Minutes of Spring 2002 Meeting of
Advisory Committee on Appellate Rules
April 22, 2002
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 22, 2002, 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., Chief 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 Judge J. Garvan Murtha, the liaison from the Standing Committee; Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Charles R. "Fritz" Fulbruge III, the former liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office; Ms. Marie C. Leary from the Federal Judicial Center; and Mr. Christopher Jennings, law clerk to Judge Anthony J. Scirica (Chair of the Standing Committee).

Judge Alito introduced Judge Stewart, who replaced Judge Will Garwood as a member of the Committee. Judge Alito also introduced Ms. Waldron, who replaced Mr. Fulbruge as the liaison from the appellate clerks. Judge Alito thanked Mr. Fulbruge for his excellent service to the Committee.

II. Approval of Minutes of April 2001 Meeting

The minutes of the April 2001 meeting were approved by consensus.

III. Report on June 2001 and January 2002 Meetings of Standing Committee

Judge Alito asked the Reporter to describe the Standing Committee's most recent meetings.

The Reporter said that, at its June 2001 meeting, the Standing Committee approved for submission to the Judicial Conference all of the proposed amendments forwarded by this Committee. Only the proposed abrogation of Rule 1(b) occasioned substantial discussion and a dissenting vote; all other proposed amendments were approved unanimously and with little or no discussion.

This Committee did not meet during the fall of 2001, and thus it had nothing to report at the January 2002 meeting of the Standing Committee.

IV. Action Items

A. Item No. 00-03 (FRAP 26(a)(4) & 45(a)(2) — names of legal holidays)

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 26. Computing and Extending Time

(a) Computing Time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or applicable statute:

* * * * *

(4) As used in this rule, "legal holiday" means New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, Christmas Day, and any other day declared a holiday by the President, Congress, or the state in which is located either the district court that rendered the challenged judgment or order, or the circuit clerk's principal office.

Committee Note

Rule 26(a)(4) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's

Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

Rule 45. Clerk's Duties

(a) General Provisions.

* * * * *

(2) **When Court Is Open.** The court of appeals is always open for filing any paper, issuing and returning process, making a motion, and entering an order. The clerk's office with the clerk or a deputy in attendance must be open during business hours on all days except Saturdays, Sundays, and legal holidays. A court may provide by local rule or by order that the clerk's office be open for specified hours on Saturdays or on legal holidays other than New Year's Day, Martin Luther King, Jr.'s Birthday, ~~Presidents' Day~~ Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, and Christmas Day.

Committee Note

Rule 45(a)(2) has been amended to refer to the third Monday in February as "Washington's Birthday." A federal statute officially designates the holiday as "Washington's Birthday," reflecting the desire of Congress specially to honor the first president of the United States. *See* 5 U.S.C. § 6103(a). During the 1998 restyling of the Federal Rules of Appellate Procedure, references to "Washington's Birthday" were mistakenly changed to "Presidents' Day." The amendment corrects that error.

The Reporter reminded the Committee that, at its April 2001 meeting, it had agreed to amend the Appellate Rules so that they referred to the third Monday in February as "Washington's Birthday" rather than as "Presidents' Day." The Reporter said that the draft amendment would implement this Committee's decision and would ensure that the Appellate Rules would be consistent not only with 5 U.S.C. § 6103(a), but also with the Criminal Rules, which have recently been restylized and retain references to "Washington's Birthday."

A member moved that the proposed amendments to Rules 26(a)(4) and 45(a)(2) be approved. The motion was seconded. The motion carried (unanimously).

B. Item No. 00-08 (FRAP 4(a)(6)(A) — 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 motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives written notice of the entry, 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~~ such 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) permits a district court to reopen the time to appeal a judgment or order if the district court finds that four conditions have been satisfied. First, the district court must 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 must 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 must 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 must find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to address confusion about what kind of "notice" triggers the 7-day period under subdivision (a)(6)(A) and about what kind of "notice" must be found lacking under subdivision (a)(6)(B) before the time to appeal may be reopened.

Subdivision (a)(6)(A). Subdivision (a)(6)(A) requires 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 have had difficulty agreeing upon what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that have addressed the question hold that only *written* notice is sufficient, although nothing in the text of the rule suggests 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 holds that while subdivision (a)(6)(A) does not require written notice, "the quality of the communication must rise to the functional equivalent of written notice." *Nguyen v. Southwest Leasing & Rental, Inc.*, 282 F.3d 1061, 1066 (9th Cir. 2002). It appears that verbal communications can be deemed "the functional equivalent of written notice" if they are sufficiently "specific, reliable, and unequivocal." *Id.* Other circuits have suggested in dicta that subdivision (a)(6)(A) requires only "actual notice," which, presumably, could include verbal notice that is 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 have read into subdivision (a)(6)(A) restrictions that have appeared only in 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 currently appear in neither subdivisions (a)(6)(A) nor (a)(6)(B) (such as a 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)).

Subdivision (a)(6)(A) has been amended to resolve this circuit split. Under amended subdivision (a)(6)(A), only *written* notice of the entry of a judgment or order will trigger 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 amended subdivision (a)(6)(A) is written notice of the entry of a judgment or order, not a copy of the judgment or order itself. Moreover, nothing in subdivision (a)(6)(A) requires that the written notice be received from any particular source, and nothing requires that the written notice have been 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 subpart (A)'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 received 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 written notice. However, a verbal communication is not written notice for purposes of subdivision (a)(6)(A), no matter how specific, reliable, or unequivocal.

Subdivision (a)(6)(B). Prior to 1998, 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 be served by a party pursuant to that same rule. In other words, 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 move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, 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, 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 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, 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 precludes a party from moving to reopen the appeal was no longer limited to Civil Rule 77(d) notice; under the amendment, *some* kind of notice, in addition to Civil Rule 77(d) notice, would preclude a party. But the text of the amended rule did not make clear what kind of notice would qualify. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, subdivision (a)(6)(B) has been amended to restore its pre-1998 simplicity. Under amended subdivision (a)(6)(B), if the court finds that the moving party was entitled under Civil Rule 77(d) to notice of the entry of the judgment or order sought to be appealed and further finds that the party did not receive "such notice"within 21 days — that is, the notice described in Civil Rule 77(d) — 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 be formally served under Civil Rule 5(b), any notice that has not been so served will not operate to preclude the reopening of the time to appeal under subdivision (a)(6)(B).

The Reporter said that Rule 4(a)(6) provides a safe harbor for litigants who fail to bring timely appeals because they do not receive notice of the entry of judgments against them. Under the rule, the concept of "notice" is important in two different respects. First, under subdivision (B), a party seeking to move to reopen the time to appeal a judgment must show that he or she did not receive "notice" of that judgment within 21 days after its entry. Second, under subdivision (A), a party must bring a motion to reopen the time to appeal a judgment no later than 7 days after receiving "notice" of its entry.

When Rule 4(a)(6) was adopted in 1991, it was clear that "subdivision (B) notice" was intended to be different from "subdivision (A) notice." Subdivision (B) notice was limited to notice formally served under Civil Rule 77(d), while Subdivision (A) notice encompassed any kind of notice from any source.

Two difficulties have arisen in interpreting Rule 4(a)(6) — one the fault of the courts and one the fault of this Committee.

The problem with Subdivision (A) notice is the fault of the courts. Although neither the text of the rule nor the Committee Note imposes any restrictions on the type of notice that suffices to trigger the seven-day window, a four-way circuit split has developed over the meaning

of "notice" in Subdivision (A). At one extreme are courts that read the rule literally and hold that any kind of notice from any source suffices to trigger the seven-day window. At the other extreme are courts that hold that only formal notice served upon a party under Civil Rule 77(d) suffices. In the middle are courts that hold that the notice must be in writing, but need not be formally served. The Ninth Circuit takes the unique position that, although the notice need not be in writing, it needs to be in a form that is the "functional equivalent" of writing.

The Reporter said that the amendment that he had drafted to Subdivision (A) was intended to require written notice, but to define "written" broadly to include, in essence, anything that can be read, such as a website, e-mail message, or docket sheet. The Reporter also said that the amendment was intended to make clear that such written notice can come from any source and does not have to be formally served under Civil Rule 77(d).

The problem with Subdivision (B) notice is the fault of this Committee and results from a 1998 amendment to Rule 4(a)(6). Prior to 1998, it was clear that, if a party was entitled to notice of entry of judgment *under Civil Rule 77(d)* and the party did not receive notice *under Civil Rule 77(d)*, then the party could bring a motion to extend the time to appeal. After 1998, it is no longer clear what kind of notice must be lacking. The amendment to Rule 4(a)(6) broadened the type of "disqualifying" notice beyond notice served under Civil Rule 77(d) to include *any* kind of notice, and broadened the source of such notice from those authorized to serve notice under Civil Rule 77(d) (the *clerk* or a party) to others (the *court* or a party). Thus, under amended Subdivision (B), if a party is entitled to notice of entry of a judgment under Civil Rule 77(d), and the party does not receive either that notice or some other kind of (unspecified) notice from someone acting on behalf of the district court or another party, then the party is eligible to move to extend the time to appeal.

The Reporter said that this ambiguity in Subdivision (B) would almost surely lead to confusion and conflict in the circuits. He also said that, as far as he could tell, Subdivision (B) worked well before being amended in 1998. The Reporter said that the amendment was intended to restore Subdivision (B) to its pre-1998 simplicity: A party would be barred from bringing a motion to reopen the time to appeal only if that party received notice under Civil Rule 77(d) within 21 days. Any other kind of notice would not preclude a motion to reopen.

The Committee discussed the proposed amendment at length, focusing on four issues:

1. The Committee discussed whether to require that Subdivision (A) notice be in writing, as the Reporter had proposed. A couple of members argued that, for example, a phone call from the clerk of court should suffice to trigger the seven-day window. Other members responded that written communications are more susceptible of proof than oral communications and that we should try to avoid creating a situation where, for example, the clerk of court is called as a witness to testify about when he or she engaged in a phone conversation with an attorney. A member moved that Subdivision (A) be amended to require written notice. The motion was seconded. The motion carried (unanimously).

2. The Committee also discussed the definition of "written." Some members were uncomfortable with the Committee Note, which essentially made an "eyes/ears" distinction: Notice that is read is deemed "written," while notice that is heard is not. One member pointed out that a claim that a party learned of the entry of a judgment by visiting a website on a particular date is no more susceptible of proof than a claim that a party learned of the entry of a judgment in an oral conversation. However, after further discussion, the Committee concluded that a narrower definition of "written" would likely create more problems than it would solve.

3. As to Subdivision (B) notice, members agreed that the subdivision should be amended to eliminate the ambiguity identified by the Reporter. However, one member pointed out that the amendment was itself ambiguous. Under the amendment, Subdivision (B) would require that the court find "that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive such notice within 21 days after entry." The problem is with the words "entitled" and "such." Under Civil Rule 77(d), a party is "entitled" to notice of entry of the judgment only from the *clerk*. Thus, in referring to "such notice" — that is, the notice to which "the moving party was *entitled*" — amended Subdivision (B) must be referring to notice served by a *clerk*. But the Committee Note goes on to refer to receiving notice from *either* the clerk *or* any party. Since there is no entitlement to notice from a party, it is impossible for a party to provide "such" notice.

The Committee agreed that it wanted any kind of Civil Rule 77(d) notice — that is, either the notice that the clerk is obligated to serve or the notice that a party is authorized to serve — to suffice to cut off the right to bring a motion to reopen. The Committee struggled with trying to redraft the amendment to Subdivision (B) to say that. The Committee eventually agreed that Subdivision (B) should be redrafted to provide: "the court finds that the moving party did not receive notice under Civil Rule 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry."

4. A member moved that Subdivision (A) be redesignated as Subdivision (B) and that Subdivision (B) be redesignated as Subdivision (A). She argued that the rule would read more clearly if it first described the formal notice of entry of judgment whose absence entitles a party to move to reopen the time to appeal and then described the informal notice that triggers the seven-day deadline to bring the motion. The motion was seconded. The motion carried (unanimously).

The Reporter agreed to present a redrafted amendment to Rule 4(a)(6) at the next Committee meeting. One member asked that the Committee Note be shortened. He complained generally of the burden that long Notes impose on practitioners who, while in court, rely upon the popular soft-covered West compilations. Other members disagreed, pointing out that Notes are also intended to serve judges and lawyers who are doing research in their offices and trying to understand the reasons why a rule was amended. When an amendment seeks to address a complicated problem — or when the Committee can anticipate future difficulties that will arise in interpreting an amendment — longer Notes can be helpful and can save courts and attorneys work in the long run.

A member said that she had trouble with the "tenses" when reading the Note — that is, she had to concentrate to figure out when the Note was describing a past version of Rule 4(a)(6), when the Note was describing the present version, and when the Note was describing the amended version. The Reporter said that he would try to make the "tenses" clearer when redrafting the Note.

C. Item No. 00-12 (FRAP 28, 31 & 32 — cover colors in cross-appeals)

Mr. Letter introduced alternative sets of proposed amendments and Committee Notes regarding briefing in cross-appeals. The first set would amend Rules 28(c), 28(h), 31(a)(1), 32(a)(2), 32(a)(7)(A), and 32(a)(7)(B) — that is, it would address the issue through amendments to several existing rules. The second set would address the issue primarily through a new Rule 28A, although a couple of existing rules (e.g., Rule 32(a)(2) regarding the covers of briefs) would also be amended. (The draft amendments and Committee Notes are found under Tab IV-C in the agenda book.)

Mr. Letter said that the rules on cross-appeals vary from circuit to circuit, sometimes in significant ways. For example, in one circuit the parties to a cross-appeal are permitted to serve a total of three briefs, while in most circuits they are permitted a total of four. Among the circuits that permit four briefs, there are differing rules regarding the length of those briefs and the colors of their covers. As a result, the Justice Department and other litigants with national practices frequently have to get extensive guidance from clerks' offices.

The Committee discussed this issue at its April 2001 meeting and asked the Department to prepare three alternative proposals:

- a proposal that would address these issues through amendments to several existing rules;

- a proposal that would combine all provisions applicable to briefs filed in cross-appeals into one new rule; and

- a proposal that would treat cross-appeals as two separate consolidated cases.

Mr. Letter said that the Department had considered and rejected the last proposal (treating cross-appeals as two separate cases). Under that proposal, instead of the appellee/cross-appellant filing a single brief that acts both as a principal brief on the merits of the cross-appeal and as a response to the brief of the appellant/cross-appellee on the appeal, the appellee/cross-appellant would file two separate briefs — a response in the first appeal and a principal brief in the second appeal. And instead of the appellant/cross-appellee filing a single brief that acts both as a response brief in the cross-appeal and a reply brief in the appeal, the appellant/cross-appellee would file a reply brief in the first appeal and a response brief in the second appeal. This would

significantly increase the number of pages that would have to be drafted by parties and considered by courts and create problems regarding cross-references and other matters.

Mr. Letter said that the Department had drafted a new Rule 28A that would consolidate *most* provisions regarding cross-appeals into one rule. Mr. Letter said that it was probably not advisable to consolidate *all* such provisions into one rule; for example, the colors of the covers of briefs would most logically be addressed in Rule 32(a)(2). Mr. Letter said that the Department was indifferent as between adopting a new Rule 28A or amending several existing rules.

Judge Alito identified the following issues for the Committee: (1) Should there be more extensive national rules on briefing in cross-appeals? (2) Should cross-appeals be treated like two separate consolidated appeals with separate briefing in each case? (3) If cross-appeals are to be treated differently than consolidated appeals, how many briefs should the parties serve in a cross-appeal? (4) What should the length of each of those briefs be? (5) What color should the covers of those briefs be?

The Committee quickly reached a consensus that FRAP should be amended to provide national rules governing briefing in cross-appeals and that cross-appeals should not be treated like separate, consolidated appeals. The Committee also quickly reached consensus that a total of four briefs should be permitted in cross-appeals:

Brief One: The appellant/cross-appellee's principal brief on the merits of the appeal.

Brief Two: The appellee/cross-appellant's response to Brief One and principal brief on the merits of the cross-appeal.

Brief Three: The appellant/cross-appellee's response to Brief Two on the cross-appeal and reply to Brief Two on the appeal.

Brief Four: The appellee/cross-appellant's reply to Brief Three on the cross-appeal.

The Committee had a lengthy discussion regarding word limitations. At the April 2001 meeting, the Justice Department had proposed that Brief One be limited to 14,000 words, Brief Two to 16,500 words, Brief Three to 14,000 words, and Brief Four to 7000 words. This would give the appellant/cross-appellee a total of 28,000 words, and the appellee/cross-appellant a total of 23,500 words. The proposal of the Department was consistent with the local rules adopted by the majority of the circuits, except that most circuits limit Brief Two to 14,000 words. At the April 2001 meeting, the Committee decided, over the objection of the Department, that Brief Two should be limited to 14,000 words. Mr. Letter asked the Committee to reconsider its decision.

A member asked whether two separate word limits could apply to Brief Three. The cross-appeal may raise only a minor issue, one that the appellant/cross-appellee could easily address in 1000 words. In this situation, the appellant/cross-appellee is essentially allowed to file a 13,000-

word reply brief. Other members thought it impracticable to try to assign word limits to portions of Brief Three, as it is often difficult to distinguish which part of Brief Three is responding to the cross-appeal and which part is replying to Brief Two's response to the appeal. Mr. Fulbruge said that the clerks would have difficulty enforcing such a rule.

The Committee debated at length whether to approve the word limitations recommended by the Department of Justice or whether instead to limit Brief Two to 14,000 words. Those in favor of the Department's proposal cited the fact that, even under the proposal, the appellant/cross-appellee gets 4,500 more words than the appellee/cross-appellant. Limiting Brief Two to 14,000 words would increase that disparity to 7,000 words, which would be unfair to the appellee/cross-appellant, especially in cases in which both parties are equally aggrieved and the denomination of one as the "appellant" simply reflects who got to the courthouse first. Although clerks have the discretion to allow longer briefs, clerks can be unpredictable in their exercise of that discretion.

Other members argued against the Department's proposal, and argued that Brief Two should be limited to 14,000 words, as it is in most circuits. One member even expressed support for limiting Brief One and Brief Two to 14,000 words, and Brief Three and Brief Four to 7,000 words. These members argued that, generally speaking, appellate courts do not suffer from too little briefing. To the contrary, judges are plagued by overly long briefs. In rare cases in which the appellee/cross-appellant needs more than 14,000 words in Brief Two, it can seek permission from the clerk. The main effect of raising the general limit on Brief Two to 16,500 words will be that hundreds of appellees/cross-appellants will lard their briefs with 2,500 needless words. As to the disparity between the overall words allotted to the appellant/cross-appellee and the appellee/cross-appellant, these members argued that there is little correlation between the size of the brief and its effectiveness. Moreover, the appellant is generally the more aggrieved party — and generally has more work to do in its briefs — and thus some disparity is justified.

A member moved that the Department's proposal be approved. The motion was seconded. The motion carried (5-4).

The Committee agreed by consensus with the Department's proposal that the cover on Brief One be blue, on Brief Two red, on Brief Three yellow, and on Brief Four gray. The Committee also agreed by consensus that, rather than attempt to address the issue of briefing in cross-appeals in a separate rule, several of the existing rules should be amended. The Reporter agreed that he would carefully review the draft amendments and Committee Notes presented by the Department, edit them as necessary, and present them at the next meeting of the Committee.

D. Item No. 00-13 (FRAP 29 — preclusion of amicus briefs)

The Reporter introduced the following proposed amendment and Committee Note:

Rule 29. Brief of an Amicus Curiae

(a) When Permitted.

(1) **Government Briefs.** The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court.

(2) **Other Briefs.** Any other amicus curiae may file a brief only:

(A) by leave of court or

(B) if the brief states that all parties have consented to its filing.

(3) **Rejection of Briefs.** A court may reject a brief filed under Rule 29(a)(2)(B) if consideration of that brief would result in the disqualification of a judge.

Committee Note

Subdivision (a). Rule 29(a) gives the government the right to file an amicus-curiae brief without seeking the leave of the court or the consent of the parties. As to all others, Rule 29(a) permits the filing of an amicus-curiae brief only "by leave of court or if the brief states that all parties have consented to its filing."

Rule 29(a) may be understood to provide that, when all parties consent to the filing of a private amicus-curiae brief, the court has no alternative but to consider the brief. That, in turn, may open the door to the strategic use of amicus-curiae briefs to force the disqualification of particular judges. For example, someone might hire the sibling of a judge to file an amicus-curiae brief, knowing that such a filing will likely result in the disqualification of the judge under 28 U.S.C. § 455 or the Code of Conduct for United States Judges. Even when an amicus-curiae brief has not been filed for the purpose of disqualifying a judge — but nevertheless has that effect — the benefit to the court of maintaining the original panel or the full en-banc court may outweigh the benefit to the court of receiving the amicus-curiae brief.

> Rule 29(a) has been amended to make clear that, even when all parties have consented to the filing of a private amicus-curiae brief, the court may act on its own initiative to reject that brief if its consideration would result in the disqualification of a judge. After all, "[t]he term 'amicus curiae' means friend of the court, not friend of a party." *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (Posner, C.J., in chambers). If the court does not want to consider a private amicus brief, Rule 29(a) should not force it to do so.

The Reporter said that the judges of the First Circuit were concerned about the fact that, under Rule 29(a), leave of court is not necessary to file a "private" amicus brief if "all parties have consented to its filing." The particular concern of the First Circuit is with the strategic use of amicus briefs to force the disqualification of particular judges. For example, if someone hired the sibling of a judge to prepare and file an amicus brief, that judge would likely feel obligated to disqualify himself or herself.

The Reporter recommended that this suggestion be removed from the study agenda. The Reporter said that it was hard for him to imagine that the situation feared by the First Circuit occurs often. The situation would arise only if all of the parties affirmatively consented to the filing of an amicus brief and if that brief resulted in the disqualification of one of the members of the panel assigned to hear the case (or one of the members of the en banc court). Presumably, it would be a rare brief that would both receive the consent of all parties and cause such a disqualification. The Reporter said that he could not find a single instance in which anyone tried such a tactic, much less succeeded. Moreover, with one exception, he could not find anything that addressed this tactic in the local rules of the courts of appeals, which also suggests that it has not been a problem. Given that Rule 29(a) has remained unchanged in relevant part since the adoption of the Federal Rules of Appellate Procedure in 1967, and given that there is no evidence that the problem feared by the First Circuit has actually arisen, the Reporter said that he recommended that the Committee decline to amend Rule 29(a).

The Reporter continued that, if the Committee disagreed, it could proceed in one of two ways. First, the Committee could simply delete the provision that permits amicus briefs to be filed without leave of court. That would allow the court to ascertain before ruling on the motion whether permitting the brief to be filed would result in the disqualification of any judge. However, it would also increase the workload of the court, as motion practice would be necessary whenever a private party sought to file an amicus brief. Second, the Committee could amend Rule 29(a) so that the rule continued to permit a brief to be "filed" without leave of the court if all parties consent, but also provided explicitly that the court may "reject" such a brief if its consideration would result in the disqualification of a judge. The amendment and Committee Note drafted by the Reporter take the latter approach.

A couple of members spoke in favor of amending the rule. One expressed the concern that, as judges are required to disclose more and more detailed information about their

investments, the strategic use of amicus briefs could increase. Another pointed out that, in many cases, the parties consent to the filing of amicus briefs without giving it much thought, opening the door to the strategic use of such briefs. He said that the judges of the D.C. Circuit shared the concern of the judges of the First Circuit. He said that the concern went beyond parties intentionally using amicus briefs to disqualify judges; amicus briefs filed in good faith that trigger judicial disqualifications can also be problematic.

Other members spoke against amending the rule. A member said that the Appellate Rules should not be amended to address problems that occur rarely if ever. Another member agreed and said that, given that amici are not parties, the ability to use amicus briefs strategically is quite limited.

A member pointed out the practical difficulties of trying to bring about the result desired by the First Circuit. In all cases, the attorneys would have to do the work of preparing the brief, and the court would have to do the work of reading the brief. Under the first option described by the Reporter, attorneys would always have to ask permission to file the completed brief, and courts could say "no." Under the second option, courts could always reject the completed brief after it was filed. Under both options, then, a brief that an amicus had spent time and money to prepare could be rejected even though every party to the case had consented to its filing.

After further discussion, a member moved that Item No. 00-13 be removed from the Committee's study agenda. The motion was seconded. The motion carried (8-1).

E. Item No. 01-05 (change references to "19__" in forms)

The Reporter pointed out that four of the five forms attached 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). He recommended that the Committee change the forms to refer to "20___" instead of to "19___."

A member moved that the change be made. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item No. 95-03 (new FRAP 15(f) — prematurely filed petitions to review)

Judge Alito said that Item No. 95-03 arose out of a suggestion by Judge Stephen Williams of the D.C. Circuit, a former member of this Committee. In 1995, Judge Williams recommended that a new Rule 15(f) be added to the Appellate Rules to provide that when, under governing law, an agency order is rendered non-reviewable by the filing of a petition for rehearing or similar petition with the agency, any petition for review or application to enforce that non-reviewable order would be held in abeyance and become effective when the agency disposes of the last such

review-blocking petition. Judge Williams's suggestion was inspired by Rule 4(a)(4)(B)(i) and was intended to align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal of judicial decisions.

The Committee approved a proposal to add such a Rule 15(f), and the proposal was published for comment in August 2000. In response, Judge A. Raymond Randolph, the Chief Judge of the D.C. Circuit, wrote to the Committee and expressed the "unanimous" and "strong" opposition of the Circuit's judges and its Advisory Committee on Procedures to proposed Rule 15(f). In light of that opposition, this Committee deferred further action on Rule 15(f).

Judge Alito said that he had talked to Judge Williams, and that Judge Williams confirmed that his colleagues were strongly opposed to new Rule 15(f). Judge Alito said that, given that the problem that Rule 15(f) is intended to solve is a problem affecting mainly the D.C. Circuit, and given the strong opposition of that circuit to the proposed rule, the proposed rule had little chance of clearing the Standing Committee or the Judicial Conference. For that reason, Judge Alito asked the Committee to remove Item No. 95-03 from the study agenda.

A couple of members affirmed that they continued to believe that proposed Rule 15(f) makes sense on the merits. There is a "trap" in the D.C. Circuit, and, unless the Appellate Rules are amended to fix that trap, it will continue to be easy for litigants unknowingly to forfeit their right to appellate review of agency action. However, these members also acknowledged the political realities of the situation and the fact that Item No. 95-03 had now been pending on the study agenda for seven years.

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

B. Item No. 97-31 (FRAP 47(a)(1) — uniform effective date for local rule changes) and Item No. 98-01 (FRAP 47(a) — conditioning effectiveness of local rules on filing with Administrative Office)

The Reporter reminded the Committee that, at its April 1998 meeting, it approved an amendment to Rule 47(a) that would do two things: First, it would bar the enforcement of any local rule that had not been filed with the Administrative Office. Second, it would require that any change to a local rule must take effect on December 1, barring an emergency.

The Committee later decided not to submit this amendment to the Standing Committee because of several concerns. First, members of the Standing Committee and this Committee have expressed concern that prescribing a uniform effective date for changes to local rules would violate 28 U.S.C. § 2071(b), which provides that a local rule "shall take effect upon the date specified by the prescribing court." Second, the A.O. has expressed concern that conditioning the enforcement of local rules upon their receipt by the A.O. would trigger a flood of inquiries to the A.O. Finally, the rules of practice and procedure should not differ on these points. If there is to

be a uniform effective date for changes to local rules, or if there is to be a requirement that local rules be filed with the A.O., then those provisions should appear in all of the rules of practice and procedure, and not just in the Appellate Rules.

The Reporter suggested that it might be time to remove Item Nos. 97-31 and 98-01 from the study agenda. At its January 2002 meeting, the Standing Committee engaged in a lengthy discussion of the proliferation of local rules, in the context of a review of the progress of the new Local Rules Project. In the course of that discussion, several members of the Standing Committee expressed reservations about these two proposals. Moreover, the other advisory committees reported either that their members had objections to the proposals or that working on similar proposals was not a high priority for them.

The Reporter also said that it seems clear that no action regarding local rules is going to be taken by the Standing Committee until the Local Rules Project completes its work and submits its recommendations. The recommendations that relate to all of the rules of practice and procedure are likely to be considered by a joint working group, consisting of members of all of the advisory committees. Prof. Coquillette agreed. He said that the Local Rules Project will likely present a tentative report to the Standing Committee in June 2002 and a final report in January 2003. Prof. Coquillette also suggested that, in light of the issue regarding 28 U.S.C. § 2071(b), the Standing Committee may deem it prudent to work with Congress on a legislative solution to the local rules problem.

A member moved that Item Nos. 97-31 and 98-01 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

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

The Reporter reminded the Committee that, at its April 2000 meeting, it removed from its study agenda a proposal that Rule 3 be amended to prevent the dismissal of an appeal when a notice of appeal does not explicitly name the court to which the appeal is taken, but only one court of appeals has jurisdiction over the appeal. The proposal had been placed on the study agenda after a panel decision of the Sixth Circuit created a circuit conflict on this issue. *See United States v. Webb*, 157 F.3d 451 (6th Cir. 1998). The proposal was removed from the study agenda after the en banc Sixth Circuit eliminated the circuit conflict by overturning the decision of the panel. *See Dillon v. United States*, 184 F.3d 556 (6th Cir. 1999) (en banc).

Public Citizen Litigation Group has asked that this proposal be restored to the Committee's study agenda. The Reporter said that, in his opinion, there is no reason to do so. The circuits that have addressed the issue continue to be unanimous that dismissal of an appeal is not necessary under these circumstances. And, in the wake of the Supreme Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001), it is extremely unlikely that a future circuit split will develop. The Supreme Court specifically stated in *Becker* that "imperfections in noticing an

appeal should not be fatal where no genuine doubt exists about who is appealing, from what judgment, *to which appellate court*." *Id.* at 767 (emphasis added).

A couple of members agreed with the Reporter. A member moved that Item No. 99-05 not be restored to the study agenda. The motion was seconded. The motion carried (unanimously).

D. Item No. 99-09 (FRAP 22(b) — COA procedures)

The Reporter said that Item No. 99-09 arose out of a suggestion by Judge Scirica that this Committee study the way that the circuit courts process requests for certificates of appealability ("COAs") and consider whether the Appellate Rules should be amended to bring about more uniformity. At the April 2000 meeting of this Committee, the Department of Justice agreed to study this matter.

The Department reported back to the Committee at its April 2001 meeting. The Department argued, and the Committee agreed, that the variation in circuit procedure was not creating a problem for litigants and that this Committee should allow more time for circuit-by-circuit experimentation before trying to impose detailed rules. The Committee concluded that this matter should be removed from its study agenda, with one exception.

The Department complained that, in some circuits, the government is required to file a brief on the merits before the court decides whether to grant a COA. The government believes that this practice defeats the purpose of the COA procedure, which is to spare the government from having to participate in meritless habeas proceedings. The Department proposed that this Committee approve a new Rule 22(b)(4), which would provide that the government cannot be required to submit a brief until the court first decides whether to grant a COA.

Members of this Committee expressed opposition to the Department's proposal for various reasons, which are described in the minutes of the April 2001 meeting. The Committee did not vote on the Department's proposal, but suggested to the Department that it reconsider whether it wanted to pursue its proposal, given the opposition of several Committee members.

The Reporter said that Mr. Letter had informed him that the Department had decided to withdraw its proposed amendment, and thus that Item No. 99-09 could be removed from the Committee's study agenda. Mr. Letter responded that, subsequent to talking with the Reporter, he had learned that the United States Attorneys were interested in presenting a more limited version of the proposal to which this Committee had reacted negatively in April 2001. By consensus, the Committee agreed to leave this item on the study agenda so that the Department can pursue this matter further.

E. Item No. 00-05 (FRAP 3 — notice of appeal of corporation unsigned by attorney)

At the request of Judge Motz, this Committee placed on its study agenda the question whether Rule 3 should be amended to specifically address the situation in which a notice of appeal filed on behalf of a corporation is signed only by one of the corporation's officers, and not by an attorney. Judge Motz feared that the Fourth Circuit might create a conflict over this issue with the Ninth Circuit. *See Bigelow v. Brady (In re Bigelow)*, 179 F.3d 1164 (9th Cir. 1999).

Judge Motz said that this item can be removed from the study agenda. The Fourth Circuit issued its decision and agreed with the Ninth Circuit. *See Amzura Enters., Inc. v. Ratcher*, 18 Fed.Appx. 95 (4th Cir. 2001). Also, in light of the Supreme Court's decision in *Becker v. Montgomery*, 532 U.S. 757 (2001), it is highly unlikely that any circuit will disagree with the Fourth and the Ninth in the future.

A member moved that Item No. 00-05 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

F. Item No. 00-07 (FRAP 4 — specify time for appeal of Hyde Amendment order)

At the request of Judge Duval, this Committee placed on its study agenda the question whether an appeal from an order granting or denying an application for attorney's fees under the Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) should be governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). The circuits have split over this question.

During a discussion of this issue at its April 2001 meeting, Committee members described similar issues over which the circuits have disagreed. The Justice Department offered to try to identify all instances in which there are disagreements over which appellate deadline should be applied to an order disposing of a "civil-type" motion brought in connection with a criminal proceeding. The Department also offered to try to draft an amendment to address the problem.

Mr. Letter gave a status report on the Department's efforts. He said, in essence, that the problem had turned out to be very complicated, and that the Department had not yet settled upon a solution. He said that he would have more to report at the next meeting of the Committee.

One member asked the Department to consider a rule that would state simply that Rule 4(b) would apply to appeals from judgments of conviction or sentence, and that Rule 4(a) would apply to all other appeals. Under this approach, Rule 4(a) would govern all post-judgment motions in criminal cases. A member responded that such an approach would change existing law as to some appeals and would probably not be as easy to administer as it sounds. For example, would Rule 4(a) or 4(b) apply to appeals of orders denying FRCrP 35(c) motions (motions to correct a sentence "imposed as a result of arithmetical, technical, or other clear error")? If the

answer is Rule 4(a), do we really want defendants to have 60 days to appeal an order denying a FRCrP 35(c) motion?

Ms. Waldron stated that most post-judgment motions in criminal proceedings are made pro se — often by movants who are imprisoned in a jurisdiction that is not the same as the jurisdiction in which the motion must be made — and thus a universal 60-day deadline for such motions might be fairer. Ms. Waldron also pointed out that there is uncertainty over the deadline that applies to orders disposing of motions made under 18 U.S.C. § 3582(c)(2) (which authorizes a prisoner to move to reduce his sentence if a favorable change is made to the sentencing guidelines).

A member suggested that the Committee consider abolishing the distinction between civil and criminal appeals and give litigants against the United States 60 days to appeal all judgments or orders, regardless of the type of case in which they are entered. He said that giving defendants 60 days to appeal instead of 10 days would not create much delay or cause much harm to parties. Any defendant who wants to do so can file an appeal in one day; thus, a longer appellate deadline would not hurt defendants. The only party who might be prejudiced is the government, which might have to wait longer to get a conviction affirmed. That is not a compelling objection.

A member asked whether defendants need a longer period of time in which to appeal in criminal cases in order to secure counsel for the appeal. A member responded that they did not. In a typical case, after a defendant is convicted, the last act of his trial attorney will be to file a notice of appeal. Filing a notice of appeal is quick and easy.

A couple of members said that they would be more comfortable with a rule that addresses specifically — on a category-by-category basis — which deadlines apply to which orders. To date, the Justice Department has identified only a handful of orders whose appellate deadlines are in doubt. Rather than crafting a sweeping general rule, which could have unanticipated consequences and eventually create as many problems as it solves, these members would rather try to address each problem as it arises.

A member moved that the Justice Department be asked to draft an amendment that would specifically address each order whose appellate deadline is in dispute. The motion was seconded. The motion carried (unanimously).

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

At its April 2001 meeting, this Committee asked the Federal Judicial Center ("FJC") to study the way that the courts of appeals have implemented 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. In particular, the Committee asked the FJC to describe how the circuits have addressed the question of whether judges who are disqualified are counted in calculating what constitutes a "majority."

Ms. Leary reported that the FJC had surveyed all 13 circuits on this question, and that three different approaches appear to be in use:

> 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.

Ms. Leary reported that, in all 13 circuits, a judge who is temporarily unavailable because of travel, illness, or another reason is counted in the base — that is, is considered an active, non-disqualified judge. Ms. Leary also reported that only minor differences existed among the circuits in the treatment of senior judges.

Prof. Mooney said that when Judge Kenneth Ripple chaired this Committee, and she served as the Committee's Reporter, the Committee had approved a uniform rule on this issue. The Committee's proposal caused a firestorm of protest among the chief judges, who were nearly unanimous in their belief that this is a matter of court administration that should be left to each circuit to decide for itself. Prof. Mooney said that she disagreed with the chief judges. There is both a national statute (28 U.S.C. § 46(c)) and a national rule (Rule 35(a)) addressing this issue, and there is no reason why three different interpretations of these national standards should exist in the circuits. That said, Prof. Mooney warned that the chief judges were quite adamant that this Committee should not try to bring about uniformity.

A member said that he would favor amending Rule 35(a) to impose a consistent national standard. He also objected to the absolute majority approach on the ground that it essentially permits a disqualified judge to count as a "no" vote. The disqualification of a judge should not

result in the equivalent of a vote either for or against rehearing en banc; it should, as much as possible, be a neutral. The member said that he would favor the case majority rule.

Another member agreed. He pointed out that disqualifications seem to be more common. He also pointed out that, under the absolute majority rule, one judge can effectively control the law of a circuit. Suppose, for example, that a circuit has 12 active judges and that, in a particular case, 5 of those 12 judges are disqualified. Even if 6 of the 7 non-disqualified judges wish to take a case en banc, the case cannot be heard en banc, because 6 is not a majority of 12. This permits just one active judge — perhaps sitting on a panel with a visiting judge and a senior judge — effectively to control circuit precedent, even over the objections of all 6 of his non-disqualified colleagues.

A member pointed out that an even worse result is possible: If, on such a panel, the one active judge is in dissent, and the visiting judge and senior judge are in the majority, the law of a circuit could be set by *zero* active judges over the objections of all 7 of the non-disqualified active judges.

Prof. Coquillette said that, although he did not disagree with these members on the merits, he concurred with Prof. Mooney's statements about the likely views of the chief judges. Any attempt by this Committee to impose a uniform standard on the circuits will be met with fierce resistence. A member agreed. He said that the opposition will take two forms: (1) Some chief judges will oppose any uniform national standard, on the grounds that each circuit should be free to set its own rules; and (2) Some chief judges will accept a national standard, as long as it imposes their circuit's rule on all of the other circuits.

A couple of members expressed their frustration at the likely opposition of the chief judges. They reiterated that there already *are* national standards that address this question; the conflict arises because circuits interpret 28 U.S.C. § 46(c) and Rule 35(a) differently. They also pointed out that there is no good reason for this practice to vary among circuits; this is not a situation in which varying local conditions need to be accommodated through different rules. Prof. Coquillette pointed out that, according to the Rules Enabling Act, the purpose of the rules of practice and procedure is "to maintain consistency and otherwise promote the interest of justice." 28 U.S.C. § 2073(b). In other words, Congress equated maintaining consistency with promoting justice.

One member said that the root of the problem is *Shenker v. Baltimore & Ohio R.R. Co.*, 374 U.S. 1 (1963), in which the Supreme Court essentially indicated that it was up to each circuit to interpret 28 U.S.C. § 46(c) for itself.

A member said that, while she did not disagree that there should be a uniform national standard, she was not convinced that the absolute majority approach was wrong. The absolute majority rule has the advantage of discouraging en banc hearings and making certain that circuit law binding on all future panels is not set by a minority of the circuit's active judges. If the

absolute majority rule insulates a bad decision from en banc review, then the Supreme Court can fix the error, or the en banc court can overturn the panel decision when the issue arises in another case.

A member argued that this Committee should propose a national rule. Even if that proposal is defeated by the Standing Committee or the Judicial Conference, it might call Congress's attention to the problem and result in statutory reform.

The Committee adjourned at 12:00 noon for lunch and reconvened at 1:20 p.m.

A member moved that this Committee propose amending Rule 35(a) to resolve the conflict over the treatment of disqualified judges. The motion was seconded. The motion carried (unanimously).

The Committee continued to discuss *how* the conflict should be resolved. Several members spoke in favor of the modified case majority approach of the Third Circuit. That approach requires a majority of those judges who are eligible to vote, and thus does not count every recusal as a "no" vote. At the same time, that approach requires that a majority of active judges be eligible to vote, which guards against en banc decisions being issued by a minority of judges.

A member said that horror stories are still possible under the Third Circuit approach. For example, if 6 of 12 active judges are disqualified, a 2-1 panel with a visitor and senior in the majority can still set circuit precedent that no active member of the circuit supports. Other members agreed that such horror stories are possible, but horror stories are possible under any of the three approaches. The Third Circuit approach seems to do the best job of minimizing them.

A member moved that Rule 35(a) be amended to adopt the modified case majority approach of the Third Circuit. The motion was seconded. The motion carried (unanimously). The Reporter said that he would prepare an implementing amendment and Committee Note and present it at the next meeting.

H. Item No. 01-01 (citation of unpublished decisions)

Judge Alito said that he had surveyed the chief judges of the circuits about the Justice Department's proposal that the Appellate Rules be amended explicitly to permit the citation of non-precedential decisions. He 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.

Mr. Letter pointed out that recent actions of several circuits suggest more openness to the Department's proposal. Among other things, the D.C. Circuit, which used to have a very restrictive rule, now permits the citation of all of its non-precedential decisions.

The Committee debated at some length whether it should propose *a* national rule on this topic. Those speaking in favor of a national rule pointed out the following:

- Currently, non-precedential decisions are the only sources 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 opinions are widely cited in district courts and in state courts; although they are not binding, they sometimes can be persuasive. 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 odd 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.

- The no-citation rule borders on raising civil liberties concerns. This is the one place where a court rule specifically forbids an attorney from making an argument that the attorney believes will help her client.

- 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.

- Prohibitions on the citation of unpublished opinions give parties an incentive to play games to find ways of hinting to the court that it has issued non-precedential opinions on a point.

- Liberalizing the rule will not "open the floodgates." Practitioners will continue to have an incentive not to cite non-precedential decisions as to do so is tantamount to admitting that no precedential decision supports one's position.

- The 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.

Those speaking against a national rule pointed out the following:

- There continues to be substantial opposition to such a rule among the chief judges of the circuits. Those chief judges make up half of the membership of the Judicial Conference, and the district court judges who make up the other half are likely to defer to the circuits on this proposal.

- Many circuit judges will view this as the first step on a path that will eventually lead to the abolition of non-precedential opinions, which are unpopular among practitioners but essential for the survival of the federal appellate courts.

- The caseloads of appellate judges do not permit them to devote substantial time to writing careful opinions in every case. Judges are able to get non-precedential opinions out quickly precisely because they know that the opinions will not be cited. Forcing all circuits to permit citation of non-precedential opinions will ensure either that decisions are rendered much more slowly or that more cases are disposed of without *any* opinion. Both options would be worse for parties and counsel than the current situation.

- The no-citation rule does not deprive the courts and litigants of anything of value. Because non-precedential opinions are not written with as much care, and particularly because they usually say little about the facts, the opinions are of almost no value to anyone but the parties.

- The amount of published case law has grown exponentially, and it is getting more and more difficult for judges and practitioners to keep up with precedential decisions. They should not also be burdened with having to keep up with the huge number of non-precedential decisions.

- Circuits forced to allow citation to their non-precedential opinions will simply make their opinions so cryptic as to be useless to anyone but the parties.

Following the discussion, a member moved that the Appellate Rules should be amended to include *a* national rule permitting the citation of non-precedential decisions. The motion was seconded. The motion carried (6-3).

The Committee then discussed the specifics of the draft Rule 32.1 proposed by the Justice Department. Several members argued that subdivision (a)(2) of the proposed rule was unnecessary. That subdivision states that "[a]n unpublished or non-precedential decision may be cited if a party believes that it persuasively addresses a material issue in the appeal, and that no published opinion of the forum court adequately addresses the issue." Members pointed out that it would be odd for a litigant to cite a non-precedential opinion if the litigant did not "believe[] that it persuasively addresses a material issue." In addition, the subdivision makes the propriety of

citing a non-precedential decision turn upon the subjective intent of a litigant, which is an unusual and potentially troublesome way of framing a rule about citing cases. Mr. Letter responded that (a)(2) was meant to be exhortatory — to encourage attorneys to think carefully before citing non-precedential decisions.

The Reporter argued that, in putting so many conditions upon the citation of non-precedential decisions, the rule was undermining the arguments of its proponents. Proponents of the rule argue, persuasively in the Reporter's view, that non-precedential decisions should not be treated any differently than other types of non-precedential authority, such as the decisions of state or foreign courts or law review articles. No rule regulates the citation of these sources; for example, no rule provides that these sources can only be cited in "support [of] a claim of res judicata" or "if a party believes that [the authority] persuasively addresses a material issue in the appeal." By imposing such restrictions on the citation of non-precedential decisions, the draft rule seems to buy into the notion that there is something "wrong" with non-precedential opinions that is not "wrong" with law review articles or other non-precedential authorities.

A member agreed with the Reporter and pointed out that, by restricting the citation of non-precedential opinions, the draft rule would give rise to a cottage industry of litigation over whether a particular non-precedential opinion was or was not cited in violation of the rule. It would be better for everyone if the rule stated simply that non-precedential opinions could be cited, period. Nothing forces courts to read those opinions or be persuaded by them.

Other members, while not contesting the force of these arguments on the merits, argued that the restrictions on the citation of non-published opinions were politically expedient in that they would increase the chances that the rule would be approved by the Standing Committee and Judicial Conference.

The Committee also discussed whether subdivision (b) of the proposed rule was necessary. That subdivision requires a party to provide copies to the court and to the other parties of all non-precedential decisions that the party cites. The Reporter argued that the effect of this rule would be to force parties cumulatively to serve hundreds of thousands of pages of photocopied opinions, when, in most circumstances, hard copies are not necessary given that judges and parties can easily find non-precedential opinions on-line or in the Federal Appendix. Members generally agreed with the Reporter and discussed two possible alternatives: first, requiring parties to serve copies of non-precedential opinions only "upon request," and second, requiring parties to serve copies of non-precedential opinions only if they are not "available on line."

A member of the Committee said that references in the proposed rule to "unpublished or non-precedential decisions" should be changed to refer just to "non-precedential decisions." The word "unpublished" has become a misnomer, especially given that many "unpublished" opinions are now being published in the Federal Appendix.

A member moved that the proposal of the Justice Department be approved, except that the rule should refer only to "non-precedential" decisions, and subdivision (b) of the rule should be changed so that parties are not required to serve copies of all non-precedential decisions that they cite. The motion was seconded. The motion carried (6-3). The Reporter agreed to prepare a cleaned-up draft of the proposed rule for the Committee to consider at its next meeting.

I. Item No. 01-02 (replace all page limits with word limits)

The Reporter stated that, at the last meeting of the Committee, members had discussed a proposal that all of the page limits in the Appellate Rules — including those in Rules 5(c), 21(d), 27(d)(2), 35(b)(2), and 40(b) — be replaced with word limits. Although several members had spoken in opposition to the proposal, the Committee had not taken any formal action. The Reporter recommended that this item be removed from the study agenda, largely for the reasons given at the April 2002 meeting.

A member moved that Item 01-02 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

J. Item No. 01-03 (FRAP 26(a)(2) — interaction with "3-day rule" of FRAP 26(c))

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). 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." As of December 1, 2002, Rule 26(a)(2) will provide that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays are excluded when the period of time is less than 11 days, and included when the period of time is 11 days or more. The ambiguity is this: In deciding whether a deadline is "less than 11 days," should the court count the 3 days that are added to the deadline under Rule 26(c)?

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.

The Reporter said that, while he agreed with Mr. Wepner that this problem should be addressed, he recommended that the Civil Rules Committee be asked to take the lead on

proposing a solution. The problem is 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.

It makes sense for the Civil Rules Committee to take the lead on this matter. The Civil Rules Committee has 17 years' experience with this issue; this Committee has none. And 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. By contrast, the Civil Rules appear to contain at least a dozen 10-day deadlines that are triggered by service.

A member moved that this Committee formally request that the Civil Rules Committee take the lead in proposing a solution to this problem. The motion was seconded. The motion carried (unanimously).

K. Item No. 01-04 (FRAP 4(b)(1)(A) — give criminal defendants 30 days to appeal)

Under Rule 4(b), a defendant generally has 10 days to bring an appeal in a criminal case, whereas the government generally has 30 days. At the April 2001 meeting of the Committee, the Justice Department was asked to make a recommendation on a proposal that Rule 4(b) be amended to give both the defendant and the government 30 days to appeal in criminal cases.

Mr. Letter said that the Department opposed the proposal. He said that the Justice Department prosecutors have not noticed a problem with the current rule nor heard complaints from criminal defense attorneys about the 10-day deadline. Filing a notice of appeal is a simple thing, and those convicted of crimes are generally anxious to get their appeals started as soon as possible. In a typical case involving appointed trial counsel, the attorney files a notice of appeal as a matter of course. The 30-day deadline for the government is justified by the fact that the government, unlike the typical criminal defendant, is a large organization, and it takes time for the government to decide whether to pursue an appeal. If time for the government to appeal were shortened, the government would have to respond by filing protective notices of appeal in almost all cases.

A member agreed with Mr. Letter that filing a notice of appeal in a criminal case is a routine matter for the defendant and should not take more than 10 days. It is common for appointed trial counsel to file a notice of appeal as her last act, often on the same day that the judgment of conviction is entered.

A member said that, if the issue were viewed in isolation, he would be inclined not to change the rule. But the member said that he was concerned about the difficulty that courts are having distinguishing "civil" motions from "criminal"motions when trying to decide whether the time limitations of Rule 4(a) or 4(b) apply to an appeal of an order disposing of a motion. Giving all parties 30 or 60 days in all cases — or giving the government 60 days in all cases, and all other parties 30 days in all cases — would obviate the need to make that distinction, while not really harming the judicial system or any party.

Other members expressed the view that the current system does not appear to be "broke," and thus they are disinclined to "fix" it, especially in an area that is a focus of as much litigation as appellate deadlines.

A member moved that Item No. 01-04 be removed from the study agenda. The motion was seconded. The motion carried (8-1).

L. Items Awaiting Initial Discussion

1. Item No. 02-01 (FRAP 27(d) — apply typeface and type-style limitations of FRAP 32(a)(5)&(6) to motions)

Item No. 02-01 was added to the Committee's study agenda by Mr. Fulbruge, who pointed out that, apparently because of an oversight, the restylized Appellate Rules do not prescribe limitations on typeface or type style for motions. The Reporter said that it would be easy to amend Rule 27(d)(1) to add a subsection (E) that would incorporate by reference the typeface limitations of Rule 32(a)(5) and type style limitations of Rule 32(a)(6). By consensus, the Committee decided to ask the Reporter to prepare such an amendment for the next meeting of the Committee.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Fall 2002 Meeting

The Committee will next meet on November 18 and 19, 2002, in San Francisco.

VIII. Adjournment

By consensus, the Committee adjourned at 3:30 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter