Minutes of Fall 2004 Meeting of
Advisory Committee on Appellate Rules
November 9, 2004
Miami, Florida

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, November 9, 2004, at 8:30 a.m., at the Wyndham Grand Bay Coconut Grove Hotel in Miami, Florida. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Judge T.S. Ellis III, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, was present representing the Solicitor General. Also present were Prof. Daniel R. Coquillette, Reporter to the Standing Committee; Ms. Marcia M. Waldron, the liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Dr. Timothy Reagan and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

II. Approval of Minutes of April 2004 Meeting

The minutes of the April 2004 meeting were approved.

III. Report on June 2004 Meeting of Standing Committee

Judge Alito reported that, at its June 2004 meeting, the Standing Committee gave final approval to all of the proposed amendments to the Federal Rules of Appellate Procedure ("FRAP"), with one exception. Those proposals were subsequently approved by the Judicial Conference and now are awaiting Supreme Court action.

The exception was proposed Rule 32.1 on the citation of unpublished opinions. Judge Alito reported that the Standing Committee had returned the proposal to this Advisory Committee for further study. Judge Alito said, and Prof. Coquillette agreed, that the decision of the Standing Committee did not signal a lack of support for the proposal. Rather, given the strong opposition to the proposal expressed by many commentators, and given that some of the claims of those commentators can be tested empirically, the Standing Committee wanted to ensure that every reasonable step is taken to gather information before it makes a final decision on the proposal.

Judge Alito announced that Dr. Reagan and his colleagues at the FJC had already designed a study, with input from Judge David F. Levi (Chair of the Standing Committee), Judge

Alito, Prof. Coquillette, and Prof. Schiltz. Judge Alito distributed a description of the study and the survey instruments that will be used in the study. At Judge Alito's invitation, Dr. Reagan then described his intended research and answered questions from Committee members.

Mr. Rabiej said that the AO was also conducting research to assist the Standing Committee and Advisory Committee in their consideration of Rule 32.1. In particular, the AO is trying to determine whether citation rules correlate with either disposition times or the percentage of appeals disposed of without published opinions. To date, Mr. Rabiej said, the AO has not found much evidence of a correlation.

Judge Alito thanked Dr. Reagan and Mr. Rabiej for the assistance of their offices.

IV. Action Items

A. Item No. 03-10 (new FRAP 25.1 — electronic filing/privacy protections)

Judge Alito took up Item No. 03-10 out of order so that Prof. Daniel J. Capra, who joined the meeting via speaker phone, could lead the discussion. Prof. Capra is the Reporter to the Advisory Committee on Evidence Rules and is serving as the Lead Reporter to the E-Government Subcommittee.

Prof. Capra said that the E-Government Act of 2002 requires the federal courts to make most of their files accessible electronically and requires the advisory committees to propose amendments to the rules of practice and procedure to address the privacy and security concerns that will be raised when court files become available over the Internet. Prof. Capra said that the Standing Committee had appointed the E-Government Subcommittee to coordinate the efforts of the advisory committees to develop such rules. The first task of the Subcommittee was to come up with a template that reflected the major policy decisions that had already been made by the Committee on Court Administration and Case Management ("CACM") and that the advisory committees could then use in drafting amendments to their respective sets of rules.

Prof. Capra said that the most important policy decision made by CACM was that "public should remain public" — meaning that anything that has traditionally been available to the public at the courthouse should continue to be available to the public over the Internet. Remote electronic access will mean, though, that information that in the past would have been stored deep in the bowels of a courthouse will now be readily available to anyone with a computer and an Internet connection. For that reason, CACM has decided that particularly sensitive information — such as Social Security numbers — should be redacted from all filings, so that the information no longer appears in either paper or electronic court files. Such redaction will, among other things, protect against identity theft. At the same time, CACM has recognized that there must be a limited number of exceptions to the redaction requirement, such as when redacting a filing would be extremely burdensome.

Reflecting these decisions, the current template provides as follows:

First, certain information will be redacted from *all* filings — paper and electronic. For example, parties will be required to redact from all filings the first five digits of Social Security numbers.

Second, some filings will be exempt from the redaction requirement, but will be available to the public over the Internet. In these cases, the privacy interests that would be protected by redaction are outweighed by the inconvenience that redaction would cause to the court and parties. For example, in a civil or criminal forfeiture proceeding, the number of the financial account that is the subject of the proceeding would not have to be redacted from filings.

Third, some filings will be exempt from the redaction requirement and will not be available to the public over the Internet (although the filings will continue to be available to the public at the courthouse). Filings in Social Security appeals are likely to receive this treatment. Requiring redaction of personal information from such filings would impose a significant burden on the government, both because of the high volume of Social Security appeals, and because those appeals involve a great deal of sensitive information.

Finally, parties will continue to be able to seek court permission to file documents under seal. Nothing will have to be redacted from a document filed under seal, for the obvious reason that such a document will not be available either at the courthouse or electronically. If a sealed document is later "unsealed," sensitive information will first have to be redacted.

Prof. Capra concluded his remarks by mentioning three issues that had been raised at the recent meetings of the Civil Rules Committee and the Criminal Rules Committee. First, the Civil Rules Committee decided that immigration cases should be treated like Social Security cases — that is, they should be exempt from the redaction requirement and protected from remote electronic access. Second, the Criminal Rules Committee decided that habeas proceedings should be exempt from the redaction requirement, but should be accessible over the Internet. Finally, both the Civil and Criminal Rules Committees noted the special problem of trial exhibits. In some district courts, trial exhibits are not filed, and thus will be neither available electronically nor subject to the privacy provisions of the Civil and Criminal Rules. When an appeal is brought, those trial exhibits will be filed with the court of appeals, and thus may become available electronically. The Appellate Rules Committee will have to address such filings.

Judge Alito asked Prof. Schiltz if he had anything to add to Prof. Capra's remarks. Prof. Schiltz said that, to date, the proposed rules that he had been drafting had directly incorporated the decisions being made by CACM and the other advisory committees. For example, if one of the other committees decided that financial account numbers should be redacted, draft Appellate Rule 25.1 provided the same. If one of the other committees decided that Social Security appeals should be exempt from both the redaction requirement and remote electronic access, then draft Rule 25.1 provided similar exemptions.

Prof. Schiltz said that he was now inclined to believe that the Appellate Rule should be drafted differently. Instead of trying to keep up with changes in the Civil or Criminal Rules, the Appellate Rule should take a "dynamic conformity" approach. In other words, the Appellate Rule should simply incorporate by reference the privacy provisions of the Civil and Criminal Rules. One way the Appellate Rule could do this is by providing that whatever privacy rules applied to a case before it was appealed will continue to apply to the case on appeal. In appeals from district courts, the Civil or Criminal Rules would apply. In administrative proceedings, the privacy rules of the agency would apply. Another way the Appellate Rules could do this is to provide that, for purposes of the privacy rules, a case filed in the court of appeals will be treated as though it had been filed in the district court — and thus that the Civil and Criminal Rules will apply to the same extent that they apply in district-court cases.

Prof. Schiltz said that everyone seems to agree that privacy issues are of more concern to the trial courts than to the courts of appeals and that the issues should therefore be addressed primarily by CACM and the Bankruptcy, Civil, and Criminal Rules Committees. It would be difficult for the Appellate Rules Committee to continually amend Appellate Rule 25.1 to keep up with changes to the other rules of practice and procedure. Moreover, gaps would develop, as "conforming" changes to the Appellate Rule would often lag behind changes to the Bankruptcy, Civil, and Criminal Rules. The Appellate Rule should adopt the other rules by reference, so that changes to the other rules are automatically reflected in the Appellate Rule.

After a brief discussion, the Committee agreed that the policy choices should be left to CACM and the other advisory committees, and that the Appellate Rules should not differ substantively from the Bankruptcy, Civil, or Criminal Rules. The Committee also agreed that, if Prof. Schiltz can find a way to implement it, the "dynamic conformity" approach would work well. Prof. Schiltz said that he would try to draft a "dynamic conformity" rule for the Committee to consider at its April 2005 meeting. Among issues that the Committee will need to consider are how to handle: (1) review of agency actions (given that most agencies do not have privacy rules), (2) mandamus and similar proceedings (which are brought directly in the courts of appeals), and (3) trial exhibits (some of which, as described above, are not filed until a case is appealed).

Most of the remainder of the Committee's discussion focused on the decision of the Civil Rules Committee to exempt immigration cases from the redaction requirement and to forbid remote electronic access to the files in such cases. One member defended the decision, arguing that the government does not have the resources to redact those files, and pointing out that members of the public will have the same access to those files that they do now (that is, access at the courthouse, but not over the Internet). Other members questioned whether filings in immigration cases contained enough sensitive information to warrant such treatment. Both Prof. Coquillette and Prof. Capra acknowledged that the exemption for immigration cases is controversial and faced an uncertain future.

Ms. Waldron raised two issues that may need further consideration by the Civil or Criminal Rules Committee. First, aliens who are subject to deportation sometimes file habeas petitions to challenge their detention. Will those cases be treated as habeas cases or as immigration cases? Second, prisoners sometimes file *pre-trial* habeas petitions. Should those be exempt from the redaction requirement, as would "typical" habeas proceedings under the Criminal Rules Committee's proposal?

Judge Alito thanked Prof. Capra for his assistance to the Committee and said that, at the Committee's April 2005 meeting, the Committee will hopefully be able to approve a "dynamic conformity" rule for publication.

B. Item No. 97-14 (FRAP 46(b)(1)(B) — "conduct unbecoming" standard)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that Item No. 97-14 encompasses a group of proposals ranging from, on one extreme, enacting a comprehensive "Federal Rules of Attorney Conduct" to, on the other extreme, tinkering with the "conduct unbecoming" standard of Rule 46(b)(1)(B). This item was added to the study agenda of the Appellate Rules Committee — and similar items were added to the study agenda of other advisory committees — in 1997 at the request of the Standing Committee.

Two developments provided the impetus for the Standing Committee's request. First, the Standing Committee's "Local Rules Project" found that the district courts had implemented as part of their local rules a large number of provisions governing the professional conduct of attorneys — provisions that were, on the whole, vague, confusing, and conflicting. Those provisions not only conflicted with each other, but often conflicted with the rules imposed by the states. Second, the Clinton Justice Department and several state courts were involved in a heated controversy over the interpretation and enforcement of Model Rule 4.2. Some states had interpreted Model Rule 4.2 to prohibit attorneys working for law enforcement agencies from having ex parte contacts with the employees of organizations that were under criminal investigation. The Department sought to use the Rules Enabling Act process to enact rules that would protect federal law enforcement agents from this broad interpretation of Model Rule 4.2 (as well as from broad interpretations of other rules, such as Model Rule 3.8).

The Reporter recommended that Item No. 97-14 be removed from the Committee's study agenda. The item has been dormant for a long time. For a number of reasons — including the presidential election of 2000 and change in administrations; the September 11 attacks and resulting reordering of federal law enforcement priorities; and changing personnel in the Department of Justice — the Department has not been able to give Item No. 97-14 sustained attention. The subcommittee established by the Standing Committee to coordinate work on this issue has not met since 2000, and this Committee has not even received an update since April 2001.

Prof. Coquillette said that he agreed with the recommendation. He said that it is unlikely that this issue will be a high priority for the Justice Department in the next year or two. In addition, when the Department again takes up this issue, it may try for a legislative solution rather than a rules-based solution.

A member moved that Item No. 97-14 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

C. Item No. 99-06 (FRAP 33 — impact of settlements on bankruptcy proceedings)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that Item No. 99-06 was added to the Committee's study agenda in 1999 at the request of the bankruptcy judges of the Fourth Circuit. Those judges expressed concern that Appellate Rule 33 — which authorizes an appellate court to order the parties to engage in a settlement conference and provides that the court may "enter an order . . . implementing any settlement agreement" — did not incorporate the notice provisions of Bankruptcy Rules 9019(a) and 7041. Those rules contain provisions designed to protect against the debtor cutting a "sweetheart" deal with one creditor to the detriment of other creditors or the bankruptcy estate. Under Bankruptcy Rule 9019(a), any proposed settlement affecting a bankruptcy estate must be approved by the bankruptcy court after notice of the proposed settlement is given to all of the creditors. And, under Bankruptcy Rule 7041, a complaint objecting to the discharge of a debtor cannot be dismissed at the request of the plaintiff alone; rather, the bankruptcy court must approve the dismissal after notice is given to the trustee.

The concerns of the Fourth Circuit bankruptcy judges were referred by this Committee to the Bankruptcy Rules Committee. After discussing this matter at two meetings, the Bankruptcy Rules Committee decided to recommend that this Committee remove Item No. 99-06 from its study agenda. The Bankruptcy Rules Committee is unaware of any evidence that the problem identified by the Fourth Circuit bankruptcy judges has actually materialized. To the contrary, in the experience of those who serve on the Bankruptcy Rules Committee, when a settlement that might affect the rights of absent creditors is reached on appeal of a bankruptcy case, the court of appeals will remand the case to the district court with instructions to remand the case to the bankruptcy court, so that the bankruptcy court can ensure compliance with Bankruptcy Rules 9019(a) and 7041.

A member moved that Item No. 99-06 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

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

The Reporter introduced the following proposed amendments and Committee Notes:

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

(1) **Time for Filing a Notice of Appeal.**

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

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

(a) the United States;

(b) a United States agency;

(c) a United States officer or employee sued in an official capacity; or

(d) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

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Committee Note

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.) The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3)(B), which extended the 60-day period to respond to complaints to such cases. The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to decide whether to file an appeal.

Rule 40. Petition for Panel Rehearing

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

(1) **Time.** Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, ~~if the United States or its officer or agency is a party, the time within which any party may seek rehearing is 45 days after entry of judgment,~~ unless an order shortens or extends the time~~.~~, a petition for panel rehearing may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) the United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States.

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Committee Note

Subdivision (a)(1). Rule 40(a)(1) has been amended to make clear that the 45-day period to file a petition for panel rehearing applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 4(a)(1)(B) makes clear that the 60-day period to file an appeal also applies in such cases.) In such cases, the Solicitor General needs adequate time to review the merits of the panel decision and decide whether to seek rehearing, just as the Solicitor General does when an appeal involves the United States, a United States agency, or a United States officer or employee sued in an official capacity.

The Reporter reminded the Committee that, at its April 2004 meeting, it had tentatively approved the Justice Department's proposal that Rules 4(a)(1)(B) and 40(a)(1) be amended to make clear that the extended time periods apply in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions that occurred in connection with duties that he or she performed on behalf of the United States. The Committee asked the Reporter to take a close look at the amendments and Committee Notes proposed by the Department, make appropriate stylistic changes, and present a final version at this meeting.

The Reporter said that he had rewritten the amendments to comply with the style conventions and to ensure that the text of the amendments will better match up with the text of restyled Civil Rules 12(a)(2) and (3). The Reporter also said that he had shortened the Committee Notes.

Mr. Letter said that the Department supported the revised amendments and Notes and had only two minor suggestions with respect to the Note to the amendment to Rule 4(a)(1)(B). First, the Department would like to replace the phrase "which extended the 60-day period to respond to complaints to such cases" with the phrase "which specified an extended 60-day period to respond to complaints in such cases." Second, the Department would like to insert the words

"the Solicitor General to" in the last sentence of the rule, after "additional time to" and before "decide whether to file an appeal." By consensus, the Committee agreed to the changes.

A member moved that the amendments to Rules 4(a)(1)(B) and 40(a)(1) be approved for publication. The motion was seconded. The motion carried (unanimously).

E. Item No. 04-04 (FRAP 25(a) — authorize courts to mandate electronic filing)

The Reporter introduced the following proposed amendment and Committee Notes:

Rule 25. Filing and Service

(a) Filing.

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(2) **Filing: Method and Timeliness.**

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(D) **Electronic filing.** A court of appeals may by local rule permit <u>or require</u> papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

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Committee Note

Subdivision (a)(2)(D). Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts requiring

electronic filing recognize the need to make exceptions for parties who cannot easily file by electronic means, and often recognize the advantage of more general "good cause" exceptions. Experience with these local practices will facilitate gradual convergence on uniform exceptions, whether in local rules or an amended Rule 25(a)(2)(D).

The Reporter said that CACM has asked that the rules of appellate, bankruptcy, civil, and criminal procedure be amended on an expedited basis to authorize the federal courts to use their local rules to force parties to file all documents electronically. CACM believes that mandatory electronic filing will achieve significant cost savings for the federal courts. CACM also points out that many bankruptcy courts and district courts are already requiring electronic filing, and that many more are likely to follow suit. It would be best for all if the national rules would authorize what the federal courts apparently are going to do anyway.

The Reporter said that the proposed amendment to Rule 25(a)(2)(D) and accompanying Committee Note are identical to amendments that have already been approved by the Bankruptcy Rules Committee and Civil Rules Committee at their meetings earlier this fall. The Standing Committee hopes that this Committee will follow suit, as the Standing Committee would like to expedite consideration of these amendments as follows: The amendments will be published for comment on November 15, 2004. The comment period will expire on February 15, 2005. The advisory committees will consider the comments and give final approval to the amendments at their spring 2005 meetings. The Standing Committee will consider the rules at its June 2005 meeting, and the Judicial Conference will consider them in September 2005.

Members expressed several concerns about the proposal. Members were concerned that mandatory electronic filing could pose a hardship for some litigants, and wondered whether the national rules should be amended to protect such litigants. Other members expressed concern about the lack of uniformity that would result from the amendments, with some courts requiring electronic filing, others allowing but not requiring electronic filing, and still others forbidding electronic filing. And almost all members agreed that they would not support an amendment that would force courts to accept electronic filings.

The Reporter said that he shared the concerns of the members, and that he had been among those who had unsuccessfully objected to considering CACM's proposal on an expedited basis. But he also reminded the Committee that, at this point, the Committee is being asked only to approve the proposal for publication. The Committee's concerns can be revisited in April, when the Committee will have the benefit of public comment on the rule. The Reporter also reminded the Committee that the rule would merely give courts the option to require electronic filing; it would not force any court to accept any electronic filing or forbid any court from requiring paper filings. Finally, the Reporter said that, although uniformity is important, it is also sometimes important to allow courts to experiment and gain experience that can inform later national rulemaking. This is particularly true in the area of technology. Mr. Rabiej added that,

in the districts that have already implemented mandatory electronic filing, both the courts and the parties have been very happy with the results.

A member moved that the proposed amendment to Rule 25(a)(2)(D) be approved for publication. The motion was seconded. The motion carried (unanimously).

V. Discussion Items

A. Item Nos. 02-16 & 02-17 (FRAP 28 & 32 — inconsistent local rules on briefs and covers of briefs)

Judge Alito reminded the Committee that Item Nos. 02-16 and 02-17 arose out of complaints by the ABA Council of Appellate Lawyers about variations in local circuit rules regarding briefs and covers of briefs. The Committee discussed the ABA's concerns at length at its November 2003 meeting. At that meeting, Judge Levi warned the Committee that any proposed changes to briefing requirements were likely to be resisted by members of the Judicial Conference. He said that the Conference was unlikely to be persuaded simply by arguments that national uniformity is important or that a particular change is thought by a majority of the Committee to be a good idea. Rather, if a proposed change to Rule 28 is to stand a chance of gaining Conference approval, the Committee will have to present solid empirical support for the change — for example, evidence that two-thirds of the circuits have already adopted the change — and the organized bar will have to get behind the change.

Members of the Committee agreed with Judge Levi. The Committee voted to table further discussion of Item Nos. 02-16 and 02-17 and to request the FJC to collect further information for the Committee. Specifically, the Committee asked the FJC to identify every local circuit rule regarding the contents of briefs that varies from Rule 28 and to try to learn the reason for each variation and assess the degree to which each variation is enforced in practice.

After an exhaustive study, Ms. Leary and the FJC produced a comprehensive report entitled, "Analysis of Briefing Requirements in the United States Courts of Appeals." The report was included under Tab V-A in the Committee's agenda book. Judge Alito thanked Ms. Leary for her excellent work and invited her to discuss that work with the Committee.

Ms. Leary told the Committee that the information compiled in the FJC's report came from a close review of local rules, standing orders, practitioner guides, and the like, as well as from questionnaires sent to every circuit executive. Ms. Leary said that she found that every one of the courts of appeals — without exception — imposes briefing requirements that are not found in Rule 28. She said that over half of the courts of appeals impose seven or more such requirements. Ms. Leary then reviewed in detail the findings described in her report.

Judge Alito again thanked Ms. Leary for her work and suggested to the Committee that, before it dug into the details of the report, the Committee should discuss a fundamental

underlying question: Should this Committee undertake a major effort to bring about uniformity — or near-uniformity — in briefing requirements, recognizing that such an effort would take a great deal of time and energy and likely be met with strong resistance from circuit judges? Or should this Committee instead try to marginally improve uniformity by enacting "pinpoint" changes and by encouraging the circuits to revoke unnecessary local rules?

Several members addressed Judge Alito's question. Some expressed deep frustration with the numerous local rules on briefs, arguing that they substantially undermine the central purpose of the rules of practice and procedure. A lawyer should be able to read the Appellate Rules and know how to file a brief in any federal court of appeals. No lawyer should have to wade through pages of local rules, practitioner guides, internal operating procedures, and standing orders every time he wants to file a brief. Nor should any attorney have to deal with the constant frustration of being told by the clerk that he must file a corrected brief because he failed to follow an obscure or picayune local rule. These local variations waste the time of attorneys and the money of clients. Some members also argued that many of the local variations appear to accomplish little, but rather seem to be in place for no better reason than "we've always done it this way." The bottom line for some members is that the local rules on briefing create considerable hardship for practitioners and little or no corresponding benefit for judges.

Other members responded in several ways:

First, some members argued that bringing about uniformity in briefing would be impossible. Rightly or wrongly, the circuits feel very strongly about their local rules on briefing, and any attempt by the Committee to sweep away those local rules is doomed to fail. It would be unwise to invest a great deal of time and effort in an endeavor that is likely to do nothing but provoke the ire of the circuit judges.

Second, in the view of some members, the desire of circuits to impose their own rules on briefing is reasonable. Circuits vary substantially in the size and nature of their caseloads, in the number and geographical dispersion of their judges, in their local legal cultures, and in many other ways. Circuits must operate differently, and the differences in briefing requirements reflect that fact.

Third, some members argued that experimentation with briefing should be encouraged, especially in an era of rapidly changing technology, communications, transportation, and the like. The experiences of the circuits with various rules and practices can help inform this Committee's consideration of proposed changes to Rule 28.

Finally, some members expressed skepticism about the degree to which local rules on briefing create a hardship. Most attorneys practice in only one circuit, and most of those who practice in multiple circuits work for large organizations (such as the Department of Justice) or large law firms. Such lawyers should have little problem finding and following local rules on briefing. Moreover, the Committee cannot possibly wipe out all local rules on all subjects, and thus, no matter what the Committee does, lawyers will still have to read and follow local rules.

It's just a fact of life that, when an attorney files a brief in a circuit, the attorney needs to follow the local rules of that circuit — just as it's a fact of life that, when an attorney files a brief in a state court, the attorney needs to follow the local rules of that county or judicial district.

After a lengthy discussion, the Committee reached a consensus on the following:

1. The Committee will not undertake a major effort to bring about uniformity or near-uniformity in briefing requirements. Although members disagree about the importance of uniformity in this area, all agree that uniformity is not achievable.

2. The Committee will continue to be open to proposals to amend Rule 28 to implement specific practices that have proven helpful.

3. In an effort to bring about more uniformity, Judge Alito will mail a copy of Ms. Leary's report to the chief judges, circuit executives, clerks, and circuit advisory committees, along with a letter that encourages each circuit to examine the rules identified by Ms. Leary and, where possible, to revoke those rules or make them more consistent with Rule 28. The letter will also encourage circuits to identify in one readily accessible place — preferably on their websites — all of their local rules on briefing.

Several members suggested that the problem here may be one of awareness — of circuits not fully appreciating just how many local rules they've implemented, how difficult those rules are for practitioners to locate and piece together, and how many ways those rules differ from Rule 28 and the rules of other circuits. Circuits may welcome the information contained in Ms. Leary's report and welcome the opportunity to review their local rules in light of that information.

Prof. Coquillette supported the Committee's decision. He said that the Standing Committee would rather use persuasion than compulsion to increase uniformity in this area. He also said that the Local Rules Project demonstrated that persuasion can be effective.

One member raised the possibility that Ms. Leary's study and Judge Alito's letter could be expanded to include rules regarding appendices. Other members argued against such an expansion. At the November 2003 meeting, the Committee agreed that it would take no action with respect to appendices. There is enormous variation among local circuit rules regarding appendices; indeed, no two circuits have the same rules. Bringing about substantially more uniformity would require just about every circuit to make significant changes to its local practices. These local practices are deeply rooted, and judges feel strongly about them. The Committee is wiser to focus on the issue of briefs, where there is more uniformity to begin with, and where progress toward still more uniformity can realistically be achieved.

A member said that, while he supported the notion of using persuasion rather than rulemaking, he preferred to wait until the controversy over proposed Rule 32.1 is resolved before raising this issue with the circuits. The Committee agreed. By consensus, the Committee agreed that the Reporter, with the help of a couple of Committee members, should prepare a draft letter

that can be reviewed by the Committee at its April 2005 meeting. Mr. Letter and Mr. Levy volunteered to work with the Reporter on the draft letter.

B. Item No. 04-01 (FRAP 5(c) et al. — replace page limits with word limits)

Judge Alito invited the Reporter to introduce this item.

The Reporter reminded the Committee that, at its last meeting, a member asked to add to the Committee's study agenda the proposal that all of the page limitations in FRAP be replaced with word limitations. The Reporter said that this is the third time in the seven years that he has served as Reporter that this proposal has appeared on the Committee's study agenda and that the proposal has been informally discussed on at least a couple of additional occasions. Every time the idea has been floated — most recently, in April 2002 — the Committee has unanimously decided not to proceed with it. The reasons that Committee members have given for not proceeding with word limitations include the following:

1. There is no compelling reason to replace page limitations with word limitations. The clerks have not complained about the page limitations; to the contrary, the clerks have consistently said that the page limitations work fine and should not be disturbed. Attorneys have also not complained about the page limitations.

2. The clerks strongly prefer page limitations because they are easy to enforce. A clerk can tell at a glance whether a paper exceeds 20 pages. By contrast, word limitations are difficult to enforce. A clerk cannot tell at a glance whether a paper exceeds 7,500 words; such a limitation can be enforced only by counting words, and no clerk has time to count words.

3. Clerks are able to enforce the type-volume limitation on briefs only because parties are required to file a certificate of compliance. For word limitations to work, then, FRAP would have to be amended not just to replace every page limitation with a word limitation, but to require that a certificate of compliance be filed with every document subject to a word limitation, such as every petition for rehearing. That would add thousands of pages to the files of attorneys and courts, and it would add substantially to the workload of clerks, who would often have to contact attorneys and ask them to supply missing certificates.

4. If the Committee replaced page limitations with word limitations, and the Committee required that compliance with the new word limitations be certified, then the Committee would also have to decide whether to amend the appendix of forms to include certificates of compliance similar to Form 6. If the Committee did so, the Committee would further have to decide whether to amend various rules to provide that the use of the new forms "must be regarded as sufficient to meet the requirements" of the various word limitations, as Rule 32(a)(7)(C)(ii) provides with respect to the type-volume limitation on briefs.

5. Word limitations and other restrictions (such as restrictions regarding typeface and type styles) were imposed on briefs because abuses were a real problem. The clerks have consistently asserted that abuses are not a problem with regard to motions, rehearing petitions, and other documents. And, as noted above, clerks have also consistently said that the abuses that do exist are better controlled through page limitations than through word limitations.

For all of these reasons, the Committee has several times in the past seven years declined to proceed with suggestions that the page limitations in FRAP be replaced with word limitations. The Reporter recommended that the Committee again remove this proposal from its study agenda.

A member disagreed. He said that word limitations present several advantages over page limitations. First, they reduce gamesmanship. Second, they allow attorneys to use larger typeface. And third, they make it easier to edit papers. Trying to meet page limitations sometimes requires attorneys to continue to cut words, move text in and out of footnotes, turn the "widow/orphan" feature on and off, and experiment with other measures until the page breaks fall just right.

Other members opposed changing all of the page limitations into word limitations. In their view, word limitations offer, at best, only minor improvements and do not justify making extensive changes to FRAP — especially changes that are opposed by the clerks who would have to enforce word limitations.

Mr. Rabiej said that it may become easier to enforce word limitations as electronic filing becomes commonplace. A clerk could simply run a word-count program on a document. Others disagreed, point out that some formats (e.g., PDF) do not have word-count features and that running a word-count program on every document would be inconvenient for clerks, especially as some words in the document (e.g., the words in the signature block) would have to be excluded from the count.

A member moved that all of the page limitations in FRAP be replaced by word limitations. The motion was seconded. The motion failed (2-5).

By consensus, the Committee agreed to remove Item 04-01 from the Committee's study agenda.

C. Items Awaiting Initial Discussion

1. Item No. 04-02 (FRAP 12(b) — timing of representation statement)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that this item was placed on the study agenda at the request of Mr. Dennis R. Cookish, a pro se litigant. Mr. Cookish is concerned that, under Rule 12(b), a party can be required to file a representation statement with the court of appeals before the notice of appeal filed with the district court has been transferred to the court of appeals. Thus, the court of appeals can receive a representation statement regarding a case before the court of appeals even knows that the case exists. Mr. Cookish suggests that clerks be required to notify the parties when a case is transferred to or docketed by the court of appeals, and that parties have 10 days to file a representation statement after receiving that notice.

Ms. Waldron said that she had informally surveyed the other circuit clerks about Mr. Cookish's concern, and the clerks do not think that it is a problem. It is true that the circuit clerks occasionally receive representation statements for cases that have not yet been transferred from the district court. But the clerks' offices simply hold those statements until the papers arrive, perhaps after confirming with the district clerk that a notice of appeal has been filed. Ms. Waldron said that, to the extent that the circuit clerks have a problem with representation statements, it is with the fact that they are often not filed at all and the clerk must nag the parties to submit them.

A member moved that Item No. 04-02 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

2. Item No. 04-03 (FRAP 4(a)(4)(A)(iii) — tolling effect of Civil Rule 54 motions)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that this item was added to the Committee's study agenda at the request of Judge Ronald Gilman, writing in *Wikol ex rel. Wikol v. Birmingham Public Schools Board of Education*, 360 F.3d 604 (6th Cir. 2004). In *Wikol*, the parents of an autistic child (the Wikols) sued their local school district in an attempt to enforce their child's rights under federal law. The district court entered judgment on March 27, 2002. The Wikols timely moved for attorney's fees under Civil Rule 54(d)(2). That motion was denied on May 15, 2002. On May 24, 2002, the Wikols moved the district court to exercise its authority under Civil Rule 58(c)(2) to order that the Rule 54(d)(2) motion that they had filed (and that had already been denied) would have "the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under [Civil] Rule 59" — i.e., that the Rule 54(d)(2) motion would toll the time to appeal the underlying judgment. While their motion was pending, the Wikols filed a notice of appeal from the underlying judgment on June 14, 2002. The district court granted the Wikols' Rule 58(c)(2) motion on July 11, 2002, ordering that their Rule 54(d)(2) motion had tolled the time to appeal the underlying judgment until that motion had been denied on May 15.

The Sixth Circuit held that the district court's July 11 order was ineffective and that the notice of appeal had been filed too late to confer jurisdiction to review the underlying judgment. Judge Gilman, author of the Sixth Circuit's opinion, reasoned as follows:

1. Under Rule 4(a)(1)(A), parties generally have 30 days to appeal in a civil case.

2. Under Rule 4(a)(4)(A), the time to appeal is automatically tolled by the timely filing of various post-judgment motions, including a motion under Rule 59 for a new trial. If a party files a motion for attorney's fees under Rule 54(d)(2), however, that motion tolls the time to appeal only "if the district court extends the time to appeal under Rule 58."

3. Under Rule 58(c)(2), a district court may "order that [a Rule 54(d)(2)] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59" — that is, the district court may order that, like a timely Rule 59 motion for a new trial, a timely Rule 54(d)(2) motion for attorney's fees will toll the time to appeal under Rule 4(a)(4). But the district court may do so only "before a notice of appeal has been filed and has become effective."

4. A notice of appeal generally becomes "effective" at the moment it is filed, with one exception: Under Rule 4(a)(4)(B)(i), a notice of appeal that is filed after a court announces or enters a judgment — but before the court disposes of one or more of the "tolling" motions listed in Rule 4(a)(4)(A) — becomes effective on entry of the order disposing of the last such remaining motion.

5. Applying these rules to the *Wikol* case: The Wikols' Rule 54(d)(2) motion for attorney's fees did not toll the time to appeal because the district court did not "extend[] the time to appeal under Rule 58." As a result, the Wikols' notice of appeal was both "filed" and "effective" on June 14. After June 14, then, the district court no longer had power to order that the Wikols' motion for attorney's fees would toll the time to appeal. Because the July 11 order was ineffective, the 30-day deadline to appeal the underlying judgment began to run when the underlying judgment was entered on March 27. The notice of appeal filed on June 14 was thus untimely, and the court did not have jurisdiction to review the underlying judgment (although it did have jurisdiction to review the May 15 order denying the motion for attorney's fees).

Understandably, the Sixth Circuit took no pleasure in its holding. The court expressed its "dismay over the complexity of the rules" and suggested that Advisory Committees consider simplifying the process, perhaps by amending the rules to provide that a timely Rule 54 motion, like a timely Rule 59 motion, automatically tolls the time to appeal under Rule 4(a)(4)(A).

The Reporter said that, in light of *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) (which held that a judgment is final and appealable even if a motion for attorney's fees is pending), this Committee and the Civil Rules Committee essentially have three options if they wish to address the problem raised by *Wikol*:

First, the Committees could decide that a party should *never* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion for attorney's fees is always treated like a timely Rule 59 motion for a new trial. Under this approach, a Rule 54 motion would toll the time to appeal, and, if a notice of appeal was filed while a Rule 54 motion was pending, the notice of appeal would not take effect until the court disposed of the Rule 54 motion.

Second, the Committees could decide that a party should *always* appeal the underlying judgment separately from the order on attorney's fees. The Committees could accomplish this by amending the rules so that a timely Rule 54 motion is never treated like a timely Rule 59 motion. Under this approach, a Rule 54 motion would not toll the time to appeal, and a notice of appeal filed while a Rule 54 motion was pending would be effective immediately (unless one of the post-judgment motions listed in Appellate Rule 4(a)(4)(A) was pending).

Finally, the Committees could decide to maintain the "hybrid" approach. Under this approach, a default rule is established — at present, the default rule is that a motion for attorney's fees under Rule 54 is not treated like a Rule 59 motion — but then the district court is given authority to make exceptions to the default rule. At present, Civil Rule 58(c)(2) gives district courts authority to "order that [a Rule 54] motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59." To solve the *Wikol* problem, though, the rules would have to be amended to impose a deadline by which a district court must act. For example, a deadline could be patterned after Criminal Rule 35(a), under which a court has authority to correct a sentence within seven days after the sentence is imposed, but loses such authority after the seventh day.

The Committee discussed the options described by the Reporter. Most Committee members said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would always be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits would always have to be brought together with the appeal on the fees. In the experience of Committee members, appeals of fee orders are usually brought separately from appeals of underlying judgments, and for good reason. A decision on fees can be much more difficult than a decision on the merits. District court judges often do not want to have to make a decision on fees until they know for certain that the decision on the merits will stand. Also, once the appeal on the merits is over, parties often settle the fees dispute.

Most Committee members also said that they would not favor amending the rules so that timely Rule 54 motions for attorney's fees would never be treated like Rule 59 motions for a new trial — i.e., so that the appeal on the merits could never be brought together with the appeal on the fees. Members pointed out that the Federal Circuit has held that, in patent infringement cases, appeals on the merits must always be packaged together with appeals on the fees. Sometimes there is good reason to present the appellate court with the merits and the fees in the same appeal.

In sum, Committee members favor maintaining the current hybrid approach, under which the assumption is that the appeals will proceed separately, unless the district court orders otherwise. Committee members believe, however, that a time limit should be added to Civil Rule 58(c)(2) so that the *Wikol* facts are not repeated. Item No. 04-03 should be referred to the Civil Rules Committee, so that it can consider approving such an amendment.

A member moved that Item No. 04-03 be referred to the Civil Rules Committee, along with the recommendation of this Committee that Civil Rule 58(c)(2) be amended to impose a deadline by which a judge must exercise his or her authority to order that a motion for attorney's fees have the same effect under Appellate Rule 4(a)(4) as a timely motion under Civil Rule 59. The motion was seconded. The motion carried (unanimously).

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Spring 2005 Meeting

The Committee will next meet on April 18 and 19, 2005, in Washington, D.C.

VIII. Adjournment

The Committee adjourned at 12:30 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter