

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

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MEMORANDUM

DATE: May 21, 2002

TO: Judge Anthony J. Scirica, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Judge Samuel A. Alito, Jr., Chair
Advisory Committee on Appellate Rules

RE: Report of Advisory Committee on Appellate Rules

I. Introduction

The Advisory Committee on Appellate Rules met on April 22, 2002, in Washington, D.C. At its meeting, the Advisory Committee approved two sets of proposed amendments, one of which is now being presented to the Standing Committee, the other of which will be held and presented later as part of a group of proposed amendments. The Advisory Committee also agreed to continue to study a couple of controversial proposals, which I discuss below. Finally, the Advisory Committee removed several items from its study agenda.

Detailed information about the Advisory Committee's activities can be found in the minutes of the April 22 meeting and in the Advisory Committee's study agenda, both of which are attached to this report.

II. Action Items

A. Forms 1, 2, 3, and 5

Four of the five forms in the appendix to the Appellate Rules refer to "the ___ day of _____, 19__" (Forms 1 and 2), "entered on _____, 19__" (Form 3), or "entered in this case on _____, 19__" (Form 5). At its April meeting, the Advisory Committee voted to replace all references to "19__" in Forms 1, 2, 3, and 5 with references to "20__." This appears to be the type of technical change that does not need to be published for comment.

III. Information Items

A. Amendments Approved for Later Submission to the Standing Committee

The Advisory Committee is continuing to consider and approve proposed amendments to the Appellate Rules, although, pursuant to the wishes of the Standing Committee, the Advisory Committee will not forward these amendments in piecemeal fashion, but will instead present a package of amendments at a later date. At its April meeting, the Advisory Committee approved the following amendments:

- An amendment to Rule 26(a)(4), which would replace the reference to “Presidents’ Day” with a reference to “Washington’s Birthday.”
- An amendment to Rule 45(a)(2), which would replace the reference to “Presidents’ Day” with a reference to “Washington’s Birthday.”

B. Long-Term Projects

At its April meeting, the Advisory Committee decided to continue to study several proposed amendments, including two that I wish to bring to your attention, as they will undoubtedly be the subject of much controversy if the Advisory Committee should approve them for submission to the Standing Committee.

The first proposal pertains to 28 U.S.C. § 46(c) and Rule 35(a), both of which require a vote of “[a] majority of the circuit judges who are in regular active service” to hear a case en banc. A three-way circuit split has developed over the question whether judges who are disqualified are counted in calculating what constitutes a “majority”:

- Eight circuits use the “absolute majority” approach. In these circuits, judges who are disqualified 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 judges must vote to hear a case en banc. If 5 of the 12 judges are disqualified, all 7 of the non-disqualified judges would have to vote to take a case en banc.
- Four circuits use the “case majority” approach. In these circuits, judges who are disqualified 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 non-disqualified judges) would have to vote to take a case en banc.
- One circuit — the Third — uses the “modified case majority” approach. This approach works the same as the case majority approach, except that a case cannot

be taken en banc unless a majority of all judges — disqualified and non-disqualified — are eligible to vote on the question. Thus, a case in which 5 of the circuit's 12 active judges are disqualified can be heard en banc upon the votes of 4 judges; a majority of all judges would be eligible to vote, and a majority of those eligible to vote would have voted in favor of taking the case en banc. But a case in which 6 of the circuit's 12 active judges were disqualified cannot be taken en banc, even if all 6 non-disqualified judges vote in favor.

Members of the Advisory Committee have expressed the view that, given that there is both a national statute (28 U.S.C. § 46(c)) and a national rule (Rule 35(a)) addressing this issue, three very different practices should not exist within the circuits. The Advisory Committee will continue to work on this issue and may present an amendment to the Standing Committee at a later date.

The second potentially controversial matter on which the Advisory Committee is working is a proposal by the Department of Justice that the Appellate Rules be amended explicitly to permit the citation of non-precedential decisions. Members of the Advisory Committee favor such a rule, for a number of reasons, including the following:

- Currently, non-precedential decisions are the only source that parties are explicitly forbidden to cite. In some circuits, a party can cite an infinite variety of non-binding sources of authority — including everything from decisions of the courts of Great Britain to law review articles to op-ed pieces — but cannot cite a court to its own non-precedential opinions.
- Non-precedential decisions are widely cited in district courts and in state courts for their persuasive value. It is odd to have the non-precedential opinions of a court of appeals used to persuade district courts and state courts, but not used to persuade the very court that authored them. This is particularly awkward when a district court relies heavily on a non-precedential opinion in issuing a ruling, that ruling is appealed to the court of appeals, and the parties are not permitted to cite or discuss the non-precedential opinion on which the district court so heavily relied in deciding the case.
- Non-precedential decisions are widely available today — on the Internet and now in the Federal Appendix — and thus permitting citation of such decisions would no longer give a substantial advantage to the Justice Department, insurance companies, and other large, national litigators.

I should stress that the Justice Department's proposal addresses only the citation of non-precedential opinions; it does not in any way purport to tell courts whether or in what circumstances they can designate opinions as non-precedential.

I recently surveyed the chief judges about the Justice Department's proposal. I received a decidedly mixed response. The chief judges of the Third, Tenth, and Eleventh Circuits expressed support for the proposal; the chief judges of the First, Fourth, Eighth, Ninth, and Federal Circuits expressed opposition; the chief judge of the Sixth Circuit said that he would support a national rule, so long as it was similar to the Sixth Circuit's rule; and the chief judge of the Fifth Circuit said that the judges of her circuit were divided. No response was received from the chief judges of the Second, Seventh, or D.C. Circuits, although I have been informed that a written response from the Second Circuit is forthcoming.

The divisions among and within the circuits are reflected within the membership of the Advisory Committee. At this point, it appears to me that the Advisory Committee will eventually propose an amendment of some kind, although it is not yet clear to me exactly what form the proposed amendment will take.

We will continue to keep the Standing Committee informed of the deliberations of the Advisory Committee regarding these two matters.

**Advisory Committee on Appellate Rules
Table of Agenda Items — Revised May 2002**

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
95-04	Amend computation of time to conform to Civil Rules method. (Related to Nos. 97-01 and 98-12.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 09/97 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to Nos. 95-04 and 98-12.)	Advisory Committee & Los Angeles County Bar Ass'n	Awaiting initial discussion Retained on agenda with medium priority 09/97 Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
97-05	Amend FRAP 24(a)(2) in light of Prison Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 09/97 Draft approved 04/98 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00

97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	<p>Published for comment 08/00</p> <p>Approved with minor revisions for submission to Standing Committee 04/01</p> <p>Approved by the Standing Committee 06/01</p> <p>Approved by the Judicial Conference 09/01</p> <p>Approved by the Supreme Court 04/02</p> <p>Awaiting initial discussion</p> <p>Retained on agenda with low priority 09/97</p> <p>Draft approved 04/98 for submission to Standing Committee in 01/00</p> <p>Approved for publication by Standing Committee 01/00</p> <p>Published for comment 08/00</p> <p>Approved with minor revisions for submission to Standing Committee 04/01</p> <p>Approved by the Standing Committee 06/01</p> <p>Approved by the Judicial Conference 09/01</p> <p>Approved by the Supreme Court 04/02</p>
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	<p>Awaiting initial discussion</p> <p>Retained on agenda with low priority 09/97</p> <p>Draft approved 04/98 for submission to Standing Committee in 01/00</p> <p>Approved for publication by Standing Committee 01/00</p> <p>Published for comment 08/00</p> <p>Approved for submission to Standing Committee 04/01</p> <p>Approved by the Standing Committee 06/01</p> <p>Approved by the Judicial Conference 09/01</p> <p>Approved by the Supreme Court 04/02</p>
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	<p>Awaiting initial discussion</p> <p>Retained on agenda with low priority 09/97</p> <p>Draft approved 04/98 for submission to Standing Committee in 01/00</p> <p>Approved for publication by Standing Committee 01/00</p> <p>Published for comment 08/00</p> <p>Approved for submission to Standing Committee 04/01</p> <p>Approved by the Standing Committee 06/01</p> <p>Approved by the Judicial Conference 09/01</p> <p>Approved by the Supreme Court 04/02</p>
97-14	Amend FRAP 46(b)(1)(B) to replace the general “conduct unbecoming” standard	Standing Committee	<p>Awaiting initial discussion</p> <p>Retained on agenda with low priority 09/97</p>

with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.

97-18

Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."

Hon. Frank H. Easterbrook (CA7)

Awaiting initial discussion
Retained on agenda with high priority 09/97
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Approved by the Supreme Court 04/02

97-21

Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."

Advisory Committee

Awaiting initial discussion
Draft approved 09/97 for submission to Standing Committee in 01/00
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Approved by the Supreme Court 04/02

97-30

Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.

Luther T. Munford, Esq.

Awaiting initial discussion
Retained on agenda with high priority 09/97
Draft approved 04/98 for submission to Standing Committee in 01/00
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97-41

Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.

Solicitor General Waxman

Awaiting initial discussion
Draft approved 04/98 for submission to Standing Committee in 01/00
Approved for publication by Standing Committee 01/00
Published for comment 08/00
Approved for submission to Standing Committee 04/01

98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A).	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 04/98 Draft approved 10/98 for submission to Standing Committee in 01/00 10/98 draft withdrawn; discussed further and retained on agenda 04/99 Revised draft approved 10/99 for submission to Standing Committee in 01/00 Standing Committee deferred action 01/00 Further revised draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Further minor revisions approved by poll of Committee 05/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
98-06	Amend FRAP 4(b)(5) to clarify whether and to extent the filing of a FRCP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice Discussed and retained on agenda 04/99; awaiting draft amendment and Committee Note Draft approved 10/99 for submission to Standing Committee in 01/00 Approved for publication by Standing Committee 01/00 Published for comment 08/00 Approved for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02
98-11	Amend FRAP 5(c) to clarify application of FRAP 32(a) to petitions for permission to appeal.	Christopher A. Goelz (CA9 Circuit Mediator)	Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 10/99 for submission to Standing Committee in 01/00

Approved for publication by Standing Committee 01/00
 Revised draft approved 04/00 for submission to Standing Committee in 06/00
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 Published for comment 08/00
 Approved with minor revisions for submission to Standing Committee 04/01
 Approved by the Standing Committee 06/01
 Approved by the Judicial Conference 09/01
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 Approved with minor revisions for submission to

Advisory Committee

Hon. Will Garwood (CA5)

Hon. Will Garwood (CA5)

Amend FRAP 4(a)(4)(A)(vi), 27(a)(3)(A), 27(a)(4) & 41(b) to account for amendment to FRAP 26(a) regarding calculating time. (Related to Nos. 95-04 and 97-01.)

Amend FRAP 24(a)(3) to address potential conflicts with Prison Litigation Reform Act.

Amend FRAP 32 to require that briefs, written motions, rehearing petitions, etc. be signed.

98-12

99-01

99-02

99-03	Amend unspecified rules to permit electronic filing and service.	Subcommittee on Technology	<p>Awaiting initial discussion Discussed and retained on agenda 04/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02</p>
99-06	Amend FRAP 33 to incorporate notice provisions of FRBP 7041 and 9019.	Hon. L. Edward Friend II (Bankr. N.D. W. Va.)	<p>Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Bankruptcy Rules Committee</p>
99-07	Amend FRAP 26.1 to broaden financial disclosure obligations.	Standing Committee	<p>Awaiting initial discussion Discussed and retained on agenda 10/99 Draft approved 04/00 for submission to Standing Committee in 06/00 Approved for publication by Standing Committee 06/00 Published for comment 08/00 Approved with minor revisions for submission to Standing Committee 04/01 Alternative draft approved by poll of Committee 05/01 Approved by the Standing Committee 06/01 Approved by the Judicial Conference 09/01 Approved by the Supreme Court 04/02</p>
99-09	Amend FRAP 22(b) to specify procedure for obtaining certificate of appealability.	Hon. Anthony J. Scirica (CA3)	<p>Awaiting initial discussion Discussed and retained on agenda 04/00; awaiting proposal from Department of Justice Discussed and retained on agenda 04/01 Discussed and retained on agenda 04/02</p>

FRAP Item

Proposal

Source

Current Status

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

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

00-08

Amend FRAP 4(a)(6)(A) 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

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

00-12

Amend FRAP 28, 31 & 32 to specify the length, timing, and cover colors of briefs in cases involving cross-appeals.

Solicitor General Waxman

Awaiting initial discussion
Discussed and retained on agenda 04/01; awaiting revised proposal from Department of Justice
Discussed and retained on agenda 04/02

01-01

Add rule to regulate the citation of unpublished and non-precedential decisions.

Solicitor General Waxman

Awaiting initial discussion
Discussed and retained on agenda 04/01
Discussed and retained on agenda 04/02

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

02-01

Amend Rule 27(d) to apply typeface and type-style limitations of FRAP 32(a)(5)&(6) to motions.

Charles R. Fulbruge III
(CA5 Clerk)

Awaiting initial discussion
Discussed and retained on agenda 04/02