ADVISORY COMMITTEE
ON
APPELLATE RULES

San Diego, CA
November 7, 2003

Agenda for Fall 2003 Meeting of
Advisory Committee on Appellate Rules
November 7, 2003
San Diego, California

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III. Report on June 2003 Meeting of Standing Committee

IV. Action Items

A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals) (Mr. Letter)

B. Item No. 01-03 (FRAP 26(a) — interaction with "3-day rule" of FRAP 26(c))

C. Item No. 03-02 (FRAP 7 — clarify whether limited to only FRAP 39 costs)

D. Item No. 03-03 (FRAP 11 & 12 — forbid returning exhibits to parties) (Mr. Letter)

E. Item No. 03-04 (FRAP 44 — differences with proposed Civil Rule 5.1) (Mr. Letter)

F. Item No. 03-06 (FRAP 3 — defining parties) (Mr. Letter)

V. Discussion Items

A. Item No. 02-08 (FRAP 10, 11 & 30 — transmitting records and filing appendices); Item No. 02-16 (FRAP 28 — contents of briefs); and Item No. 02-17 (FRAP 32 — contents of covers of briefs) (Mr. Letter)

B. Item No. 03-07 (FRAP 35 — disclose judges' votes on rehearing petitions)

C. Items Awaiting Initial Discussion

1. Item No. 03-08 (FRAP 4(c)(1) — mandate simultaneous affidavit)

2. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) — U.S. officer sued in individual capacity)

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

VII. Schedule Dates and Location of Spring 2004 Meeting

VIII. Adjournment

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October 20, 2003
Projects

Advisory Committee on Appellate Rules
Table of Agenda Items — Revised October 2003

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.	Standing Committee	Awaiting initial discussion Discussed and retained on agenda 04/98 Discussed and retained on agenda 10/99 Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01
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 Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee
00-03	Amend FRAP 26(a)(4) & 45(a)(2) to use "official" names of legal holidays.	Jason A. Bezis	Awaiting initial discussion Discussed and retained on agenda 04/00 Discussed and retained on agenda 04/01 Draft approved 04/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03
00-07	Amend FRAP 4 to specify time for appeal of order granting or denying motion for attorney's fees under Hyde Amendment.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting proposal from Department of Justice Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02; awaiting revised proposal from Department of Justice
00-08	Amend FRAP 4(a)(6) to clarify whether a moving party "receives notice" of the entry of a judgment when that party learns of the judgment only through a verbal communication.	Hon. Stanwood R. Duval, Jr. (E.D. La.)	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03
00-11	Amend FRAP 35(a) to provide that disqualified judges should not be considered in assessing whether "[a] majority of the circuit judges who are in regular active service" have voted to hear or rehear a case en banc.	Hon. Edward E. Carnes (CA11)	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting report from Federal Judicial Center Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03

FRAP Item	Proposal	Source	Current Status
00-12	Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03
01-01	Add rule to regulate the citation of unpublished and non-precedential decisions.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02 Discussed and retained on agenda 11/02 Draft approved 05/03 for submission to Standing Committee Approved for publication by Standing Committee 06/03
01-03	Amend FRAP 26(a)(2) to clarify interaction with "3-day rule" of FRAP 26(c).	Roy H. Wepner, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/01 Referred to Civil Rules Committee 04/02
01-05	Amend Forms 1, 2, 3, and 5 to change references to "19__."	Advisory Committee	Awaiting initial discussion Draft approved 04/02 for submission to Standing Committee in 06/02 Approved by Standing Committee 06/02 Approved by Judicial Conference 09/02 Approved by Supreme Court 03/03
02-01	Amend FRAP 27(d) to apply typeface and type-style limits of FRAP 32(a)(5)&(6) to motions.	Charles R. Fulbruge III (CA5 Clerk)	Awaiting initial discussion Discussed and retained on agenda 04/02 Draft approved 11/02 for submission to Standing Committee Approved for publication by Standing Committee 06/03
02-08	Amend FRAP 10, 11 & 30 to eliminate local rule variations regarding transmitting records and filing appendices.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice
02-16	Amend FRAP 28 to eliminate local rule variations regarding contents of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice

FRAP Item	Proposal	Source	Current Status
02-17	Amend FRAP 32 to eliminate local rule variations regarding contents of covers of briefs.	ABA Council of Appellate Lawyers	Awaiting initial discussion Discussed and retained on agenda 11/02; awaiting proposal from Department of Justice
03-02	Amend FRAP 7 to clarify whether reference to "costs" includes only FRAP 39 costs.	Advisory Committee	Awaiting initial discussion Discussed and retained on agenda 05/03
03-03	Amend FRAP 11 or 12 to forbid returning exhibits to parties unless electronic copies are made.	Hon. John M. Roll (D. Ariz.)	Awaiting initial discussion Discussed and retained on agenda 05/03; awaiting proposal from Department of Justice
03-04	Amend FRAP 44 to conform to proposed Civil Rule 5.1.	Civil Rules Committee	Awaiting initial discussion Discussed and retained on agenda 05/03; awaiting proposal from Department of Justice
03-06	Adopt new FRAP 3(f) to define parties.	Solicitor General	Awaiting initial discussion Discussed and retained on agenda 05/03; awaiting revised proposal from Department of Justice
03-07	Amend FRAP 35 to require disclosure of votes of individual judges when rehearing petitions are denied.	Hon. A. Wallace Tashima (CA9)	Awaiting initial discussion Discussed and retained on agenda 05/03
03-08	Amend FRAP 4(c)(1) to mandate simultaneous filing of 28 U.S.C. § 1746 declaration to take advantage of prison mailbox rule.	Prof. Philip A. Pucillo	Awaiting initial discussion
03-09	Amend FRAP 4(a)(1)(B) & 40(a)(1) to clarify treatment of U.S. officer or employee sued in individual capacity.	Solicitor General	Awaiting initial discussion

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Minutes of Spring 2003 Meeting of
Advisory Committee on Appellate Rules
May 15, 2003
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, May 15, 2003, at 8:30 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Diana Gribbon Motz, Judge Carl E. Stewart, Judge Stanwood R. Duval, Jr., Justice Richard C. Howe, Prof. Carol Ann Mooney, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. John G. Roberts, Jr. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. John K. Rabiej from the Administrative Office; and Ms. Marie C. Leary from the Federal Judicial Center.

Judge Alito announced that the terms of Judge Motz and Prof. Mooney would expire before the next meeting of the Committee. Judge Alito thanked Judge Motz and Prof. Mooney for their devoted service to the Committee — in Judge Motz's case, as a member, and in Prof. Mooney's case, first as the Reporter and then as a member.

Judge Alito also announced that the nomination of Mr. Roberts to the U.S. Court of Appeals for the D.C. Circuit had been approved by the Senate on May 8. On behalf of the entire Committee, Judge Alito congratulated Mr. Roberts on his confirmation.

II. Approval of Minutes of November 2002 Meeting

The minutes of the November 2002 meeting were approved.

III. Report on January 2003 Meeting of Standing Committee

The Reporter stated that, at the January 2003 meeting of the Standing Committee, Judge Alito gave an update on the continuing deliberations of the Advisory Committee with respect to the proposed amendment to Rule 35(a) regarding en banc voting and the proposed new Rule 32.1 regarding the citation of "unpublished" opinions. The Reporter said that members of the Standing Committee had expressed a great deal of interest in these two proposals.

IV. Action Items

A. Item No. 00-08 (FRAP 4(a)(6) — clarify whether verbal communication provides "notice")

The Reporter introduced the following proposed amendment and Committee Note:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

* * * * *

(6) **Reopening the Time to File an Appeal.** The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives or observes written notice of the entry from any source, whichever is earlier;

~~(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed~~

~~but did not receive the notice from the district court or any party within 21 days after entry;~~ and

(C) the court finds that no party would be prejudiced.

* * * * *

Committee Note

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what kind of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one important substantive change has been made.

Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen the time to appeal. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "*such* notice" — that is, the notice required by Civil Rule 77(d) — but instead referred to the failure of the moving party to receive "*the* notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the *clerk* or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the *district court* or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what kind of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B) — new subdivision (a)(6)(A) — has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

REVISED VERSION OF NOTE TO AMENDMENT TO RULE 4(a)(6)(B)

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

New subdivision (a)(6)(B) makes clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal that judgment or order. However, all that is required is that a party receive or observe written notice of the entry of the judgment or order, not that a party receive or observe a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the

potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 533 U.S. 956 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received or observed written notice. However, an oral communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period to move to reopen the time to appeal under former subdivision (a)(6)(A). The majority of circuits held that only written notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

New subdivision (a)(6)(B) resolves this circuit split by making clear that only *written* notice of the entry of a judgment or order will trigger the 7-day period for a party to move to reopen the time to appeal. "[R]equir[ing] written notice will simplify future proceedings. As the familiar request to 'put it in writing' suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice." *Scott-Harris v. City of Fall River*, 134 F.3d

427, 434 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

ORIGINAL VERSION OF NOTE TO AMENDMENT TO RULE 4(a)(6)(B)

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made.

Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Courts had difficulty agreeing upon what type of "notice" was sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only *written* notice was sufficient, although nothing in the text of the rule suggested such a limitation. *See, e.g., Bass v. United States Dep't of Agric.*, 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appeared that oral communications could be deemed "the functional equivalent of written notice" if they were sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," *see Benavides v. Bureau of Prisons*, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, *see Ryan v. First Unum Life Ins. Co.*, 174 F.3d 302, 305 (2d Cir. 1999)).

Former subdivision (a)(6)(A) — new subdivision (a)(6)(B) — has been amended to resolve this circuit split. Under new subdivision (a)(6)(B), only *written* notice of the entry of a judgment or order triggers the 7-day period. "[R]equir[ing] written notice will simplify future proceedings. As the familiar request to 'put it in writing' suggests, writings are more readily susceptible to proof than oral communications. In particular, the receipt of written notice (or its absence) should be more easily demonstrable than attempting to discern whether (and, if so, when) a party received actual notice." *Scott-Harris v. City of Fall*

River, 134 F.3d 427, 434 (1st Cir. 1997), *rev'd on other grounds sub nom. Bogan v. Scott-Harris*, 523 U.S. 44 (1998).

All that is required to trigger the 7-day period under new subdivision (a)(6)(B) is that a party receive or observe written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in new subdivision (a)(6)(B) requires that the written notice be received from any particular source, and nothing requires that the written notice be served pursuant to Civil Rules 77(d) or 5(b). "Any written notice of entry received by the potential appellant or his counsel (or conceivably by some other person), regardless of how or by whom sent, is sufficient to open [new] subpart [(B)'s] seven-day window." *Wilkens v. Johnson*, 238 F.3d 328, 332 (5th Cir.) (footnotes omitted), *cert. denied*, 533 U.S. 956 (2001). Thus, a person who checks the civil docket of a district court action and learns that a judgment or order has been entered has observed written notice of that entry. And a person who learns of the entry of a judgment or order by fax, by e-mail, or by viewing a website has also received or observed written notice. However, an oral communication is not written notice for purposes of new subdivision (a)(6)(B), no matter how specific, reliable, or unequivocal.

The Reporter said that this was the third time that the Committee had considered a draft amendment to Rule 4(a)(6). Prior drafts were discussed at the April 2002 and November 2002 meetings.

Describing the most recent draft amendment, the Reporter said that the amendment to subdivision (A) and the accompanying Committee Note were identical to the amendment and Note approved by the Committee at its November 2002 meeting.

Regarding the amendment to subdivision (B), the Reporter said that the amendment had been changed precisely as the Committee had directed at its November 2002 meeting. Specifically, the words "or observes" were inserted after "receives" and before "written," and the words "from any source" were added after "entry" and before "whichever." These changes are intended to communicate more clearly that the 7-day period is triggered even when a party has not been served with notice of the entry of the judgment, but instead has learned of that entry "passively" by, for example, checking a docket sheet or a website.

Regarding the Note, the Reporter reminded the Committee that, at the November 2002 meeting, a member of the Committee suggested reordering the Note to the amendment to subdivision (B) so that it first described the changes made by the amendment and then described the reasons for the changes. The Reporter said that he had revised the Note as requested. However, the Reporter thought that, although both the original Note and the revised Note were

satisfactory, the original Note was clearer on first read. The Reporter provided both versions of the Note so that the Committee could decide which it preferred.

After a brief discussion, the Committee decided by consensus to make two changes to the revised version of the Note. First, the Committee deleted the quotation from *Scott-Harris v. City of Fall River*. By referring to "written" notice, to "'put[ting] it in writing,'" and to "writings," that quotation might mislead readers about the scope of amended subdivision (B). Again, the 7-day window is triggered not just by notice received from "writings," but by, for example, notice observed on a website. Second, the Committee inserted the words "receipt or observation of" prior to "*written* notice" in the sentence preceding the (deleted) quotation from *Scott-Harris*. This change will avoid misunderstandings by making the language of the Note more consistent with the language of the rule.

A member moved that the amendments to Rule 4(a)(6) and the revised version of the Committee Note be approved, with the two changes agreed to by the Committee. The motion was seconded. The motion carried (unanimously).

B. Item No. 00-11 (FRAP 35(a) — disqualified judges/en banc rehearing)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

(a) When Hearing or Rehearing En Banc May Be Ordered. A majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc. An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:

(1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or

(2) the proceeding involves a question of exceptional importance.

* * * * *

Committee Note

Subdivision (a). Two national standards — 28 U.S.C. § 46(c) and Rule 35(a) — provide that a hearing or rehearing en banc may be ordered by "a majority of the circuit judges who are in regular active service." Although these standards apply to all of the courts of appeals, the circuits are deeply divided over the interpretation of this language when one or more active judges are disqualified.

The Supreme Court has never addressed this issue. In *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), the Court rejected a petitioner's claim that his rights under § 46(c) had been violated when the Third Circuit refused to rehear his case en banc. The Third Circuit had eight active judges at the time; four voted in favor of rehearing the case, two against, and two abstained. No judge was disqualified. The Supreme Court ruled against the petitioner, holding, in essence, that § 46(c) did not provide a cause of action, but instead simply gave litigants "the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case." *Id.* at 5. *Shenker* did stress that a court of appeals has broad discretion in establishing internal procedures to handle requests for rehearings — or, as *Shenker* put it, "'to devise its own administrative machinery to provide the *means* whereby a majority may order such a hearing.'" *Id.* (quoting *Western Pac. R.R. Corp. v. Western Pacific R.R. Co.*, 345 U.S. 247, 250 (1953) (emphasis added)). But *Shenker* did not address what is meant by "a majority" in §46(c) (or Rule 35(a), which did not yet exist) — and *Shenker* certainly did not suggest that the phrase should have different meanings in different circuits.

In interpreting that phrase, a majority of the courts of appeals follow the "absolute majority" approach. Marie Leary, Defining the "Majority" Vote Requirement in Federal Rule of Appellate Procedure 35(a) for Rehearings En Banc in the United States Courts of Appeals 8 tbl.1 (Federal Judicial Center 2002). Under this approach, disqualified judges are counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a circuit with 12 active judges, 7 must vote to hear a case en banc. If 5 of the 12 active judges are disqualified, all 7 non-disqualified judges must vote to hear the case en banc. The votes of 6 of the 7 non-disqualified judges are not enough, as 6 is not a majority of 12.

A substantial minority of the courts of appeals follow the "case majority" approach. *Id.* Under this approach, disqualified judges are not counted in the base in calculating whether a majority of judges have voted to hear a case en banc. Thus, in a case in which 5 of a circuit's 12 active judges are disqualified, only 4 judges (a majority of the 7 non-disqualified judges) must vote to hear a case en

banc. (The Third Circuit alone qualifies the case majority approach by providing that a case cannot be heard en banc unless a majority of all active judges — disqualified and non-disqualified — are eligible to participate in the case.)

Rule 35(a) has been amended to adopt the case majority approach as a uniform national interpretation of the phrase "a majority of the circuit judges . . . who are in regular active service" in § 46(c). The federal rules of practice and procedure exist to "maintain consistency," which Congress has equated with "promot[ing] the interest of justice." 28 U.S.C. § 2073(b). The courts of appeals should not follow two inconsistent approaches in deciding whether sufficient votes exist to hear a case en banc, especially when there is a governing statute and governing rule that apply to all circuits and that use identical terms, and especially when there is nothing about the local conditions of each circuit that justifies conflicting approaches.

Both the absolute majority approach and the case majority approach can be defended as reasonable interpretations of § 46(c), but the absolute majority approach has at least two major disadvantages. First, under the absolute majority approach, a disqualified judge is, as a practical matter, counted as voting against hearing a case en banc. To the extent possible, the disqualification of a judge should not result in the equivalent of a vote for or against hearing a case en banc. Second, the absolute majority approach can leave the en banc court helpless to overturn a panel decision with which almost all of the circuit's active judges disagree. For example, in a case in which 5 of a circuit's 12 active judges are disqualified, the case cannot be heard en banc even if 6 of the 7 non-disqualified judges strongly disagree with the panel opinion. This permits one active judge — perhaps sitting on a panel with a visiting judge — effectively to control circuit precedent, even over the objection of all of his or her colleagues. *See Gulf Power Co. v. FCC*, 226 F.3d 1220, 1222-23 (11th Cir. 2000) (Carnes, J., dissenting from denial of rehearing en banc), *rev'd sub nom. National Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002). For these reasons, Rule 35(a) has been amended to adopt the case majority approach.

Judge Alito reminded the Committee that, at its April 2002 meeting, the Committee decided to move forward on the suggestion of Judge Edward E. Carnes that Rule 35(a) be amended to resolve the three-way circuit split over the treatment of disqualified judges in determining whether "a majority of the circuit judges who are in regular active service" have ordered an en banc hearing under 28 U.S.C. § 46(c) and Rule 35(a). Specifically, the Committee tentatively decided to amend Rule 35(a) to impose the "qualified case majority" approach upon all of the circuits.

At its November 2002 meeting, the Committee changed course and decided, by a 5-3 vote (with one abstention), to amend Rule 35(a) to impose the "case majority" approach. The draft amendment and Note now presented by the Reporter would implement that decision.

Committee members expressed satisfaction with the amendment and Note, except that one member said that she still believes that the "absolute majority" approach is much more defensible as an interpretation of § 46(c) than the "case majority" approach. Other Committee members responded that, in their view, both were reasonable interpretations.

One member suggested that the Note be amended so that, in the first sentence of the last paragraph, the words "can be defended as reasonable interpretations" be replaced by the words "are reasonable interpretations." By consensus, the Committee agreed to the change.

The Committee discussed at some length the conflicting practices of the circuits regarding the amount of information that is disclosed about votes to deny petitions for hearing or rehearing en banc. (Understandably, no circuit discloses any information about votes to *grant* rehearing petitions.) Practices appear to range from, at the one extreme, disclosing nothing except that the petition was denied to, at the other extreme, identifying which judges voted in favor of rehearing, which voted against, which abstained, and which were disqualified. One member said that Judge A. Wallace Tashima, a member of the Standing Committee, had suggested that the Appellate Rules be amended to require courts to disclose the votes of individual judges when rehearing petitions are denied. By consensus, the Committee agreed to put Judge Tashima's suggestion on the study agenda.

Following further discussion, a member moved that the amendment to Rule 35(a) and accompanying Committee Note be approved, with the one change to the Note agreed to by the Committee. The motion was seconded. The motion carried (unanimously).

C. Item No. 01-01 (citation of non-precedential decisions)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 32.1. Citation of Judicial Dispositions

(a) **Citation Permitted.** No prohibition or restriction may be imposed upon the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like, unless that

prohibition or restriction is generally imposed upon the citation of all sources.

(b) Copies Required. A party who cites a judicial opinion, order, judgment, or other written disposition that is not available in a publicly accessible electronic database must file and serve a copy of that opinion, order, judgment, or other written disposition with the brief or other paper in which it is cited.

Committee Note

Rule 32.1 is a new rule addressing the citation of judicial opinions, orders, judgments, or other written dispositions that have been designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like. This Note will refer to these dispositions collectively as "unpublished" opinions. This is a term of art that, while not always literally true (as many "unpublished" opinions are in fact published), is commonly understood to refer to the entire group of judicial dispositions addressed by Rule 32.1.

The citation of "unpublished" opinions is an important issue. The thirteen courts of appeals have cumulatively issued tens of thousands of "unpublished" opinions, and about 80% of the opinions issued by the courts of appeals in recent years have been designated as "unpublished." Administrative Office of the United States Courts, Judicial Business of the United States Courts 2001, tbl. S-3 (2001). Although the courts of appeals differ somewhat in their treatment of "unpublished" opinions, most agree that an "unpublished" opinion of a circuit does not bind panels of that circuit or district courts within that circuit (or any other court).

State courts have also issued countless "unpublished" opinions in recent years. And, again, although state courts differ in their treatment of "unpublished" opinions, they generally agree that "unpublished" opinions do not establish precedent that is binding upon the courts of the state (or any other court).

Rule 32.1 is extremely limited. It takes no position on whether refusing to treat an "unpublished" opinion as binding precedent is constitutional. *See Symbol Technologies, Inc. v. Lemelson Med., Educ. & Research Found.*, 277 F.3d 1361, 1366-68 (Fed. Cir. 2002); *Williams v. Dallas Area Rapid Transit,* 256 F.3d 260

(5th Cir. 2001) (Smith, J., dissenting from denial of reh'g en banc); *Hart v. Massanari*, 266 F.3d 1155, 1159-80 (9th Cir. 2001); *Anastasoff v. United States*, 223 F.3d 898, 899-905, *vacated as moot on reh'g en banc* 235 F.3d 1054 (8th Cir. 2000). It does not require any court to issue an "unpublished" opinion or forbid any court from doing so. It does not dictate the circumstances under which a court may choose to designate an opinion as "unpublished" or specify the procedure that a court must follow in making that decision. It says nothing about what effect a court must give to one of its "unpublished" opinions or to the "unpublished" opinions of another court. The one and only issue addressed by Rule 32.1 is the *citation* of judicial dispositions that have been *designated* as "unpublished" or "non-precedential" by a federal or state court — whether or not those dispositions have been published in some way or are precedential in some sense.

Subdivision (a). Every court of appeals has allowed "unpublished" opinions to be cited in some circumstances, such as to support a claim of claim preclusion, issue preclusion, law of the case, double jeopardy, sanctionable conduct, abuse of the writ, notice, or entitlement to attorney's fees. Not all of the circuits have specifically mentioned all of these claims in their local rules, but it does not appear that any circuit has ever sanctioned an attorney for citing an "unpublished" opinion under these circumstances.

By contrast, the circuits have differed dramatically with respect to the restrictions that they have placed upon the citation of "unpublished" opinions for their persuasive value. An opinion cited for its "persuasive value" is cited not because it is binding on the court or because it is relevant under a doctrine such as claim preclusion. Rather, it is cited because the party hopes that it will influence the court as, say, a law review article might — that is, simply by virtue of the thoroughness of its research or the persuasiveness of its reasoning.

Some circuits have freely permitted the citation of "unpublished" opinions for their persuasive value, some circuits have disfavored such citation but permitted it in limited circumstances, and some circuits have not permitted such citation under any circumstances. These conflicting rules have created a hardship for practitioners, especially those who practice in more than one circuit. Rule 32.1(a) is intended to replace these conflicting practices with one uniform rule.

Under Rule 32.1(a), a court of appeals may not prohibit a party from citing an "unpublished" opinion for its persuasive value or for any other reason. In addition, under Rule 32.1(a), a court of appeals may not place any restriction upon the citation of "unpublished" opinions, unless that restriction is generally imposed upon the citation of published opinions and all other sources.

It is difficult to justify prohibiting or restricting the citation of "unpublished" opinions. Parties have long been able to cite in the courts of appeals an infinite variety of sources solely for their persuasive value. These sources include the opinions of federal district courts, state courts, and foreign jurisdictions, law review articles, treatises, newspaper columns, Shakespearian sonnets, and advertising jingles. No court of appeals places any restriction on the citation of these sources (other than restrictions that apply generally to all citations, such as requirements relating to type styles). Parties are free to cite them for their persuasive value, and judges are free to decide whether or not to be persuaded.

There is no compelling reason to treat "unpublished" opinions differently. It is difficult to justify a system under which the "unpublished" opinions of the D.C. Circuit can be cited to the Seventh Circuit, but the "unpublished" opinions of the Seventh Circuit cannot be cited to the Seventh Circuit. D.C. Cir. R. 28(c)(1)(B); 7th Cir. R. 53(b)(2)(iv) & (e). And, more broadly, it is difficult to justify a system that permits parties to bring to a court's attention virtually every written or spoken word in existence *except* those contained in the court's own "unpublished" opinions.

Some have argued that permitting citation of "unpublished" opinions would lead judges to spend more time on them, defeating their purpose. This argument would have great force if Rule 32.1(a) required a court of appeals to treat all of its opinions as precedent that binds all panels of the court and all district courts within the circuit. The process of drafting a precedential opinion is much more time consuming than the process of drafting an opinion that serves only to provide the parties with a basic explanation of the reasons for the decision. As noted, however, Rule 32.1(a) does not require a court of appeals to treat its "unpublished" opinions as binding precedent. Nor does the rule require a court of appeals to increase the length or formality of any "unpublished" opinions that it issues.

It should also be noted, in response to the concern that permitting citation of "unpublished" opinions will increase the time that judges devote to writing them, that "unpublished" opinions are already widely available to the public, and in two years every court of appeals will be required by law to post all of its decisions — including "unpublished" decisions — on its website. *See* E-Government Act of 2002, Pub. L. 107-347, § 205(a)(5), 116 Stat. 2899, 2913-15. Moreover, "unpublished" opinions are often discussed in the media and not infrequently reviewed by the United States Supreme Court. *See, e.g., Holmes Group, Inc. v. Vornado Air Circulation Systems, Inc.*, 122 S. Ct. 1889 (2002) (reversing "unpublished" decision of Federal Circuit); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) (reversing "unpublished" decision of Second Circuit).

If this widespread scrutiny does not deprive courts of the benefits of "unpublished" opinions, it is difficult to believe that permitting a court's "unpublished" opinions to be cited to the court itself will have that effect. The majority of the courts of appeals already permit their own "unpublished" opinions to be cited for their persuasive value, and "the sky has not fallen in those circuits." Stephen R. Barnett, *From* Anastasoff *to* Hart *to West's* Federal Appendix: *The Ground Shifts Under No-Citation Rules*, 4 J. APP. PRAC. & PROCESS 1, 20 (2002).

In the past, some have also argued that, without no-citation rules, large institutional litigants (such as the Department of Justice) who can afford to collect and organize "unpublished" opinions would have an unfair advantage. Whatever force this argument may once have had, that force has been greatly diminished by the widespread availability of "unpublished" opinions on Westlaw and Lexis, on free Internet sites, and now in the Federal Appendix. In almost all of the circuits, "unpublished" opinions are as readily available as published opinions. Barring citation to "unpublished" opinions is no longer necessary to level the playing field.

Unlike many of the local rules of the courts of appeals, Rule 32.1(a) does not provide that citing "unpublished" opinions is "disfavored" or limited to particular circumstances (such as when no published opinion adequately addresses an issue). Again, it is difficult to understand why "unpublished" opinions should be subject to restrictions that do not apply to other sources. Moreover, given that citing an "unpublished" opinion is usually tantamount to admitting that no published opinion supports a contention, parties already have an incentive not to cite "unpublished" opinions. Not surprisingly, those courts that have liberally permitted the citation of "unpublished" opinions have not been overwhelmed with such citations. Finally, restricting the citation of "unpublished" opinions may spawn satellite litigation over whether a party's citation of a particular "unpublished" opinion was appropriate. This satellite litigation would serve little purpose, other than further to burden the already overburdened courts of appeals.

Rule 32.1(a) will further the administration of justice by expanding the sources of insight and information that can be brought to the attention of judges and making the entire process more transparent to attorneys, parties, and the general public. At the same time, Rule 32.1(a) will relieve attorneys of several hardships. Attorneys will no longer have to pick through the conflicting no-citation rules of the circuits in which they practice, nor worry about being sanctioned or accused of unethical conduct for improperly citing an "unpublished" opinion. *See Hart*, 266 F.3d at 1159 (attorney ordered to show cause why he should not be disciplined for violating no-citation rule); ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-386R (1995) ("It is ethically improper for a lawyer to cite to a court an 'unpublished' opinion of that court or of another

court where the forum court has a specific rule prohibiting any reference in briefs to ['unpublished' opinions]."). In addition, attorneys will no longer be barred from bringing to the court's attention information that might help their client's cause; whether or not this violates the First Amendment (as some have argued), it is a regrettable position in which to put attorneys. Finally, game-playing should be reduced, as attorneys who in the past might have been tempted to find a way to hint to a court that it has addressed an issue in an "unpublished" opinion can now directly bring that "unpublished" opinion to the court's attention, and the court can do whatever it wishes with that opinion.

Subdivision (b). Under Rule 32.1(b), a party who cites an "unpublished" opinion must provide a copy of that opinion to the court and to the other parties, unless the "unpublished" opinion is available in a publicly accessible electronic database — such as in Westlaw or on a court's website. A party who is required under Rule 32.1(b) to provide a copy of an "unpublished" opinion must serve and file the copy with the brief or other paper in which the opinion is cited.

It should be noted that, under Rule 32.1(a), a court of appeals may not require parties to file or serve copies of *all* of the "unpublished" opinions cited in their briefs or other papers (unless the court generally requires parties to file or serve copies of *all* sources that they cite). "Unpublished" opinions are widely available on free websites (such as those maintained by federal and state courts), on commercial websites (such as those maintained by Westlaw and Lexis), and even in published compilations (such as the Federal Appendix). Given the widespread availability of "unpublished" opinions, parties should be required to file and serve copies of such opinions only in the circumstances described in Rule 32.1(b).

The Reporter said that he had taken "Alternative B" of the three alternative drafts of new Rule 32.1 presented to the Committee at the November 2002 meeting and made the following changes (among others) to address concerns raised by Committee members:

1. Rule 32.1 has been divided into two subdivisions. Subdivision (a) permits the citation of unpublished opinions, and subdivision (b) requires parties who cite unpublished opinions to provide copies of those opinions if they are not available online.

2. Rule 32.1 is written passively ("No prohibition or restriction may be imposed") rather than actively ("A court must not impose"). Some Committee members thought that this was less confrontational and thus less likely to raise the hackles of judges. This change is not likely to be popular with the Style Subcommittee, though.

3. Rather than state affirmatively that "any opinion may be cited," Rule 32.1 instead forbids courts from placing prohibitions or restrictions on the citation of unpublished opinions. The Committee has been concerned that courts hostile to the citation of unpublished opinions might undermine an affirmative rule by placing various conditions or restrictions upon the citation of unpublished opinions, while claiming that they still permit such opinions to be cited.

4. Rule 32.1 refers broadly to the citation of "judicial opinions, orders, judgments, or other written dispositions." The Committee has been concerned that, if a narrower phrase such as "judicial opinions" is used, courts hostile to the citation of unpublished opinions might argue that they do not issue "opinions," but "orders" or "mem. disps."

5. Rule 32.1 refers broadly to the citation of opinions "that have been designated as 'unpublished,' 'not for publication,' 'non-precedential,' 'not precedent,' or the like." Again, this is an attempt to capture the entire universe of what are commonly referred to as "unpublished" opinions so as to prevent hostile courts from evading the rule.

6. The Note abandons "non-precedential" as the shorthand way of referring to the judicial dispositions that are the subject of Rule 32.1 and substitutes in its place "unpublished." This reflects common parlance, and it further distances Rule 32.1 from battles over whether and to what extent these dispositions are precedential.

7. Language has been added to the Note to more clearly communicate that Rule 32.1 is meant to encompass the unpublished opinions of state courts, as well as those of federal courts.

The Committee's discussion of draft Rule 32.1 focused on three issues:

1. A member asked whether the expression "not available in a publicly accessible electronic database" in subdivision (b) would be understood to refer to an opinion that was available on Westlaw or Lexis but no where else. Are Westlaw and Lexis "publicly accessible," given that one has to pay a fee to use them? The Reporter said that he thought so — just as, say, a movie playing at a local theater would be considered "publicly accessible," even though one must buy a ticket to see it. Other members concurred and pointed out that the Note was clear on the point. Members also mentioned that, under the E-Government Act of 2002, all of the courts of appeals will soon be required to make all of their opinions — published and unpublished — available on their websites.

2. A member pointed out the difference between the language at the end of subdivision (a) — "unless that prohibition or restriction is generally imposed upon the citation of all sources" — and the language at the end of the fourth paragraph of the Note to subdivision (a) — "unless that restriction is generally imposed upon the citation of published opinions and all other sources." The member expressed concern that the inclusion of the reference to "published opinions" in the Note might confuse readers, who might conclude that the Note was meant to communicate something different from the rule. By consensus, the Committee agreed to delete

the words "published opinions and" from the last sentence of the fourth paragraph of the Note to subdivision (a).

3. A member expressed concern about using the expression "generally imposed upon the citation of all sources" in *either* the rule *or* the Note. The member said that courts should be free to impose restrictions on the citation of all *judicial opinions* — published or unpublished — even if those restrictions were not also imposed upon the citation of *all* sources. For example, a local rule requiring parties to identify the author of any judicial opinion cited in a brief should not be objectionable, as long as it is applied to both published and unpublished opinions. But such a rule would be barred by subdivision (a) as currently drafted, because such a rule would place upon the citation of unpublished opinions a restriction that is not "generally imposed upon the citation of *all* sources" — including, for example, statutes or regulations.

All members agreed that subdivision (a) should be modified to provide, in essence, that no restriction can be imposed upon the citation of unpublished judicial opinions unless that restriction is also imposed upon the citation of published judicial opinions. After members struggled to find a concise and elegant way to amend the rule to express that sentiment, a member moved that subdivision (a) be amended by replacing the phrase "unless that prohibition or restriction is generally imposed upon the citation of all sources" with the phrase "unless that prohibition or restriction is generally imposed upon the citation of all judicial opinions, orders, judgments, or other written dispositions." The motion was seconded. Several members spoke in support of the motion, arguing that, while the motion would lengthen the rule and make it somewhat ungainly, it would also express the Committee's intention precisely and clearly. The motion carried (unanimously).

Following further discussion, a member moved that new Rule 32.1 and the accompanying Committee Note be approved, with the one change to subdivision (a) agreed to by the Committee. The motion was seconded. The motion carried (7-1, with one abstention). By consensus, the Committee authorized Judge Alito and the Reporter to make any changes in the Note that they deemed appropriate in light of the amendment to subdivision (a).

V. Discussion Items

A. Item No. 00-07 (FRAP 4 — time for Hyde Amendment appeals)
B. Item No. 02-08 (FRAP 10, 11 & 30 — transmitting records and filing appendices)
C. Item No. 02-16 (FRAP 28 — contents of briefs)
D. Item No. 02-17 (FRAP 32 — contents of covers of briefs)

The Committee is awaiting proposals or revised proposals from the Justice Department with respect to Item Nos. 00-07, 02-08, 02-16, and 02-17. Mr. Letter brought the Committee up to date with respect to the Department's deliberations about these proposals, describing at length

the complications that the Department is attempting to address. Mr. Letter said that the Department hopes to present proposals or revised proposals with respect to these items at the November 2003 meeting of the Committee.

The Committee took a 15-minute break.

E. Items Awaiting Initial Discussion

1. Item No. 03-01 (FRAP 4(a)(4)(A)(vi) — clarify whether includes Rule 60(a) motions)

Judge Jon O. Newman of the Second Circuit wrote a letter to Judge Alito calling the attention of the Committee to *Dudley v. Penn-America Ins. Co.*, 313 F.3d 662 (2d Cir. 2002), in which two judges disagreed over the meaning of Rule 4(a)(4)(A)(vi). That rule tolls the time to appeal if a party files a motion "for relief under [Civil] Rule 60 if the motion is filed no later than 10 days after the judgment is entered." In *Dudley*, Judge Rosemary S. Pooler, writing for the majority, read Rule 4(a)(4)(A)(vi) to encompass both motions under Rule 60(a) and motions under Rule 60(b). Judge Sonia Sotomayor, in a concurrence, argued that Rule 4(a)(4)(A)(vi) should be read to encompass only motions filed under Rule 60(b).

After discussion, the Committee determined by consensus that no amendment to Rule 4(a)(4)(A)(vi) was necessary and that Item No. 03-01 should be removed from the study agenda. Members of the Committee agreed with Judge Pooler that the rule is clear on its face and encompasses both Rule 60(a) motions and Rule 60(b) motions. Moreover, the Committee did not want to amend Rule 4(a)(4)(A)(vi) in a way that would make it necessary for judges to identify whether a post-trial motion was filed under Rule 60(a) or instead under Rule 60(b). Post-trial motions are often labeled wrongly — or not labeled at all — and thus it is often not clear whether a motion is brought under Rule 59, Rule 60(a), or Rule 60(b). After amending Rule 4(a)(4) in 1993 to make it unnecessary to distinguish between Rule 59 and Rule 60 motions, the Committee does not want to amend Rule 4(a)(4) to make it necessary to distinguish between Rule 60(a) and Rule 60(b) motions.

2. Item No. 03-02 (FRAP 7 — clarify whether limited to only FRAP 39 costs)

The Reporter called the attention of the Committee to *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), in which the Eleventh Circuit described a circuit split over the meaning of Rule 7. Under Rule 7, a district court may require an appellant to post a bond "to ensure payment of costs on appeal." The circuits disagree about whether the reference to "costs on appeal" in Rule 7 is limited to those costs identified in Rule 39(e). The D.C. and Third Circuits have held that the phrase is so limited, but the Second and Eleventh Circuits disagree. According to the Second and Eleventh Circuits, the phrase "costs on appeal" in Rule 7 encompasses attorneys' fees that are defined as "costs" under a fee-shifting statute.

The Committee discussed this issue at some length and reached two conclusions:

First, Rule 7 should be amended to resolve the circuit split. This issue is important, and appellants in the Second and Eleventh Circuits — who might be required to post a bond to secure costs and attorneys' fees amounting to hundreds of thousands of dollars — are treated much differently than similarly situated appellants in the D.C. and Third Circuits — who cannot be required to post a bond to secure anything more than a few hundred dollars in costs.

Second, the amendment to Rule 7 should make it clear that district courts can require appellants to post bonds to secure only what are typically thought of as "costs" (such as the costs identified in Rule 39(e)) and not attorneys' fees — whether or not those attorneys' fees are defined as "costs" in the relevant fee-shifting statute. Adopting the position of the Second and Eleventh Circuits would expand Rule 7 beyond its intended scope and vastly increase the cost of Rule 7 bonds. It would also attach significant consequences to whether a particular fee-shifting statute defines attorneys' fees as "costs," a matter that likely reflects little conscious thought on the part of Congress. In addition, district courts would confront practical problems in trying to determine the size of bond necessary to secure attorneys' fees that will be incurred for an appeal in its infancy. Finally, requiring appellants to post a bond to secure attorneys' fees is almost always unnecessary. In most cases in which an appellant might be held liable under a fee-shifting statute for the attorneys' fees incurred by an appellee, the appellant will be a public entity or other organization with ample resources to pay the fees.

The Committee discussed how Rule 7 might be amended to reflect this decision. It quickly became apparent that the drafting will be complicated by the fact that nowhere in the Appellate Rules or in the U.S. Code is there a comprehensive list of costs that are recoverable on appeal. For example, 28 U.S.C. § 1920 identifies costs that are not mentioned in Rule 39, and Rule 39 identifies costs that are not mentioned in § 1920. The Reporter agreed to research this matter further and present a draft amendment and Committee Note at a future meeting.

3. Item No. 03-03 (FRAP 11 & 12 — forbid returning exhibits to parties)

Judge John M. Roll, a member of the Criminal Rules Committee, has called the attention of the Committee to the fact that it is the practice of many district courts to return trial exhibits to the parties while their case is pending on appeal. Judge Roll has two concerns: (1) He is concerned about the ability of appellate courts to quickly retrieve exhibits from parties. (2) More importantly, he is concerned about the integrity of the exhibits — that is, about the possibility that exhibits will be destroyed, misplaced, or altered by the parties while the case is on appeal.

Members of the Committee agreed that this is an important issue, but expressed at least two concerns about any rule that would require clerks to maintain possession of all trial exhibits. First, many clerks simply do not have space to store exhibits. Second, many exhibits — such as

guns or drugs — are dangerous, and clerks understandably do not want to take responsibility for securing them.

At the request of the Committee, Mr. Letter agreed that the Justice Department would study this issue and make a recommendation at a future meeting.

4. Item No. 03-04 (FRAP 44 — differences with proposed Civil Rule 5.1)

Under Rule 44(a), a party who challenges the constitutionality of a federal statute in a case in which the federal government is not a party is required to notify the clerk of the challenge, and the clerk is then required to notify the Attorney General. Rule 44(b) — added in 2002 — applies a similar notice requirement to challenges to the constitutionality of state statutes in cases in which state governments are not parties. Rule 44 is derived from 28 U.S.C. § 2403.

Civil Rule 24(c) contains provisions similar to those found in Appellate Rule 44. However, the provisions of Civil Rule 24(c) have largely escaped the notice of district judges and trial attorneys, most likely because they are buried in a rule regarding intervention. As a result, the federal government often has not received timely notice — or, indeed, *any* notice — of constitutional challenges to federal statutes.

The Civil Rules Committee proposes to remedy this problem by adopting a new Civil Rule 5.1. That rule — which has not yet been approved for publication by the Standing Committee — would differ in several respects from current Appellate Rule 44. Most significantly, Civil Rule 5.1 would require the clerk to notify the government of a constitutional challenge when the party raising the challenge fails to do so (or when the court itself questions the constitutionality of a statute). Under Appellate Rule 44, the clerk is obligated to notify the government only after a party has notified the clerk of the existence of a constitutional challenge. Given that proposed Civil Rule 5.1 and existing Appellate Rule 44 are derived from the same statute and address the same subject matter, the Standing Committee is likely to insist that the rules be reconciled or that the differences be justified by the differences between trial proceedings and appellate proceedings.

Mr. Letter said that current Civil Rule 24(c) is not effective and needs to be changed so that the government receives timely notice of constitutional challenges to federal statutes. Although members of the Committee did not dispute that point, they did raise some practical questions about proposed Civil Rule 5.1. For example, how are clerks supposed to "screen" cases for constitutional challenges? Clerks cannot possibly read every paper filed in every case — much less follow every oral argument made before a court. How are clerks supposed to know when the constitutionality of a statute has been challenged? Moreover, does the government really want to be notified of each and every constitutional challenge — including the many hundreds of frivolous challenges made by prisoners, tax protesters, and pro se litigants? Is it not possible that serious challenges would get lost in the blizzard of paperwork created by the many frivolous challenges?

Mr. Letter acknowledged that these were valid questions and asked the Committee to give him an opportunity to consult with his colleagues at the Department of Justice and report back with a recommendation regarding Rule 44. By consensus, the Committee agreed to maintain Item No. 03-04 on its study agenda.

5. Item No. 03-05 (require written opinions in every case)

Prof. Joseph R. Weeks of the Oklahoma City University School of Law has proposed a new Appellate Rule 49 that would require courts to "issue a written opinion explaining the basis for each disposition." In other words, every decision by a court of appeals would have to be explained in a written opinion. Under Prof. Weeks's proposal, every opinion would have to "expound on the law as applied to the facts of the case and set out the basis for the disposition."

Several members of the Committee expressed appreciation for Prof. Weeks's proposal and agreement with many of the points that he made in his letter. No one on the Committee disagrees that, for many reasons, it is important for courts to explain their decisions. All members of the Committee agree that, in an ideal world, every decision of every court would be accompanied by a meaningful opinion. However, the Committee also agreed by consensus not to pursue Prof. Weeks's proposal. Among the Committee's concerns are the following:

1. Any rule that would require courts to explain every decision in a written opinion would have little chance of being approved by the Standing Committee and no chance of being approved by the Judicial Conference.

2. The Committee is already engaged in a difficult effort to amend the Appellate Rules to require courts to permit the citation of unpublished opinions. Members of the Committee have assured wary judges that proposed Rule 32.1 is not the first step on a slippery slope that will end with all courts being required to issue "precedential" opinions in all cases. Prof. Weeks's proposal would be seen as the next step on that slippery slope, and if the Committee were to pursue the proposal, the likely reaction from judges might make it more difficult to get approval of Rule 32.1.

3. The workloads of federal appellate judges are enormous. Judges of today are required to decide many more cases than judges of 30 or 40 years ago. Until significantly more judgeships are created and filled, hard decisions will have to be made about the allocation of judicial resources. Prof. Weeks's proposal would essentially force judges to spread their time thinly over all cases rather than choose to devote substantial time to some cases and less time to others. Some members of the Committee view this as poor stewardship of judicial resources. More importantly, all Committee members, regardless of their personal views, agree that this policy decision should not be made in the same way for all judges by this Committee.

4. It would be extremely difficult to draft a rule that would be effective in forcing judges who do not want to do so to issue a satisfactory opinion in every case. Moreover, it would be almost impossible to enforce a "mandatory opinion" rule against judges who tried to evade it.

By consensus, the Committee removed Item No. 03-05 from the study agenda.

6. Item No. 03-06 (FRAP 3 — defining parties)

On behalf of the Solicitor General, Mr. Letter presented a proposal to add a new Rule 3(f). Under that proposed rule, all parties to the case before the district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could withdraw from the case by filing a notice with the clerk. An "appellee" who supported the position of an appellant would have to file its brief within 7 days after the brief of that appellant was due. And an appellee who supported the position of an appellant would not be permitted to file a reply brief. Mr. Letter stressed that proposed Rule 3(f) was drafted to avoid the difficult issue of whether and to what extent a non-party can take advantage of the decision of an appellate court.

One member said that, in prohibiting appellees who support appellants from filing reply briefs, proposed Rule 3(f) departs from the Supreme Court rules on which it is patterned. Respondents who support petitioners are allowed to file reply briefs in the Supreme Court. The member said that he thought that a similar practice should be followed in the courts of appeals.

Another member objected to giving appellees who support appellants 7 more days to file their briefs than appellants themselves. Although she understands the desire to avoid duplication, she pointed out that the effect of the rule is to give de facto appellants who do *not* file notices of appeals more time to file briefs than de jure appellants who *do* file such notices.

Another member questioned the need for proposed Rule 3(f). He pointed out that, under Rule 4(a)(3), if one party files an appeal, all other parties get at least 14 days to file a notice of appeal. Thus, a party who does not want to appeal, but who also wants to participate in the appeal if another party appeals, can simply file its own notice of appeal after the other party "pulls the trigger." The member said that he saw little need for the rule, and he feared that the rule might have unintended and unanticipated consequences.

Finally, Prof. Mooney said that the Committee considered a similar proposal about 10 years ago. She recalls that the Committee gave the proposal considerable attention. She said that she did not have a good memory of the details of the proposal or the reasons for its rejection, but the records of the Committee should illuminate the matter. Mr. Rabiej agreed to research the Committee records.

By consensus, the Committee agreed to maintain Item No. 03-06 on the study agenda. Mr. Letter said that the Justice Department would consider the comments made by Committee members and review any records discovered by Mr. Rabiej.

VI. Additional Old Business and New Business

Judge Stewart and Mr. Svetcov described an issue that had been brought to their attention by Judge Will Garwood of the Fifth Circuit (former chair of the Committee) and Fifth Circuit clerk Charles R. "Fritz" Fulbruge III (former liaison to the Committee from the appellate clerks).

Under Rule 26(a)(2), "legal holidays" are excluded when computing any period of time that is less than 11 days. Moreover, under Rule 26(a)(3), if the last day of a period of time falls on a "legal holiday," that period of time does not end until the following day.

Rule 26(a)(4) defines "legal holiday" to include a list of federal holidays and "any other day declared a holiday by . . . the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office." Thus, in a case involving an appeal to the Fifth Circuit (headquartered in New Orleans) from an order of a district court in Texas, a day that is declared a holiday in *either* Louisiana *or* Texas would be deemed a "legal holiday" for purposes of Rule 26(a).

Mr. Fulbruge has raised the question whether a holiday declared by a particular *county* or *parish* would count as a "legal holiday" under Rule 26(a)(4). The Committee unanimously agreed that it would not, although the fact that a holiday was declared by the county or parish in which the circuit clerk's office was located might make the office "inaccessible" for purposes of Rule 26(a)(3).

Judge Garwood and Mr. Fulbruge also identified the following anomaly: A lawyer who lives in Texas and who represents a party in an appeal from an order of a district court in Texas and who has 10 days to respond to a paper would get an "extra" day under Rule 26(a)(2) if a holiday declared by the State of *Louisiana* falls in the middle of that 10-day period. There is no reason why an attorney who lives and works in Texas — or any other state except Louisiana — should get extra time to file a paper because one of the days within his deadline happens to be a holiday in Louisiana.

Committee members agreed with Judge Garwood's and Mr. Fulbruge's interpretation of the rule. However, Committee members also expressed the view that Rule 26(a) should not be amended to "fix" this anomaly. First, the anomaly does not arise from an ambiguity in the rule; indeed, the anomaly is created by the plain meaning of the rule. Second, the anomaly does not harm anyone. A very clever lawyer might figure out that he has one additional day to file a paper, and a similarly situated lawyer who is not as clever might file his paper one day earlier than was necessary. But no lawyer is going to blow a deadline because of the anomaly. Third,

the anomaly cuts both ways in the sense that a lawyer living and working in New York who represents a party in an appeal from an order of a district court in Texas will *not* get to exclude a New York holiday, even though his office may be closed on that day. Finally, amending the rule to "fix" the anomaly would be a complicated undertaking and might very well give rise to additional anomalies — anomalies that might be more harmful than the anomaly identified by Judge Garwood and Mr. Fulbruge.

Judge Alito agreed that he would contact Judge Garwood and Mr. Fulbruge and inform them that, while the Committee would be happy to entertain a specific proposal to amend Rule 26(a), it was not presently inclined to try to fix the anomaly that they had identified.

VII. Schedule Dates and Location of Fall 2003 Meeting

The Committee will meet on November 7, 2003, in San Diego, California. At this point, it appears that only a one-day meeting will be necessary.

VIII. Adjournment

By consensus, the Committee adjourned at 12:00 noon.

Respectfully submitted,

_____

Patrick J. Schiltz
Reporter

The minutes of the June 2003 meeting of the Standing Committee will be sent to you in a subsequent mailing.

00-07

U.S. Department of Justice
Civil Division, Appellate Staff
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DNL

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October 15, 2003

Professor Patrick J. Schiltz
St. Thomas More Chair in Law
University of St. Thomas School of Law
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Minneapolis, MN 55403-2015

Re: Possible Amendment to FRAP 4 Notice of Appeal Times

Dear Patrick:

At our last meeting, the Federal Rules of Appellate Procedure Advisory Committee asked me to report on a possible amendment to FRAP 4, which would provide 30 days for notices of appeal for all private parties in both civil and criminal cases, and 60 days for notices of appeal by the Government in both types of cases. For various reasons, the Department of Justice strongly opposes this proposal, and instead believes that no change in the FRAP 4 notice of appeal times is either necessary or desirable.

Although there would be one benefit from the simplified proposal (eliminating the need to decide if a case is governed by civil or criminal appeal times), we do not believe that there remains any pressing problem with FRAP 4 that needs to be fixed, and that extending the time for criminal appeals – both by the Government and by defendants – would raise a variety of problems, and would cause the overall substantial disadvantage of slowing down appeals in criminal cases. In addition, the proposal described above would require the Committee to recommend to the Supreme Court that it take the serious step of promulgating a rule that would directly overrule existing statutory provisions.

1. Some background knowledge of the statutes and rules setting notice of appeal times is necessary.

By statute, the time for taking appeals in private cases "of a civil nature" is 30 days after the entry of the appealable judgment, order, or decree. 28 U.S.C. 2107(a). In any action in which the United States, or its agencies or officers is a party, all parties – whether private or governmental –

have 60 days from such entry. 28 U.S.C. 2107(b).

FRAP 4(a) also discusses the deadlines for filing notices of appeal "in a Civil Case," and provides the same timing for civil cases as does Section 2107. See FRAP 4(a)(1).

No statute currently sets the time within which a defendant in a criminal case may file a notice of appeal. However, the time for the Government to appeal in criminal cases is generally set by 18 U.S.C. 3731 at 30 days.

FRAP 4(b)(1) governs appeal times in "a Criminal Case," and provides ten days for a defendant, and 30 days for the Government. A cross-appeal may be filed by a defendant within ten days of the Government's appeal, and by the Government within 30 days of a defendant's appeal.

In addition to these statutes and rules setting the notice of appeal times in general, there are various specialized statutes and rules providing different times for particular types of appeals. For example, ten days are provided to appeal in the following situations: (1) certain interlocutory civil appeals (28 U.S.C. 1292(b)); (2) Government appeals under the Classified Information Procedures Act (18 U.S.C. App. 3, Sec. 7); and, discretionary appeals from orders involving class action certifications (FRCP 23(f)).

2. The difference in criminal and civil notice of appeal times reflects the more general practice that criminal appeals are handled more expeditiously by the Circuits than standard civil cases. See, e.g., Second Circuit Local Rules Appendix Part B ("Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals"); Fifth Circuit Local Rules Appendix I ("Plan for Expediting Criminal Appeals"). Such treatment appears to be based partially on statutory command (see 18 U.S.C. 3731 (criminal appeals by the Government "shall be diligently prosecuted"; 18 U.S.C. 3145(c) (appeals under the Bail Reform Act from a release or detention order "shall be determined promptly"), and a lengthy tradition, recognized by the Supreme Court. See Corey v. United States, 375 U.S. 169, 171-72 (1963) (explaining purpose of rules governing federal criminal appeals – including the ten-day period for filing notices of appeal: "The dominant philosophy embodied in these rules reflects the twin concerns that criminal appeals be disposed of as expeditiously as the fair and orderly administration of justice may permit, and that the imposition of actual punishment be avoided pending disposition of an appeal"). See also U.S. Const., Amend VI (providing a constitutional right to a "speedy and public trial").

3. As I recall, the FRAP Committee began examining the notice of appeal times several years ago because there had been court of appeals case law addressing the issue of whether different cases are governed by the civil or criminal deadlines in different contexts. By proposing a new rule, which was eventually adopted by the Supreme Court, the Committee expressly resolved a conflict existing among the Circuits concerning the time for appeal from an order granting or denying a writ of *coram nobis* (see FRAP 4(a)(1)(C)). (There is still an inconsistency within the Circuits concerning the nature of Hyde Amendment appeals, but, as I have previously informed the Committee, this situation does not pose a serious problem and does not warrant the substantial

process needed to achieve a FRAP amendment.)

In the course of considering the appeal time issue, Committee members have raised the question whether the period for notices of appeal by criminal defendants is too short, and should be expanded to equal the Government's deadline of 30 days. By letter of March 26, 2002 (a copy of which is attached here), I have already explained why such an expansion is unnecessary and problematic. In addition, some members of the Committee have suggested that any future controversies about appeal times could be eliminated by making all notices of appeal due within 30 days, regardless of the type of case or party involved. I opposed this proposal, pointing out that there is a very good reason why the Government has 60 days in civil cases to file a notice of appeal: the Solicitor General must be given sufficient time to gather recommendations from various interested federal agencies and to decide whether or not to appeal, and this process works in many cases, thus saving the district and appellate courts substantial time and resources as fewer protective notices of appeal are filed.

Another informal proposal was then raised, providing that all notices of appeal by private parties would be due within 30 days, and all notices of appeal by the Government would be due within 60 days. (I do not know how this proposal would treat the various types of speedy specialized appeals mentioned above.)

4. From our perspective, the first problem with this proposal is that it will put in motion the substantial process for amending a FRAP provision when there is no actual need for it. As you know, some Committee members in the past have expressed the view that ten days is too short a period for a criminal defendant to decide to appeal. However, our understanding is that this period has been the rule for approximately 70 years, and the federal criminal bar is by now fully familiar with it. In addition, the recent change to FRAP 26(a)(2), covering its method of counting days, means that criminal defendants actually have between 14 and 17 days (depending upon the calendar) in which to have a notice of appeal filed, thus mitigating lingering concerns that a ten-day period is too short. And, we are not aware that the Committee has ever heard convincing evidence that defendants are being prejudiced by the current ten-business day notice of appeal time.

In addition, there is an overwhelming policy interest in the speedy resolution of criminal cases, which includes their appeals. The restrictive time limits for criminal cases in the Constitution, statutes, and rules embody the principle that the Government and criminal defendants should proceed expeditiously with their appeals. Defendants challenging their convictions and sentences through appeals should move swiftly so that the convictions can become final and, presumably, the defendants can accept the convictions and begin the process of rehabilitation. See United States v. Craig, 907 F.2d 653, 656 (7th Cir. 1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration. * * * [R]ule 4(b) is just a small part of a larger scheme to ensure that criminal prosecutions do not plod on indefinitely"); United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (noting the "policy

considerations supporting prescription of a very short time for appeal in a criminal case").

Additional time for criminal defendants to appeal will have reverberations on timing through different aspects of a criminal case. For example, 18 U.S.C. 3145(c) commands that an appeal from a release or a detention order "shall be determined promptly." An expansion of the time for filing a notice of appeal from the current 10/30 day scheme to a 30/60 day scheme would undermine that command. As noted earlier, 18 U.S.C. 3731 limits to 30 days the period within which the Government may appeal an order releasing a defendant, dismissing an indictment, suppressing evidence, or granting a new trial. Particularly with respect to interlocutory appeals, an expansion of the current time limits would delay trials in a manner inconsistent with the statutory and constitutional speedy trial guarantees. Once sentence is imposed, FRCrP 33(b)(2) and 34(b) give the defendant only seven days to file a motion seeking relief from the judgment. Likewise, FRCrP 35(a) gives the district court only seven days within which to correct the sentence. These short seven-day periods are designed to fit within the defendant's ten-day window for filing a notice of appeal. Like the ten-day period, they expedite post-judgment review and move the case quickly to the court of appeals.

We also note that many of the Government's criminal appeals are from interlocutory orders. Providing 60 days to file a notice of appeal in such situations will cause serious disruption and delay for the underlying case, and seems thoroughly inconsistent with the principle of speedy resolution of such cases. Indeed, a 60-day period for filing a notice of appeal would plainly be antithetical to the structure and purpose of the Speedy Trial Act, which provides the Government with only 70 days to bring a case to trial. See 18 U.S.C. 3161(c)(1).

Further, we believe that increasing the notice of appeal time for defendants will result in more appeals by defendants, particularly among those who pled guilty. As defendants have increased time to contemplate their ongoing incarcerations, and come under the greater influence of "jailhouse lawyers," we think it likely that more of them will decide to launch unmeritorious appeals, thereby increasing the burden on the courts. And, a longer notice of appeal time will create greater opportunities for defendants to delay final resolution of their cases through such additional trial court pleadings as reconsideration motions, ineffective-assistance-of-counsel claims, attacks on prosecutorial conduct, and bail requests. Our experience is that many such generally wasteful filings are currently avoided as defendants instead follow the tradition of moving rapidly on to the court of appeals and final determinations.

Any change in the current FRAP 4 rules would also raise some complications with the need to consider cross-appeals. In criminal cases, the United States currently can file a cross-appeal within 30 days of any defendant's notice of appeal. See FRAP 4(b)(1)(B). And, any defendant has ten days beyond the filing of an appeal by the Government. See FRAP 4(b)(1)(A)(ii). While surmountable, this problem simply underscores our concern that amending well-established FRAP provisions can be difficult as changes in one rule affect various other related rules. This problem would have to be solved, as well as the need to find appropriate phrasing to deal with the timing for the various specialized appeals mentioned earlier.

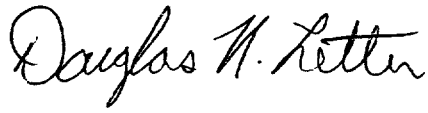
5. The proposal on the table also raises a serious concern because it would call for altering some statutorily-set appeal periods. As noted previously, the time for the Government to appeal in criminal cases is established by statute at 30 days. And, the time for private parties to appeal in civil cases involving the Government is set by statute at 60 days. The new proposed rule would override those deadlines.

The statutory scheme providing the Supreme Court with the power to set the rules for the lower Article III courts does provide that the Court can establish new rules overriding existing contrary statutory provisions. See 28 U.S.C. 2072 (providing that the Supreme Court has the power to prescribe general rules of practice and procedure in the United States district and appellate courts, and that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect"). And, the rules process provides Congress with notice of new proposed rules, and time to override them through legislation if it wishes. See 28 U.S.C. 2074.

Thus, although the Rules Enabling Act allows the Supreme Court to promulgate new rules that directly override statutes, we believe this power has been sparingly, if ever, used to date. It strikes us as odd to test this principle on a new rule that does not appear to be demanded by any pressing need.

In sum, given the fact that there does not appear to be a serious problem requiring an amendment to FRAP 4, we do not favor the radical revisions to FRAP 4 tentatively proposed to me. We believe that such a change is unnecessary, will likely lead to more and slower criminal appeals, and an increased number of filings by convicted defendants in the district courts seeking to disrupt proceedings, rather than moving on to the appellate stage. Accordingly, we strongly urge the Committee to leave in place the long-entrenched rules that govern notices of appeal, and that do not appear to be causing any significant trouble.

Sincerely,



Douglas N. Letter

00-07

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March 26, 2002

Professor Patrick J. Schiltz
Associate Dean and Professor of Law
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1000 La Salle Avenue, TMH 440
Minneapolis, MN 55403-2005

Re: Time To File Notice Of Appeal In Criminal Cases

Dear Patrick:

At the April 2001 meeting of the Federal Rules of Appellate Procedure Advisory Committee, there was discussion concerning an amendment to FRAP 26(a)(2) to make the time-computation provisions of FRAP consistent with those of the Federal Rules of Civil Procedure. During that discussion some members of the Committee raised the issue of whether the time within which defendants can file appeals in criminal cases should be increased beyond ten days because the Government has 30 days in which to appeal in such cases. See FRAP 4(b)(1). I was asked by Judge Garwood to study this issue and report to the Committee, which I am now doing by this letter. We do not believe that any change in the current rule is warranted.

There are persuasive policy and practical reasons for the Government to have more time than defendants to decide whether to appeal a criminal case. First, it takes the Government, because of its sheer size and bureaucratic organization, more time than most private parties to decide whether or not to appeal a decision. By regulation, any appeal must be authorized by the Solicitor General. See 28 C.F.R. § 0.20(b). This process entails memoranda by the United States Attorney's Office that tried the matter and by the Criminal Division at the Main Justice Department, followed by consideration by attorneys in the Solicitor General's Office. For obvious reasons, this process of winnowing the cases in order to pursue only appropriate appeals takes time.

We note that, in many instances, there is a strong preference for obtaining final appellate authorization -- or at least an indication that authorization to appeal likely will be forthcoming -- before any notice of appeal is filed. This practice is beneficial to the courts because it minimizes the number of protective notices of appeal that must be filed.

The Federal Rules of Appellate Procedure generally recognize that the appeal consideration process within the Department of Justice requires extra time. These rules grant more time to the Government to file a notice of appeal in civil cases (60 days when the Government is a party, versus 30 days when the appeal involves only private litigants) (see FRAP 4(a)(1)), and more time to seek

en banc review of adverse appellate decisions. See FRAP 40(a) (granting parties 45 days, instead of 14 days, to file a petition for rehearing in a civil case when the United States is a party).

Second, the Government's decision to appeal -- apart from the time-consuming institutional review associated with that process -- usually entails a probing substantive analysis of both the merits of the issue as well as the institutional consequences of pursuing an appeal. This consideration is necessary because the Government must not only consider whether an appeal makes sense in a particular case, but also the ramifications of such an appeal in terms of presenting a uniform position across the nation and in terms of consistency with whatever the Government's overarching policy is in the particular area. These are factors that an individual defendant simply need not consider.

We recognize that in the civil context, both the Government and private parties are given the same extra time to file an appeal in cases involving the Government. See FRAP 4(a). Apparently, this equal-time rule was adopted in the civil context because, in the view of the 1946 Advisory Committee, "[i]t would be unjust to allow the United States * * * extra time and yet deny it to other parties in the case." See 9 Moore's Federal Practice § 203.25[1], § 3-102 (2d ed. 1985).

However, the dynamics of criminal cases are fundamentally different from civil cases, and there is no good reason to extend the practice in civil cases to criminal ones. There is a special public policy interest in the speedy and orderly disposition of criminal cases -- embodied most prominently in the Speedy Trial Clause in the Constitution, the Speedy Trial Act (18 U.S.C. §§ 3161 et seq.), and the resulting priority given to criminal cases on court dockets. Indeed, the very fact that the Government is granted only 30 days in criminal cases to file a notice of appeal -- instead of the 60 days it is accorded in civil cases -- indicates that time is of the essence in criminal cases, and that the extra time given to the Government in criminal cases is a necessary concession to practical realities, a concession that should not be extended to other parties who do not face that reality.

Not surprisingly, the one appellate decision we have found to evaluate the time disparity contained in FRAP 4(b) for the Government and for defendants upheld that disparity against an equal protection challenge. Then-Ninth Circuit Judge Anthony Kennedy wrote:

> Applying [the rational basis] test, we have no difficulty finding that the different periods provided the government and criminal defendants for filing an appeal do not deny defendants the equal protection of the laws. It is reasonable to presume that it takes a large, bureaucratic organization such as the government, responsible for prosecuting thousands of cases across the country, a greater time to assess the merits of an appeal than it does an individual defendant. In reaching its decision whether or not to appeal, the government must be concerned, moreover, with the consistency of its positions and the future impact of the case, considerations that do not weigh as heavily, if at all, in the decision of the defendant.

United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986).

In addition, the appeal rights of the Government and of defendants are quite different in criminal cases. The Government may appeal in criminal cases only when authorized by statute and not barred by the Double Jeopardy Clause. Thus, the Government may appeal only in limited circumstances, authorized by 18 U.S.C. §§ 3731 and 3742, which usually involve interlocutory orders that have the effect of terminating a prosecution, post-verdict rulings that disregard a jury's verdict, or the severity of a sentence. The Government cannot appeal a not guilty verdict. By contrast, a defendant generally cannot appeal except from the final judgment of conviction (with some narrow exceptions). Thus, a defendant's decision to appeal typically involves only the verdict and sentence.

Moreover, we are aware of no pressing problem that would seem to favor amendment of Rule 4(b) to allow more time for defendants to appeal.

As noted already, there is a strong policy interest in the speedy resolution of criminal cases. The restrictive time limits for criminal cases in the Constitution, statutes, and rules embody the principle that criminal defendants should proceed expeditiously with challenges to their convictions and sentences, so that the convictions can become final and, presumably, the defendants can accept the convictions and begin the journey of rehabilitation. See United States v. Craig, 907 F.2d 653, 656 (7th Cir. 1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration. * * * [R]ule 4(b) is just a small part of a larger scheme to ensure that criminal prosecutions do not plod on indefinitely."); United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (noting the "policy considerations supporting prescription of a very short time for appeal in a criminal case").

Balanced against the need for quick finality is the fairness consideration of allowing criminal defendants sufficient time to file a timely appeal. At this point, however, we know of no evidence suggesting that ten days is proving insufficient for criminal defendants to decide whether to appeal and to file a notice. Because such a high percentage of defendants convicted in disputed criminal proceedings do appeal, it seems clear that this decision is not generally a difficult one. Further, the federal rules do not obligate defendants to file a brief or even file a list of issues to be preserved or questions presented within that time. Thus, the need for defendants to decide quickly that they want a notice of appeal filed is not an onerous burden,

In our view, given the strong public policy favoring fair but expeditious processing of criminal matters, and the absence of any evidence suggesting that the current ten-day time limit needs to be lengthened, there is no reason to propose amendments to FRAP 4(b) at this time.

Sincerely,

Douglas Letter
Appellate Litigation Counsel

MEMORANDUM

DATE: October 14, 2003

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 01-03

At its Spring 2002 meeting, this Committee decided to refer to the Advisory Committee on Civil Rules the proposal of attorney Roy H. Wepner that Appellate Rule 26(c) and Civil Rule 6(e) be amended to eliminate uncertainty about how their "three-day provisions" are applied. Attached is a copy of my memorandum of March 27, 2002, which explains one aspect of this problem in detail and recommends referral to the Civil Rules Committee.

In August, the Civil Rules Committee published for comment an amendment to Rule 6(e) that would resolve the uncertainties that have arisen about the application of the "three-day rule" by district courts. The proposed amendment and accompanying Committee Note are attached. Also attached is an excerpt from a memo by Prof. Edward Cooper, the Reporter to the Civil Rules Committee, in which excerpt Prof. Cooper describes the reasoning behind the proposed amendment.

The proposal of the Civil Rules Committee seems sound, except that, as I have discussed with Prof. Cooper, I believe that the Committee Note to the amendment to Rule 6(e) needs to be expanded slightly to make sure that there is no ambiguity regarding the following situation: A paper is served by mail. The prescribed period is 30 days. The 30th day falls on a Saturday. Are the three days counted beginning on that Saturday — thus making the paper due on Tuesday —

or are the three days counted beginning on Monday (when the prescribed period would expire under the time calculation provisions of the Civil Rules, in the absence of the three-day extension) — thus making the paper due on Thursday? Prof. Cooper and I discussed this at length, eventually agreeing that amended Rule 6(e) is not entirely clear on this point.

I have attached a draft amendment to Rule 26(c). The amendment and accompanying Committee Note would resolve the ambiguity in the Appellate Rules in the same manner as the proposed amendment to Civil Rule 6(e) resolves the ambiguity in the Civil Rules. I have put the phrase "would otherwise expire" in brackets, because I cannot decide whether the phrase would be helpful. (The phrase is not in the amended Civil Rule, but perhaps it should be.) The Committee Note that I have drafted is somewhat longer than the Committee Note to the amendment to Civil Rule 6(e), so as to address the issue described in the preceding paragraph — and, I hope, so as to leave less room for future misunderstandings.

Rule 26. Computing and Extending Time

* * * * *

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

Committee Note

Subdivision (c). Rule 26(c) has been amended to eliminate uncertainty about application of the 3-day extension. Civil Rule 6(e) was amended in 2004 to eliminate similar uncertainty in the Civil Rules, uncertainty that was described at length in 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002).

Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension provided by Rule 26(c), but with reference to the other time computation provisions of the Appellate Rules. (For example, if the prescribed period is less than 11 days, the party should exclude intermediate Saturdays, Sundays, and legal holidays, as instructed by Rule 26(a)(2).) After the party has identified the date on which the prescribed period would expire but for the operation of Rule 26(c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

To illustrate: A paper is served by mail on Wednesday, June 1, 2005. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday, June 15, 2005. (See Rules 26(a)(1) and (2).) Under Rule 26(c), three calendar days are added — Thursday, Friday, and Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a Saturday, Sunday, or legal holiday. Thus, the response is due on Monday, June 20, 2005.

To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the

prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 15, 2005.

To: **Honorable Anthony J. Scirica, Chair, Standing Committee on Rules of Practice and Procedure**

From: **David F. Levi, Chair, Advisory Committee on the Federal Rules of Civil Procedure**

Date: **May 21, 2003, as revised July 31, 2003**

Re: **Report of the Civil Rules Advisory Committee**

Introduction

The Civil Rules Advisory Committee met on May 1 and 2 at the Administrative Office of the United States Courts in Washington, D.C.

* * * * *

Part I of this report describes recommendations to publish for comment in two parts. Part IA recommends four proposals for immediate publication along with the amendments to Admiralty Rules B and C approved for publication at the January meeting.

* * * * *

Finally, draft Rule 5.1, adapting a provision in Civil Rule 24(c), provides that a party's failure to file the required notice, or a court's failure to make a required certification, "does not forfeit a constitutional right otherwise timely asserted." Appellate Rule 44 has no similar provision.

Rule 6(e)

Moved by comments on the Appellate Rules amendments that conformed appellate time-counting conventions to the Civil Rules conventions, the Appellate Rules Committee referred to the Civil Rules Committee a nice question arising from the relationship between Civil Rules 6(a) and 6(e). Rule 6(e), set out below, adds 3 days to some prescribed time periods. Unfortunately, it does not do so in a way that is as clear as time-counting rules should be. The proposed amendment aims to increase clarity in a way that will support, not disrupt, the general present understanding.

As recently amended, Rule 6(e) says:

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

(Rule 5(b)(2)(B) governs service by mail. (C) governs service by leaving a copy with the court clerk. (D) governs service by "any other means, including electronic means, consented to in writing.")

Rule 6(a) says that intervening Saturdays, Sundays, and legal holidays are excluded when computing a prescribed or allowed "period of time" that is "less than 11 days."

Four possible methods of integrating Rules 6(a) and 6(e) have been recognized. Two can be rejected without regret. One would "add" the 3 days "to the prescribed period" directly — a 10-day period becomes a 13-day period, Rule 6(a) is ousted because the

period is no longer less than 11 days, and the time to respond is shorter than it would be if Rule 6(e) did not exist. That is not the intent. The other would treat the three Rule 6(e) days as an independent time period, so that intervening Saturdays, Sundays, and legal holidays are excluded, often lengthening the time to respond by many more than three days.

The two plausible alternatives are to "add" the three Rule 6(e) days before beginning to count the ten days or after completing the ten-day count. Perhaps surprisingly, the choice makes a difference. It is easier to illustrate the difference than to articulate the explanation.

One illustration: The paper is mailed on Wednesday. If we count Thursday, Friday, and Saturday as the three days added by Rule 6(e), Monday is day 1 of the 10-day period; the tenth day is Friday, sixteen days after mailing. If we count Thursday and Friday as days 1 and 2 of the 10-day period, day 10 is a Wednesday; the third day added under Rule 6(e) is Saturday, and the response is due on Monday, 19 days after mailing.

The reason for this difference is that adding three days at the beginning of the period means that if service is made on a Wednesday, Thursday, or Friday, the first Saturday and often Sunday are double-counted. Saturday is omitted both because it is one of three added days and also because it is Saturday. (An intervening legal holiday may trigger the same phenomenon.) If the three days are added at the end, there is no opportunity for double counting. The extension may be greater.

So there is a difference. How should it be resolved? In the abstract, there is much to be said for adding the three days before beginning to count the ten-day period. Using mail service as an illustration, the three additional days are provided to allow for the time that may be required to deliver the mail. That happens at the beginning. Apart from the abstract, this approach would move things along a bit more quickly than if the three days are added at the end.

Adding three days at the end has proved more attractive despite these arguments. Perhaps it is desirable to allow more time. However that may be, informal surveys of practicing lawyers show two things. One is substantial uncertainty and a strong desire to achieve greater clarity. The second is an overwhelmingly common practice. Lawyers add the three days at the end, perhaps because it may allow more time, perhaps because that is the natural reading of the present language.

If clarity is the overriding goal, smooth implementation also is important. Conforming to general present practice will mean that the clarified rule does not trap many lawyers during the learning period that follows any rule change. Indeed no lawyer should be trapped, since the time never will be shorter than if the three days were added at the beginning.

The proposal recommended for publication adds three days after the prescribed period. It is based on the Style version of Rule 6(e) that is presented below for approval for publication at a later time. If publication of Rule 6(e) is approved now, it may become appropriate in the cycle of the Style Project to substitute amended Rule 6(e) for the present Style version.

One final note. Every discussion of this proposal has prompted the anguished protest made during every other discussion of time-counting rules. It is said that the rules are too complicated, and by more than half. Instead of excluding intervening days, we should set realistic time periods and adhere to them without further complication. The only rules needed would address the problems that would arise if a time period terminates on a Saturday, Sunday, legal holiday, or day when the clerk's office is inaccessible. (These problems arise also when an order sets a time measured by an interval before another event — a brief must be filed ten days before trial. If ten days before trial is a Sunday, must the brief be filed on Friday, or will Monday do?)

The Advisory Committee suggested that when competing demands allow, it may be desirable to establish an ad hoc committee

cutting across all the advisory committees to consider a general approach to counting short time periods.

Rule 27(a)(2)

Rule 27(a) sets the procedure for a petition to perpetuate testimony before an action is filed. Paragraph (a)(2) provides for notice to expected adverse parties and directs that the notice be served "in the manner provided in Rule 4(d)." This cross-reference to Rule 4(d) has been outdated since the 1993 Rule 4 amendments. Rule 4(d) now governs waiver of service. The cross-reference must be fixed.

Fixing the cross-reference is not entirely easy. The service provisions of former Rule 4(d) have been dispersed among present Rules 4(e), (g), (h), (i), and (j)(2). Even as to these provisions, new methods of service have been added to those provided by former Rule 4(d). Former Rule 4(d), moreover, did not provide for service on an individual in a foreign country — that matter was covered by former Rule 4(i), now found in Rule 4(f). And present Rule 4(j)(1) provides for service on a foreign state or political subdivision. Recreation of the precise circumstances of former Rule 4(d) would be difficult.

It is not only that recreation of former Rule 4(d) would be difficult. More importantly, recreation would be pointless. The purpose of Rule 27(a)(2) is to provide a reliable means of notice to expected adverse parties so that the pre-action discovery will function as well as can be. Duplication later would be wasteful, and — given the very purpose of allowing discovery before an action is filed — often would be impossible. The sensible approach is to invoke Rule 4 methods of service as to all categories of expected adverse parties. Although service may seem a cumbersome means of notice to parties in foreign countries, notice by other means may be offensive to foreign law.

The substantive change in Rule 27(a)(2), then, is to correct the superseded cross-reference to former Rule 4(d) by cross-referring to all means of Rule 4 service. The proposal is presented in the Style version of Rule 27(a)(2) that is under consideration by the Style Subcommittee. If publication of Rule 27(a)(2) is approved now, it

Draft of

Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure

Request For Comment

ALL WRITTEN COMMENTS DUE BY FEBRUARY 16, 2004

COMMENTS ARE SOUGHT ON AMENDMENTS TO:

Appellate Rules	4, 26, 27, 28, 32, 34, 35, 45, and new Rules 28.1 and 32.1
Bankruptcy Rules	1007, 3004, 3005, 4008, 7004, and 9006
Civil Rules	6, 24, 27, 45, and new Rule 5.1
Admiralty Rules	B and C
Criminal Rules	12.2, 29, 32, 32.1, 33, 34, 45, and new Rule 59

COMMITTEE ON RULES OF
PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES

APRIL 2003

or rule procedures that permit dismissal of all or part of an action — including a constitutional challenge — at any time, even before service of process.

Rule 6. Time

* * * * *

(e) Additional Time After Certain Kinds of Service ~~Under Rule 5(b)(2)(B), (C), or (D)~~. Whenever a party ~~has the right or is required to do some act or take some proceedings~~ must or may act 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~~ service and service is made under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added ~~to~~ after the ~~prescribed~~ period.

Committee Note

Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period expires. All the other time-counting rules apply unchanged.

One example illustrates the operation of Rule 6(e). A paper is mailed on Wednesday. The prescribed time to respond is 10 days. Assuming there are no intervening legal holidays, the prescribed period ends on Wednesday two weeks later. Three days are added, expiring on the following Saturday. Because the last day is a Saturday, the time to act extends to the next day that is not a legal holiday, ordinarily Monday.

Other changes are made to conform Rule 6(e) to current style conventions.

MEMORANDUM

DATE: March 27, 2002

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 01-03

Attorney Roy H. Wepner has called the Committee's attention to an ambiguity in the way that Rule 26(a)(2) interacts with Rule 26(c). (A copy of Mr. Wepner's letter is attached.)

Rule 26(c) provides that "[w]hen a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service." For example, under Rule 31(a)(1), the appellee must serve and file a brief within 30 days after the appellant's brief is served. If the appellant serves its brief by mail, the appellee's brief must be served and filed within 33 days — the 30 days prescribed in Rule 31(a)(1) plus the 3 days added to that prescribed period by Rule 26(c).

Rule 26(a)(2) currently provides that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays are excluded when the period of time is less than 7 days, and included when the period of time is 7 days or more. This Committee has proposed amending Rule 26(a)(2) so that the demarcation line is changed from 7 days to 11 days. The purpose of the proposed amendment is to make time calculation under the Appellate Rules consistent with time calculation under the Civil Rules and Criminal Rules.

The ambiguity is this: In deciding whether a deadline is less than 7 days or 11 days, should the court "count" the 3 days that are added to the deadline under Rule 26(c)? Suppose, for example, that a party has 5 days to respond to a paper that has been served upon her by mail. Is she facing a 5-day deadline — that is, a deadline "less than 7 days" for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by excluding intermediate Saturdays, Sundays, and legal holidays? Or is she facing an 8-day deadline — that is, a deadline that is *not* "less than 7 days" for purposes of current Rule 26(a)(2) — and therefore a deadline that should be calculated by including intermediate Saturdays, Sundays, and legal holidays?

This question never arises under the current version of Rule 26(a)(2). The question would arise only with respect to 4-, 5-, or 6-day deadlines, as only then would including the 3 extra days provided by Rule 26(c) change the deadline from one that is less than 7 days to one that is 7 days or more. But there are no 4-, 5-, or 6-day deadlines in the Appellate Rules.

This question will arise under the *amended* version of Rule 26(a)(2). (The amendment will take effect on December 1, 2002, barring Supreme Court or Congressional action.) Under amended Rule 26(a)(2), the question will arise with respect to 8-, 9-, and 10-day deadlines. There are no 8- or 9-day deadlines in the Appellate Rules, but there are several 10-day deadlines.

A lot turns on this question. Suppose that a party has 10 days to respond to a paper that has been served by mail. If the 3 days *are* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2), then the deadline is *not* "less than 11 days," intermediate Saturdays, Sundays, and legal holidays do count, and the party would have at least 13 calendar days to respond. If the 3 days are *not* added to the deadline before asking whether the deadline is "less than 11 days" for purposes of amended Rule 26(a)(2),

then the deadline *is* "less than 11 days" for purposes of Rule 26(a)(2), intermediate Saturdays, Sundays, and legal holidays do *not* count, and the party would have at least 17 calendar days to respond.

Mr. Wepner is correct that this problem should be fixed. But it is difficult to know exactly how the problem should be fixed or by whom.

The district courts have wrestled with this problem under the Civil Rules for 17 years, yet they have failed to agree on a solution. Professor Arthur Miller devotes 7 pages to this problem in the new edition of Volume 4B of *Federal Practice & Procedure*.[1] Professor Miller's discussion outlines three possible ways of solving the problem (actually four, as the second option has two "sub-options"), but cites disadvantages to each. The problem is a complicated one.

The problem is also one that should not be addressed only by the Appellate Rules Committee. After December 1, the identical issue will arise under the Appellate Rules, the Civil Rules, and the Criminal Rules. If time is to be calculated the same under all three sets of rules, the issue will have to be resolved at the same time and in the same manner by the three advisory committees. One of those committees will have to take the lead.

Judge Alito and I believe — and the Reporter to the Civil Rules Committee agrees — that the Civil Rules Committee should take the lead on this matter. The Civil Rules Committee is, if you will, the "biological parent" of this issue; this Committee is only the "adoptive parent." The Civil Rules Committee has 17 years' experience with this issue; this Committee has none. And

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[1] *See* 4B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1171, at 595-601 (2002). A copy of this section is attached.

this issue is a bigger problem for the Civil Rules than for the (amended) Appellate Rules. The problem does not arise unless a party is required to act within a prescribed period of 8, 9, or 10 days after a paper is *served* on that party. The Appellate Rules contain no 8- or 9-day deadlines and only a handful of 10-day deadlines that are triggered by *service* (as opposed to by the filing of a paper or the entry of an order). Only one of these 10-day deadlines is of any real consequence — the deadline in Rule 27(a)(3)(A) regarding responding to motions.[2] By contrast, the Civil Rules appear to contain at least a dozen 10-day deadlines that are triggered by service.

I recommend that the Committee refer Mr. Wepner's letter to the Civil Rules Committee.

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[2]This Committee has proposed amending Rule 27(a)(3)(A) so that it provides 8 days to respond to a motion, rather than 10. But the change will not eliminate the problem cited by Mr. Wepner.

MEMORANDUM

DATE: October 13, 2003

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 03-02

Rule 7 authorizes a district court to require an appellant to post a bond "to ensure payment of costs on appeal."[1] The courts of appeals have divided over the meaning of "costs." At least two circuits — the D.C.[2] and the Third[3] — hold that a Rule 7 bond can secure only the

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[1]The cost bond that is authorized by Rule 7 should not be confused with the supersedeas bond that is authorized by Rule 8. A Rule 7 bond ensures that the appellant will pay any costs that are incurred on appeal by the appellee and that are eventually taxed against the appellant. A Rule 8 bond is posted by an appellant who seeks a stay of the district court's judgment; it ensures that the appellant will pay that judgment if he or she loses the appeal. *See* 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3953, at 291 (3d ed. 1999); *see also* Adsani v. Miller, 139 F.3d 67, 70 n.2 (2d Cir. 1998) ("It appears that a 'supersedeas bond' is retrospective covering sums related to the merits of the underlying judgment (and stay of its execution), whereas a 'cost bond' is prospective relating to the potential expenses of litigating an appeal.").

[2]*See* In re American President Lines, Inc., 779 F.2d 714, 716 (D.C. Cir. 1985) ("The costs referred to [in Rule 7] . . . are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal." (footnote omitted)); *but see* Montgomery & Assocs., Inc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 784 (D.C. Cir. 1987) ("Nothing in the language of Fed.R.App.P. 39(d), and no language elsewhere in Rule 39, enumerates what items are included in 'costs' or suggests an exception for attorneys' fees deemed to be costs by statute.").

[3]*See* Hirschensohn v. Lawyers Title Ins. Corp., No. 96-7312, 1997 WL 307777, at *1 (3d Cir. Apr. 7, 1997) ("'Costs' referred to in Rule 7 are those that may be taxed against an unsuccessful litigant under Federal Rule of Appellate Procedure 39.").

costs that are identified in Rule 39. At least two other circuits — the Second[4] and the Eleventh[5] — hold that Rule 7 bonds can also secure attorney's fees when such fees are defined as "costs" under a fee-shifting statute.

At its May 2003 meeting, the Committee tentatively agreed to resolve this circuit split by amending Rule 7 to adopt the narrow interpretation of "costs" favored by the D.C. and Third Circuits. The Committee asked me to draft an implementing amendment and to take a closer look at this issue. In particular, the Committee was unclear about exactly which costs may be recovered on appeal and under what authority.

I looked at this issue over the summer. To my knowledge, 28 U.S.C. § 1920 is the only statute that *generally* authorizes the recovery of costs incurred in federal litigation. (There are, of course, statutes that authorize recovery of costs as a sanction and fee-shifting statutes that authorize recovery of a particular type of "cost" (e.g., attorney's fees) in a particular type of action (e.g., patent or civil rights).) Section 1920 is a comprehensive statute; it traces its roots to 1853 and "embodies Congress' considered choice as to the kinds of expenses that a federal court may tax as costs against the losing party."[6] The Supreme Court has rejected the argument that

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[4]*See* Adsani, 139 F.3d at 71-76 (upholding a district court's order that appellant post a Rule 7 bond to secure the attorney's fees that appellees might be entitled to "as part of the costs" under 17 U.S.C. § 505).

[5]*See* Pedraza v. United Guar. Corp., 313 F.3d 1323, 1328-33 (11th Cir. 2002) (agreeing with *Adsani* that attorney's fees can be secured by a Rule 7 bond when they are defined as "costs" under a fee-shifting statute, but holding that attorney's fees were not defined as "costs" by 12 U.S.C. § 2607(d)(5) (which authorizes the award of "costs of the action together with reasonable attorneys fees")).

[6]Crawford Fitting Co. v. J. T. Gibbons, Inc., 482 U.S. 437, 440 (1987).

"§ 1920 does not preclude taxation of costs above and beyond the items listed."[7] A litigant seeking to recover costs not listed in § 1920 may do so only when § 1920 has been "overridden by contract or explicit statutory authority."[8]

Section 1920 provides:

> A judge or clerk of any court of the United States may tax as costs the following:
>
> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case;
>
> (5) Docket fees under section 1923 of this title; [and]
>
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Appellate Rule 39 is entitled "Costs," but the rule does not itself seem to authorize the taxation of any costs. Rather, Rule 39 provides procedures for the taxing of the costs that may be

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[7] *Id.* at 441.

[8] *Id.* at 444.

recovered pursuant to some other authority — usually, § 1920.[9] Rule 39(e) provides that the following costs are taxable in the district court:

(1) the preparation and transmission of the record;

(2) the reporter's transcript, if needed to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and

(4) the fee for filing the notice of appeal.

Rule 39(d) provides that all other costs are taxable in the court of appeals. By definition, these are the costs (1) that can be recovered under § 1920 (or another statute), but (2) that are not taxable in the district court under Rule 39(e). As a practical matter, this means the costs of duplicating and binding the briefs and appendices (or record excerpts). All other costs mentioned in § 1920 are either taxable in the district court under Rule 39(e) or almost never incurred on appeal.[10]

There is one anomaly, an anomaly that I have ignored to this point: Rule 39(e) provides that the costs of "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal" should be taxed in the district court. The problem is that I cannot find any statute that

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[9]*See* Pedraza, 313 F.3d at 1329 ("Rule 39 contains no definition of 'costs' at all, and instead . . . sets forth procedural requirements for the obtainment of costs . . . and finally lists some costs that are taxable in the district court. . . . Notably, the rule never sets forth an exhaustive list or a general definition of 'costs.'"); Adsani, 139 F.3d at 74 ("None of these provisions [of Rule 39] purports to define costs: each concerns procedures for taxing them. Specific costs are mentioned only in the context of how that cost should be taxed, procedurally speaking.").

[10]Marcie Waldron confirms my impression that taxation of costs in the appellate court is generally limited to duplication and binding costs and is generally a routine matter handled by deputy clerks.

authorizes the taxation of these costs. As best as I can tell, taxation of these costs was permitted by the common law (at least in some jurisdictions) and by the local rules of some district courts at the time that Rule 39 was enacted, and for that reason these costs were included in Rule 39(e).[11]

This anomaly has made it somewhat difficult to draft an amendment to Rule 7 that implements the Committee's decision that Rule 7 bonds should not extend to attorney's fees. Rule 7 cannot simply cross-reference § 1920, as that statute does not include premiums for supersedeas bonds (which presumably should be included in the costs bonded under Rule 7). Rule 7 also cannot simply cross-reference Rule 39, as Rule 39 neither authorizes the recovery of any costs itself nor provides a complete list of costs recoverable under § 1920. Rather, Rule 39 merely directs that certain (specified) costs be taxed in the district court, and other (unspecified) costs be taxed in the court of appeals.

It seems to me that this leaves the Committee with two options. First, it could amend Rule 7 to identify those costs that *can* be bonded — specifically, the costs authorized by § 1920 plus the costs of premiums paid for supersedeas bonds. Second, it could amend Rule 7 to identify those costs that *cannot* be bonded — specifically, attorney's fees. (I suppose a third option is to amend Rule 7 to do both, but that would be redundant.)

I have followed the first approach in drafting the attached amendment. Identifying what "costs" does *not* include may open the door for future litigation over what it *does* include. It

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[11] *See* Advisory Committee Note to 1967 Adoption of Rule 39 ("Provision for taxation of the cost of premiums paid for supersedeas bonds is common in the local rules of district courts and the practice is established in the Second, Seventh, and Ninth Circuits.").

seems to me better to specify the "costs" that are encompassed within Rule 7 and require anyone who seeks to expand the scope of Rule 7 to amend either the rule or § 1920.

Rule 7. Bond for Costs on Appeal in a Civil Case

In a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal. As used in this rule, "costs on appeal" means the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Rule 8(b) applies to a surety on a bond given under this rule.

Committee Note

Rule 7 has been amended to resolve a circuit split over whether attorney's fees are included among the "costs on appeal" that may be secured by a Rule 7 bond when those fees are defined as "costs" under a fee-shifting statute. The Second and Eleventh Circuits hold that a Rule 7 bond can secure such attorney's fees; the D.C. and Third Circuits hold that it cannot. *Compare Pedraza v. United Guar. Corp.*, 313 F.3d 1323, 1328-33 (11th Cir. 2002), *and Adsani v. Miller*, 139 F.3d 67, 71-76 (2d Cir. 1998), *with Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777, at *1 (3d Cir. Apr. 7, 1997), *and In re American President Lines, Inc.*, 779 F.2d 714, 716 (D.C. Cir. 1985).

The amendment adopts the views of the D.C. and Third Circuits. To require parties to secure attorney's fees with a Rule 7 bond would "expand[] Rule 7 beyond its traditional scope, create[] administrative difficulties for district court judges, burden[] the right to appeal for litigants of limited means, and attach[] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes." 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, EDWARD H. COOPER & PATRICK J. SCHILTZ, FEDERAL PRACTICE AND PROCEDURE § 3953 (3d ed. Supp. 2004). Moreover, it seems likely that in many, if not most, of the cases in which a fee-shifting statute requires an appellant to pay the attorney's fees incurred on appeal by its opponent, the appellant is a governmental or corporate entity whose ability to pay is not seriously in question.

Under amended Rule 7, an appellant may be required to post a bond to secure only two types of costs. First, a Rule 7 bond may ensure payment of the costs that may be taxed under 28 U.S.C. § 1920; attorney's fees are not among those costs. *See Roadway Express, Inc. v. Piper*, 447 U.S. 752, 757-58 (1980). Second, a Rule 7 bond may ensure payment of the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal. Although this cost is not mentioned by § 1920, it has long been recoverable under the common law and the local rules of district courts, and it is explicitly mentioned in Rule 39(e).

03-03

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DNL

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October 15, 2003

Professor Patrick J. Schiltz
St. Thomas More Chair in Law
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 302
Minneapolis, MN 55403-2015

Re: Possible New Rule Covering Safekeeping of Exhibits

Dear Patrick:

At our last meeting, the Federal Rules of Appellate Procedure Advisory Committee asked me to report on a possible amendment to the FRAP concerning the practice followed in many district courts for trial exhibits to be returned to the parties after trial and during an appeal. Judge Roll had raised originally with the Criminal Rules Committee the possibility of a new rule to cover this matter, and Judge Carnes, the Chair of that committee, then referred the matter to Judge Alito of our committee.

Judge Roll noted that the practice used in many courts raises two concerns: whether the exhibits are easily retrievable for use by an appellate court, if necessary; and the integrity of the retrieved exhibits. He noted with respect to the practice of returning trial exhibits to the parties during an appeal: "The opportunity for serious mischief in connection with trial exhibits seems too apparent to dispute."

I raised this issue at the Department of Justice with the United States Attorneys' Appellate Working Group. This body was created several years ago by the Attorney General and the Solicitor General to ensure a high level of appellate advocacy in the U.S. Attorneys' offices and to provide expert advice to the Justice Department on a wide variety of appellate procedures and issues. This group includes appellate experts from the Criminal Division and the Civil Division at the Justice Department, and at least one appellate chief from a U.S. Attorney's office in each of the Circuits. Thus, the Appellate Working Group has an extremely wide degree of experience and expertise on federal appellate matters.

During discussions on the issues raised by Judge Roll, the members of the Appellate Working Group agreed that there is sometimes a problem with safekeeping trial exhibits during the course of appeals. For obvious reasons, these Assistant United States Attorneys made clear that they would favor a rule and practice under which all trial exhibits would remain within the custody of the respective district court clerks, who would be fully responsible for protecting these exhibits (which can include a vast variety of materials, both innocuous and dangerous, such as paper records, illegal narcotics, firearms, explosives, clothing, photographs, etc.) From their regular dealings with the district court's clerks offices, the Appellate Working Group members immediately recognized, however, that the district courts are not equipped with facilities, personnel, or necessary funds to take on this very difficult burden. In addition, if each district court clerk's office were responsible for safekeeping all of the trial exhibits from the many cases from each court on appeal at any one time, the massive nature of this function would obviously lead to situations in which exhibits would be lost. Thus, it was quite clear that assigning the safekeeping function to all of the district courts would undoubtedly be desirable from a theoretical and public policy perspective, but it is plainly not a practical option without substantial changes in district court facilities, personnel, and funding.

In addition, while the members of the Appellate Working Group agreed with Judge Roll that there is a risk of mischief with the current general practice, we do not believe that establishment of a FRAP provision would achieve anything useful. This matter does not seem to be one on which a uniform national rule is necessary or appropriate; indeed, it appears to be a subject much better dealt with in each district individually, with participation by the district court, its clerk, and local practitioners to work out together the best means of minimizing the risk of problems in that particular area, in light of the nature of the court, the bar there, and the locality.

For example, the best practice in a district comprising a small geographic area, such as the Southern District of New York, might be inappropriate for a large region such as the Northern District of California or the District of Alaska. Further, districts with many cases of a particular type, such as criminal immigration law violations in the Southwest or administrative law challenges in the District of Columbia, might have very different concerns from districts covering areas such as Wyoming or Massachusetts.

In sum, while Judge Roll has very helpfully identified a potentially serious problem, it is not one that we think is best dealt with through a nationwide, uniform rule in the FRAP.

Sincerely,

Douglas N. Letter

03-04

U.S. Department of Justice
Civil Division, Appellate Staff
601 "D" Street, N.W., Rm: 9106
Washington, D.C. 20530

DNL

Douglas N. Letter
Appellate Litigation Counsel

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October 15, 2003

Professor Patrick J. Schiltz
St. Thomas More Chair in Law
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 302
Minneapolis, MN 55403-2015

Re: Potential Amendment to FRAP Regarding Intervention in Constitutional Challenges

Dear Patrick:

I am writing because I was asked to respond to the issue raised by the FRAP Committee of whether to amend FRAP 44 to correspond to the newly proposed changes to Federal Rule of Civil Procedure 5.1, governing district court matters. As discussed below, FRAP 44 has proven generally effective in ensuring that the Government receives warning of appeals involving constitutional challenges to federal statutes. Although there are noticeable differences between the statute providing for intervention by the United States in cases involving constitutional challenges to federal statutes (28 U.S.C. § 2403(a)), and the federal rules implementing this statute (FRAP 44 and FRCP 5.1), we do not believe that these differences warrant an amendment to FRAP 44.

28 U.S.C. § 2403(a) confers a right on the United States to intervene in cases in which a party challenges the constitutionality of "any Act of Congress" and the United States is not already a party. Section 2403(a) states that in any proceeding in federal court "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 into question," the court must certify the issue to the Attorney General and "shall permit the United States to intervene for presentation of evidence * * * and for argument on the question of constitutionality."

FRCP 5.1 and FRAP 44 are designed to implement Section 2403 in the district and appellate courts, respectively. There are distinctions, however, between Section 2403 and the rules, and between the rules themselves.

FRAP 44(a) requires that a party who "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" must provide 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 court clerk is then responsible for certifying the constitutional challenge to the Attorney General. See ibid. In practice, at our request, the circuit clerks actually notify the Office of the Solicitor General.

The newly proposed FRCP 5.1 requires "[a] party that files a pleading, written motion, or other paper that draws in question the constitutionality of an Act of Congress," in an action where the United States, its agency, or its officer or employee sued in an official capacity is not a party, to file notice of such question with the court and serve the notice (and the document raising the question) on the Attorney General. Rule 5.1(a). This proposed district court rule also requires the court to certify the constitutional challenge to the Attorney General. FRCP 5.1(c) further provides that the court must allow the Attorney General at least sixty days to determine whether or not to intervene. Moreover, "[a] party's failure to file and serve a Rule 5.1(a) notice, or a court's failure to make a Rule 5.1(b) certification, does not forfeit a constitutional right otherwise timely asserted." FRCP 5.1(d).

FRCP 24(c), the precursor to proposed FRCP 5.1, requires only the court to notify the Attorney General of a statutory constitutional challenge. However, FRCP 24(c) does specify that the party challenging the statute "should call the attention of the court to its consequential duty, but failure to do so is not a waiver of any constitutional right otherwise timely asserted." Therefore, proposed FRCP 5.1 departs from FRCP 24(c) in explicitly requiring the challenging party to serve written notice of the challenge on the court and on the Attorney General, and in specifying a minimum time for intervention by the Government.

Proposed FRCP 5.1 incorporates these measures in response to specific problems that arose under FRCP 24(c). The amendments were proposed by the Department of Justice in part due to the complete lack of notification to the Government in many cases, or the untimeliness of such notification. Requiring notice from both the party challenging the statute and the relevant court was intended to ensure that the Attorney General is made aware of all district court constitutional challenges to federal statutes. The sixty-day minimum period for intervention was set to mirror the Government's time to answer a complaint and to provide sufficient time in which to obtain approval to intervene.

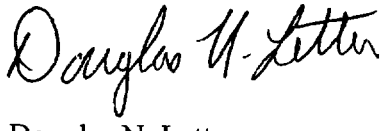
These amendments differ from the language of Section 2403(a) and FRAP 44. Given the differences between district court and appellate court practice, however, amending FRAP 44 to conform to the new provisions of FRCP 5.1 is unwarranted. The appellate courts under FRAP 44, unlike the district courts under FRCP 24(c), have, with some rare exceptions, been reliably providing notice to the Attorney General (through the Office of the Solicitor General) of appeals raising a constitutional challenge to a federal statute. As a result, FRCP 5.1's requirement that the challenging party also notify the Attorney General of the constitutional question appears unnecessary in the appellate context. In addition, the 60- day period for intervention in FRCP 5.1 would not be practical in appellate court. The 60-day period, chosen to equal the time for the Government to respond to a complaint, is not relevant to intervention in a case on appeal. Moreover, although the Government

sometimes receives notice under FRAP 44 after briefing has already been completed, the practice of the courts of appeals has generally been to allow the United States sufficient time to determine whether to intervene, and, if so, to grant the United States time to file a brief and participate in oral argument. Therefore, unlike in the district courts under FRCP 24(c), the Government's right to intervene in appeals generally has not been impaired by FRAP 44. In sum, the rationale for adopting the new provisions in FRCP 5.1 does not support similar changes to FRAP 44.

Both FRCP 5.1 and FRAP 44 depart from 28 U.S.C. 2403 in one significant way. Whereas Section 2403 applies to a suit in which "the United States or any agency, officer or employee thereof is not a party," FRCP 5.1 applies to suits in which "the United States, a United States agency, or an officer or employee of the United States sued in an official capacity" is not a party. FRCP 5.1(a)(1) (emphasis added). Thus, FRCP 5.1 requires notification to the United States even when one of the parties is a federal official sued in an individual capacity for acts and omissions occurring in connection with the performance of his official duties. This change was adopted (in contrast to FRCP 24(c)) to ensure that the Government receives notification of constitutional challenges in Bivens cases where the federal official may be represented by private, rather than government, counsel. FRAP 44, similar to FRCP 5.1, also extends the Government's right to notification and intervention to actions in which "the United States or its agency, officer, or employee is not a party in an official capacity." FRAP 44(a) (emphasis added). Although the language in Rules 44 and 5.1 is more restrictive than that found in Section 2403, the result is an arguably broader notification than is explicitly required by the statute.

Because FRAP 44 as it is now written effectively implements Section 2403, it is unnecessary to amend this rule to conform to the changes adopted in proposed FRCP 5.1. The adage "if it ain't broke, don't fix it," appears to apply here perfectly. The amendments to FRCP 5.1 are specific to district court implementation of Section 2403 and are not applicable to appeals. As a result, we recommend that no amendments be made to FRAP 44 at this time.

Sincerely,



Douglas N. Letter
Appellate Litigation Counsel

MEMORANDUM

DATE: October 15, 2003

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 03-06

At its May 2003 meeting, the Committee gave initial consideration to a proposal by the Solicitor General that a new Rule 3(f) be added to provide that all parties to a case before a district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could withdraw from the case by filing a notice with the clerk. An "appellee" who supported the position of an appellant would have to file its brief within seven days after the brief of that appellant was due and would not be permitted to file a reply brief. The Solicitor General's proposal — which is attached — is patterned after Supreme Court Rules 12.6 and 18.2.

In the course of the Committee's discussion, Professor Mooney said that she had a vague recollection that the Committee had considered and rejected a similar proposal about ten years ago. She could not recall the reasons why the proposal was rejected. John Rabiej and James Ishida agreed to research the records of the Committee.

Professor Mooney's recollection proved correct. A proposal by Judge Frank Easterbrook to pattern Rule 3 after what is now Supreme Court Rule 12.6 (and what was then Supreme Court Rule 12.4) — a proposal that was similar to the current proposal by the Solicitor General — was

considered by the Committee but eventually rejected, in part because it was unanimously opposed by the clerks and the chief deputy clerks of the circuits. The nub of the clerks' opposition — and the main reason for the Committee's rejection — was the belief that the Supreme Court's rule might work for a court that decides fewer than 200 cases on the merits every year, but would not work for a circuit that must annually dispose of several thousand appeals. The Committee concluded that whatever benefits the rule would provide were outweighed by the administrative burden that the rule would impose on the parties and clerks.

Attached is the material that John and James provided regarding the Committee's consideration of Judge Easterbrook's proposal.

03-06

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April 11, 2003

Professor Patrick J. Schiltz
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Re: FRAP Amendment Proposal to Define the Parties before the Court of Appeals

Dear Patrick:

I am writing because the Solicitor General wishes to propose to the FRAP Committee a rules change to fix an apparent gap in the FRAP, and to conform those rules to the existing Supreme Court rules with regard to identifying the parties before the court.

Surprisingly, the FRAP do not define who is an "appellee," although that term is used throughout the rules. See FRAP 6(b)(2)(B)(ii), 9(a)(2), 10(b)(3), 11(c), 20, 28(b)-(d),(h),(i), 30(b),(c), 31(a),(c), 32(a)(2), 34(d),(e), 35(c), 38, 39(a)(3), 43(a)(3). The lack of a definition can be a problem when a party adversely affected by a district court decision does not appeal, but seeks to file a brief or otherwise participate in an appeal filed by another party.

The Supreme Court rules broadly recognize that all parties to the case below are presumptively parties in the Supreme Court (though they may choose not to participate); those rules designate as appellee or respondent every party that has not sought review. See S. Ct. R. 12.6, 18.2. That approach avoids the need to distinguish between parties based on their legal positions or their adversary relationship to an appellant. It also allows all parties to participate in the review of a lower court decision.

We propose that a nearly identical provision be added to FRAP 3. Moreover, we recommend that FRAP 3 be amended to clarify that every party to a case in district court is presumptively entitled to participate in the court of appeals as a party. This change would conform to Supreme Court practice.

1. As it now stands, there is no definition in the FRAP of who is a party to an appeal, in part because of the lack of a definition for the term "appellee" in these rules. This gap is puzzling because the Supreme Court rules specifically address this issue. The uncertainty in FRAP in turn can affect practice before the Supreme Court because that Court's Rules 12.6 and 18.2 refer to the parties in the court below as the basis for determining who is a party to a case before the Supreme Court.

Supreme Court Rule 12.6 provides:

> All parties to the proceeding in the court whose judgment is sought to be reviewed are deemed parties entitled to file documents in this Court, unless the petitioner notifies the Clerk of this Court in writing of the petitioner's belief that one or more of the parties below have no interest in the outcome of the petition. * * * A party noted as no longer interested may remain a party by notifying the Clerk promptly * * * of an intention to remain a party. All parties other than the petitioner are considered respondents, but any respondent who supports the position of a petitioner shall meet the petitioner's time schedule for filing documents * * *. Parties who file no document will not qualify for any relief from this Court.

Supreme Court Rule 18.2 sets a similar, but slightly different, procedure for appeals.

2. The issue about who is an appellee in the court of appeals arose in recent discussions before the FRAP Committee. The Circuit clerks had proposed a rule to require an appellant to name the appellees in the notice of appeal, thereby minimizing the burden on Circuit clerks to identify the appellees for docketing purposes. The FRAP Committee rejected this proposal, in part because the clerks' proposal appeared to assume a narrow definition of "appellee," perhaps based on a party's position adverse to the appellant. The proposal and ensuing discussion brought to light the absence of a definition of "appellee" in the FRAP. If adopted, our proposal should clarify the docketing procedures and may simplify the tasks of the Circuit clerks.

The issue has also arisen in a few litigation contexts. For example, in one case, the district court issued a preliminary injunction against a federal agency, but the Government determined not to appeal that interlocutory decision. However, an intervenor-defendant did appeal the preliminary injunction, and the district court later decided to stay its decision on the request for a final injunction until after the appeal was concluded. At that point, the Government sought to participate in the appeal and to be aligned with the appellant even though it had not filed a notice of appeal. The FRAP provided no procedure for this situation; the Government was plainly not an appellant, but it was unclear if it could be an appellee, and yet an appellee who wished to support overturning the district court judgment.

The problem with the lack of definition of "appellee" can also arise in the *qui tam* context under the False Claims Act, when the Government has exercised its statutory right to intervene (see 31 U.S.C. 3730(b)). When the district court dismisses an action on grounds unique to the relator's

status (such as if the *qui tam* plaintiff is not a proper relator under the terms of the statute), the Government might not itself appeal, but might seek to participate in the relator's appeal in order to assert its concerns. In these circumstances, the Government has sometimes succeeded in convincing an appellate court to allow it to participate as an appellee aligned with the appellant, but these determinations have by necessity been *ad hoc*.

3. The final sentence of Supreme Court Rules 12.6 and 18.2 demonstrates that the procedural question about who is an appellee may also raise a related substantive issue: When is a non-appealing party entitled to claim the benefit of a reversal obtained in an appeal filed by another party. See S. Ct. R. 12.6, 18.2 ("Parties who file no document will not qualify for any relief from this Court."). The new rule we propose in the FRAP is not intended to change existing law on that question, nor to preclude the continuing development of that law by the courts of appeals. Existing law -- as it has been developed by the courts of appeals to date -- does not generally require that the non-appealing party participate in an appeal as a prerequisite to benefitting from an appellate decision. Accordingly, to avoid confusion in this area, we have omitted from the new rule any reference to such a requirement.

There is some uncertainty under current law concerning the effect of an appellate decision on a non-appealing party. It is well-accepted that a losing party in one case cannot benefit from an appeal brought by a similarly situated party in a different case, even if the cases were consolidated and the lower court issued a single decision. See Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 399-401 (1981). Indeed, as a "general rule[,] * * * when less than all the co-defendants [in a single case] appeal from an adverse judgment, the non-appealing co-defendants cannot benefit from an appellate decision reversing the judgment." Abatti v. CIR, 859 F.2d 115, 119 (9th Cir. 1988). "[P]arties failing to appeal are not usually entitled to the benefits of a reversal obtained by appealing co-parties * * *." Floyd v. District of Columbia, 129 F.3d 152, 157 (D.C. Cir. 1997). This rule has no application to injunctive orders, which can be modified at any time based on a change in the governing law. See, e.g., Pasadena City Bd. of Education v. Spangler, 427 U.S. 424, 437-438 (1976).

Even in damages cases there seem to be some exceptions to the rule that a party that does not appeal does not gain the benefit of the appellate ruling. See Abatti, 859 F.2d at 119 (referring to cases involving "joint tortfeasors, cross claimants, or multiple parties asserting rights against a stakeholder"); see also, e.g., Floyd, 129 F.3d at 157; Bryant v. Technical Research Co., 654 F.2d 1337, 1341-1343 (9th Cir. 1981); Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 743-745 (5th Cir. 1980); In re Barnett, 124 F.2d 1005, 1009-1010 (2d Cir. 1942); but see id. at 1013-1014 (L. Hand, J., dissenting). Those exceptions flow from "the principle that once a timely notice of appeal has been filed from a judgment, the court has jurisdiction to review the entire judgment." Abatti, 859 F.2d at 119 (citing Hysell v. Iowa Pub. Serv. Co., 559 F.2d 468, 476 (8th Cir. 1977)). That principle, in turn, reflects the view that "rules requiring separate appeals by other parties are rules of practice, which may be waived in the interest of justice where circumstances so require." Hysell, 559 F.2d at 476.

Those exceptions, and the conclusion that a court may waive the requirement of separate appeals, may be undercut by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), which held that the requirements of FRAP 3 and 4 are jurisdictional prerequisites for an appeal to proceed. See Young Radiator Co. v. Celotex Corp., 881 F.2d 1408, 1416 (7th Cir. 1989), cited in Moores Fed. Practice 3d § 304.11. But the question has not been explored in detail by the courts of appeals, and the state of the law remains unsettled.

The effect of the Supreme Court Rules in this context is itself somewhat uncertain. The Seventh Circuit has recognized that a party that does not participate before the Supreme Court is not entitled to the benefit of a decision. See Local 322, Allied Indus. Workers v. Johnson Controls, Inc., 969 F.2d 290, 293 (7th Cir. 1992) (former Supreme Court Rule 12.4 (now Rule 12.6) "simply permits a litigant * * * an opportunity to participate before the Supreme Court * * *. It is not a mechanism by which parties * * * can deliberately bypass a Supreme Court proceeding and then attempt to reap the benefit of a judgment favorable to the other parties"). But that case did not address the more difficult question whether a party that chose not to petition for certiorari, but who did participate as a respondent in support of the petitioner, is entitled to such a benefit. The new rule we propose would ensure that a non-appealing party is left in the same position it otherwise would have occupied, whether or not it chose to participate in the appellate proceedings brought by another party. Thus, we propose to omit from the new FRAP provision any reference to the effect of an appellate decision on non-appealing parties.

Our proposal includes two relatively minor differences from the model provided by the Supreme Court rules; these are based on the FRAP's provisions for *amicus* briefs. See FRAP 29(e), (f). First, the proposed rule would require an appellee who supports an appellant to file its brief within 7 days after the appellant's brief is filed. This is the same period allowed for *amicus* briefs and is intended to minimize the duplication of argument between a party and any supporting *amici*. Second, our proposed rule would prohibit an appellee supporting an appellant from filing a reply brief, except by leave of the court of appeals.

I look forward to discussing this proposal with you and the members of the Committee at our next meeting.

Sincerely,

Douglas Letter

Douglas Letter
Appellate Litigation Counsel

Rule 3. Appeal as of Right -- How Taken; Parties

* * *

(f) Parties.

(1) All parties to the case before the district court are deemed parties in the court of appeals, but a party having no interest in the outcome of the appeal may so notify the Clerk of the court, with service on the other parties.

(2) All parties other than appellants or cross-appellants are considered appellees, but any appellee who supports the position of an appellant or cross-appellant must serve and file a brief within 7 days after the brief of that appellant or cross-appellant (see Rule 31(a)(1)). Except by the court's permission, an appellee may not file a reply brief, even if the appellee supports the position of an appellant or cross-appellant.

Committee Note

New Rule 3(f) is based on Supreme Court Rules 12.6 and 18.2, which provide that each party to a case is deemed a party for purposes of appellate (or certiorari) review. Previously, the FRAP lacked a definition of "appellee," although the rules refer to the obligations of an appellee in various places. See FRAP 6(b)(2)(B)(ii), 9(a)(2), 10(b)(3), 11(c), 20, 28(b)-(d),(h),(i), 30(b),(c), 31(a),(c), 32(a)(2), 34(d),(e), 35(c), 38, 39(a)(3), 43(a)(3). This rule makes clear which parties are entitled to file briefs and other papers as an appellee. It also clarifies, at the outset of an appeal, which parties to the case below are parties to the appeal. It imposes an obligation on all parties to the case below to consider whether they intend to participate in the appeal, and to notify the clerk in certain circumstances. When an appellee supports the position of an appellant (or cross-appellant), the appellee must file its brief within 7 days after the brief of an appellant whose position the appellee supports. This schedule is the same as that for amicus briefs. See Rule 29(e). As with amicus briefs, this schedule is intended to minimize duplication of argument. Similarly, an appellee is normally not permitted to file a reply brief, except by the court's permission in a particular case. The new rule is not intended to change existing law concerning when a non-appealing party may seek the benefit of a reversal obtained by another party. The general rule is that a party must itself appeal in order to obtain the benefit of a reversal. "[P]arties failing to appeal are not usually entitled to the benefits of a reversal obtained by appealing co-parties * * *." Floyd v. District of Columbia, 129 F.3d 152, 157 (D.C. Cir. 1997); see also, e.g., Abatti v. CIR, 859 F.2d 115, 119 (9th Cir. 1988). But there are certain exceptions to that general rule as well, including for injunctive orders, which can be modified at any time based on a change in the governing law. See, e.g., Pasadena City Bd. of

Education v. Spangler, 427 U.S. 424, 437-438 (1976). Some cases also suggest exceptions to the general rule in some cases involving joint tortfeasors or cross-claimants, as well as interpleader cases. See Floyd, 129 F.3d at 157; Abatti, 859 F.2d at 119. It is not clear to what extent those exceptions have survived the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). See Young Radiator Co. v. Celotex Corp., 881 F.2d 1408, 1416 (7th Cir. 1989); but see Floyd, 129 F.3d at 157 (vacating entire judgment where only one defendant appealed). The new rule simply makes clear that a non-appealing party is entitled to participate as an appellee; it does not alter existing law concerning when a favorable court of appeals judgment will inure to the benefit of a non-appealing party. The new rule applies only to appeals, not to petitions for review or enforcement of an agency order (see FRAP 15).

Rule 31. Serving and Filing Briefs

(a) Time to Serve and File a Brief.

(1) The appellant must serve and file a brief within 40 days after the record is filed. ~~The~~ An appellee must serve and file a brief within 30 days after the appellant's brief is served, except that an appellee supporting the position of the appellant must serve and file a brief within 7 days after the appellant's principal brief.

*** * ***

03-06

TO: Honorable Kenneth F. Ripple, Chair, Members of the Advisory Committee on Appellate Rules, and Liaison Members

FROM: Carol Ann Mooney, Reporter

DATE: April 13, 1992

SUBJECT: Item 90-4, Amendment of Fed. R. App. P. 3(c) in light of the Supreme Court's decision in Torres

At its January 1992 meeting, the Standing Committee approved immediate publication, under expedited procedures, of the proposed amendment to Fed. R. App. P. 3(c) and the conforming amendments to Rule 15(a) and Forms 1, 2, and 3. Because the Standing Committee believed that the Torres problem is sufficiently important to justify shortening the usual publication period, the Committee voted to publish the rules and forms immediately and only for a three month period. The three month period will allow the Advisory Committee to consider the comments and submit a report to the Standing Committee for its June meeting.

Although the comment period has not ended yet and there likely will be further comments to consider, I have begun the GAP report summarizing the three comments received to date. The draft pages are attached to this memorandum. As Judge Ripple explained in his February 4 memorandum summarizing the actions taken by the Standing Committee at the January meeting, a telephone conference will be needed to finalize the Advisory Committee's response to all of the comments. However, the Committee may begin the task at the April 30 meeting.

In addition to generally considering the comments submitted on the proposed amendments, the Standing Committee requested that the Advisory Committee continue to explore alternative approaches that would preserve as many appeals as possible. Specifically, the Standing Committee asked the Advisory Committee to consider an approach analogous to that in Supreme Court Rule 12.4.

This memorandum will first discuss the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. It will then discuss the other comments submitted on the published draft.

SUPREME COURT APPROACH

Supreme Court Rule 12.4 provides that all parties to a proceeding sought to be reviewed are parties in the Supreme Court unless the petitioner notifies the Court that the petitioner believes that one or more of the parties below has no interest in the outcome of the petition. A party noted as no longer interested may remain a party by notifying the clerk of the party's intention to remain a party. All parties not named in the petition as petitioners are respondents but any respondents who support the position of the petitioner must meet the time schedule for filing papers which is applicable to the

petitioner.

The Advisory Committee briefly considered this approach at its meeting last December, but did not pursue it in depth. See Minutes of the December 4 & 5 meeting at page 11. Although the minutes do not reflect the reason the Advisory Committee rejected the Supreme Court approach, I believe the committee dismissed the approach for the same reason it rejected the suggestion that all parties represented in the court below by the attorney filing the notice of appeal should be appellants -- it would be extremely difficult for the courts of appeals to ascertain the identity of the parties because the courts of appeals have difficulty obtaining district court records.

The Supreme Court addresses that problem by requiring the petitioner to list in the petition for certiorari all parties to the proceeding in the court whose judgment is sought to be reviewed. Sup. Ct. R. 14.1(b). If the petitioner either intentionally or accidentally fails to name a party, the party still is automatically a party to the proceeding in the Supreme Court by reason of Sup. Ct. R. 12.4, if the party so desires.

All parties should receive notice of the filing of a petition for certiorari, and thus of their status as respondents, because a petitioner is required to serve all respondents (i.e. all parties to the proceeding in the court below) with notice of the filing of a petition for certiorari, Sup. Ct. R. 12.1, as well as with a copy of any document notifying the Clerk of the Supreme Court of the petitioner's belief that one or more of the parties below has no interest in the outcome of the petition. Sup. Ct. R. 12.4. If an unnamed party is not so served, "the unnamed party should notify the Clerk and other parties of his intentions as soon as he is otherwise made aware of the filing and, where necessary, obtain an appropriate extension of time from the Clerk, under Rule 29.4 [now Rule 30.4], to file a brief or memorandum stating his position." Robert L. Stern, et al., Supreme Court Practice, 348 n.57 (6th ed. 1986).

So, while the possibility that a petitioner may fail to list all persons who were parties to the proceeding under review creates some uncertainty at the Supreme Court as to the identity of all the parties before the Court, in most cases the rule requiring the petitioner to list all of the parties in the petition will supply the Court with the names of all the parties. In those instances in which a party's name is omitted, the party has not lost the right to be heard.

Judge Easterbrook's comment on the proposed amendments contains a draft amendment of Fed. R. App. P. 3(c) using the Supreme Court Rule as a model. Judge Easterbrook's draft provides:

> (c) Content of the notice of appeal.- The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed

from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. All parties to the proceeding in the court whose judgment is sought to be reviewed shall be parties in the court of appeals, unless any party or counsel notifies the clerk of the court of appeals in writing that a party has no interest in the outcome of the appeal. A person noted as no longer interested may remain a party by promptly notifying the Clerk, with service on the other parties, of desire to remain a party. All parties other than those identified as appellants by name in the caption or body of the notice of appeal shall be appellees, but any appellee who supports the position of an appellant shall be treated as an appellant if that party meets the time schedule for filing briefs established for the appellants. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

With regard to the uncertainty issue, Judge Easterbrook points out in his comments that "[i]n the years before Torres few (maybe no) voices were heard to the effect that "et al." and similar designations prejudiced opponents or burdened judicial administration. Courts across the nation accepted such documents."

Judge Easterbrook's draft would more closely approximate the Supreme Court's practice, and minimize the uncertainty problem, if it also required appellants to list in the notice of appeal the names of all the parties to the proceeding to be reviewed.

Supreme Court Rule 12.4 provides that all parties to the proceeding below are parties in the Supreme Court unless the petitioner notifies the Clerk in writing that the petitioner believes that one or more of the parties below has no interest in the outcome of the petition. Judge Easterbrook's draft allows any party or counsel to so notify the court. I think the alteration makes sense clearly to the extent that it allows a party to

notify the court that it has no interest in the case and will not be participating, and probably also to the extent that it allows a party other than the appellant to notify the court when the party is aware that another party has no continuing interest.

Sup. Ct. R. 12.4 requires service of all such notices on all other parties to the proceeding below. Judge Easterbrook dropped the service requirement from his draft of Rule 3(c) presumably because Fed. R. App. P. 25(b) requires service "of all papers filed by any party . . . on all other parties to the appeal or review." However, it might be better to include a service provision in Rule 3 because an ambiguity may be created by the interplay between Fed. R. App. P. 25 and draft Rule 3(c). Fed. R. App. P. 25 requires service on all parties to the appeal. The draft Rule 3(c) would drop persons noted as no longer interested from the list of parties, unless such persons promptly notify the clerk of their desire to remain parties. It is not clear that Rule 25 would require service of such notice on persons who will be dropped as parties as a result of the notice. (The answer to the question may depend upon whether the provision in lines 6 through 10 of the draft are seen as self-executing. However, it would be a simple matter to clarify the question by rule.)

Therefore, if the Committee is interested in pursuing this approach, I suggest the following amended draft:

Amended Draft

(c) Content of the notice of appeal.- The notice of appeal shall specify the party or parties taking the appeal; shall list all the parties to the proceeding in the district court whose judgment is to be reviewed; shall designate the judgment, order, or part thereof, appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. All parties to the proceeding in the court whose judgment is to be reviewed shall be parties in the court of appeals, unless any party or counsel notifies the clerk of the court of appeals in writing that a party has no interest in the outcome of the appeal. A copy of the writing shall be served on all parties to the proceeding in the district

court. A person noted as no longer interested may remain a party by promptly notifying the clerk, with service on the other parties, of desire to remain a party. All parties other than those identified as appellants by name in the caption or body of the notice of appeal shall be appellees, but any appellee who supports the position of an appellant shall be treated as an appellant ~~if that party meets the~~ time schedule for filing briefs established for the appellants. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

The Court of Appeals Clerks and Chief Deputy Clerks met in late February. Mr. Strubbe, the liaison between the clerks and the Advisory Committee, reserved time on the clerks' meeting agenda to discuss FRAP amendments being considered by the Advisory Committee. Judge Ripple asked Mr. Strubbe to discuss the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. Following the meeting Mr. Strubbe wrote to Judge Ripple stating the following:

> One thing all clerks and chief deputies agreed upon is that we should not adopt a rule similar to Supreme Court Rule 12.4. Everyone agreed that such a rule could create confusion and potentially lead to the filing of numerous additional documents to notify clerks that parties noted by the appellants as no longer interested in the litigation still have the intention to remain parties. This system, to us, appears unnecessarily complex and unwieldy.

Judge Ripple also spoke to Mr. Frank Lorson, Deputy Clerk of the Supreme Court of the United States, about the operation of the Supreme Court rule. Mr. Lorson reported that, in the context of Supreme Court practice, the rule works well with only occasional problems. There are, on occasion, problems with party interveners. There are also occasional problems with enforcing time limitations for filing on respondents who, for purposes of filing, must follow the time limitations imposed on the petitioner because they really support the side of the petitioner. Finally, Mr. Lorson noted that there have been occasional problems with appeals from three judge district courts. In these cases, it is somewhat more difficult to ascertain the proper alignment of the parties. These appeals are filed under Supreme Court Rule 18.2.

Other Comments

Magistrate Judge Rosenberg suggested the rule should require that notices of appeal list the names of the parties in the body and that naming parties in the caption should not be sufficient because captions may be used as a matter of course and without conscious review. The published draft clearly provides that naming parties in either the caption or the body is sufficient because, although the aim of the published draft is clarity, it seems to create an unnecessary trap to treat the names in the caption as insufficient.

Judge Ginsburg questions the adequacy of the portion of the amendment dealing with class actions. She suggests that the rule should require the designation of at least one person qualified to take the appeal.

Although the published rule ordinarily requires a notice of appeal to name each party taking the appeal, it states that "[i]n class actions, whether or not the class has been certified, it shall be sufficient for the notice to state that it is filed on behalf of the class." For obvious reasons, the draft does not require the naming of all actual or potential class members. And because putative class members may appeal an order denying class certification if the named plaintiffs choose not to appeal, the rule avoids requiring that a "party" be named as class representative.

Judge Ginsburg's suggestion is that the rule should require that a notice of appeal be brought in the name of at least one person qualified to take the appeal. Along with her suggestion, she forwarded a copy of the D.C. Circuit opinion in Walsh v. Ford Motor Co., 945 F.2d 1188. In that case, Jack Walsh was the only party specified in a notice of appeal seeking review of the district court's denial of class certification. Prior to the filing of the notice of appeal, Mr. Walsh had entered a settlement agreement with Ford in which Walsh released Ford from "any and all actions or causes of action, suits, claims, counterclaims" that Walsh had against Ford. The court determined that because Walsh had relinquished "any and all" of his claims against Ford, he could not appeal. The court then concluded that it did not have authority to review the class certification denial because without Walsh as an appellant, no party was adequately "specified" as required by Fed. R. App. P. 3(c).

One possible response to Judge Ginsburg's suggestion is that the proposed change in Rule 3(c) eliminates the need for "specifying" a party in notices of appeal in class actions. Indeed, the Supreme Court has already modified that rule by finding in United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977), that a putative class member (who is not a named party) may appeal an adverse class determination order.

In McDonald, however, the notice of appeal was brought in the name of a particular putative class member, who sought to intervene, and not simply on behalf of unnamed putative class members. Perhaps a better way to analyze Judge Ginsburg's

suggestion is to consider whether Article III requires a notice of appeal to name at least a class member or putative class member as representative of the others. Without the naming of at least one person qualified to bring the appeal, the appeal actually would be brought by the attorney seeking to represent the class.

Requiring that a notice of appeal in class actions name at least one person qualified to bring the appeal as representative of the others provides some assurance that there is still a justiciable controversy. Although the constitutional requirement of a case-or-controversy exists, the Supreme Court has recognized that a legally cognizable interest in the traditional sense rarely exists with respect to a class certification claim. United States Parole Comm'n v. Geraghty, 445 U.S. 388, 402 (1979). In Geraghty, the Supreme Court stated that the "right" to have a class certified "is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." Id. at 403. Therefore, the Court held that even a party whose claim has become moot may appeal a ruling denying class certification so long as the named representative will fairly and adequately protect the interests of the class. Id. at 406.

If the proper focus is whether the person filing a notice of appeal will fairly and adequately protect the interests of the class, as to an appeal from a ruling denying class certification it may be appropriate for the attorney seeking to represent the class to bring the notice of appeal. Once a class is certified, however, and the focus shifts to the merits of the claim, someone eligible to press the class claims must act as representative.

The portion of the published rule in question deals generally with notices of appeal in class actions and not simply with appeals from class certification rulings. Unless there is to be a distinction between the two types of appeals, Article III may require that at least one person qualified to appeal be named in the notice of appeal. This question should be discussed by the committee. If the conclusion is that a person qualified to bring the appeal should be specified, the draft should be revised.

The sentence in question could be revised to state:

1 In class actions, whether or not the class has been
2 certified, it shall be sufficient for the notice to name as
3 representative of the class one person qualified to bring
4 the appeal.

List of Commentators
Proposed Amendment to Fed. R. App. P. 3(c)
and Conforming Amendments to Fed. R. App. P.
15 and to Forms 1, 2, and 3

Honorable Frank H. Easterbrook
United States Circuit Judge
319 South Dearborn Street
Chicago, Illinois 60604

Honorable Ruth Bader Ginsburg
United Stated Circuit Judge
United States Court of Appeals
Washington, D.C. 20001

Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2675

COMMENTS ON PROPOSED AMENDMENT OF FED. R. APP. P. 3(C)

Honorable Frank H. Easterbrook
United States Circuit Judge
319 South Dearborn Street
Chicago, Illinois 60604

Judge Easterbrook notes that the proposed amendment clarifies the level of specificity needed to identify the parties taking an appeal so that any lawyer who reads the rule can file an effective notice of appeal. However, Judge Easterbrook notes that the clarity achieved by the change would come at the expense of parties whose lawyers do not read the rule and thus fail to follow it. He suggests that a different approach be adopted. Unless there is evidence that such an approach causes prejudice to other parties or disrupts the administration of the courts, Judge Easterbrook advocates adopting a rule that will protect meritorious claims to the greatest extent possible. He suggests amending Rule 3(c) along the line of Supreme Court Rules 12.4 and 18.2 so that all parties to the proceeding in the court whose judgment is to be reviewed are automatically parties in the court of appeals.

Judge Easterbrook favors the amendments to Rule 15, because it makes sense to require identification - for the first time in *any* court - of the persons contesting an administrative decision.

Honorable Ruth Bader Ginsburg
United Stated Circuit Judge
United States Court of Appeals
Washington, D.C. 20001

Judge Ginsburg questions the adequacy of that portion of the amendment dealing with class actions. She suggests that the rule should require the designation of <u>at least one person qualified to take the appeal</u>.

Honorable Paul M. Rosenberg
United States Magistrate Judge
244 U.S. Courthouse
101 W. Lombard Street
Baltimore, Maryland 21201-2675

Magistrate Judge Rosenberg believes that the rule should require the parties to be named <u>in the body</u> of a notice of appeal and not in the caption because the caption may be used as a matter of course.

03-06

REVISED AGENDA
Meeting of the Advisory Committee on Appellate Rules
April 30, 1992

I. Gap Report

Consideration of comments on items published August 1992:

- item 86-10 and 86-26, amendment of Rules 4(a)(4) and 4(b) regarding the need for a new notice of appeal after disposition of post-trial tolling motions;
- item 86-25, amendment of Rule 28 to require a statement of the standard of review in briefs;
- item 88-10, amendment of Rule 34(c) deleting the requirement that an opening argument shall include a statement of the case;
- item 88-13, amendment of Rule 35(a) to provide that a majority of judges eligible to participate in a case shall have the power to grant in banc review;
- item 89-2, amendment of the filing rules in light of the Supreme Court's decision in Houston v. Lack (amendments to Rule 3(d), 4(c), and 25);
- item 90-5, technical amendment of Rule 10(b)(3); and,
- item 91-1, changing "magistrate" to "magistrate judge" in all rules (amendments to Rules 3.1 and 5.1).

II. Requests from the Standing Committee:

A. Item 92-1. The Standing Committee asked the Advisory Committees on Civil and Appellate Rules to draft amendments to the national rules requiring uniform numbering of local rules and deletion of all language in local rules that merely repeats the language of the national rules.

B. Item 92-2. The Standing Committee would like to dispense with the need to follow the full procedures (publication, comment, etc.) whenever a typographical or clerical error gives rise to the need to amend a rule. The Standing Committee has asked each of the Advisory Committees to consider the possibility of amending their rules to authorize such changes.

C. The Standing Committee would like a report from each of the Advisory Committees about the desirability of developing a numbering system that would eliminate the duplication of numbers from one set of rules to another. The report is due next November. At the April meeting we will have a preliminary discussion, with further discussion to follow in the fall.

D. Item 90-4. The Standing Committee approved publication of the proposed amendments to Rules 3(c), 15(a) and Forms 1, 2, and 3 on an expedited basis because of the importance of the Torres problem which those

changes address. However, the Standing Committee requested that the Advisory Committee revisit the question of whether a procedure analogous to that in Supreme Court Rule 12.4 would be a better approach because it would both deal with the Torres problem and preserve as many appeals as possible.

III. Action Items

A. Items 89-5 and 90-1, amendment of Rule 35 to treat suggestions for rehearing in banc like petitions for panel rehearing so that a request for a rehearing in banc will also suspend the finality of the court's judgment and thus toll the period in which a petition for certiorari may be filed.

B. Item 91-5, rule to authorize use of special masters in the courts of appeals.

C. Item 91-27, amendment of all the appellate rules that require the filing of copies of a document to authorize local rules that require a different number of copies.

D. Item 91-22, amendment of Rule 9 regarding the type of information that should be presented to a court.

E. Item 91-14, amendment of Rule 21 so that a petition for mandamus does not bear the name of the district judge and the judge is represented pro forma by counsel for the party opposing the relief unless the judge requests an order permitting the judge to appear.

F. Item 91-11, amendment of Rule 42 regarding the authority of clerks to return or refuse documents that do not comply with national or local rules.

G. Item 91-4, amendment of Rule 32 regarding typeface.

IV. Discussion items:

A. Item 86-23 regarding the ten day period within which an objection to a magistrate's report must be filed and the difficulty that prisoners have in meeting that time schedule.

B. Item 91-7 regarding appeal of remand orders.

C. Item 91-6 regarding allocation of word processing equipment costs between producing originals and producing "copies."

D. Item 91-17 regarding the publication of opinions.

E. Eleventh Circuit's response to the Local Rules Project.

03-06

MINUTES OF THE APRIL 30, 1992
MEETING OF THE
ADVISORY COMMITTEE ON APPELLATE RULES

The meeting was chaired by Hon. Kenneth F. Ripple. The following committee members attended: Hon. Danny J. Boggs, Mr. Donald F. Froeb, Hon. Cynthia H. Hall, Hon. E. Grady Jolly, Hon. James K. Logan, and Hon. Stephen F. Williams. Mr. Robert Kopp attended as the Solicitor General's representative. Hon. Robert E. Keeton, Chair of the Standing Committee on Rules of Practice and Procedure, was present. Mr. Joseph F. Spaniol, Jr. - the Committee Secretary, Hon. Dolores K. Sloviter - liaison member from the Standing Committee, and Mr. Thomas Strubbe - liaison from the clerk's committee, were also present. Mr. John Rabiej, Ms. Judy Krivit, and Ms. Ann Rustin - all of the Administrative Office - attended, as did Mr. Joseph Cecil of the Federal Judicial Center.

Judge Ripple called the meeting to order at 9:00 a.m. in the sixth floor conference room of the Administrative Office.

I. GAP REPORT

Judge Ripple began the meeting with a consideration of the draft Gap Report. In August 1991, the Standing Committee published proposed amendments to nine appellate rules. The period for public comment on those amendments ended February 15, 1992. Public hearings on the amendments had been scheduled for December 4, 1991, in Chicago, but were cancelled for lack of interest.

The draft Gap Report included summaries of all of the comments received. The Advisory Committee's task was to review the comments and consider whether to amend the draft rules in light of the comments. The Reporter had prepared suggested changes for the Committee's consideration.

A. Item 86-10 and 86-26, amendment of Rules 4(a)(4) and 4(b) to eliminate the need for a new notice of appeal after disposition of posttrial tolling motions and Item 89-2, amendment of the filing rules in light of the decision in Houston v. Lack.

Rule 4

The suggested amendments to Rule 4 serve two main purposes: 1) to eliminate the trap for a litigant who files a notice of appeal before a posttrial motion or while a posttrial motion is pending, and 2) to "codify" the Supreme Court's decision in Houston v. Lack, holding that a notice of appeal filed by an inmate confined in an institution is timely if it is deposited in the institution's internal mail system, with postage prepaid, on or before the filing date. No comments were submitted regarding proposed Rule 4(c), dealing with inmate filings. Several commentators had suggestions for improving Rule 4(a)(4).

The Committee discussion revealed concern about the breadth of the proposed rule. The Committee had just spent a considerable amount of time reviewing recommended "style" changes and recognized that the line between style and substance can be rather elusive. The ability to make changes essential to conform with statutory changes without full procedures also raised concern. Changing "magistrate" to "magistrate judge" with less formality than is currently required was seen as appropriate. However, every time the bankruptcy code is amended, sweeping changes need to be made to the bankruptcy rules. There was consensus that such changes should not be made without observing the full procedures. The proposed rule made no distinction between the two situations.

Because of the hour some members of the Committee had already left and there was no longer a quorum. Judges Williams, Jolly, and Ripple suggested that it might be helpful to insert the word "technical" at the beginning of line 5, before the word "changes." Mr. Kopp expressed the opinion, that even with that amendment, the rule was too broad.

C. Item 90-4, amendment of Rules 3(c), 15(a), and Forms 1, 2, and 3 in light of the Torres opinion.

Rule 3(c) of the Federal Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal." In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court held that a court of appeals has no jurisdiction to hear an appeal of a party not properly identified as an appellant and that the phrase "et al." is insufficient to identify an unnamed party as an appellant. Following the Torres decision, the courts of appeals have struggled with how much specificity is sufficient to identify an appellant.

Judge Ripple briefly reviewed the history of the proposed amendments. At the Advisory Committee's December 1991 meeting, the Committee approved draft amendments essentially requiring a notice of appeal to name each appellant, with an exception for class actions. Because of the importance of the Torres problem, the Standing Committee approved immediate publication of the proposed amendments at the January 1992 meeting. The Standing Committee further approved shortening the usual six month publication period to three months. Although the Standing Committee had expedited the process for the Advisory Committee's draft, the Standing Committee had requested that the Advisory Committee review its draft and consider developing an alternative that would better preserve the right to an appeal on the merits.

Public hearings on the amendments were scheduled for April 8, 1992, but were canceled due to lack of interest. Because the publication period would not end until mid-May, Judge Ripple informed the Committee that it would be necessary to hold a telephone conference to finalize the Committee's decision on the proposals.

The reporter had prepared summaries of the public comments received thus far. One of the commentators was Judge Easterbrook from the Seventh Circuit, whose comments

included an alternative draft modeled upon the Supreme Court's rule. The Supreme Court's rule essentially provides that once any party brings an appeal, all other litigants are parties to the appeal.

Judge Boggs indicated that he favored the Easterbook suggestion. He stated that he prefers administrative inconvenience to having a party lose the right to appeal because an attorney failed to include the party's name.

Judge Logan stated that there may be some difficulties translating the Supreme Court's rule to the courts of appeals. However, he noted that prior to the Supreme Court's decision in Torres any lack of specificity did not seem to cause problems.

Judge Williams indicated that he would like to work toward a draft that generally tries to save appeals. A party could clear up any uncertainty by demanding that a lawyer state who the lawyer represents.

Judge Jolly stated that there are two sides to the problem -- a client who may suffer because a lawyer mistakenly omits the clients name from a notice of appeal, and an appellee who has a right to know who is bringing the appeal and on what grounds. A rule requiring that each appellant be named gives a lawyer clear and simple directions.

Discussion of the drafts based upon the Supreme Court rule revealed several problems. The drafts attempt to resolve the problem of the lost appellant by providing, in essence, that, once any party brings an appeal, all other litigants are parties to the appeal as appellees. It leaves to the court of appeals the task of sorting out those who actually have an interest in being active parties in the appellate litigation. It also requires the court of appeals to realign the parties for purposes of briefing schedules, etc.

Mr. Kopp suggested using the published rule as an interim solution. The Committee may not be able to come up with a workable alternative before the Standing Committee's June meeting. Until a better solution is achieved, the published rule would provide clarity.

Judge Ripple pointed out that the published rule has not elicited much comment; that may be some indication that a rule requiring each appellant to be named is not controversial.

One of the commentators had suggested that with regard to class actions, the rule should require a notice of appeal to name at least one person qualified to take the appeal. The committee members present agreed and approved the following language:

> In class actions, whether or not the class has been certified, it shall be sufficient for the notice to name as representative of the class one person qualified to bring the appeal.

Final work on the amendments would have to await the close of the comment period. Judge Ripple indicated that he would contact the Committee members to set up a telephone conference in May.

Judge Ripple thanked the members of the Committee for their hard work and the meeting adjourned at 4:45 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter

03-06

MINUTES OF THE MAY 26, 1992 TELEPHONE CONFERENCE OF THE ADVISORY COMMITTEE ON APPELLATE RULES

The conference call began at 2:00 p.m. Eastern Standard Time. The conference was chaired by Judge Kenneth F. Ripple. The following Committee members participated: Judge Danny J. Boggs, Judge Cynthia H. Hall, Judge E. Grady Jolly, Judge James K. Logan, Chief Justice Arthur McGiverin, and Judge Stephen F. Williams. Mr. Robert Kopp participated on behalf of the Solicitor General. Mr. Joseph F. Spaniol, Jr., the Committee Secretary, participated. Mr. Thomas F. Strubbe, the liaison from the clerks of the courts of appeals, also participated.

The purpose of the telephone conference was to complete the Advisory Committee's deliberations about the "Torres" amendments. The period for public comment had concluded and the members of the Committee had all had an opportunity to review the comments. The Committee's task was to approve rules for submission to the Standing Committee. Judge Ripple began the conference by reviewing the history of the Advisory Committee's discussions and of the steps taken by the Standing Committee, including its expedited publication of the proposed amendments and the request that the Advisory Committee consider alternative solutions.

Judge Ripple also reviewed his May 21, 1992, memorandum to the Advisory Committee in which he attempted to reconcile the division of opinion among the members of the Committee concerning the solution to "the Torres problem." He noted that the central problem is to balance sensibly the very real concerns of definiteness, certainty, and ease of administration, with the possibility of inadvertent and excusable loss of appellate rights. The memorandum presented an alternate draft. The new draft retains the requirement that a notice of appeal name the party or parties taking the appeal but allows that requirement to be satisfied in a number of ways. Although the new draft allows an attorney to simply state that a notice is filed on behalf of "all plaintiffs" (or "the plaintiffs," or "plaintiffs A, B, et al.," or "all of the plaintiffs except ...") any ambiguity caused by an attorney's use of such shorthand designations would be rectified by a new requirement in Rule 12 that an attorney file a statement naming each party represented on appeal by that attorney. The draft also states that dismissal of an appeal should not occur when it is "otherwise clear from the notice" that the party intended to appeal.

Judge Jolly stated that the proposal to amend Rule 12 prompted another idea. He continues to like a clear rule that requires a notice of appeal to list the name of each appellant; the problem with such a rule is its harshness. His suggestion was to eliminate the sentence allowing an attorney to use shorthand methods of indicating the persons bringing the appeal and to reinsert the language in the published draft stating that use of such terms as "et al." is insufficient. However, he further suggested inserting a statement that failure to name a party in a notice of appeal is not fatal if the party is named in the docketing statement. In

other words, his suggestion was to provide a second chance to include an appellant's name.

Judge Williams pointed out that Judge Jolly's alternative still has a sudden death consequence; the alternative only provides a second chance to catch an error. In reality, this might only slightly reduce the risk of inadvertent omission.

Judge Boggs stated that he was comfortable with Judge Jolly's intent but he thought that the suggestion produced an odd result. A notice of appeal, the jurisdictional document, initially would not be effective to bring appeal for a party, but later -- after the filing of a docketing statement -- it could be.

Judge Logan pointed out the difference between the use of the representation statement in Judge Ripple's draft and Judge Jolly's suggestion. In Judge Ripple's draft, the representation statement provides clarification. Under Judge Jolly's suggestion, the representation statement would cure a jurisdictional defect.

Judge Hall indicated that she favors the draft. She stated that she had no sense that the clerk's office provides assistance to lawyers filing appeals.

Chief Justice McGiverin stated his preference for the published rule. If, however, the Committee consensus is to follow a different approach, he favored Judge Ripple's new draft.

Mr. Kopp stated that he favored Judge Ripple's draft but would omit lines 20-22 (providing that an appeal should not be dismissed "for failure to name a party whose intent to appeal is otherwise clear from the notice."). He also recommended that the representation statement be filed with the docketing statement.

Judge Logan agreed that it would be helpful if the representation statement were filed with the docketing statement.

Mr. Strubbe pointed out that several circuits do not have docketing statements.

Judge Ripple suggested that the rule could require an attorney to file a representation statement within 10 days unless a circuit requires it at a different time. With regard to Mr. Kopp's suggestion to eliminate lines 20-22, Judge Ripple stated that his intent was to give motions panels some discretion to avoid unduly harsh results.

Judge Williams indicated that he preferred to retain lines 20-22. He observed that lines 20-22 create a reasonableness standard for interpreting the words "such terms" (on line 8).

Judge Logan moved that the Committee vote on Rule 3(c) independently of Rule 12. The motion was seconded. In the discussion following the motion, Mr. Kopp reiterated his opposition to lines 20-22 and moved to delete them. His motion failed for want of a second.

The voted on Judge Logan's motion to approve the new draft of Rule 3(c) passed by a vote of seven in favor and one opposed.

The discussion then turned to Rule 12. Judge Logan made a motion that the draft should be amended to make it possible for a court to include the representation statement as part of the docketing statement, or to have it filed simultaneously with the docketing statement. Judge Hall seconded the motion. It was approved unanimously. The Committee asked the Chair and the Reporter to work out language.

Mr. Spaniol suggested that at line 7 of the draft the words "on appeal" should be inserted after the word "represented." It was so moved and seconded and the motion was approved unanimously.

Mr. Spaniol also asked whether an attorney would be required to file a representation statement even if the attorney represented only one party. The Committee consensus was it would be simpler to always require a statement.

A motion was made to approve Rule 12 as amended. The motion was seconded and passed unanimously.

The reporter told the Committee that there had been no adverse comments on published Rule 15 and that two of the commentators who opposed the naming requirement in Rule 3 supported it in Rule 15. Because the filing of a petition under Rule 15 is the first filing in any court, the Committee consensus was that it should retain the naming requirement in that rule without adding the shorthand references authorized in Rule 3. A motion was made and seconded to approve Rule 15 as it was published. The motion passed unanimously.

The conference concluded at 2:45 p.m.

Respectfully submitted,

Carol Ann Mooney
Reporter

03-06

Agenda E-19
(Appendix A)
Rules
September, 1992

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

TO: Honorable Robert E. Keeton, Chair, and Members of the Standing Committee on Rules of Practice and Procedure

FROM: Honorable Kenneth F. Ripple, Chair
Advisory Committee on Appellate Rules KFR

DATE: June 2, 1992

The Advisory Committee on Appellate Rules submits the following items to the Standing Committee on Rules:

1. Proposed amendments to Federal Rules of Appellate Procedure 3, 3.1, 4, 5.1, 10, 25, 28, and 34, approved by the Advisory Committee on Appellate Rules at its April 30, 1992 meeting. These proposed amendments were published in August 1991. A public hearing was scheduled for December 4, 1991 in Chicago, Illinois but was canceled for lack of interest. The Advisory Committee has reviewed the written comments and, in some instances, altered the proposed amendments in light of the comments. The Advisory Committee recommends withdrawing the proposed amendments to Rule 35 but requests that the Standing Committee approve the other published rules, in their amended form, and send them to the Judicial Conference. Part A of this report includes the amended rules. Part B identifies and discusses the primary criticisms and suggestions; it also explains the changes made in the text or notes after publication; and it discusses any disagreement among the Advisory Committee members concerning the changes. Part C is a summary of the written comments received.

2. Proposed amendments to Federal Rules of Appellate Procedure 3(c), 12, and 15, approved by the Advisory Committee on Appellate Rules by telephone conference after its April 30 meeting. Proposed amendments, dealing with the Torres problem, were published under expedited procedures in February 1992 for a three month

period. The Advisory Committee has reviewed the written comments and now suggests different changes in Rule 3(c), proposes a new subdivision for Rule 12, and suggests style changes in Rules 3(c) and 15(a) and (e). Part D of this report contains the revised rules; it also discusses the major criticisms and suggestions made by the commentators; it explains the changes made in the rules and notes after publication; and, it discusses any disagreement among the Advisory Committee members concerning the approach taken in the revised draft. Part E is a summary of the written comments received.

3. Proposed amendments to Federal Rules of Appellate Procedure 35, and 47. These proposals were approved at the Advisory Committee's April 30th meeting and the Advisory Committee requests the Standing Committee's approval of them for publication. If approved, these new proposals could be published along with the proposed amendments approved for publication by the Standing Committee at its January, 1992 meeting (proposed amendments to Appellate Rules 25, 28, 38, 40, and 41). Part F of this report contains the draft amendments to Rules 35 and 47. Part F also contains proposed amendments to Federal Rule of Appellate Procedure 6(b)(2)(i); these amendments conform Rule 6 to the Rule 4(a)(4) amendments.

Part D
Rules published February 1992
Issues and changes and
Revised drafts - June 1992

PROPOSED AMENDMENTS - FED. R. APP. P. 3(c) & 15(a) & (e)
Issues and changes
Revised drafts

Rule 3(c) of the Federal Rules of Appellate Procedure requires that a notice of appeal "specify the party or parties taking the appeal." In Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988), the Supreme Court held that a court of appeals has no jurisdiction to hear the appeal of a party not properly identified as an appellant and that the phrase "et al.," is insufficient to identify an unnamed party as an appellant. Id. at 318. Following the Torres decision, the courts of appeals have struggled with how much specificity is sufficient to identify an appellant. A rule change is important because of the current confusion among the courts of appeals.

Because of the importance of the Torres problem, at its January 1992 meeting, the Standing Committee approved immediate publication of the proposed amendments to Fed. R. App. P. 3(c) and 15(a) and (e), as well as Forms 1, 2, and 3. Because the Standing Committee believes that the Torres problem is sufficiently important to justify shortening the usual publication period, the Committee voted to publish the rules and forms only for three months rather than the usual six months. (Although subpart (e) of Rule 15 is not related to the Torres question, publication of all the suggested amendments to Rule 15 at one time was approved.) Public hearings were scheduled for April 8, 1992, but were canceled due to lack of interest.

The published drafts require that each appellant be "named" in the notice of appeal, except in class actions. Although the Standing Committee approved publication of the draft amendments to Rules 3 and 15, the Standing Committee requested that the Advisory Committee continue to explore other alternatives that might better preserve as many appeals as possible.[5]

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[5] A special note accompanying the published rules states:
The Committee, after receiving public comment, may explore other variations of the proposed amendment here submitted and may recommend a modified amendment without asking for further public comment, Accordingly, the Committee welcomes suggestions of other means to identify appellants in a notice of appeal.

There has been a division of opinion among the members of the Advisory Committee regarding the best way to resolve "the Torres problem."

At the December 1991 meeting a majority of the Advisory Committee supported the published draft -- requiring that each appellant be named -- because it is definitive. The naming requirement allows both the court and all parties to know precisely who is taking the appeal. Consequently, the rule is easy to administer. Naming also requires each litigant to make an explicit choice about taking an appeal. Arguably, the draft resolves the ambiguity of the present rule by telling lawyers and litigants that shorthand methods will not suffice.

The published draft accomplishes these goals by incurring costs, costs that some of the Advisory Committee consider unacceptable. The greatest is the possibility that the right of appeal will be lost because of an inadvertent omission of a party's name. One can also argue that a requirement that a notice of appeal list all names will simply be overlooked by a practicing lawyer because in all other filings with a district court after the complaint such terms as "et al." are sufficient.

For these reasons, some members of the Advisory Committee have opposed the approach taken in the published draft and have favored alternatives that would make it harder for a party to lose a right to appeal through mistaken nomenclature. One such alternative, explored briefly at the Committee's December meeting and in more depth at its April meeting, attempts to resolve the problem of the lost appellant by providing, in essence, that once any party brings an appeal all other litigants are parties to the appeal. Drafts prepared by both Judge Easterbrook and Professor Mooney, modeled on Supreme Court Rule 12.4, were considered at the Advisory Committee's April meeting.

The Supreme Court model leaves to a court of appeals the task of sorting out those parties who actually have an interest in being active in the appellate proceeding. It also requires that a court of appeals realign the parties for purposes of briefing schedules, etc. The clerks of the courts of appeals met in late February and discussed the possibility of amending Rule 3(c) along the lines of Sup. Ct. R. 12.4. The clerks and chief deputies unanimously agreed that given the volume in the courts of appeals, this task would be a formidable one. It is this volume problem that may make the analogy to the Supreme Court's practice limp. Because most petitions for certiorari are denied,

the Supreme Court needs to deal with the realignment problem in only a relatively few cases. Nevertheless, the Advisory Committee agrees that some administrative cost incurred to save an appeal is salutary. Indeed, in its work on Rule 4(a)(4), it settled on an approach that creates some administrative costs in order to ensure that appeals are not lost through inadvertence.

Following the close of the comment period, the Advisory Committee had a telephone conference to discuss the comments and to attempt to reconcile the two differing viewpoints. Two of the seven commentators opposed the approach taken in the published draft; the other five commentators offered suggestions for refining the draft. The Committee tried to balance sensibly the very real concerns of definiteness, certainty, and ease of administration against the possibility of inadvertent and excusable loss of appellate rights. As a result, it proposes new amendments to Rule 3(c) and to Rule 12.

Rule 3. Appeal as of Right--How Taken

* * *

(c) Content of the Notice of Appeal.-- ~~The~~ A notice of appeal ~~shall~~ must specify the party or parties taking the appeal by naming each appellant either in the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of appeal clearly indicates a contrary intent. In a class action, whether or not the class has

been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must ~~; shall~~ designate the judgment, order, or part thereof appealed from, and ~~shall~~ must name the court to which the appeal is taken. An appeal ~~shall~~ will 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. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

Committee Note

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres the Supreme Court held that the language in Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a jurisdictional requirement and that naming the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants. Since the Torres decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether

it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1980). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. 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.

Rule 12. Docketing the Appeal; Filing a Representation Statement; Filing of the Record

* * *

(b) Filing a Representation Statement.--Within 10 days after filing a notice of appeal, or at such other time designated by a court of appeals, the attorney who filed the notice of appeal must file with the clerk of the court of appeals a statement naming each party represented on appeal

by that attorney.

~~(b)~~ (c) Filing ...

Committee Note

Note to new subdivision (b). This amendment is a companion to the amendment of Rule 3(c). The Rule 3(c) amendment allows an attorney who represents more than one party on appeal to "specify" the appellants by general description rather than by naming them individually. The requirement added here is that whenever an attorney files a notice of appeal, the attorney must soon thereafter file a statement indicating all parties represented on the appeal by that attorney. Although the notice of appeal is the jurisdictional document and it must clearly indicate who is bringing the appeal, the representation statement will be helpful especially to the court of appeals in identifying the individual appellants.

The rule allows a court of appeals to require the filing of the representation statement at some time other than specified in the rule so that if a court of appeals requires a docketing statement or appearance form the representation statement may be combined with it.

Changes Since Publication

Obviously the new draft is significantly different from the published draft. The new draft makes it clear that naming each appellant is the surest way to perfect an appeal on behalf of each of them; however, the draft gives an attorney representing more than one party flexibility to use general descriptive terms as long as the notice makes it clear who intends to appeal. The companion amendment to Rule 12, requiring a representation statement, is intended to assist the court of appeals and the other parties in identifying the individual appellants.

Two commentators suggested that the rule should require listing the names of the parties in the body of the notice and that naming parties in the caption should not be sufficient. The draft continues to provide that naming in the caption is sufficient. It would create an unnecessary trap to treat the names in the caption as insufficient.

A provision is added to the rule dealing with pro se appellants. A notice of appeal filed by a pro se appellant is

sufficient to perfect an appeal on behalf of the signer's spouse and minor children if they are parties, unless the notice indicates a contrary intent.

With regard to class actions, the published rule provided that it would be sufficient for a notice to indicate that it is filed on behalf of the class. The revised draft requires that the notice name one person qualified to bring the appeal as representative of the class.

No substantive changes are made in Rule 15. Only two comments were submitted regarding Rule 15; both support the approach taken in the draft which requires that a petition for review or enforcement of agency orders name each party seeking review. Both comments were from persons who oppose the naming requirement in Rule 3. They support the naming requirement in Rule 15 principally because the notice is the first document filed with any court. The Committee note accompanying subdivision (a) is amended because it previously stated that subdivision (a) was a conforming amendment to Rule 3(c). Style changes are made in Rule 15, consistent with the changes recommended by the Style Subcommittee in other rules.

Only one minor change is made in the published forms even though substantive changes have been made in Rule 3(c), and Forms 1 and 2 are governed by Rule 3(c). The published forms indicate that each appellant/petitioner should be named in the body of the notice of appeal. Although that requirement has been relaxed in Rule 3, naming remains the preferred method and the published amendments to the forms remain appropriate. However, because Rule 3(c) authorizes alternative means an asterisk and footnote referring the reader to Rule 3(c) have been added to Forms 1 and 2.

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF APPELLATE PROCEDURE[1]

Rule 3. Appeal as of Right--How Taken

* * * * *

(c) *Content of the Notice of Appeal.*--~~The~~ A notice of appeal ~~shall~~ must specify the party or parties taking the appeal by naming each appellant in either the caption or the body of the notice of appeal. An attorney representing more than one party may fulfill this requirement by describing those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X." A notice of appeal filed pro se is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice of

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[1]New matter is underlined; matter to be omitted is lined through.

appeal clearly indicates a contrary intent. In a class action, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as representative of the class. A notice of appeal also must ~~, shall~~ designate the judgment, order, or part thereof appealed from, ~~,~~ and ~~shall~~ must name the court to which the appeal is taken. ~~Form 1 in the Appendix of Forms is a suggested form of a notice of appeal.~~ An appeal ~~shall~~ will 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. Form 1 in the Appendix of Forms is a suggested form for a notice of appeal.

(d) ~~*Service of*~~ *Serving the Notice of Appeal*. - The clerk of the district court

shall serve notice of the filing of a notice of appeal by mailing a copy ~~thereof~~ to each party's counsel of record (apart from the appellant's), ~~of each party other than the appellant,~~ or, if a party is not represented by counsel, to the party's last known address. ~~of that party; and the~~ The clerk of the district court shall ~~transmit~~ forthwith send a copy of the notice ~~of appeal~~ and of the docket entries to the clerk of the court of appeals named in the notice. The clerk of the district court shall likewise send a copy of any later docket entry in the case to the clerk of the court of appeals. When ~~an appeal is taken by~~ a defendant appeals in a criminal case, the clerk of the district court shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail

addressed to the defendant. The clerk shall note on each copy served the date ~~on~~ ~~which~~ when the notice of appeal was filed and, if the notice of appeal was filed in the manner provided in Rule 4(c) by an inmate confined in an institution, the date when the clerk received the notice of appeal. ~~Failure of t~~ The clerk's failure to serve notice ~~shall~~ does not affect the validity of the appeal. Service ~~shall be~~ is sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

* * * * *

COMMITTEE NOTE

Note to subdivision (c). The amendment is intended to reduce the amount of satellite litigation spawned by the Supreme Court's decision in Torres v. Oakland Scavenger Co., 487 U.S. 312 (1988). In Torres the Supreme

Court held that the language in Rule 3(c) requiring a notice of appeal to "specify the party or parties taking the appeal" is a jurisdictional requirement and that naming the first named party and adding "et al.," without any further specificity is insufficient to identify the appellants. Since the Torres decision, there has been a great deal of litigation regarding whether a notice of appeal that contains some indication of the appellants' identities but does not name the appellants is sufficiently specific.

The amendment states a general rule that specifying the parties should be done by naming them. Naming an appellant in an otherwise timely and proper notice of appeal ensures that the appellant has perfected an appeal. However, in order to prevent the loss of a right to appeal through inadvertent omission of a party's name or continued use of such terms as "et al.," which are sufficient in all district court filings after the complaint, the amendment allows an attorney representing more than one party the flexibility to indicate which parties are appealing without naming them individually. The test established by the rule for determining whether such designations are sufficient is whether it is objectively clear that a party intended to appeal. A notice of appeal filed by a party proceeding *pro se* is filed on behalf of the party signing the notice and the signer's spouse and minor children, if they are parties, unless the notice clearly indicates a contrary intent.

In class actions, naming each member of a class as an appellant may be extraordinarily

burdensome or even impossible. In class actions if class certification has been denied, named plaintiffs may appeal the order denying the class certification on their own behalf and on behalf of putative class members, United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980); or if the named plaintiffs choose not to appeal the order denying the class certification, putative class members may appeal, United Airlines, Inc. v. McDonald, 432 U.S. 385 (1977). If no class has been certified, naming each of the putative class members as an appellant would often be impossible. Therefore the amendment provides that in class actions, whether or not the class has been certified, it is sufficient for the notice to name one person qualified to bring the appeal as a representative of the class.

Finally, the rule makes it clear that dismissal of an appeal should not occur when it is otherwise clear from the notice that the party intended to appeal. 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.

Note to subdivision (d). The amendment requires the district court clerk to send to the clerk of the court of appeals a copy of every docket entry in a case after the filing of a notice of appeal. This amendment accompanies the amendment to Rule 4(a)(4), which provides that when one of the posttrial motions enumerated in Rule 4(a)(4) is filed, a notice of appeal filed before the

disposition of the motion becomes effective upon disposition of the motion. The court of appeals needs to be advised that the filing of a posttrial motion has suspended a notice of appeal. The court of appeals also needs to know when the district court has ruled on the motion. Sending copies of all docket entries after the filing of a notice of appeal should provide the courts of appeals with the necessary information.

Rule 3.1. Appeals ~~from~~ a Judgments Entered by a ~~Magistrates~~ Judge in a Civil Cases

When the parties consent to a trial before a magistrate judge under ~~pursuant to~~ 28 U.S.C. § 636(c)(1), ~~an appeal from a judgment entered upon the direction of a magistrate shall~~ any appeal from the judgment must be heard by the court of appeals ~~pursuant to~~ in accordance with 28 U.S.C. § 636(c)(3), unless the parties~~, in accordance with 28 U.S.C. § 636(c)(4),~~ consent to an appeal on the record to a district judge ~~of the district court~~ and thereafter, by petition only, to the court

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02-17

U.S. Department of Justice
Civil Division, Appellate Staff
601 "D" Street, N.W., Rm: 9106
Washington, D.C. 20530

DNL

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October 15, 2003

Professor Patrick J. Schiltz
St. Thomas More Chair in Law
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 302
Minneapolis, MN 55403-2015

Re: Standardization of Appendix Contents, Designation, and Preparation, and Brief Cover and Contents

Dear Patrick:

At the last meeting of the Federal Rules of Appellate Procedure Advisory Committee, I informed you and the other members of the Committee that we were in the process of considering and developing recommendations concerning an ABA Council of Appellate Lawyers proposal about two issues: (1) whether there should be a uniform national rule concerning the covers and contents of briefs; and (2) whether there should be a uniform national rule concerning the contents and the designation and preparation of the appendix, and whether that goal would be easily accomplished through the elimination of the current Circuit option in FRAP 30(f).

After further discussion and consideration, the Department of Justice recommends revising the Federal Rules of Appellate Procedure in an effort to develop a standard approach to the cover and contents of briefs. Although we believe that a standard approach to the contents, designation, and preparation of appendices also would be generally advantageous to practitioners, we believe that, in light of the widely divergent practices among the Circuits, a standard approach for appendices does not make sense at this time.

Briefs

The FRAP's requirements for the contents and cover of the brief are located in FRAP 28 and 32, respectively. FRAP 28 sets out the items that must be included in appellant's and appellee's briefs, as well as the information to be included in an addendum to the brief. FRAP 32 establishes, inter alia, the color of each brief and the information that must be provided on the brief's cover.

A. Contents of the Brief

FRAP 28 requires the inclusion in the brief of eleven items including: a corporate disclosure statement by any non-governmental corporate party to a proceeding; tables of contents and authorities; statements of jurisdiction, the issues presented, the case, and the facts; a summary of the argument; the argument; and the conclusion. In certain circumstances, a certificate of compliance also is required.

Most of the Circuits have added to FRAP 28, most commonly requiring information about related cases, see, e.g., D.C. Cir. R. 28(a)(1)(C); 3d Cir. R. 28.1(a)(2); the identity of the lower court judge, see, e.g., D.C. Cir. R. 28(a)(1)(B); 2d. Cir. R. 28(2); 10th Cir. R. 28.2(C)(5); a statement about whether oral argument is desired in a case, see, e.g., 5th Cir. R. 28.2.4 (required); 1st Cir. R. 434(a) (permissive); or the identification of the most important cases discussed in the briefs, see, e.g., D.C. Cir. R. 28(a)(2); 11th Cir. R. 28-1(e).

In addition, some Circuits require more detailed information in the sections already required by the FRAP, such as where in the record each issue was raised below and ruled on by the lower court, a broader definition of interested parties, or a more detailed discussion of lower court jurisdiction.

In spite of these variations, we believe it is highly worthwhile to establish uniform standards for the contents of briefs by means of an amendment to the FRAP. We are unable to discern any good reason for the courts of appeals to have varying requirements concerning briefs. Such variations are a significant burden on legal practitioners, and undoubtedly take up much clerk time unnecessarily. Based on our review of the most common Circuit practices and our assessment of the practices that likely are most useful to the Circuits, we recommend making two additions to FRAP 28's requirements: the disclosure of related cases, and the identity of the judge or agency that issued the decisions from which appeal has been taken. We also recommend adding as an option, a statement as to whether the parties believe oral argument would assist the Court.[1]

Recognizing that several of the Circuits provide for less burdensome requirements in particular types of cases, we also recommend that the amended FRAP rules include the "Local Variation" provision currently found in FRAP 32(e). That provision states that documents complying with this rule must be accepted, but that, by local rule, Circuits may accept documents not meeting all of the requirements. Such a rule would enable the Circuits to maintain some of their more flexible approaches. A national practitioner could nonetheless submit a brief in compliance

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[1] We also raise for the Committee's discussion and consideration an additional option, which is currently required in the D.C. Circuit's local rules: a glossary of terms and abbreviations used in a brief. This section has proven of particular value in complex administrative law cases. However, a glossary is certainly not needed in many cases. Accordingly, we urge the Committee to consider adding this option for litigants preparing a brief if they believe there are many or potentially confusing abbreviations and acronyms used in a brief, and that a glossary would thus assist the court.

with the more extensive FRAP requirements and not risk the brief's rejection.

Finally, although not directly related to the issue of standardization, we recommend deleting the phrase "the course of proceedings" from Rule 28(a)(6), which currently requires a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below, and amending the required statement of facts in Rule 28(a)(7) to include a statement of both the facts and the prior proceedings. The phrase "course of proceedings" has caused great confusion among practitioners, and we believe the information it seeks can be set out more plainly in a statement of facts and prior proceedings.

Proposed FRAP 28.1 (addressing briefing in cases involving cross-appeals) also will need to be amended as a result of the proposed changes to Rule 28, although the amendments should be quite minor and will principally involve recalibrating to account for the renumbering of Rule 28's provisions.

B. Addendum

FRAP 28(f) provides that, if the court's decision requires the study of statutes, rules, regulations, etc., the relevant provisions must be set out in the brief, in an addendum at the end of the brief, or in a separate pamphlet. Several Circuits have expanded the list of items to include in an addendum, adding the decision of the lower court, any unpublished decisions cited in the briefs, and, in the First Circuit, jury instructions if the appeal involves a challenge to those instructions. Several Circuits also permit the inclusion of other materials such as additional relevant excerpts from the record.

Based on our review of the Circuit practices, the most significant addition to the FRAP's addendum requirements seems to be the inclusion of cited unpublished opinions. Accordingly, we recommend amending the FRAP to include a requirement that any unpublished opinions cited in the briefs be included in an addendum to the brief. This amendment would conform the current requirements of Rule 28 with the requirement in proposed FRAP 32.1, the rule addressing the citation of unpublished decisions that was approved by the Advisory Committee at its May 2003 meeting. Proposed FRAP 32.1 requires the parties to include any unpublished decision cited in the brief in an attachment or addendum that accompanies the brief.

C. Form of the Brief

The form of the brief and its cover are governed by FRAP 32. In light of FRAP 32(e), which provides that the Circuits must accept any brief that complies in form with the requirements of FRAP, the Circuits should not be able to add any mandatory requirements about the form of the brief, including its cover. Nonetheless, two Circuits do appear to alter the requirements for the cover of the brief: the Second Circuit requires the docket number typeface be printed in type at least one inch high, 2d Cir. R. 32(c), and the Tenth Circuit requires the inclusion of the name of the lower court judge on the brief, 10th Cir. R. 28.2(C)(5).

We have considered adding these two requirements to the FRAP, but neither rule seems sufficiently necessary or beneficial as to warrant requiring all other Circuits to alter their rules in order to comply. Therefore, we do not recommend any changes to FRAP 32. Furthermore, since FRAP 32 already requires that the Circuits accept briefs in compliance with the uniform national rule, it is not necessary to add that provision, but it might be wise to emphasize this point in a Committee note.

A draft of the proposed amended FRAP 28 is attached at the end of this letter.

Appendices

FRAP 30 sets out the requirements for the appendix to the briefs on appeal. Rule 30 provides instructions as to: the contents of the appendix (including what to include and what to exclude); the methods of designating and preparing the appendix (with allocations of responsibilities between the appellant and the appellee); the format; the time to file; and the number of copies to be filed.

FRAP 30 also explicitly provides for local variances. FRAP 30(a)(3) states that a Circuit, by local rule or by order in a particular case, may require the filing or service of a different number of copies; FRAP 30(c) states that a Circuit may provide, in classes of cases or in a particular case, for a deferred appendix; and FRAP 30(f) states that a Circuit, by rule for all cases, classes of cases, or by order in a particular case, may dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record or excerpts of the record that the Circuit requires. (FRAP 30(f) was promulgated specifically to avoid the preemption of local rules that at that time dispensed with the appendix. FRAP 30(f) 1967 Advisory Committee Notes.)

As was discussed at the Committee's most recent meeting, the Circuits have developed widely varying rules in accordance with these provisions, and, in addition, have added to or modified the other requirements set out in FRAP 30. As a result, no two Circuits have the same requirements for the appendix.

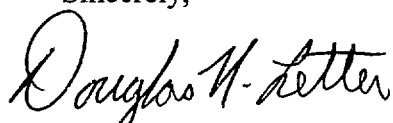
The Circuits also have developed local rules addressing the designation and preparation of the appendix. While a majority of the Circuits have adopted FRAP 30(b)'s procedure as to the designation of contents in the appendix, several of the Circuits have developed their own procedures ranging from a mandatory deferred appendix to an appendix filed by the appellant in the absence of any consultation, which may then be supplemented by the appellee as needed.

Four Circuits (the Fifth, Ninth, Tenth, and Eleventh) also have taken advantage of the flexibility provided for by FRAP 30(f) to require the filing of record excerpts instead of an appendix at all. 5th Cir. R. 30.1; 9th Cir. R. 30-1.1(a); 10th Cir. R. 30.1; 11th Cir. 30-1. Additionally, several of the Circuits that ordinarily require the filing of an appendix provide for the use of record excerpts or the record on appeal in pro se cases, cases proceeding in forma pauperis, social security cases, or habeas appeals. See, e.g., 2d Cir. R. 30(b) (original record instead of appendix in appeals conducted under the Criminal Justice Act, 18 U.S.C. 3006A, in forma pauperis proceedings, and social security

cases); 3d Cir. R. 30.2 (no appendix required in habeas corpus and in forma pauperis cases).

Although the divergent requirements among the local rules for appendices underscore the difficulties faced by nationwide practitioners and the desirability for a uniform rule, they also highlight the extreme difficulties inherent in the implementation of such a proposal. Many of the Circuits would need to make substantial changes to their current procedures in order to comply with a national uniform rule. Although there would be significant benefits from uniformity, we believe that achieving uniformity at this point would cause great difficulty and resentment and is not worth the goal of nationwide uniformity. Accordingly, having considered the issue, we recommend against proposing a uniform mandatory rule for appendices.

Sincerely,



Douglas N. Letter
Appellate Litigation Counsel

Proposed New Rule

Rule 28. Briefs

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

(1) an introductory statement, which must include:

(A)the identity of the judge or agency whose decisions are being appealed, and the citation for any decision being appealed that is reported in a federal reporter.

(B) a statement of related cases indicating whether any appeal from the case on review was previously or is currently before this court or any other court, and, whether any appeal involving substantially the same parties or the same or similar issues is pending in the courts of appeals. For each case, the caption and docket number should be provided. If there are no related cases, the statement must so state.

The appellant may also include in the introductory statement a statement as to whether oral argument would be appropriate in the case.

(~~1~~2) a corporate disclosure statement if required by Rule 26.1;

(~~2~~3) a table of contents, with page references;

(~~3~~4) a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the brief where they are cited;

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

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

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

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

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

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

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

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

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

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

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

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

(1~~0~~1) a short conclusion stating the precise relief sought; and

(1~~1~~2) 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)-(12), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the introductory statement;

(~~1~~2) the jurisdictional statement;

(~~2~~3) the statement of the issues;

(~~3~~4) the statement of the case;

(~~4~~5) the statement of the facts; and

(~~5~~6) the statement of the standard of review.

(c) Reply Brief. The appellant may file a brief in reply to the appellee's brief. An appellee who has cross-appealed may file a brief in reply to the appellant's response to the issues presented by the cross-appeal. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the reply brief where they are cited.

(d) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the

employee," "the injured person," "the taxpayer," "the ship," "the stevedore."

(e) References to the Record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:

- Answer p. 7;
- Motion for Judgment p. 2;
- Transcript p. 231.

Only clear abbreviations may be used. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(f) Reproduction of Statutes, Rules, Regulations, etc. If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end, or may be supplied to the court in pamphlet form. Pursuant to Rule 32.1, any party citing an unpublished or non-precedential decision must include a copy of the decision in an attachment or addendum that accompanies the brief.

(g) [Reserved]

(h) Briefs in a Case Involving a Cross-Appeal.[2] 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). But an appellee who is satisfied with appellant's statement need not include a statement of the case or of the facts.

(i) Briefs in a Case Involving Multiple Appellants or Appellees. In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief. Parties may also join in reply briefs.

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's

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[2] Under Proposed Rule 28.1, this provision is being deleted, and briefing in a case involving a cross-appeal will be addressed in new Rule 28.1.

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 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 350 words. Any response must be made promptly and must be similarly limited.

(k) Local Variation. Every court of appeals must accept for filing documents that comply with the 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 requirements of this rule.

Committee Note

The amendments to Rule 28 are designed to provide a uniform national rule governing the content of briefs. Because under subdivision (k) the courts of appeals must accept a brief that includes all of the elements required in this rule, the amendment adopts the most widespread and most important local requirements, and incorporates them into the uniform national rule.

Subdivision (a). The amendment adds a new subparagraph (1) that requires an appellant to provide the names of the judge or agency that issued the decision from which appeal has been taken, as well as the name and number of any related cases in either the court in which the appeal has been taken or any other court of appeals Finally, the amendment permits an appellant to make a statement regarding whether oral argument is appropriate in the case. Such a statement is not required.

Subdivision (f). The amendment is intended solely to incorporate the requirement set out in Rule 32.1 and to make Rule 28 conform with Rule 32.1.

Subdivision (k). A brief that complies with the national rule should be acceptable in every court. Local rules may move in one direction only: they may authorize noncompliance with some of the national norms. A local rule may not, however, impose requirements that are not in the national rule.

MEMORANDUM

DATE: October 15, 2003

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 03-07

The Committee decided at its last meeting that it wanted to give further thought to an informal suggestion by Judge A. Wallace Tashima, a member of the Standing Committee, that the Appellate Rules be amended to require courts to disclose how individual judges vote on requests to hear or rehear cases en banc.

To assist the Committee's deliberations, I asked Mary Wells, a reference librarian at St. Thomas, to contact the 13 clerks' offices and gather information about the current practices. Mary reports the following:

> **D.C. Circuit.** If a judge does not participate for any reason, that fact is disclosed; however, the order does not specify why the judge did not participate — i.e., it does not indicate whether the judge was disqualified or failed to participate for another reason. Judges' votes on rehearing petitions are not disclosed unless a judge specifically requests that his or her favorable vote be noted on the order denying the petition.
>
> **First Circuit.** Disqualifications are noted on the order granting or denying rehearing by putting an asterisk next to the name of disqualified judges and explaining in a footnote that they did not participate. Votes are not disclosed.
>
> **Second Circuit.** Disqualifications are disclosed. Votes are not disclosed, unless a judge writes or joins an opinion dissenting from denial.

Third Circuit. Disqualifications are disclosed by omitting the names of disqualified judges from the order granting or denying rehearing. Votes are not disclosed unless a judge specifically requests disclosure or writes or joins a dissenting opinion.

Fourth Circuit. Disqualifications are not disclosed unless a judge specifically requests. Votes are disclosed.

Fifth Circuit. Disqualifications are not disclosed. Votes are not disclosed unless a judge writes or joins a dissenting opinion.

Sixth Circuit. Disqualifications are disclosed. Votes are not disclosed unless a judge writes or joins a dissenting opinion.

Seventh Circuit. Disqualifications are not disclosed. Votes are not disclosed.

Eighth Circuit. Disqualifications are not disclosed. Votes are not disclosed unless a judge specifically requests.

Ninth Circuit. Disqualifications are not disclosed unless a judge specifically requests. Votes are not disclosed unless a judge writes or joins a dissenting opinion.

Tenth Circuit. Disqualifications are disclosed. Votes are disclosed.

Eleventh Circuit. Disqualifications are not disclosed. Votes are not disclosed unless a judge writes or joins a dissenting opinion.

Federal Circuit. If a judge does not participate for any reason, that fact is disclosed; the order does not specify why the judge did not participate. Votes are not disclosed unless a judge specifically requests.

There are probably some inaccuracies in this compilation. Mary called each clerk's office, asked a deputy clerk to describe the circuit's practice, and wrote down what the clerk said. She did not ask specific follow-up questions. (This is my fault; I should have give her better instructions.) As a result, some of what she has reported is probably misleading. For example, it is difficult to believe that a First Circuit judge cannot disclose his or her dissent from denial of

rehearing en banc. Likewise, I assume that a Fifth Circuit judge can ask that his or her dissenting vote be disclosed without having to go through the trouble of writing an opinion.

I apologize for the limitations of this survey, but, even given those limitations, a couple of things seem clear. First, circuit practices regarding disclosure of disqualifications vary widely, from full disclosure to disclosure when requested to no disclosure. Second, circuit practices regarding votes do not vary widely. No circuit discloses votes when rehearing petitions are granted, and, in every circuit save the Fourth and Tenth, votes are not disclosed when rehearing petitions are denied unless a judge does something to make his or her vote public — such as request that the vote be noted on the order or to write or join a dissenting opinion.

Attached is a draft amendment and Committee Note. I provide this draft more to help the Committee focus its discussion than with the expectation that the Committee will approve the draft as written. (I personally have serious reservations about the proposal.) Some explanation of the draft may be helpful:

1. I have drafted an amendment to Rule 35, regarding petitions for hearing or rehearing en banc. The Committee should consider whether a similar amendment should be proposed to Rule 40, regarding petitions for panel rehearing. My initial inclination is "no," given that petitions for panel rehearing are filed after it is already clear whether members of the panel are disqualified and after the views of each panel member on the merits of the case have been disclosed. The Committee may disagree, though.

2. The draft amendment requires disqualifications to be noted in every case, whether or not the petition is granted. It seems to me that there is a legitimate public interest in verifying compliance with the provisions of the Code of Conduct for United States Judges, particularly

given the *Washington Post* and *Kansas City Star* reports that led to last year's expansion of the corporate disclosure provisions.

3. The draft amendment does not require that any information — save disqualifications — be disclosed when the petition is *granted*. The case for disclosure here appears weaker than the case for disclosure when a rehearing petition is *denied*. When a petition is granted, the views of each judge on the merits of the case will usually become known when the case is decided. Also, disclosing how judges voted on the rehearing petition before those same judges consider the merits of the case arguably gives rise to the appearance of unfairness — just as disclosing the names of the justices who voted to grant certiorari in a case pending before the Supreme Court would lead to speculation and assumptions about the views of those justices.

4. For similar reasons, the draft amendment does not require that any information — save disqualifications — be disclosed when a petition to hear an appeal *initially* en banc is denied. The court will continue to deal with the case, raising the concern about the appearance of unfairness. Moreover, the views of every judge — either on the merits of the case or on whether rehearing en banc should be granted — will eventually be disclosed, lessening the public interest in knowing how judges voted on the request to hear the case en banc as an initial matter.

5. The draft amendment requires that, when a court denies a rehearing petition, the court must disclose whether a vote was taken and, if so, how each judge voted. The Note cites in support of this provision the public interest in knowing how judges exercise their power and the lack of any public interest furthered by secrecy.

6. Needless to say, the disqualification provisions are severable from the voting provisions. The Committee could decide to amend Rule 35 to require that all disqualifications be

disclosed, but not to require disclosure of votes. It would be easy to redraft the amendment if the Committee should decide to go this route.

7. Finally, this is another of those instances in which the meaning of a potentially contentious amendment could be explained by a very short Committee Note, but a longer Note may be advisable to persuade members of the bench and bar — including members of the Standing Committee, Judicial Conference, Supreme Court, and Congress — that the amendment deserves their support. I can shorten the Note if the Committee decides that less "persuasion" is necessary.

Rule 35. En Banc Determination

* * * * *

(g) **Disclosure of Vote.**

(1) **Petition Granted.** If a petition for hearing or rehearing en banc is granted, the court must identify the judges who participated in the consideration of the petition.

(2) **Petition Denied.**

(A) If a petition that an appeal be heard initially en banc is denied, the court must identify the judges who participated in the consideration of the petition.

(B) If a petition that an appeal be reheard en banc is denied, the court must:

(i) identify the judges who participated in the consideration of the petition;

(ii) disclose whether a vote was taken; and

(iii) if a vote was taken, disclose how each participating judge voted.

Committee Note

Subdivision (g). The courts of appeals follow inconsistent practices when it comes to disclosing information about the consideration of petitions for hearing and rehearing en banc. For example, some circuits always identify judges who are disqualified, while other circuits never do — or do so only when a disqualified judge requests. Similarly, if a petition is denied after a judge calls for a vote, some circuits always disclose how each judge voted, while other circuits never do — or do so only when a judge writes or joins an opinion dissenting from denial of the petition.

New subdivision (g) has been added to ensure that, in every case in which a court considers a petition for hearing or rehearing en banc, the court will identify the judges who participated (and, by implication, those who did not participate) in the consideration of the

petition. There is a strong public interest in ensuring that "[a] judge . . . disqualif[ies] himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Code of Conduct for United States Judges, Canon 3C(1). The need for vigilance has been underscored in recent years by media reports regarding the inadvertent failure of judges to disqualify themselves in cases in which they had "a financial interest in the subject matter in controversy." Canon 3C(1)(c). At the same time, no important public interest appears to be furthered by keeping secret the identities of the judges who determined whether a case should be heard or reheard en banc.

New subdivision (g) also requires that, when a court denies a petition for rehearing en banc, the court must disclose whether a vote was taken. (Under Rule 35(f), a vote need not be taken unless a judge calls for a vote.) If a vote was taken, subdivision (g) requires that the vote of each participating judge be disclosed. The parties and the general public have a legitimate interest in knowing how judges exercised the authority entrusted to them, and, after a rehearing petition is denied, keeping the vote secret does not appear to further any important public interest.

Subdivision (g) does not require the disclosure of any information about the decision to grant a petition for hearing or rehearing en banc (except, as noted, the identity of the judges who participated in the decision). The public interest in disclosure is diminished, because when such a petition is granted, every judge will likely write or join an opinion on the merits of the case. At the same time, non-disclosure serves a legitimate interest. Revealing how judges voted on the petition before those same judges consider the merits of the case would lead to speculation and assumptions about the views of particular judges and arguably give rise to the appearance of unfairness.

For similar reasons, subdivision (g) does not require disclosure of any information about the decision to deny a request that an appeal be heard en banc as an initial matter (except the identity of the judges who participated in the decision). Such a denial begins rather than concludes the court's consideration of the case; the case will typically be decided by a panel on the merits and will often be the subject of a petition for rehearing en banc. Thus, concern about the appearance of unfairness is present. At the same time, disclosing how judges voted on a petition that an appeal be heard initially en banc does not further an important public interest. The votes of the members of the panel on the merits of the case will be disclosed. If a petition for rehearing en banc is filed and denied, the votes of the entire court on that petition will be disclosed. And if such a petition is filed and granted, the votes of the entire court on the merits of the case will be disclosed.

03-08

RECEIVED 8/14/03

03-AP-C

AVE MARIA SCHOOL of LAW

AVE MARIA
SCHOOL OF LAW

August 7, 2003

Peter G. McCabe
Secretary
Standing Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Washington, D.C. 20544

Dear Mr. McCabe:

Please refer this proposal for amendment to Rule 4(c)(1) of the Federal Rules of Appellate Procedure to the Advisory Committee on Appellate Rules.

Rule 4(c)(1), which was enacted to codify the "prisoner mailbox" rule first pronounced by the Supreme Court in *Houston v. Lack*, 487 U.S. 266 (1988), provides:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Fed. R. App. P. 4(c)(1).

The focus of this proposal is the Rule's concluding sentence, which concerns the showing of "timely filing" through submission of either a § 1746 declaration or a notarized statement. The apparent basis of this provision is Rule 29.2 of the Supreme Court Rules. *See* Fed. R. App. P. 4(c), 1993 Advisory Committee Note ("The language of the amendment is similar to that in Supreme Court Rule 29.2"). The relevant portion of Rule 29.2 provides:

3475 Plymouth Rd., Ann Arbor, MI 48105-2550 (734) 827-8040 Fax (734) 622-0123

> If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid.

As the Advisory Committee Note indicates, Rules 4(c)(1) and 29.2 have similar language. They each mention a § 1746 declaration or a notarized statement setting forth the date of deposit and stating that first-class postage has been prepaid. However, the Rules differ in one significant respect: it is clear that an inmate must submit one of the mentioned documents to receive the benefit of Rule 29.2, but it is not so clear whether he must do so to receive the benefit of Rule 4(c)(1). *See* Fed. R. App. P. 4(c)(1) ("Timely filing *may* be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.") (emphasis added). Rule 4(c)(1) arguably does nothing more than create a "safe harbor" for those inmates who submit a § 1746 declaration or a notarized statement containing the requisite content. The Advisory Committee Note provides no explanation as to why the Committee took this particular approach.

In a perfect world, each and every inmate would be astute enough to take advantage of Rule 4(c)(1)'s "safe harbor" by attaching a § 1746 declaration or a notarized statement to his notice of appeal. It would then be simple for a court of appeals to verify that the inmate deposited the notice in the institution's internal mail system on or before the last day for filing. Unfortunately, however, inmates routinely neglect to accompany their notices with either of the mentioned documents, leaving the courts of appeals to determine on a case-by-case basis whether the inmate will nevertheless receive the benefit of the Rule.

Because Rule 4(c)(1) provides the courts of appeals with no guidance on how to proceed in the absence of a § 1746 declaration or a notarized statement, it is not surprising that divergent approaches have emerged, including several within the same circuit. The Sixth and Eighth Circuits, construing the submission of a § 1746 declaration or a notarized statement as mandatory, have dismissed appeals on the basis that the inmate failed to satisfy his burden of establishing the existence of appellate jurisdiction. *See United States v. Streck*, Nos. 01-6087, 01-6089, 2003 WL 1518639 (6th Cir. Mar. 20, 2003) (unpublished disposition); *Portia v. Norris*, 251 F.3d 1196 (8th Cir. 2002). The consistent practice of the Fourth Circuit, on the other hand, is to remand to the district court for factual findings regarding whether the inmate complied with Rule 4(c)(1). *See, e.g., United States v. Propst*, No.03-6282, 2003 WL 21652692 (4th Cir. July 15, 2003) (unpublished disposition).

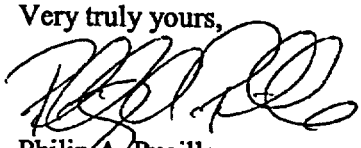
Another approach, employed by both the Eighth and Tenth Circuits, is to forgive the absence of a § 1746 declaration or a notarized statement when other evidence demonstrates that the inmate timely deposited his notice of appeal in the prison mail system. *See Sulik v. Taney County*, 316 F.3d 813, 814 (8th Cir. 2003) (postmark on envelope containing notice of appeal); *Fleenor v. Scott*, No. 01-6233, 2002 WL 725450 (10th Cir. Apr 25, 2002) (unpublished disposition) (prison mail log); *United States v. Bailey*, No. 99-6250, 2000 WL 309296 (10th Cir. March 27, 2000) (unpublished disposition) (certificate of service).

In an effort to bring about some uniformity, the Committee might consider prescribing a standard approach for the courts of appeals to follow when an inmate seeking the benefit of Rule 4(c)(1) fails to include a § 1746 declaration or a notarized statement with his notice of appeal. A preferable course, however, would be to amend Rule 4(c)(1) to make abundantly clear that an inmate will not receive the benefit of the Rule in that circumstance. Not only would this revision bring Rule 4(c)(1) in conformity with Rule 29.2 of the Supreme Court Rules, it would preserve judicial resources that would otherwise be expended to determine the relevant date upon which the inmate deposited his notice of appeal in the institution's mail system. The burden that the amendment would impose upon an inmate (compelling him to supply a § 1746 declaration or a notarized statement with each appeal) is minimal.

Below is proposed language incorporating the proposed amendment for the Committee's consideration:

> If an inmate confined in an institution files a notiee of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the intuition's internal mail system on or before the last day for filing. ~~If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first class postage has been prepaid.~~ To receive the benefit of this rule, the inmate must:
>
> (A) attach to the notice a notarized statement or declaration in compliance with 28 U.S.C. § 1746, either of which must set forth the date of deposit and state that first-class postage has been prepaid; and
>
> (B) use the system designed for legal mail, if the institution has one.

Very truly yours,



Philip A. Pucillo
Assistant Professor of Law

03-09

U.S. Department of Justice
Civil Division, Appellate Staff
601 "D" Street, N.W., Rm: 9106
Washington, D.C. 20530

DNL

Douglas N. Letter
Appellate Litigation Counsel

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October 15, 2003

Professor Patrick J. Schiltz
St. Thomas More Chair in Law
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 302
Minneapolis, MN 55403-2015

Re: Proposed Amendments to FRAP to Clarify Time Limits for Filing Notices of Appeal and Petitions for Rehearing

Dear Patrick:

I am writing because the Solicitor General wishes to propose to the FRAP Committee rule changes to clarify the applicable period for filing notices of appeal and petitions for rehearing in civil cases in which a United States officer or employee sued in an individual capacity is a party. These proposed amendments would also conform the FRAP to the Federal Rules of Civil Procedure, which have already been amended to make a similar clarification regarding suits against federal officials in their individual capacities.

Rules 4(a)(1) and 40(a)(1), respectively, establish the time in which a notice of appeal and a petition for rehearing in a civil case must be filed. Each rule provides an extended filing time for appeals in which the United States, its agency, or officer is a party. See FRAP 4(a)(1) (30 days extended to 60); FRAP 40(a)(1) (15 days extended to 45). Neither rule, however, specifies whether this extended time also applies to appeals in which a United States officer or employee is sued in an individual, rather than official, capacity.

The rationale for providing an extended filing time in appeals in which the Government is a party applies equally to appeals in which a United States officer or employee sued in his individual capacity is a party. When an officer or employee is sued in that capacity, the United States must decide whether to represent him, and, if it does represent him, must go through the same processes involved in any other appeal to which the United States is a party and which warrant the extended filing time for notices of appeal and petitions for rehearing.

Federal Rule of Civil Procedure 12(a)(3) has already been amended for analogous reasons. See FRCP 12(a)(3) (extending time in which to answer complaint to sixty days for cases in which the United States, its agency, or its officer or employee, either in an official or individual capacity, is a party). Our proposed amendments to the FRAP would maintain consistency between the district and appellate court rules and would provide the Government with sufficient time to file notices of appeal or petitions for rehearing in Bivens appeals.

1. FRAP 4(a)(1) provides that in a civil case, a notice of appeal generally must be filed with the district court within thirty days after the judgment or order appealed from is entered. See FRAP 4(a)(1)(A). However, "[w]hen 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." FRAP 4(a)(1)(B). This extended time for filing a notice of appeal in cases in which the United States is a party recognizes the Government's need to review the case, determine whether an appeal is warranted, and secure approval from the Solicitor General.

FRAP 40(a)(1) states that "a petition for panel rehearing may be filed within 14 days after entry of judgment," unless this time is altered by court order or local rule. "But in a civil case, if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment * * * ." Ibid. The forty-five day period, "analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, recognizes that the Solicitor General needs time to conduct a thorough review of the merits of a case before requesting a rehearing." Rule 40, Advisory Committee Notes, 1994 Amendment.

2. Although the extended filing times in Rules 4 and 40 clearly apply to appeals involving a federal officer sued in his official capacity, neither rule explicitly extends this filing time to appeals in which a United States officer or employee is sued in his individual capacity. As a result, the proper deadline by which to file a notice of appeal or petition for rehearing is an issue that frequently arises in Bivens appeals. Clarification of the rules would allow the Government to take advantage of the extended filing time intended for appeals in which the United States participates. Currently, out of an abundance of caution, the Government's practice in Bivens appeals is to file protective notices of appeal within thirty days or petitions for rehearing within fifteen days to avoid any possibility of litigation over timeliness.

3. The same rationale for providing an extended deadline in Rules 4 and 40 to appeals in which "the United States or its officer or agency is a party" supports an extended deadline in appeals in which a United States officer or employee sued in an individual capacity is a party. When a United States officer or employee is sued in his individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, and the Government decides to provide representation to the officer or employee, the Government, as in any other appeal to which it is a party, requires time to conduct a review of the case, determine whether appeal or rehearing is appropriate, and seek approval from the Solicitor General. Therefore, we recommend that Rules 4 and 40 be amended to clarify that the extended filing deadline for a notice of appeal or petition for rehearing applies to any appeal in which the United States, its agency, or its officer or

employee, sued either in an official or individual capacity, is a party.

4. Such an amendment would also maintain consistency between the FRAP and the Federal Rules of Civil Procedure, governing district court matters. FRCP 12(a) sets forth the relevant periods in which a defendant must serve an answer to a complaint in district court. It provides a default period of twenty days, except that, when "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity" is the defendant, the period is extended to sixty days. Similar to the current versions of FRAP 4 and 40, FRCP 12, prior to an amendment in 2000, provided that "[t]he United States or an officer or agency thereof" was entitled to sixty days to file an answer; the former version of the rule did not specify whether this extended time to file also applied to a case in which the defendant was a United States officer or employee sued in his individual capacity. In the year 2000, however, Rule 12(a)(3)(B) was added to remedy this situation.

FRCP 12(a)(3)(B) provides that the extended sixty day period applies to a suit against "[a]n officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." The rationale for adopting this amendment was that in cases involving a United States officer or employee sued in his individual capacity, "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee." FRCP 12, Advisory Committee Notes, 2000 Amendment. Moreover, "[i]f the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." Ibid.

Therefore, because the Federal Rules of Civil Procedure have been amended to clarify that an extended filing time for the United States, its agencies, or officers should also apply to district court filings by a United States officer or employee sued in his individual capacity, our proposed amendments to FRAP 4 and FRAP 40 would be consistent with the rules governing the district courts. To further this purpose of consistency, the amending language we propose is the same as is used in FRCP 12(a)(3)(B) (e.g., "officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States").

Attached are our proposed amended versions of Rules 4 and 40, along with explanatory committee notes. We believe these amendments will clarify application of the extended filing

deadlines to appeals in which a United States officer or employee sued in his individual capacity is a party, thereby providing the Government with sufficient time to file notices of appeal or petitions for rehearing in Bivens appeals.

Sincerely,

Douglas N. Letter
Appellate Litigation Counsel

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, employee, or agency is a party, including an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

* * *

Committee Note

Rule 4(a)(1)(B) is amended to clarify that the sixty day period for filing a notice of appeal also applies when an officer or employee of the United States sued in his individual capacity is a party. When a United States officer or employee is sued in his individual, rather than official capacity, and the United States provides the officer or employee with representation, the amended rule recognizes that the Solicitor General, as in any other case where the United States is a party, needs time to conduct a review of the case to determine whether an appeal is warranted.

The new language corresponds to that in Federal Rule of Civil Procedure 12(a)(3)(B), which was added to clarify that in actions "assert[ing] individual liability of a United States officer or

employee for acts occurring in connection with the performance of duties on behalf of the United States," the United States has sixty, rather than thirty, days to file an answer to a complaint. See FRCP 12, Advisory Committee Notes, 2000 Amendment. The Committee's rationale for adopting 12(a)(3)(B) was that "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in action against the United States, a United States agency, or a United States officer sued in an official capacity." See ibid.

Rule 40. Petition for Panel Rehearing

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

(1) Time. Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, if the United States or its officer, employee, or agency is a party, including an officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States, the time within which any party may seek rehearing is 45 days after entry of judgment, unless an order shortens or extends the time.

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Committee Note

Rule 40(a)(1) is amended to clarify that when an officer or employee of the United States, sued in his individual capacity, is a party, the time within which any party may seek rehearing is forty-five days from entry of judgment. When a United States officer or employee sued in his individual capacity is a party, and the United States represents the officer or employee, the United States, as in all other cases in which it is a party, needs additional time to review the case and determine whether to seek rehearing.

The amended rule is also intended to conform with amended language in Rule 4(a)(1)(B). The extended forty-five day period for rehearing in civil cases involving the United States is "analogous to the provision in Rule 4(a) extending the time for filing a notice of appeal in cases involving the United States, [and] recognizes that the Solicitor General needs time to conduct a

thorough review of the merits of a case before requesting a rehearing." See Rule 40, Advisory Committee Notes, 1994 Amendment. Rule 4(a)(1)(B) is similarly amended to clarify that the extended time for filing a notice of appeal in civil cases involving the United States applies equally to suits where a United States officer or employee, sued in his individual capacity, is a party.

As with the amendment to Rule 4(a)(1)(B), the amended language of Rule 40(a)(1) corresponds to Federal Rule of Civil Procedure 12(a)(3)(B), which was added to clarify that in actions "assert[ing] individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States," the United States has sixty, rather than thirty, days to file an answer to a complaint. See FRCP 12, Advisory Committee Notes, 2000 Amendment. The Committee's rationale for adopting 12(a)(3)(B) was that "[t]ime is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in action against the United States, a United States agency, or a United States officer sued in an official capacity." See ibid.