the appeal is taken.

The court's ruling today renders this provision a nullity in the vast majority of appeals that come before us. In so doing the court violates one of the most fundamental canons of statutory construction: "A statute should be construed to accord meaning and effect to each of its provisions." Federal Express Corp. v. United States Postal Serv., 151 F.3d 536, 542 (6th Cir.1998). See also Business Guides v. Chromatic Communications Enter., Inc., 498 U.S. 533, 540- 41, 111 S.Ct. 922, 112 L.Ed.2d 1140 (1991) (applying standard rules of statutory construction in interpreting the Federal Rules of Civil Procedure). Apparently a majority of the members of this court have come to disagree with the naming requirement codified at Rule 3(c)(1)(C) as it is applied in the vast majority of cases that come before us. But this disagreement on the part of the members of this court does nothing to lessen our obligation to enforce the rule as it is currently written.

C.

Nor does anything in the Federal Rules of Appellate Procedure or the governing Supreme Court case law permit this court to excuse an appellant from fulfilling the dictates of Rule 3(c). Instead, the Court has held only that Rule 3's requirements are to be liberally construed. Smith, 502 U.S. at 248; Torres, 487 U.S. at 316. This means that "if a litigant files papers in a fashion that is technically at variance with the letter of [Rule 3], a court may nonetheless find that the litigant has complied with the rule if the litigant's action is the functional equivalent of what the rule requires." Torres, 487 U.S. at 316-17 The

Court has explained that this approach is appropriate given the provision, now located at Rule 3(c)(4), that "[a]n appeal must not be dismissed for informality of form or title of the notice of appeal." See Smith, 502 U.S. at 249.

***9** The Court first applied this doctrine to rescue an appeal from dismissal in Smith. There the Court held that a pro se prisoner's "informal brief" filed with the appellate court within the time allowed for filing a notice of appeal could constitute the functional equivalent of the notice of appeal if it contained all three elements required under Rule 3(c). The Court held that the Federal Rules of Appellate Procedure "do not preclude an appellate court from treating a filing styled as a brief as a notice of appeal ... if the filing is timely under Rule 4 and conveys the information required by Rule 3(c)." Id. In so holding, the Supreme Court simply followed the lead of numerous circuit courts--including this one -that had permitted a document labeled other than a notice of appeal to serve as a notice of appeal if it otherwise met all three of the substantive Rule 3(c) requirements. See, e.g., United States v. Christoph, 904 F.2d 1036 (6th Cir.1990) (holding that the appellant's motion for enlargement of time could serve as the notice of appeal where it met all of the Rule 3(c) requirements); McMillan v. Barksdale, 823 F.2d 981 (6th Cir.1987) (holding that the appellant's pro se request for a certificate of probable cause could function as the notice of appeal where it met the requirements of Rule 3(c) and was filed within the time prescribed by Rule 4).

Not surprisingly, the majority does not rely on the "functional equivalent" doctrine to justify its holding today. This doctrine applies only where, as in Smith, the appellant's papers substantively comply with Rule 3(c) but are somehow deficient in style or form; for example, the document is not expressly labeled as a notice of appeal even though it contains all of the information required by Rule 3(c) and is timely filed. See United States v. Means, 133 F.3d 444, 450 (6th Cir.1998) (holding that two filings by the appellant could not serve as the functional equivalent of a notice of appeal where the first document did not contain all of the information required by Rule 3(c) and the second was not timely filed pursuant to Rule 4(a)).

Here, Dillon nowhere named this court in his notice of appeal. Accordingly, the defect is not one of style, but of substance: an essential element is completely missing from the notice of appeal. Such a complete failure to fulfill a Rule 3(c) requirement cannot be considered the functional equivalent of complying with the rule. For example, in Smith, the Supreme Court ultimately remanded the case to the court of appeals to determine if the appellant's "informal brief" actually contained all of the information required by Rule 3(c) so that it could serve as the functional equivalent of a notice of appeal. Smith, 502 U.S. at 250. See also Mattingly v. Farmers State Bank, 153 F.3d 336, 337 (6th Cir.1998) (stating that "[t]he complete failure to sign a notice of appeal cannot be viewed as the functional equivalent of doing so").

D.

***10** For similar reasons, I find unpersuasive the majority's reliance on that portion of Rule 3(c)(4), added in 1979, that excuses informalities of form or title in a notice of appeal. "Informality of form" suggests that the required substantive information is included, however inartfully or clumsily communicated. Here, on the other hand, the name of the court to which the appeal is being taken is not presented informally or in the improper manner; instead, it is omitted entirely.

Nor do I agree that the 1993 amendment to Rule 3(c) requires a different conclusion. Because its conduct today runs afoul of well-settled Supreme Court case law establishing the jurisdictional and unalterable nature of Rule 3(c)'s requirements, the majority can do no more than quote out of context the Advisory Committee Notes accompanying an amendment of no relevance here. Had their position been properly grounded in the text of Supreme Court decisions, the majority would doubtless refrain from relying upon such a

lesser authority.

In any event, this authority is of no moment to the instant case. The 1993 amendment simply provided that, in specific response to Torres, an "appeal must not be dismissed ... for failure to name a party whose intent to appeal is otherwise clear from the notice." Fed. R.App. P. 3(c)(4). This provision has the effect of modifying the requirement contained in Rule 3(c)(1)(A) so that the appellant's failure to name a party in the notice of the appeal is not always fatal to the appeal. See, e.g., Anderson v. AT & T Corp., 147 F.3d 467, 472-73 (6th Cir.1998) (holding that notice of appeal's use of et al. to designate additional parties was not cause for dismissal in light of the 1993 amendment to Rule 3(c)).

If anything, the 1993 amendment demonstrates that any substantive change to Rule 3(c)'s requirements should not be effected through court decisions, but only through the official rule-making process. Congress has vested the Supreme Court with the power to promulgate the general rules that govern practice and procedure in the federal courts, including the courts of appeals, provided that those rules do not alter any substantive right. See 28 U.S.C. § 2072. In turn, the Advisory Committee, which is subject to public and congressional scrutiny, has the authority to recommend proposed rules and modifications to the Supreme Court for approval. See 28 U.S.C. § 2073. If the Court approves of a proposed rule, it then submits a copy of the rule to Congress; if Congress takes no action in opposition, the rule may then go into effect. See 28 U.S.C. § 2074.

Thus, the 1993 amendment that relaxed the requirement of Rule 3(c)(1)(A) went into effect only after completion of the specific process provided for by statute. Similarly, if the members of the majority believe that Rule 3(c)(1)(C) should be amended, they are free to attempt to effect change through the prescribed statutory process. Instead, this court has chosen to effectively eliminate the naming requirement contained in Rule 3(c)(1)(C) without following any of the procedures mandated by statute.

III.

*11 Today's decision excuses the vast majority of appellants in the Sixth Circuit from one of the essential requirements of Rule 3(c), without regard for the plain language of the rule or the governing Supreme Court case law. It is well-settled that "litigants are charged with the responsibility for complying with the Federal Rules of Appellate Procedure," Maerki, 128 F.3d at 1008, and this court is not vested with the authority to excuse noncompliance, regardless of individual judges' notions of equity or prejudice, Torres, 487 U.S. at 317. "Rather plainly, certain rules are deemed sufficiently critical in avoiding inconsistency, vagueness and an unnecessary multiplication of litigation to warrant strict obedience even though application of the rules may have harsh results in certain circumstances. Under Torres, Rule 3(c) is such a rule." Minority Employees, 901 F.2d at 1329.

The majority today disregards these principles in its drive to rewrite the text of Rule 3(c). Because I believe that today's ruling constitutes an abuse of the judicial process to reach a result that can only be achieved by following the procedures mandated by statute, I respectfully dissent.

GILMAN, Circuit Judge, dissenting.

I concur in Judge Clay's dissent, except for Part I of his opinion. As much as I sympathize with the result reached by the majority, I do not find any justifiable way to ignore the clear requirements of Rule 3(c)(1) of the Federal Rules of Appellate Procedure as interpreted by the United States Supreme Court.

In my opinion, the consequence of failing to name the court to which the appeal is taken is unduly harsh in a case such as the one before us. But we are not at liberty to act as free-wheeling chancellors of old, riding roughshod over rules that in our opinion are inequitable. The rule of law requires that such a change come from either Congress or the Supreme Court, which I in fact would urge be done. In the meantime, I agree with the wisdom of

President Ulysses S. Grant's statement that "the best way to get rid of a bad law is to enforce it." See State ex rel. Skilton v. Miller, 164 Ohio St. 163, 128 N.E.2d 47, 52 (Ohio 1955) (Stewart, J., dissenting).

FN1. or instance, some circuits have held that a claimant for black lung benefits may appeal in any circuit in which he or she worked and was exposed to danger. See, e.g., Hon v. O.W.C.P., 699 F.2d 441, 444 (8th Cir.1983). Similarly, 26 U.S.C. § 7482(a) vests jurisdiction over appeals from the Tax Court in all federal courts of appeal except for the federal circuit. See also 29 U.S.C. § 160(f) (permitting appeals from NLRB actions in various circuit courts). In other words, while relatively small as a percentage of appeals to this court, there are a significant number of cases that require explicit designation of the court of appeals in order to comply with Rule 3(c)(1)(C).

FN1. Rule 3(c)(1) sets forth a total of three requirements for a notice of appeal: the notice must (A) specify the party or parties taking the appeal; (B) designate the judgment, order, or part thereof being appealed; and, of course, (C) name the court to which the appeal is taken. Fed. R.App. P. 3(c)(1).

END OF DOCUMENT

LEONIDAS RALPH MECHAM
Director

CLARENCE A LEE, JR
Associate Director

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

JOHN K RABIEJ
Chief
Rules Committee Support Office

WASHINGTON, D.C. 20544

September 23, 1999

MEMORANDUM TO ADVISORY COMMITTEE ON APPELLATE RULES

SUBJECT: *Financial Disclosure*

At the request of the Judicial Conference's Committee on Codes of Conduct in late 1998, the Standing Committee asked each of the advisory rules committees to examine the need for uniform rules requiring disclosure of financial interests patterned on Appellate Rule 26.1. It was decided that additional information on the experiences of courts was needed, and the Federal Judicial Center undertook a survey of the courts' practices. The Center plans to submit a final report on its study in January 2000. An interim report will soon be available.

If a consensus to adopt a uniform rule requiring financial disclosure develops, we plan to publish proposed amendments in August 2000. Under this timeframe, the advisory rules committees would need to approve the proposal at their respective spring 2000 meetings. During the January 2000 Standing Committee meeting, the advisory committees' reporters will undertake a coordinated effort to put forward a proposed uniform rule acceptable to all advisory rules committees. The preliminary views of the advisory committees at their respective fall 1999 meetings would help guide the reporters in their discussion at the Standing Committee meeting. As a starting point, it would be useful to know whether any advisory committee objects to or has reservations to adopting a rule identical or very similar to Appellate Rule 26.1.

The following materials are attached: (1) background information on the Appellate Rules Committee's drafting of Appellate Rule 26.1, (2) the actions of the Committee on Codes of Conduct addressing recusal problems and recommending solutions, and (3) a series of newspaper articles criticizing the federal bench for recusal lapses.

John K. Rabiej

Attachments

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

September 15, 1999

Honorable Carol Bagley Amon
Chair, Committee on Codes of Conduct
225 Cadman Plaza East
Brooklyn, New York 11201

Dear Judge Amon:

Thank you for your September 9th letter describing your committee's work on financial disclosure issues. Let me briefly describe what the rules committees are doing now and what they plan to do at upcoming meetings. Our advisory rules committees will consider the preliminary results of the Federal Judicial Center's survey of courts' practices at their respective fall meetings. I understand that the Center found a growing number of local rules and standing orders requiring parties to disclose particular financial information. It seems that these new practices, however, have generated unforeseen problems, and we are keenly interested in reviewing the courts' experiences.

Much of our schedules is dictated by statutory deadlines. We expect that the advisory rules committees will finish their work at their respective spring 2000 meetings and will submit proposed uniform financial disclosure rules for consideration by the Standing Rules Committee at its June 2000 meeting. Under this timetable proposed rule amendments would be published for public comment in August 2000. As noted in your letter, the rulemaking process is time consuming. Assuming that the public comments do not uncover any major problems with the proposed rule amendments, the proposals would be reviewed again by the rules committees, and transmitted for approval to the Judicial Conference and the Supreme Court in late 2001. The rules would take effect in December 2002, unless Congress intervenes.

The time required in prescribing a national financial disclosure rule certainly suggests that interim measures should be implemented now to address the problems. Recent adverse news coverage underscores the need for swift action, and your initiative will provide immediate assistance to judges. Although the rules committees generally disfavor local rules or standing orders, I agree with you that in this case interim local rules or standing orders may be prudent. Accordingly, I endorse the recommendations made in your suggested letter.

I very much appreciate the opportunity to comment on the draft letter. I will keep you and your committee's staff advised of the rules committees' progress as we proceed in the rulemaking process.

Sincerely,

Anthony J. Scirica

cc: Chairs and Reporters,
Advisory Rules Committees
Marilyn J. Holmes

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
225 CADMAN PLAZA EAST
BROOKLYN, N.Y. 11201

TELEPHONE
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MARILYN J. HOLMES
COUNSEL
(202) 502-1100

September 9, 1999

Honorable Anthony J. Scirica
Chair, Committee on Rules of Practice
and Procedure of the Judicial Conference
of the United States
22614 U.S. Courthouse
601 Market Street
Philadelphia, Pennsylvania 19106

Re: Disclosure of Corporate Parents

Dear Judge Scirica:

Last year, my predecessor as chairman of the Codes of Conduct Committee, Judge A. Raymond Randolph, wrote to your predecessor, Judge Alicemarie Stotler, soliciting the assistance of your Committee in an initiative to help judges meet their recusal obligations. Judge Randolph asked your Committee to consider promulgating a national rule applicable in district and bankruptcy courts corresponding to Rule 26.1 of the Federal Rules of Appellate Procedure, which requires disclosure of corporate parents. I understand that the Committee on Rules of Practice and Procedure and the Advisory Committees on Bankruptcy Rules, Civil Rules, and Criminal Rules considered this request at recent meetings and have begun exploring the issue.

My colleagues and I on the Codes of Conduct Committee very much appreciate the attention you have given to this request. We recognize that the process of adopting new federal rules involves weighty considerations and requires extended analysis and consultation. I am writing to reiterate my Committee's continued interest in and support for your efforts. In addition, I want to take this opportunity to advise you of a complementary step the

Codes Committee is considering that relates closely to the Rules Committee's ongoing efforts.

During the last year, the Codes of Conduct Committee has been exploring various ways to assist judges in meeting their recusal obligations. We are offering enhanced education and training at the Federal Judicial Center's national judges' workshops, and we are working to develop automated conflicts screening software and conflicts checklists, which should help judges identify potential conflicts of interest. These efforts are particularly important in light of recent and continuing press coverage criticizing judges who failed to recuse themselves when they or their spouses owned stock in a party. In most of those situations, it appears that the judge's failure to recuse was inadvertent and was occasioned by a breakdown of the system for identifying conflicts of interest in the judge's chambers or the clerk's office.

Identification of all potential conflicts of interest is a difficult endeavor under the best of circumstances, but it presents special challenges in situations involving corporate parents. As you know, Canon 3C(1)(c) of the Code of Conduct for United States Judges and Advisory Opinion No. 57 advise that judges should recuse when they own stock in a parent company whose subsidiary appears as a party before the judge. Disclosure of corporate parents by the parties presents a simple way for judges to determine whether a subsidiary of a company in which they own stock is a party to a case, necessitating recusal. The alternative — attempting to identify and keep track of all subsidiaries of the companies in which a judge owns stock — can be a difficult, time-consuming exercise, complicated further by the daily vicissitudes of the modern corporate world.

For these reasons, the Codes of Conduct Committee strongly supports a federal rule requiring parties to disclose their corporate parents (and to update this disclosure as necessary). This approach holds substantial promise as a means of identifying proceedings in which judges may be disqualified. Indeed, we believe this approach is sufficiently beneficial that individual judges ought to consider adopting similar local procedures as an interim measure. We believe it may be useful, on an interim basis, for judges to consider requesting information from parties about their corporate parents, pending adoption of a national rule. This could be accomplished by adoption of local rules or standing orders. My Committee is interested in providing guidance along these lines to circuit councils and chief judges. I am hopeful that our two Committees can coordinate this effort, and I want to ensure that you have no concerns or objections before we proceed.

I have drafted the attached sample letter setting out the Codes of Conduct Committee's views on this subject. We are considering communicating these views to circuit councils and to district and bankruptcy chief judges. I would appreciate your comments on this initiative. Please feel free to call me at (718) 260-2410 if you believe it would be useful for us to discuss these issues. Thank you for your counsel and for your ongoing efforts to devise a national disclosure rule.

Sincerely,

Carol Bagley Amon
Chairman

Attachment

cc: Honorable W. Eugene Davis
Honorable Adrian G. Duplantier
Honorable Paul V. Niemeyer
John K. Rabiej

(Attached sample letter has not been finalized and is omitted.)

COMMITTEE ON CODES OF CONDUCT
ADVISORY OPINION NO. 57

Disqualification in a Case When Controlled Subsidiary of a Corporation in Which Judge Owns Stock Is a Party.

Two judges have requested an opinion from the Committee as to whether a judge is disqualified when a controlled subsidiary of a corporation in which the judge owns stock is a party.

A complete answer to these inquiries would involve an interpretation of both Canon 3C of the Code of Conduct for United States Judges and 28 U.S.C. § 455. The provisions of the canon and statute are similar, but our opinion is limited to an interpretation of the canon.

Canon 3C(1) provides that:

> (1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> * * *
>
> (c) the judge knows that . . . [he or she] has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.

Canon 3C(3)(c) defines a "financial interest" as "ownership of a legal or equitable interest, however small," with enumerated exceptions, including ownership in a mutual or common investment fund, the proprietary interest of a policy holder in a mutual insurance company, or a similar proprietary interest, where the outcome of the proceeding could not substantially affect the value of the interest.

The Reporter's Notes to Code of Judicial Conduct, in explaining the meaning of financial interest, reads in part:

> The "financial interest" of a judge that will disqualify him is his direct legal or equitable ownership interest, no matter how small, in a party or in the subject matter in a proceeding before him.
>
> * * *
>
> When a judge deposits money in a mutual savings association or takes out a policy of insurance in a mutual insurance company, he has a technical legal interest in the association or

> company. The Committee was of the opinion that these technical interests, and other similar ones, should not be a basis for disqualifying a judge even though the association or company is a party to a proceeding before him, unless the value of his interest could be substantially affected by the outcome of the proceeding or the broad test of Canon 3C(1) is applicable.

Thode, Reporter's Notes to Code of Judicial Conduct 69-71 (ABA 1973).

We are concerned accordingly with the question of whether an owner of stock in the parent corporation has a direct legal or equitable interest in the controlled subsidiary or merely a "technical legal interest" within the recognized exceptions.

It is the opinion of the Committee that the owner of stock in a parent corporation has a direct legal or equitable interest in a controlled subsidiary, and where a judge knows that a party is controlled by a corporation in which the judge owns stock, the judge should disqualify in the proceeding.

August 9, 1978
Revised July 10, 1998

TO: Honorable James K. Logan, Chair
Members of the Advisory Committee on Appellate Rules

FROM: Carol Ann Mooney, Reporter

DATE: October 13, 1994

SUBJECT: 93-5, amendment of Rule 26.1 re: use of the term affiliates, and
93-10, application of Rule 26.1 to trade associations

I. Item 93-5, Use of the Term Affiliates

At the Committee's April 1993 meeting it reviewed Fed. R. App. P. 26.1 and an amendment to it which had been published earlier in the year; the amendment dealt with the number of copies problem. During the discussion, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates."

The first sentence of Fed. R. App. P. 26.1 provides:

> Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case shall file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public.

The Committee briefly discussed the meaning of the term "affiliates." Judge Boggs stated that he thought the term encompassed "brother" and "sister" corporations; *i.e.*, those owned in whole or in part by the same parent. Judge Williams noted that the term "affiliate" is used in virtually every antitrust consent decree.

Nine circuits have local rules supplementing Fed. R. App. P. 26.1. (The local rules are appended to this memorandum.) Of those nine, six use the term affiliate in their rules. Two of the six define "affiliate" for purposes of the rule.

The D.C. rule states: "For the purposes of this rule, 'affiliate' shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity . . .."[1] The Sixth Circuit's

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[1] D.C. Cir. R. 26.1(a). This definition appears to be drawn from the definition of an "affiliate" in the regulations promulgated under the Securities Exchange Act of 1934. The regulations define an "affiliate as:

> [A] person "affiliated" with, a specified person, is a person that directly, or indirectly through one or more intermediaries, controls, or is controlled by, or is under common control with, the person specified.

definition is similar; it states: "A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation."[2]

Because Fed. R. App. P. 26.1 explicitly requires disclosure of parent and subsidiary corporations, it is the "under common control" provisions of the definitions that is helpful, and it appears to require disclosure of "brother" and "sister" corporations. Disclosure of their existence is required under the rule, however, only if they have issued shares to the public. The disclosure, therefore, of the existence of "full brother" or "sister" corporations, those wholly owned by an entity's parent, would not be required. Disclosure of the existence of affiliates that have issued shares to the public would seem appropriate.

The Seventh Circuit's rule does not require the disclosure of subsidiaries or of "brother" or "sister" corporations. It requires the disclosure only of parent corporations and of publicly held companies owning 10% or more of the stock of the party. The underlying assumption apparently is that a decision adverse to the party would harm significantly only those corporations owning at least 10% of the stock of the party and that an adverse decision would not have sufficient impact upon a subsidiary or sister corporation to require recusal of a judge who owned stock in the subsidiary or sister.

If the Committee wishes to retain the term affiliate, but clarify its meaning, Rule 26.1 could be amended to include a definition like that in the D.C. or Sixth Circuit rules.

Rule 26.1. Corporate Disclosure Statement

Any non-governmental corporate party to a civil or bankruptcy case or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates

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17 C.F.R. § 240.12b-2 (1994).

The same regulation defines "control" as:

> the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.
> 17 C.F.R. § 240.12b-2 (1994).

[2] 6th Cir. R. 25.

that have issued shares to the public. For purposes of this rule, an affiliate is a corporation that directly, or indirectly, through one or more intermediaries, controls, is controlled by, or is under common control with, the corporate party. The statement must be filed with a party's principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever first occurs, unless a local rule requires earlier filing. Whenever the statement is filed before a party's principal brief, an original and three copies of the statement must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. The statement must be included in front of the table of contents in a party's principal brief even if the statement was previously filed.

II. Item 93-10, Applicability of 26.1 to Trade Associations

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The question of whether the rule does, or should, require a trade association to disclose all of its members was deferred for later discussion.

As the local rules attached to this memorandum disclose, most of the circuits rules are silent about the applicability of Rule 26.1 to trade associations. Two circuits, however, directly address the question and take opposite positions.

The D.C. circuit rule by its terms applies not only to corporations but also to an "association, joint venture, partnership, syndicate, or other similar entity." D.C. Cir. R. 26.1(a). As to unincorporated associations, the disclosure statement generally must include the "names of any members of the entity that have issued shares or debt securities to the public." The rule further provides, however, that a trade association need not list the names of its members. D.C. Cir. R. 26.1(b). For purposes of the rule, a trade association is defined as "a continuing association of numerous organizations or individuals, operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership." Id.

In contrast, the fourth circuit rule states: "A trade association shall identify in the disclosure statement all members of the association and their parents, subsidiaries (other than wholly owned subsidiaries), and affiliates that have issued shares to the public." Note that in addition to disclosing each member of the association, the fourth circuit requires disclosure of each member's affiliates.

The Advisory Committee worked for several years to develop Rule 26.1. One of the drafts prepared for the Committee's consideration required disclosure of a trade association's publicly owned members, whenever a trade association is a party or an intervenor. That approach was thought to be a middle of the road approach requiring disclosure of members (which while possibly lengthy, should not be burdensome to produce) but not of their affiliates. The Committee ultimately approved a less detailed rule that had been modeled after Supreme Court Rule 28.1. Because there had been a lack of consensus among the circuits on the approach that should be taken (an earlier draft had been circulated to the circuits for comment), the Committee approved a rule that established minimum requirements that all circuits should meet. As the Committee Note to the rule indicates, a court of appeals is free to require additional information by local rule.

The language of Fed. R. App. P. 26.1 does not address the trade association question. The rule requires a "corporate" party to disclose "parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates." Even if a trade association is incorporated, its members are not subsidiaries or affiliates in the ordinary sense of those words.

Although the Committee in 1988 rejected a provision addressing the trade association issue, is it time to reverse that decision? If so, should the Committee reconsider a more global reversal of the rule's bare bones approach? Section 455 requires a judge to disqualify himself or herself from hearing a case whenever the judge's impartiality might reasonably be questioned. The statute addresses a much broader range of interests than simply stock ownership. One of the early drafts considered by the Committee would have required all parties (not just corporate parties) to list "all attorneys involved in the case, and all persons, associations of persons, firms, partnerships, or corporations having an interest in the outcome of the case, including subsidiaries, conglomerates, affiliates, and parent corporations, and other identifiable legal entities related to a party."

The Local Rules Project had suggested that Rule 26.1 should be broadened in an effort to eliminate the diverse circuit rules. The Advisory Committee voted to take no further action on that suggestion in light of the difficulty the Committee previously had encountered when trying to develop a rule that would be acceptable to most of the circuits.

D.C. Cir. R. 26.1. Disclosure Statement

(a) A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or *amicus* in any proceeding shall file a disclosure statement, at the time specified in FRAP 26.1, or as otherwise ordered by the court, identifying all parent companies, subsidiaries, and affiliates that have issued shares or debt securities to the public. For the purposes of this rule, "affiliate" shall be a person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, the specified entity; "parent" shall be an affiliate controlling such entity directly, or indirectly through intermediaries; and "subsidiary" shall be an affiliate controlled by such entity directly, or indirectly through one or more intermediaries.

(b) The statement shall identify the represented entity's general nature and purpose, insofar as relevant to the litigation, and if the entity is unincorporated, the statement shall include the names of any members of the entity that have issued shares or debt securities to the public. No such listing need be made, however, of the names of members of a trade association or professional association. For purposes of this rule, a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

* * * * *

Third Cir. R. 26.1.1. Disclosure of Corporate Affiliations and Financial Interest.

(a) Promptly after the notice of appeal is filed, each corporation that is a party to an appeal, whether in a civil, bankruptcy, or criminal case, shall file a corporate affiliate/financial interest disclosure statement on a form provided by the Clerk that identifies every publicly owned corporation not named in the appeal with which it is affiliated. The form shall be completed whether or not the corporation has anything to report.

(b) Every party to an appeal shall identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. The form shall be completed only if a party has something to report under this section.

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II-B II-C I-H I-I II-A

Fourth Cir. R. 26.1 Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation.

(a) All parties to a civil or bankruptcy case, and all corporate defendants in a criminal case, whether or not they are covered by the terms of Federal Rule of Appellate Procedure 26.1, shall file a corporate affiliate/financial interest disclosure statement. This rule does not apply to the United States, to state and local governments in cases in which the opposing party is proceeding without counsel, or to parties proceeding in forma pauperis.

(b) The statement shall set forth the information required by Federal Rule of Appellate Procedure 26.1 and the following:

(1) A trade association shall identify in the disclosure statement all members of the association and their parents, subsidiaries (other than wholly owned subsidiaries), and affiliates that have issued shares to the public.

* * * * *

Fifth Cir. R. 28.2.1. ***Certificate of Interested Persons***

A certificate will be furnished by counsel for all private (non-governmental) parties, both appellants and appellees, which shall be incorporated on the first page of each brief before the table of contents or index, and which shall certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. . . .

Sixth Cir. R. 25. Disclosure of Corporate Affiliations and Financial Interest.

(a) Parties Required to Make Disclosure. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is also required.

(b) Financial Interest to Be Disclosed.

(1) Whenever a corporation which is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation which is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation which is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it

controls, is controlled by, or is under common control with a publicly owned corporation.

* * * * *

Seventh Cir. R. 26.1. Certificate of Interest

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or *amicus curiae*, or a private attorney representing a governmental party, must furnish a certificate of interest stating the following information:

* * * * *

(2) If such a party or *amicus* is a corporation:
(i) its parent corporation, if any; and
(ii) a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or *amicus*.

* * * * *

Eighth Cir. R. 26.1A. Certificate of Interested Persons.

Within ten days after receipt of notice that the appeal has been docketed in this court, each nongovernmental party shall certify a complete list of all persons, associations, firms, partnerships, or corporations with a pecuniary interest in the outcome of the case. This certificate enables judges of the court to evaluate possible bases for disqualification or recusal. . . .

Eleventh Cir. R. 26.1-1. Certificate of Interested Persons and Corporate Disclosure Statement; Contents.

A certificate shall be furnished by appellants, appellees, intervenors and amicus curiae, including governmental parties, which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party. In criminal and criminal-related cases, the certificate shall also disclose the identity of the victim(s).

Federal Cir. R. 47.4. Certificate of Interest.

(a) *Contents.* To determine whether recusal is necessary or appropriate, an attorney for a party or amicus curiae other than the United States must furnish a certificate of interest (in the form set forth in the appendix of these rules) stating:

(1) The full name of every party or amicus represented by the attorney in

the case;

(2) The name of the real party in interest if the party named in the caption is not the real party in interest;

(3) The corporate disclosure statement prescribed in Rule 26.1 of the Federal Rules of Appellate Procedure; and

(4) The names of all law firms whose partners of associates have appeared for the party in the lower tribunal or are expected to appear for the party in this court. . . .

A member of the Advisory Committee indicated that he reads the statutory language as requiring the Judicial Conference to either "modify or abrogate" a circuit rule, once the Conference determines that the rule is inconsistent with federal law. Another member disagreed; that member believes that the statutory language permits the Judicial Conference to abstain from acting. He noted that the Judicial Conference is not a court and that if it abrogates a circuit rule there is no review by the Supreme Court. Because the Judicial Conference is not a court before which parties appear, it is not presented with the sort of in depth research and argument that is typical of the adversary process. He believes that the questions can and should be litigated and in that context the issues can be presented to the Supreme Court.

Professor Coquillette invited the members of the Advisory Committee to write to him with their recommendations for the Standing Committee.

Item 93-5, Rule 26.1

Fed. R. App. P. 26.1 requires a corporate party to file a statement "identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." At the Committee's April meeting, Mr. Spaniol noted that although the language of Rule 26.1 had been patterned after the Supreme Court Rule, the Supreme Court had recently amended its rule to omit references to "affiliates." As a result of Mr. Spaniol's observation, the Committee determined that it would reconsider the propriety of requiring disclosure of "affiliates."

As a preliminary matter, one of the Committee members asked whether the scope of the rule should be broader; it does not require disclosure of all matters that are cause for recusal under the statute. Some of the circuit rules require disclosure of anyone who has a financial interest in the case. The Reporter indicated that during the process of developing Rule 26.1, the Advisory Committee approved a rather broad draft and circulated it to the circuits. Several circuits had strongly negative reactions to the broad rule. As a result, the Advisory Committee promulgated a rule that requires bare-bones disclosure. The Committee Note indicates that the Advisory Committee realizes that some circuits may wish to require more complete disclosure.

Another member spoke in support of the limited disclosure required by Rule 26.1. It would impose a serious burden to require a party to certify that it has identified all persons who may have a financial interest in the outcome of the case. A corporate party, however, is in a position to know who it controls and by whom it is controlled and it is reasonable to require the party to disclose that information.

Another member spoke in support of an even narrower rule than current Rule 26.1; in his opinion the seventh circuit provision dealing with corporate affiliates is narrower but sufficient. The rule need only require disclosure of corporations that may be adversely affected by a decision in the case. The seventh circuit rule requires a corporate party or amicus to disclose its parent corporation and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party or amicus. That disclosure is appropriate; if a judge owns stock in a parent corporation of the litigant, the judge has an interest in the litigant. The other disclosures required by the current federal rule and many of the circuit rules, however, seem unnecessary. For example, disclosure of subsidiaries may be unnecessary. If the litigant is a part parent of a corporation in which the judge may own stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation. Similarly, that a judge owns stock in a brother or sister corporation of the litigant is unlikely to create any bias. In short, it may be appropriate to eliminate not only the term affiliate but also the term subsidiaries.

Another member posed a hypothetical that illustrated the possibility of an ethical problem arising from participation of a judge in a case if the judge owns stock in a corporation which is under common control with a party to the case. A judge owns 20% of Joe's Barber Shop; the other 80% is owned by Barber Shops Inc.. Barber Shops Inc. also owns 80% of Mary's Barber Shop. If Mary's Barber Shop is the litigant and is awarded judgment, 80% of that will accrue to the benefit of Barber Shops Inc. Although Barber Shops Inc. does not owe Joe's Barber Shop any of that money, does the fact the Barber Shops Inc. is wealthier effect Joe's Barber Shop and its shareholders (one of whom is the judge in the case)? Does the fact that the judge's co-owner could be richer as the result of the litigation mean that the judge should recuse himself or herself? It might because if Joe's Barber Shop needs cash at some point in the future, Barber Shops Inc. may be in a better position to provide the cash if Mary's Barber Shop is awarded a substantial judgment.

Another member pointed out that what is striking about the hypothetical is that the ownership interests are large and in such cases the judge is likely to be aware of the ownership interests and the disclosure statement would not be necessary to make the judge aware of his or her potential interest. In the typical case the ownership interests of shareholders are minuscule and the impact of a judgment for or against a brother or sister corporation would be negligible upon a judge shareholder.

Another member indicated that the purpose of the rule is to address clear-cut interests. The party's certificate cannot address all possible problems such as persons who are contemplating purchases of interests, etc.

A motion was made and seconded to weave the seventh circuit solution into the rule and to eliminate disclosure of subsidiaries and affiliates. It was pointed out that there may be political reaction to what may be perceived as a narrowing of the disclosure. In response, it was suggested that the Committee Note should explain the change, indicating that a person who owns stock in a subsidiary or an affiliate is not affected by judgment for or against the parent. The publication period provides an opportunity to gauge the public reaction to the proposal.

Specifically the motion was to amend Rule 26.1 to read as follows:

> Any non-governmental corporate party in a civil or bankruptcy case, or agency review proceeding and any non-governmental corporate defendant in a criminal case must file a statement identifying its parent corporation, if any, and a list of stockholders which are publicly held companies owning 10% or more of the stock of the party.

The motion passed by a vote of 6 to 2.

Although the seventh circuit rule requires an amicus that is a corporation to file a similar statement, the Committee decided to treat the amicus question in Rule 29. Specifically, a motion was made to amend draft Rule 29(d) to indicate that "an amicus brief must comply with Rule 32 and, if a non-governmental corporation, file a disclosure statement like that required of a party in Rule 26.1." The motion was seconded and passed unanimously.

Item 93-10, Rule 26.1

At one of the Advisory Committee's recent meetings, the question of the applicability of Rule 26.1 to trade associations was raised. The language of Fed. R. App. P. 26.1 does not address the trade association question. The current rule requires only that a "corporate" party disclose its parent, subsidiaries and affiliates. Under the current rule, a trade association would be required to make disclosure only if it is incorporated and even then it typically would not have anything to disclose; a trade association does not have a parent and the association's members are not subsidiaries or affiliates in the ordinary sense of those words.

Given the decisions just approved under item 93-5, that the only disclosures required are those involving financial interest and, more specifically, only disclosure of parent corporations, the consensus was that no change is needed.

Item 94-1, Rule 26(c)

Fed. R. App. P. 26(c) provides that when the time for action is measured from the date of service and service is accomplished by mailing, three days are

TO: Honorable James K. Logan, Chair
Members of the Advisory Committee on Appellate Rules &
Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: March 27, 1996

SUBJECT: Gap Report concerning the proposed amendments to the Federal Rules of Appellate Procedure published September 1995

In September 1995 the Standing Committee published a packet of proposed amendments to the Federal Rules of Appellate Procedure. The period for public comment closed on March 1, 1996. At the Advisory Committee's meeting on April 15 and 16 the Committee must consider all the comments and decide whether to amend the published rules. If the Committee decides to make amendments, the Committee has the further task of deciding whether the amendments are substantial. If substantial amendments are made, it is necessary to republish the rule(s). If only minor amendments are made, republication is not necessary.

Each rule, as published, is set forth below and is followed by a summary of the comments submitted concerning that specific rule. Following the summary is a segment labeled "Issues and Changes." In that segment, I discuss the issues raised by the commentators and outline the changes that are made in the new draft prepared for your consideration. The new draft concludes the treatment of each rule.

General comments, applicable to all of the rules are summarized first.

COMMENTS ON PROPOSED AMENDMENTS OF FED. R. APP. P. 26.1

The rule is divided into three subdivisions to make it more comprehensible. The rule continues to require disclosure of a party's parent corporation but the amendments delete the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. The amendments, however, add a requirement that the party list all its stockholders that are publicly held companies owning 10% or more of the stock of the party.

1. Robert L. Baechtol, Esquire
Chair, Rules Committee
The Federal Circuit Bar Association
1300 I Street, N.W.
Suite 700
Washington, D.C. 20005-3315

The Association agrees that recusal will rarely be required based on a judge's ownership of stock in a litigant's subsidiary or affiliate; but states that "rarely" does not mean "never." The Association urges that the rule continue to require disclosure of subsidiaries and affiliates because it does not impose a significant burden and not requiring it risks adverse reflection on the court's neutrality when a judge would have elected recusal had the facts been disclosed.

2. Robert S. Belovich, Esquire
5638 Ridge Road
Parma, Ohio 44129

The rule will not assure disclosure of publicly held corporations which may be a joint venture partner of a party to an appeal, or of a publicly traded corporation which is a grandparent or great grandparent of a party to an appeal. He gives as an example a party that is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the majority shares of the party. The publicly traded corporation's disclosure would not be required under a strict reading of the rule.

3. Donald R. Dunner, Esquire
Chair, Section of Intellectual Property Law
American Bar Association
750 N. Lake Shore Drive
Chicago, Illinois 60611

Mr. Dunner submitted comments prepared by two of the section's committees:

a. One committee says that the amendments appear reasonable.

b. Another committee says that the proposed deletions from the rule are well-advised but the committee has two concerns about requiring a party to disclose any publicly-held company owning 10% or more of the party's stock. First, it implies that a judge who owns any stock in a company that owns 10% of the stock in a party should recuse himself or herself; the committee thinks this "over-extends an assumption of disqualification in some circumstances" and that the provisions may prevent a judge from using mutual funds to avoid the appearance of impropriety. Second, the committee thinks that compliance with the disclosure requirement could be burdensome and that the burden is not justified by the indirect and potentially extremely minimal ownership interests it addresses.

4. Kent S. Hofmeister, Esquire
Section Coordinator
Federal Bar Association
1815 H Street, N.W.
Washington, D.C. 20006-3697

Mr. Hofmeister forwarded the comments of Mark Laponsky, Esquire, the Chair of the Labor Law and Labor Relations Section of the Federal Bar Association. Mr. Laponsky thinks the changes generally make the rule more comprehensible but questions whether the new rule will generate adequate information. Substituting "stockholders that are publicly traded companies" for "affiliates" is helpful, but limiting disclosure to stockholders with 10% or greater interest in the party may cause difficulties in obtaining the requisite information from a corporate client. Although he does not disagree that a 10% threshold will identify stockholders whose interests are most likely to be affected by litigation, he thinks it would be easier for the corporation to simply identify all publicly traded stockholders.

5. Jack E. Horsley, Esquire
Craig & Craig
1807 Broadway Avenue
Post Office Box 689
Mattoon, Illinois 61938-0689

Attorney Horsley makes two comments:

a. He suggests that the rule be expanded to require the filing of a statement by the Chief Executive Officer and by members of the Board of Directors of the company.

b. He suggests amending lines 23-28 to state: "If the statement is filed before the principal brief, the party shall file an original and <u>at least</u>

three copies, unless the court requires the filing of a ~~different~~ reasonable number by local rule or by order in a particular case."

6. Heather Houston, Esquire
Gibbs Houston Pauw
1111 Third Avenue, Suite 1210
Seattle, Washington 98101
on behalf of the Appellate Practice Committee of the Federal Bar Association for the Western District of Washington

It is not always clear whether a particular corporation is "publicly held." The committee suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

7. Philip A. Lacovara, Esquire
Mayer, Brown & Platt
1675 Broadway
New York, New York 10019-5820

Agrees with eliminating the need to identify a party's subsidiaries or affiliates; but suggests amending lines 12-14 as follows:
"listing any stockholder[s] that is a [are] publicly held company[ies] and that owns[ing] 10% or more of the party's stock."
The changes are intended to make it clear that the rule does not call for identifying public companies that, collectively, might own a total of 10% of the party's stock.

Even though there are other forms of financial involvement other than "stock" that could be effected by a decision for or against a party, e.g. convertible notes and debentures, Attorney Lacovara says that the difficulties of defining a broader category of investments and in tracking the identity of the investors make the focus on "stock" reasonable.

8. Don W. Martens, Esquire
President
American Intellectual Property Law Association
2001 Jefferson Davis Highway, Suite 203
Arlington, Virginia 22202

The AIPLA supports the additional requirement of listing owners of more than 10% of the stock of the party to the appeal, but it questions the need to delete the identification of subsidiaries and affiliates. Although it is unlikely that a subsidiary or affiliate would be affected by the outcome of the appeal,

it may be and the judges should have that information as well.

9. Honorable A. Raymond Randolph
Chair, Committee on Codes of Conduct of the
Judicial Conference of the United States
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

The Committee supports the proposed revisions. Disclosure of only parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that the judges are made aware of parties' corporate affiliations and are able to make informed decisions about the need to recuse.

10. James A. Strain, Esquire
Seventh Circuit Bar Association
219 South Dearborn Street, Suite 2722
Chicago, Illinois 60604

Notes only that the proposed amendment brings the Federal Rule in accordance with its Seventh Circuit analogue.

11. Carolyn B. Witherspoon, Esquire
Office of the President
Arkansas Bar Association
P.O. Box 3178
Little Rock Arkansas 72203
(on behalf of the committee members of the Arkansas Bar Association Legislation and Procedures Committee)

Approves the proposed changes.

In addition to the comments submitted during the publication period, Judge James A. Parker, a member of the Standing Committee, wrote to Judge Logan and me after last summer's Standing Committee meeting. He is concerned that Rule 26.1 is too narrow because it deals only with corporations. Corporations are not the only form of organization that has numerous diverse owners. Judge Parker notes by way of example that the rule does not require a corporation that is a general or limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner. Judge Parker recommends broadening the language of Rule 26.1 to require identification of all types of organizations in which a party may have an

interest that would create a conflict for a judge. A copy of Judge Parker's letter follows this page.

One part of Judge Parker's example is probably not much different than the relationship between a party and its subsidiary or affiliates, a relationship that the Committee believes does not require disclosure. When a corporate party is a limited partner and there is the potential that the judge may also be a limited partner in the same partnership, a judgment for or against the corporate party should have no effect upon the judge. The point remains, however, that Rule 26.1 is narrow. The Advisory Committee has long been aware that Rule 26.1 is not as broad as may be desirable. However, the Committee consulted with the circuits during the development of Rule 26.1 and there was no consensus for a broader rule. The Committee has agreed with Mr. Lacovara's comment that the difficulty of defining a broader category of investments and in tracking the identity of investors makes the focus on stock reasonable.

V-G-3

UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO
POST OFFICE BOX 566
JAMES A. PARKER
Judge
ALBUQUERQUE, NEW MEXICO 87103

July 31, 1995

Honorable James K. Logan
United States Circuit Judge
P.O. Box 790
Olathe, Kansas 66061

Professor Carol Ann Mooney
University of Notre Dame
Law School
Notre Dame, Indiana 46556

Re: Proposed Appellate Rule 26.1 - Corporate Disclosure Statement

Dear Judge Logan and Professor Mooney:

I begin with an apology for not earlier having commented on proposed Rule 26.1. Obviously your Advisory Committee has devoted considerable time and thought to this rule. Unfortunately, I did not focus attention on the substance of Rule 26.1 until the Standing Committee meeting on July 6.

My concern is that proposed Rule 26.1 is worded too narrowly to accomplish its objective of requiring parties to provide information that will help judges identify potential conflicts of interest. The proposed rule covers only corporations. A corporation, of course, is only one form of organizations that have numerous, diverse owners. Another is a limited partnership. Limited partnerships that have been widely sold often have been parties in many lawsuits. As presently worded, proposed Rule 26.1(a) would not require a corporation that is either a general or a limited partner to disclose its interest in a limited partnership in which a judge may also be a limited partner.

I recommend broadening the language of proposed Rule 26.1(a) to require identification of all types of organizations, not just corporations, in which a party may have an interest that would create a conflict for a judge. Having said that, I apologize, again, for not proposing alternative language. I would suggest, however, deleting "corporate" from the title of Rule 26.1.

Sincerely,

James A. Parker

cc: Honorable Alicemarie H. Stotler
Standing Committee Chairperson

ISSUES AND CHANGES - RULE 26.1

Eleven letters commenting on the proposed amendments were received; the letter from the A.B.A. Section of Intellectual Property, however, included separate suggestions from two committees so there is a total of 12 commentators. Of the 12, four support the amendments, none generally oppose the amendments, but 8 suggest revisions.

1. Support

The opinion of the Judicial Conference Committee on Codes of Conduct was specifically solicited. The Committee supports the amendments. The Committee believes that disclosure only of parent companies and public companies owning more than 10 percent of the party's stock should be adequate to ensure that a judge is made aware of a party's corporate affiliations and that a judge is able to make an informed decision about recusal.

2. Suggested Revisions

All of the commentators who suggest revisions focus on the extent of the disclosure that should be required. Unfortunately, they are not in agreement about what should be done.

a. Two commentators urge the Committee to continue to require disclosure of subsidiaries and affiliates, although they apparently would also retain the new 10% rule. These commentators stress that although it would be rare that recusal would be required because a judge owns stock in a litigant's subsidiary or affiliate, "rarely" does not mean "never."

b. Three other commentators specifically approve the deletions but would make changes in that portion of the amendments that require disclosure of all publicly traded companies that own 10% or more of the party's stock:

   i. one commentator recommends dropping the requirement because the judge's interest may be extremely minimal — some stock in a company that owns 10% of the party's stock (would this preclude the use of mutual funds?) — and it would be a burden for the party to comply with the requirement;

   ii. another commentator would require disclosure of all stockholders that are publicly owned; he thinks it would be easier to list them all;

   iii. a third commentator would amend the language to make it clear that the rule does not call for identifying public companies that collectively might own a total of 10% of the party's stock; he would amendment the language as follows:

"listing any stockholders that is a ~~are~~ publicly held company ~~ies~~ and that owns ~~ing~~ 10% or more of the party's stock."

c. Another commentator suggests that it is not always clear whether a company is publicly held and suggests that the rule refer to companies "that have issued shares that are traded on exchanges or markets that are regulated by the Securities and Exchange Commission."

d. Another commentator believes that the rule should be expanded to include publicly held joint venture partners and grandparent or great grandparent companies.

3. The New Draft

The Advisory Committee specifically requested that the Committee on Codes of Conduct review the proposed amendments. Given the approval of the Committee on Codes of Conduct, the new draft does not reinstate the requirement that a party disclose "subsidiaries" and "affiliates." Both of the commentators who urged retention of the rule admitted that it would be rare that a judge should recuse himself or herself because of the judge's ownership of stock in a subsidiary or affiliate.

The new draft does continue to require disclosure of a stockholder that owns 10% or more of the party's stock if the stockholder is publicly held. Although one commentator believes that this provision "over-extends" the assumption of disqualification because a judge's interest may be extremely minimal, the disqualification statute is quite demanding. The statute requires a judge to disqualify himself or herself if the judge has a "financial interest" in a party "however small" the interest may be, if the interest could be "substantially affected by the outcome of the proceeding." 28 U.S.C. § 455(b)(4), (d)(4). Note, the statute does not require that the judge be substantially affected by the outcome, but that the judge's interest (however small) could be substantially affected. Although it could be argued that the judge does not have a financial interest in the party, but only in the stockholder, the commentator's focus upon the "minimal" nature of the judge's interest is inappropriate. As to the mutual fund question, the statute specifically says:

> Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund. 28 U.S.C. § 455(d)(4)(i).[2]

The draft, however, does not require the party to disclose all of the party's stockholders that are publicly held (as one commentator suggested) but continues

[2] That the statute creates a specific exception for mutual fund ownership may suggest that the statute is otherwise concerned about the sort of indirect ownership at issue in the proposed amendment.

only to require disclosure of those corporations that own 10% of the party's stock. The ten percent threshold makes the judge's interest in the stockholder a financial interest in the party. If a judge owns stock in a corporation which in turn owns a very small percentage of the party's stock, the argument that the judge does not have a financial interest in the party is quite strong.

Changes are made in the draft at lines 11 and 12. (Changes are shaded.) Mr. Lacovara's suggestion is adopted so that it is clear the rule applies only when a single corporate stockholder owns at least 10% of the party's stock. And at line 11, the rule now requires disclosure of "all" of a party's parent corporations, rather than "any" parent corporation. The intent of the change is to require disclosure of grandparent and great-grandparent corporations. See the underlined changes in the Committee Note.

At line 27 the words "the filing of" are deleted as suggested in the "style" version being prepared for publication.

Judges Ruled on Firms in Their Portfolios

Appeals Jurists Attribute Participation to Innocent Mistakes

By Joe Stephens
Washington Post Staff Writer
Monday, September 13, 1999; Page A01

A number of federal appellate judges have ruled on cases involving companies in which they own stock, despite a federal law designed to prevent judges from taking part in any case in which they have a financial interest.

An examination of financial disclosure reports and federal court records shows that in 1997 eight appeals court judges took part in at least 18 cases in which they, their spouses or trusts they helped manage held stock in one of the parties. The stock ownership ranged from a few thousand dollars to as much as $250,000.

In interviews, the judges acknowledged that they should not have participated in the cases but stressed that their stock interests did not affect their rulings. The judges, who include some of the nation's best-known jurists, attributed their participation in the cases to innocent mistakes or memory lapses about their financial portfolios.

"It's embarrassing; I should have been more alert," said Judge Alex Kozinski of the 9th U.S. Circuit Court of Appeals in California. "I certainly am going to try to be more careful."

Some of those involved in the cases also were upset to learn about the stock. Judge Alice Batchelder of the 6th Circuit in Ohio improperly sat on a case involving Wal-Mart Stores Inc. even though her husband held up to $50,000 worth of stock in the company. Batchelder and two other judges ruled the discount-store chain could not be held responsible for selling Wayne Brashear's 19-year-old son a .357 Magnum revolver, which he later used to commit suicide.

"It leaves a pretty bitter taste," Brashear said of the judge's actions.

Batchelder explained that, until contacted by a reporter, she did not realize her husband's retirement account owned stock in Wal-Mart and other companies. She said she should have withdrawn from Brashear's appeal and four other cases.

"I'm extremely chagrined to discover it," she said. "The error is mine."

The conflicts were uncovered by Community Rights Counsel, a public-interest law firm that concentrates on land-use issues. The group reviewed 1997 personal financial disclosure reports, the most recent available at the time, filed by the approximately 150 active federal appeals court judges, and checked the holdings against computerized records of cases in which the judges participated. It provided the material to The Washington Post.

"Our findings represent the tip of the iceberg, and there are likely hundreds of similar cases to be found throughout the federal judiciary," said the group's executive director, Doug Kendall.

But David Sellers, a spokesman for the Administrative Office of the U.S. Courts, said the conflicts involved a surprisingly small percentage of the roughly 52,000 cases that passed through the nation's appeals courts in 1997. He also questioned why seven of the eight judges cited by the group were named by Republican presidents.

Kendall said he scrutinized all judges equally. He said his study understated the probable number of conflicts because it did not include cases handled by judges who have taken retired status and did not include an exhaustive search of corporate subsidiaries.

In interviews, the judges said their rulings in the cases were unlikely to affect their stock values. In some cases, in fact, the judges ruled against the companies' interests. Even so, they acknowledged that they should have withdrawn from the lawsuits to prevent a conflict.

"I accept the responsibility. I shouldn't have sat on those cases," said Judge Morris Arnold of the 8th U.S. Circuit in Arkansas. "I regret the mistake happened and I'm going to work to see it doesn't happen again."

Arnold took part in one lawsuit involving General Electric and another involving a General Electric subsidiary while his wife owned company stock worth up to $50,000. He said he overlooked one conflict because the case had dozens of litigants. In the other, he said, he did not recognize that General Electric Capital Corp. was a subsidiary of General Electric.

Some judges said their spouses or investment managers bought the stocks without immediately notifying them. Others said the companies' names became lost in a long list of litigants or that they were confused by the names of subsidiaries and affiliated corporations.

Federal appeals court rules require corporations to provide a list of all parent companies and related entities in order to prohibit precisely such conflicts.

Federal law requires that judges remove themselves from any case in which they know they or their spouses have a financial interest, no matter how small. Even a $1 investment violates the statute. Federal law also directs judges to keep abreast of what they own so that they may immediately resolve any conflicts that arise.

Evidence of the conflicts was not news to one judge, Laurence Silberman of the U.S. Circuit Court of Appeals for the District of Columbia.

Silberman said he identified a series of conflicts in early 1998 and sent letters reporting the problem to the lawyers in three cases. At the same time, Silberman withdrew from hearing an appeal in one of the most closely watched cases in recent years -- the U.S. Justice Department's antitrust lawsuit against Microsoft Corp.

Silberman said he had no ownership in Microsoft or the companies involved in the other cases. But after his brother-in-law died suddenly in 1997, Silberman explained, he became a trustee of the Gaull Marital Trust, which owned a variety of stocks, including up to $100,000 in Microsoft.

In his letters, Silberman noted that his "participation was in violation" of federal ethics laws.

In 1997, Silberman received $15,000 for teaching at Georgetown University Law Center and was one of three judges who ruled in Georgetown's favor in a case accusing the university hospital of medical malpractice. Silberman said it was "absurd" to think he should remove himself in that situation, noting the hospital and law school are separate entities. Legal ethics experts said he was not required to disqualify himself.

In cases handled by the other judges, lawyers and litigants were not warned about the conflicts. For example, attorney Paul Bennett of San Francisco said he was surprised to learn that Judge Kozinski owned General Motors stock.

Bennett represented eight railroad workers who claimed their hearing was damaged by noise from locomotive engines manufactured by General Motors. Kozinski led a three-judge panel that rejected his argument, which Bennett said could have led to a national class-action suit against General Motors if it had been successful.

"It's disturbing that people say they don't know what they own," Bennett said. "If I had a different panel of judges, who knows if I would have won?"

Kozinski explained that midway through the case his wife bought 95

shares of stock, worth less than $15,000. The judge learned of the purchase later, he said, and never connected it to the lawsuit.

"We will try harder from now on," Kozinski said. "We do take this very seriously."

Some members of Congress argue that, to help the public quickly identify such conflicts, lists of stocks held by federal judges should be easily available to the public. In March the Judicial Conference rejected a plan to have judges post "recusal lists" at local courthouses, citing security and privacy concerns. Judges also said that such lists already are available to anyone willing to fill out a request and wait several weeks.

Kendall and other critics point out, however, that each request results in a warning to the judge about who is examining his finances. They said few lawyers and litigants would risk angering the judge who will decide the outcome of their case.

The Environmental Working Group, an environmental watchdog organization, wrote to Chief Justice William H. Rehnquist last week urging him to improve the disclosure process, including posting the forms on the Internet. "Litigants and citizens' faith in the judicial process is severely eroded by these conflicts," said the letter by vice president Mike Casey.

Judge Arnold called it a good idea to make judges' financial disclosures more readily available to the public.

"I understand why some people would be reluctant" to check the reports if they know their inquiries will be reported to the judge, Arnold said. "If it's a matter of public record, it's a matter of public record, and people ought to be able to look at it."

Taking Stock on the Bench

Federal appeals court judges with conflicts of interest:

Morris Arnold of the 8th Circuit in Arkansas

* Took part in one lawsuit involving General Electric, and another involving a General Electric subsidiary, while his wife owned company stock worth up to $50,000.

Alice Batchelder of the 6th Circuit in Ohio

* Took part in five lawsuits involving Wal-Mart Stores Inc. and Bristol-Myers Squibb Co. while her husband's retirement account held up to $50,000 stock in those companies.

Edward Becker of the 3rd Circuit in Pennsylvania

* Said his clerk overlooked his stock ownership in one case involving Hercules Inc. In a second, said he mistakenly believed he had already sold the stock, worth up to $15,000.

Alex Kozinski of the 9th Circuit in California

* Ruled for General Motors in a case brought by railroad workers who claimed hearing damage from GM engines. Said his wife bought GM shares midway through the case and that he only learned of the purchase later.

Sandra Lynch of the 1st Circuit in Massachusetts

* Married a man who owned up to $100,000 in Monsanto Co. stock a few weeks before joining a ruling in a case involving Monsanto. Said she did not learn of her husband's stock until later, and did not realize the problem with the case until called by a reporter.

Daniel Manion of the 7th Circuit in Indiana

* Participated in a lawsuit involving Lucent Technologies while holding company stock worth up to $15,000. Manion pointed out that early in the appeal the litigant's name was listed as AT&T. Later, it was changed to Lucent.

Bruce Selya of the 1st Circuit in Rhode Island

* Participated in three cases while owning stock worth up to $15,000 in a litigant's or a litigant's parent company. Said the problems arose because his investment manager bought stocks for his portfolio and only later supplied him with the names of the companies.

Laurence Silberman of the D.C. Circuit

* Participated in three cases involving companies in which a trust he administered held stock. Wrote letters to the parties saying his involvement violated federal ethics rules.

"On Their Honor: Judges and their Assets."

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Stocks and ethics collide in courtroom

By JOE STEPHENS - Staff Writer
Date: 04/04/98 23:00

Federal judges here and elsewhere repeatedly have presided over lawsuits against companies in which they own stock.

That's not supposed to happen. U.S. law requires judges to withdraw from any lawsuit in which they know they have a financial interest, however small. So does the judicial Code of Conduct.

Yet a study by *The Kansas City Star* discovered federal judges from the Kansas City area issued more than 200 court orders while holding an interest in a litigant. They set hearings, granted motions, threw out legal claims and even conducted a jury trial.

For comparison, *The Star* examined courthouses in Oregon and Pennsylvania -- and found identical problems.

In all, *The Star's* investigation identified 57 legal actions in which a district judge entered one or more such orders. In the Kansas City area alone, nine district judges, or two-thirds of those in the local courthouses, entered orders in 33 problem cases.

At the same time, the judges owned anywhere from a few thousand dollars to as much as $250,000 in stock in companies involved in a suit, or in the companies' parent corporations.

"I'm shocked," said Jeffrey Shaman, a

To review the investments of federal district judges in the Kansas City area, click the judges' names below.

G. Thomas Van Bebber District of Kansas	John W. Lungstrum District of Kansas
Earl E. O'Connor District of Kansas	Kathryn H. Vratil District of Kansas
D. Brook Bartlett Western District of Missouri	Gary A. Fenner Western District of Missouri
Elmo B. Hunter Western District of Missouri	Fernando J. Gaitan Jr. Western District of Missouri
Nanette K. Laughrey Western District of Missouri	Howard F. Sachs Western District of Missouri
Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

http://www.kcstar.com/item/pages/judges.pat,local/30da0058.404,.html

judicial ethicist and a law professor at DePaul University in Chicago. "It's such a clear violation."

The newspaper's study found no evidence any judge benefited personally or let his stock holdings influence his rulings.

But many litigants and lawyers said the findings raised questions about how judges, who are appointed for life to ensure others follow the letter of the law, police themselves.

David Barrett, an attorney in one of the lawsuits, called the findings "a little scary."

"People assume," he said, "that judges are all honest and fair -- and avoid conflicts."

Most judges said in explaining the lapses that they made innocent mistakes or forgot what they owned. Some said their staffs were supposed to spot the conflicts. Others blamed the crush of paperwork.

Many orders were routine and had little effect on the lawsuits, which often were settled out of court. Some orders simply appointed legal couriers or set filing schedules. And in at least seven of the 57 cases, judges recognized their stock conflict and stepped out of the lawsuits before *The Star* began its study.

Yet experts said that, in each instance, judges should have monitored their investments and withdrawn before entering a single order.

"This kind of sloppiness is more than unseemly; it is destructive of the public's confidence in an impartial judiciary," said James C. Turner, a Washington lawyer and consumer advocate.

Many judges acknowledged they may have broken ethics laws, at least technically.

http://www.kcstar.com/item/pages/judges.pat,local/30da0058.404,.html

"I take it very seriously," Judge John W. Lungstrum of Kansas City, Kan., said of the lapses. He inadvertently presided over two recent lawsuits while his family owned up to $65,000 in stock in the defendants.

"I want to make sure," he added, "that it doesn't happen again."

For some litigants, the judges' stock ownership already has sullied the image of the court system.

Two years ago a Kansas City man sued cigarette manufacturers, accusing them of deliberately addicting smokers to nicotine. Seven weeks later, a judge threw out the lawsuit as frivolous.

Until told by *The Star,* the plaintiff had no idea the judge owned stock in one of the companies.

In another lawsuit, Dana DeSuza of Independence charged that the Sprint Corp. violated discrimination laws when it fired her. A judge threw out part of her $1.9 million claim, and presided over a trial in which a jury rejected the remainder of her case.

Two years passed before DeSuza learned the judge owned stock in Sprint. Her reaction: "I'm disgusted."

The Star's findings already are leading to change here and around the country.

For example, at least one judge sold his stock within days of being interviewed. "I don't want any question," said Judge Dean Whipple, "about whether I had any ulterior motive on those cases."

Two weeks after court officials sent her notice that the newspaper was reviewing her investments, Judge Kathryn H. Vratil mailed letters to litigants in at least six lawsuits. She told them they might have grounds to vacate her judgments and

reopen their cases. Vratil called the timing a coincidence.

In Pittsburgh, a judge withdrew from a $9 million lawsuit shortly after *The Star* notified him that his wife owned stock in three separate defendants, eight years into the legal action.

A factory worker in northern Pennsylvania, alerted to his judge's stock by *The Star's* study, two weeks ago filed a motion accusing the judge of violating ethics laws. He requested a new trial in the age-discrimination case, which had been closed for two years.

Other litigants said they also were looking into resurrecting their long-closed cases.

Authorities in Washington are taking notice, too.

Three days after being contacted by *The Star*, the Administrative Office of the U.S. Courts faxed a memo marked "URGENT" to more than 100 chief judges across the nation. It suggested they review and update their methods for identifying conflicts of interest. That is something several judges said they were doing already.

"What we're really talking about is the integrity of the judicial system," explained Leslie W. Abramson, a law professor at the University of Louisville and an expert on judicial ethics.

"In the worst-case scenario, judgments could be affected."

The honor system

Congress was worried about such conflicts 24 years ago. That's when legislators beefed up ethics laws to bolster confidence in the courts.

They considered financial conflicts so serious, in fact, that they made them illegal even when

the judge's investment is tiny and when lawyers waive any objections.

The idea was to prevent quibbling over the extent of the judge's legal role or the size of his financial stake. As a practical matter, experts said, it would be impossible to determine the purity of a judge's thoughts when he renders a particular decision.

To help ensure compliance, judges must list their investments annually on reports filed in Washington.

But strict rules make the reports difficult to get and alert the judges they are under scrutiny. That ensures few people review them.

Short of Congress impeaching a judge, no one outside the judiciary is authorized to enforce the ethics statutes. Judges are on the honor system, trusted to police their own conflicts. The law sets no penalty for crossing the line.

Until now, experts said, no one has taken an in-depth look at how scrupulous trial-level judges have been about avoiding such problems.

For its study, the newspaper analyzed financial disclosure reports filed since 1991 by district judges based in parts of four of the 13 federal appellate circuits.

The courthouses were chosen because of their size and because each represents a different judicial district: Kansas City (Western Missouri District); Kansas City, Kan. (Kansas); Pittsburgh (Western Pennsylvania) and Portland (Oregon).

The Star then compared the judges' stock holdings with thousands of civil lawsuits.

Although the study found problems at each courthouse, on average judges in the Kansas City area issued more court orders in more questionable cases.

Among the lawsuits identified locally, 19

involved judges who owned stock in a litigant; one suit involved a judge whose wife owned the problem stock. In 11 other lawsuits, judges owned stock in the parent corporation of one or more litigants.

The final two cases involved a different sort of problem. A judge who sat on the Board of Governors at Truman Medical Center presided over two lawsuits against the center -- and threw both out of court.

Under ethics statutes and judicial canons, experts said, judges should have no role in any of those cases.

"Some people might say it's surprising," Abramson said of *The Star's* findings. "Other people might say it's disappointing."

`Slap in the face'

Some litigants grew furious when told of the judges' investments.

"It makes me feel like I've been violated," litigant Ed Wallace said moments after hearing that the judge in his lawsuit against the Chrysler Corp. bought Chrysler stock in the midst of the case.

"I really feel that I got the raw end of the deal."

Nancy Powell is stinging, too. The judge who handled Powell's lawsuit against her former employer revealed her stock ownership just 11 days before trial, bringing the case to a halt.

"The sheer emotion of the whole thing was horrendous," Powell said.

Darrell Taylor suffered severe injuries in a traffic accident, then pursued a $1 million lawsuit against an insurance company. He had no idea his judge owned stock in the company's holding corporation.

"There should be a law against that," he said.

Even in cases where a judge's involvement was brief and cursory, some litigants grew indignant.

For example, the first judge assigned to handle Linda Zimmerman's lawsuit against General Motors issued one order, scheduling a conference. Because of a conflict unrelated to stock ownership, the judge withdrew nine days later.

Even so, Zimmerman erupted when a reporter told her the judge owned up to $30,000 in General Motors stock.

"I did not know about any of this," Zimmerman said. "That's a conflict."

Rightly or wrongly, the findings also fed a pervasive skepticism about the fairness of American courts.

"I am not a fan of the justice system," explained one litigant, Harvey Bruce. "You cannot get a fair shake in this country."

Among the lawyers involved, Randy James' reaction mirrored that of many.

James of Overland Park praised the integrity of federal judges. He is confident stock investments did not sway the judge's rulings in his case.

Yet James responded to *The Star's* overall findings with exclamations of "Wow!" and "My goodness!" And he found the picture they painted disturbing.

"It's so obvious it slaps you in the face," James said. "If you've got a conflict, you've got to get out."

Unlike James, many lawyers refused to discuss the conflicts unless promised anonymity.

"You've got to understand my position," one attorney said, repeatedly asking that his name not appear in the newspaper. "This judge

determines my ability to make a living."

Several lawyers said they never considered looking for financial conflicts. They assumed judges were conscientious and would reveal any stock interests.

Some also pointed out that if an attorney had a financial conflict, he would face serious trouble for himself and his case.

"It's more than a little ironic," one lawyer said, "that a judge got caught in this situation."

Hollow warnings

Each spring, judges take part in a ritual designed to remind them of conflicts and their duty to avoid them.

Every judge lists his assets on a detailed form, then signs an attached certification declaring that he did not break any ethics laws.

The certification requires each judge to attest that:

"To the best of my knowledge at the time after reasonable inquiry, I did not perform any adjudicatory function in any litigation during the period covered by this report in which I ... had a financial interest. ..."

The judge's signature is followed by a pre-printed warning:

"Any individual who knowingly and wilfully falsifies ... this report may be subject to civil and criminal sanctions."

But the warning is hollow. Court officials in Washington could not identify a single instance in which a judge was disciplined. And the certification clearly did not stop judges from handling cases in which they owned stock.

For example, Whipple presided over two 1996 lawsuits against the Philip Morris Cos. Whipple threw out both.

Then, Whipple filed a financial report last spring that disclosed he owned up to $15,000 worth of stock in Philip Morris. (The form only shows ranges of stock value, not precise amounts.)

Whipple said in an interview he believed that, in some cases, he could legally own stock in litigants, although he concedes his opinion is in the minority.

Whipple was far from alone in signing the statement. *The Star* reviewed more than 200 of the certifications filed over six years by judges in four states. None of the judges disclosed a single conflict.

That's the case even for judges who presided over part of a lawsuit, discovered and acknowledged their stock ownership, then belatedly withdrew. Each later signed the statement without elaboration.

For example, Judge Elmo B. Hunter presided over a lawsuit filed in 1990 by the General Motors Acceptance Corp. Ten months and seven court orders into the suit, he notified lawyers that he owned General Motors stock; his disclosure reports show it was worth $100,000 to $250,000.

Hunter announced he would preside over the case unless the lawyers objected. They did not, and Hunter continued on the case until the parties reached a negotiated settlement six months later.

Federal law requires a judge with an interest in a litigant to withdraw even if the lawyers beg him to stay. That applies even when the judge's interest is in the litigant's parent company, experts said. Yet Hunter signed the certification.

Hunter, who has been ill, could not be reached for comment.

The lapses are especially striking in instances where a judge issued orders in a lawsuit just

before signing the certification.

Two years ago, for example, Judge Fernando J. Gaitan Jr. issued an order in a lawsuit against AT&T Communications, a common name for AT&T Corp. The very next day, Gaitan signed the certification and sent a list of his investments to Washington.

The list included up to $15,000 in AT&T stock.

Gaitan declined repeated requests for an interview. In a letter, he called his AT&T holdings insubstantial and his role in the case minimal.

About the same time, Judge Lungstrum signed a 108-page consent decree in a lawsuit against a string of corporations, including Western Resources Inc. and General Motors.

The same day, Lungstrum signed the certification and mailed a list of his family's 1995 holdings to Washington. They included Western Resources stock and a special class of General Motors securities, worth up to $100,000.

Lungstrum acknowledged he probably did not compare his assets with his caseload before signing the form. Instead, he assumed he already would have discovered and resolved any conflicts.

"I just did not think about that," he said. "But I signed it with an absolute certainty that I did not have a conflict.

"I probably had a little bit of hubris there that I was not going to miss it."

In one case, the disclosure ritual failed to prevent stock problems from cropping up twice in a single lawsuit.

Jerald Heintzelman filed suit in 1995 after losing his job at AT&T Microelectronics, a division of AT&T with offices in Lee's Summit.

The case was assigned to Judge Howard F. Sachs, who owned AT&T stock worth $15,000 to $50,000. Sachs issued two orders.

Seven months into the suit, Sachs disclosed his stock and withdrew. Three days later, a magistrate withdrew before taking any action because he also was an AT&T stockholder.

The case then passed to Gaitan, who issued five orders. Ultimately, Gaitan agreed to requests by both sides and dismissed the lawsuit.

Five weeks later, Gaitan signed a form disclosing his assets.

The only stock listed: AT&T.

The Star

On their honor: Judges and their assets

Judicial ethics law contains few loopholes

By JOE STEPHENS - Staff Writer
Date: 04/04/98 22:30

Congress had a simple idea in mind two decades ago when it enacted strict new ethics laws:

No one should be a judge in his own dispute.

So Congress set an exacting standard. A judge, it said, must pull out of a lawsuit when he knows he has a financial interest "in the subject matter in controversy or in a party to the proceeding."

In 1988, the U.S. Supreme Court weighed in. It ruled that a judge must step aside even when no reasonable person would conclude that the investment could affect his judgment.

Federal law, the court said, "requires disqualification no matter how insubstantial the financial interest and regardless of whether or not the interest actually creates an appearance of impropriety."

Appeals courts and ethics committees have ruled the same way in case after case, noting that judges must withdraw even when no one objects and when doing so "would involve great inconvenience."

The only other option: Sell the stock.

In one often-cited case, a judge was presiding over a complex class-action lawsuit involving thousands of companies

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Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

when he discovered that his wife had an interest in the dispute worth less than $30. A federal appeals court ruled that the judge had to withdraw.

"Thus," the court wrote, "after five years of litigation, a multimillion-dollar lawsuit of major national importance, with over 200,000 class plaintiffs, grinds to a halt over ... $29.70."

And just in case a judge claims ignorance of what he owns, the law flatly states: "A judge should inform himself about his personal and fiduciary interests." Failure to do so, the Supreme Court has held, may constitute a separate violation of ethics laws.

Peter W. Rodino Jr. was chairman of the House Judiciary Committee in 1974 and helped craft the ethics statutes. He describes them as common sense.

"Public service is a public trust," Rodino explained in an interview last month. "We've got to have *full* trust."

That is why Rodino and his colleagues provided judges with a clear formula for determining when they must disqualify themselves. The legislators did not want anyone questioning when the rule applied.

"So there is no argument upon which reasonable people could differ, Congress chose to draw a bright line," explained Stephen Gillers, a judicial ethicist at New York University who has worked as a White House consultant.

"What the Congress did was simply not leave room for discretion. Congress decided it's better to err on the side of recusal when a judge has a financial interest in a party, rather than split hairs about whether the judge's financial interest is likely to be decreased or increased, depending on the result of the case."

And if the rule seems severe, that's as it should be, said Steven Lubet, a judicial ethicist at Northwestern University in Chicago.

"It's supposed to be picky," he said, "because judging is important."

The rules also recognize the uncommon influence commanded by members of the bench.

Judicial authority is not hamstrung by politics or limited by the need to reach consensus. The clout wielded by Kansas City Mayor Emanuel Cleaver pales beside that of U.S. District Judge Russell G. Clark, who took control of Kansas City public schools and ordered a property tax increase. Or that of Judge Dean Whipple, who seized the Kansas City Housing Authority.

Unlike senators and presidents, federal judges are guaranteed their jobs for life. Even if they retire or are convicted of a felony, federal law gives them the right to receive their full salary until death.

"A federal district court judge in many ways is the most powerful individual in our governmental system, excepting the president," said James C. Turner, a Washington lawyer and legal reformer.

In return for that power, ethics canons demand that the nation's 585 district judges be not only incorruptible but also above even the appearance of impropriety. Actions and conflicts common among elected officials are expressly illegal for federal judges.

Congress enacted those prohibitions in a flood of post-Watergate reforms. And in particular, Rodino recalled, they were prompted by Clement Haynsworth.

Richard Nixon nominated the appellate judge to the U.S. Supreme Court in 1969.

http://www.kcstar.com/item/pages/judges.pat,local/30da0056.404,.html

Soon, scandal erupted over Haynsworth's business dealings.

Two civil cases in which Haynsworth took part, it turned out, involved subsidiaries of companies in which he owned a few thousands dollars in stock. One of the cases was a personal injury lawsuit that resulted in an award of just $50.

Although no one charged Haynsworth with making money off his rulings, U.S. senators cited the conflicts as the reason for his rejection. Some critics even called for him to resign from the federal appeals court.

Tom Eagleton, then a senator from Missouri, lambasted Haynsworth in a nationally televised debate.

"It's fundamental that a judge is prohibited from sitting on a case when he has stock ownership in one of the parties," Eagleton said. "That in itself disqualifies him from being considered for the court."

On their honor Judges and their assets

Most area federal judges have owned stock in litigants

NAME: Kathryn H. Vratil
COURTHOUSE: Kansas City, Kan.
APPOINTED: In 1992 by President Bush
PROBLEM CASES: 14

Vratil

Vratil owned stock in more companies than did any other local federal judge. She also issued orders in more lawsuits involving those companies.

And she offered by far the most extensive explanation of any judge.

The cases involved General Electric, Travelers Group Inc., Sprint Corp., General Motors, Transamerica Corp. and their subsidiaries. Vratil owned no more than $30,000 in stock in any of the corporations.

Vratil acknowledged that her stock ownership may have created the appearance of impropriety. "It's a bad situation," she said.

In fact, last year Vratil wrote to litigants in six of the lawsuits and offered to consider vacating her judgment and reopening their cases. (None has accepted.) She told them her stock holdings resulted in an "actual or apparent" conflict of interest.

In interviews and a detailed letter

To review the investments of federal district judges in the Kansas City area, click the judges' names below.

G. Thomas Van Bebber District of Kansas	John W. Lungstrum District of Kansas
Earl E. O'Connor District of Kansas	Kathryn H. Vratil District of Kansas
D. Brook Bartlett Western District of Missouri	Gary A. Fenner Western District of Missouri
Elmo B. Hunter Western District of Missouri	Fernando J. Gaitan Jr. Western District of Missouri
Nanette K. Laughrey Western District of Missouri	Howard F. Sachs Western District of Missouri
Ortrie D. Smith Western District of Missouri	Joseph E. Stevens Jr. Western District of Missouri
Dean Whipple Western District of Missouri	Scott O. Wright Western District of Missouri

complete with footnotes, she offered a series of explanations:

- She gave an investment manager discretion to buy and sell some stocks in her portfolio. She said she mistakenly thought her staff was tracking the purchases and comparing them with her caseload.

- Although she signed annual disclosure reports that listed her stocks, Vratil said she lacked "conscious knowledge" that she had a financial interest in any of the companies while signing court orders.

That, she said, meant the stock ownership did not bias her rulings and did not create what she considered a true conflict of interest.

- Vratil said she told her staff to scour her mail and remove information about her investments, such as brokerage statements, annual reports and letters to shareholders. The judge said she did not want to know details of her portfolio.

However, federal law states: "A judge should inform himself about his ... financial interests." Ethicists said Congress enacted that rule to prevent judges from claiming ignorance of their investments.

- Finally, the judge said, the investment manager who bought stocks for her also bought stocks on behalf of other investors in a "managed money" program. That, she said, means her portfolio shared some, but not all, the attributes of a mutual fund.

Investments made through a mutual fund are exempt from ethics laws. Judges are not required to disclose the underlying stocks.

But Vratil's disclosure reports list her stocks as individual assets. The reports do not identify the securities as part of a

fund and do not indicate they were under independent management.

And Vratil acknowledged that, unlike mutual fund investors, she took direct ownership of the stock and was notified about all trades.

"I considered the ownership to be sort of technical in nature," Vratil said. "I don't know if I made the right call."

Vratil said she discovered her stock ownership last spring while in the midst of two of the lawsuits. She disclosed the investments, withdrew from the cases, then told her staff to search for similar problems in older, closed lawsuits.

Vratil eventually notified litigants in at least six of those legal actions about her stock. She mailed letters to them about two weeks after *The Star* began reviewing her finances. The timing, she said, had nothing to do with the newspaper's inv estigation.

In some other lawsuits, Vratil said, she was unaware she had owned stock in a litigant or in a litigant's parent company until questioned by *The Star.*

Vratil says she has moved her savings into mutual funds to avoid similar problems in the future.

"I'm sorry this happened," she said. "And this is not going to happen again."

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NAME: Elmo B. Hunter
COURTHOUSE: Kansas City
APPOINTED: In 1965 by President Johnson
PROBLEM CASES: 5


Hunter

Hunter's financial disclosure reports show he owned General Motors stock worth as much as $250,000 while presiding over all or part of four legal actions involving the car company or one of its wholly owned subsidiaries.

Midway through one lawsuit against a General Motors subsidiary, Hunter notified lawyers for both sides that he owned General Motors stock. The lawyers waived any objection, and Hunter remained on the case until its conclusion seven months later.

Federal law requires judges to withdraw when they know they have an interest in a litigant, even when no one objects.

In a fifth case, Hunter's wife owned stock in General Electric while he appointed a legal courier in a lawsuit involving the company.

Hunter, who has been ill, could not be reached for comment. Lawyers in the cases, like those in the other lawsuits identified by *The Kansas City Star's* study, said they saw no evidence of bias in the judge's rulings.

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NAME: Fernando J. Gaitan Jr.
COURTHOUSE: Kansas City
APPOINTED: In 1991 by President Bush
PROBLEM CASES: 3

Gaitan owned stock in AT&T while presiding over all or part of three cases involving the company or one of its wholly owned subsidiaries. Gaitan declined repeated requests for an interview.

Gaitan

In a brief letter, however, he described his handling of the lawsuits as minimal and called his investment in the company insubstantial. Federal records show his stock was worth $15,000 or less.

Gaitan said he acquired the stock during the six years he worked for a subsidiary of AT&T.

"Obviously, I would not intentionally violate a code of conduct," Gaitan wrote. "I have scrupulously avoided conflicts during my nearly 18 years as a judicial officer.

"Two of the three cases were dismissed by agreement of the parties at a very early stage. The third was dismissed for plaintiff's failure to comply with procedures necessary to prosecute the case, again at an early stage of the case."

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NAME: Howard F. Sachs
COURTHOUSE: Kansas City
APPOINTED: In 1979 by President Carter
PROBLEM CASES: 3

Sachs owned up to $50,000 worth of stock in AT&T while entering orders in three cases against AT&T or one of its wholly owned subsidiaries.

Sachs

In one lawsuit, Sachs issued two orders, then disclosed his stock ownership and withdrew.

In another, Sachs said a clerk stamped his signature on an order appointing a legal courier; Sachs later disclosed his stock and passed the case to another judge. That order, like many identified by the study, was routine and had little effect on the c ase.

None of the litigants in Sachs' cases contested any of the orders, and Sachs estimated he spent no more than a minute working on each lawsuit.

He acknowledged that "conceivably, somebody could say it's an illegal situation." But he called any violation a technicality and said he would be inclined to do the same thing in the future.

"Maybe," he joked, "I will be impeached."

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NAME: Dean Whipple
COURTHOUSE: Kansas City
APPOINTED: In 1987 by President Reagan
PROBLEM CASES: 2

Whipple presided over two lawsuits against the Philip Morris Cos. and other cigarette manufacturers. The suits, each filed by a state inmate, accused the tobacco companies of manipulating nicotine levels to addict smokers.

Whipple

Whipple declared both cases "frivolous" and threw them out of court. He said he believed he could lawfully handle the lawsuits, despite owning up to $15,000 worth of stock in Philip Morris.

"I take the position that whatever I rule will not affect the bottom line of Philip Morris," he said.

After researching the issue, however, Whipple agreed his position was not supported by most legal ethicists or by case law.

"I'm in the minority in my opinion," he acknowledged. "Although I think that I have a valid argument, I'm not going to fight it. And so, from now on, if I have a case where I own any stock, I'll just disqualify (withdraw)."

Shortly after being questioned by a reporter, Whipple sold all his shares in Philip Morris.

"I don't want any question," he said, "about whether I had any ulterior motive on those cases."

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NAME: John W. Lungstrum
COURTHOUSE: Kansas City, Kan.
APPOINTED: In 1991 by President Bush
PROBLEM CASES: 2

Lungstrum

Lungstrum presided over two lawsuits against companies in which he and his family owned stock. In each instance, he acknowledged, his actions appeared contrary to ethics laws.

Lungstrum entered several orders in a $2 million lawsuit against the Chrysler Corp. that the litigants ultimately settled out of court. He said the case slipped by because he bought stock in the car company -- up to $15,000, according to his disclosure form -- after the case was assigned to his courtroom.

"I forgot I had the case at the time the stock was bought," he said. "By the time the case came back to my attention, I had forgotten I had the stock."

Lungstrum also filed one order and approved a consent decree in a lawsuit over the multimillion-dollar cost of cleaning up a Superfund hazardous waste site in Johnson County. Lungstrum and his family owned up to $50,000 in stock in one of the many comp anies named in the lawsuit.

"I may not have even checked who the parties were," he said. "I probably just got lazy."

Lungstrum said he made no contested rulings in that case. Still, he says he plans to tighten his procedures for identifying financial conflicts.

"We should be concerned about these things," he said. "I'm glad to have my attention called to it, and to redouble my efforts to make sure things don't fall through the cracks."

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NAME: D. Brook Bartlett
COURTHOUSE: Kansas City
APPOINTED: In 1981 by President Reagan
PROBLEM CASES: 2

Bartlett

Bartlett, chief judge for the Western District of Missouri, presided over two lawsuits against McDonald's restaurants while he owned up to $50,000 in stock in McDonald's Corp.

In one case, Bartlett issued two orders, then disclosed his stock ownership and withdrew. In the other, he issued one order, then granted the plaintiff's request that he dismiss the lawsuit.

"I should not have done that," Bartlett said. "It probably was a technical violation (of ethics laws).

"It's below the standards I set for myself. It just means I have to be more careful."

Upon checking, Bartlett said he was relieved to discover that "all orders entered were either routine or not opposed by plaintiff."

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NAME: Ortrie D. Smith
COURTHOUSE: Kansas City
APPOINTED: In 1995 by President Clinton
PROBLEM CASES: 1

Smith issued a single order setting deadlines in an employment discrimination lawsuit against Wal-Mart Stores Inc. Two months later, Smith withdrew because he owned up to $15,000 worth of stock in the company.


Smith

"It probably was a technical violation (of the law)," Smith said. "I regret that it happened, but it did."

Smith said he did not read the routine order, which was issued by a clerk using a signature stamp. The order did not affect the outcome of the lawsuit, he said.

"There should have been a procedure in place to avoid it ever coming to me to begin with," he said of the case. "That is now in place."

• **Joseph E. Stevens Jr.:**
Position held at hospital poses different problem

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No problems

District judges from the Kansas City area who did not issue any court orders in cases involving companies in which they owned stock:

WESTERN DISTRICT OF MISSOURI

Gary A. Fenner
Nanette K. Laughrey
Scott O. Wright

DISTRICT OF KANSAS

Earl E. O'Connor
G. Thomas Van Bebber

The Star

On their honor Judges and their assets

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Position held at hospital poses different problem

NAME: Joseph E. Stevens Jr.
COURTHOUSE: Kansas City
APPOINTED: In 1981 by President Reagan
PROBLEM CASES: 2


Stevens

For many years, Judge Stevens was a powerful figure at Truman Medical Center, where he sat on the board of governors.

But during that time he also had a hand in the hospital's affairs while sitting on the bench.

That's where, in May 1995, Stevens threw out a legal claim against Truman. Eleven months later, he threw out another.

He ultimately dismissed both lawsuits "with prejudice," meaning the plaintiffs can never refile them.

Yet federal law is clear: Judges must withdraw from any lawsuit in which they know they are a "director, adviser or other active participant in the affairs of a party."

Stevens did not dispute that he should not have handled cases against Truman. In fact, he said he was surprised to learn that he had presided over the lawsuits. Each was filed by an inmate at the Jackson County Jail, alleging he received substandard medical care.

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"If I had known Truman was on the pleading," Stevens said, "I would not have signed the orders."

Each order emanating from Stevens' chambers bears his signature. But in many routine lawsuits, he said, law clerks draft orders for him to review and sign.

If they failed to point out Truman was a defendant, he argued, the conflict was due to "administrative error" by the clerks -- not to his own lapse.

Both of the court orders that dismissed the claims against Truman referred to the medical center four times by name. One of those orders mentions Truman in both its first and last sentence. Directly below the last sentence, the judge signed his name.

Yet Stevens said that does not mean he realized Truman was a defendant. "I just barely see them," he explained of the orders, which did not list Truman in the headings.

Stevens said *The Star's* discovery might lead him to resign from Truman -- and nine days later he did.

At Truman, Stevens said, he and his fellow governors acted as advisers to the hospital's board of directors.

Governors attend but have no vote at the hospital's monthly business meetings. That power is reserved for directors, a position Stevens held for nine years before becoming a governor.

But governors also serve on policy committees with the directors. Governors may vote at committee meetings, officials said, and their duties can include guiding litigation.

The hospital listed Stevens in its corporate filings as part of the medical center's controlling board. And it listed

Stevens on its federal tax return as among its "directors, trustees and key employees."

Still, Stevens said, determining whether his actions broke ethics laws remains "a hard question."

"There isn't any black and white," he said.

But the judge agreed that his actions may have created the appearance of impropriety.

"I now think it would have been better," he said, "to have recused."