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

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Friday, November 7, 2003, at 8:25 a.m. at the Loews Coronado Bay Resort near San Diego, California. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr. (by phone), Justice Richard C. Howe, Prof. Carol Ann Mooney, 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 Judge David F. Levi, chair of the Standing Committee, and his assistant, Ms. Brook Coleman; 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; and Ms. Marie C. Leary from the Federal Judicial Center. Prof. Patrick J. Schiltz served as Reporter.

Judge Alito announced that Judge Levi had replaced Judge Anthony J. Scirica as chair of the Standing Committee. Judge Alito also announced that several changes had been made to the membership of the Advisory Committee. Judge Roberts, who formerly served on the Committee as a representative of the bar, was appointed to replace Judge Diana Gribbon Motz as a representative of the bench. Judge T.S. Ellis III was appointed to replace Judge Stanwood R. Duval, Jr. And Mr. Mark I. Levy was appointed to fill the vacancy created by the elevation of Judge Roberts. Judge Alito welcomed Mr. Levy to the Committee and said that he looked forward to welcoming Judge Ellis, who was unable to attend today's meeting.

Judge Alito said that Judge Motz and Judge Duval were also unable to attend today's meeting, but he hoped that they would be able to join the Committee at its spring meeting so that Committee members could express appreciation for their service.

Finally, Judge Alito announced that Justice Howe would be leaving the Committee following today's meeting. Judge Alito thanked Justice Howe for his service and presented Justice Howe with a certificate of appreciation.

II. Approval of Minutes of May 2003 Meeting

The minutes of the May 2003 meeting were approved.

III. Report on June 2003 Meeting of Standing Committee

The Reporter stated that, at its June 2003 meeting, the Standing Committee had approved for publication all of the amendments proposed by this Advisory Committee. The Reporter described some of the comments that members of the Standing Committee made regarding the proposed rules. The Reporter said that he would remind the Advisory Committee of those comments when the Committee reconsiders the proposed rules following the formal notice-and-comment period.

IV. Action Items

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

At Judge Alito's request, Mr. Letter introduced this item. Mr. Letter reminded the Committee that this item arose out of a suggestion by Judge Duval that Rule 4 be amended to resolve a circuit split over whether appeals of orders granting or denying applications 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)) are 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).

In the course of the first Committee discussion of Judge Duval's proposal, several members pointed out that the circuit split over the Hyde Amendment closely resembled the circuit split over whether appeals of orders granting or denying applications for a writ of error *coram nobis* were "civil" or "criminal" — a circuit split that was resolved by the amendment of Rule 4(a)(1) in 2002. The Department of Justice agreed to study the general question of whether Rule 4 should be amended to make it easier to distinguish "civil" appeals from "criminal" appeals.

At the Committee's November 2002 meeting, Mr. Letter presented a draft amendment that would have taken a "laundry list" approach to distinguishing "civil" from "criminal" appeals. The draft amendment would have defined several specific appeals as "appeals in a civil case" and other specific appeals as "appeals in a criminal case." Committee members expressed a number of objections to the "laundry list" approach and, by consensus, agreed not to pursue it further. But members asked the Department to consider whether Rule 4 could instead be amended to implement a global solution to the problem of distinguishing "civil" appeals from "criminal" appeals. A couple of Committee members specifically suggested amending Rule 4 so that, in all cases — civil and criminal — private parties would get 30 days and the government 60 days to appeal.

Mr. Letter said that the Department had studied this suggestion and decided to recommend against it for three reasons. First, now that Rule 4 has been amended to solve the *coram nobis* problem, only one circuit split remains over whether a particular type of appeal is "civil" or "criminal" — and that is the split over the Hyde Amendment. That split is not serious

enough to justify a fundamental reworking of Rule 4. Second, expanding the time to appeal in criminal cases from 10 to 30 days for defendants and from 30 to 60 days for the government would unduly delay criminal appeals, contrary to the oft-stated public interest in expediting such appeals. Finally, a rule that gave private parties 30 days and the government 60 days to appeal in all cases would conflict with 18 U.S.C. § 3731 and perhaps other statutes. Although the supersession clause of the Rules Enabling Act (28 U.S.C. § 2072(b)) gives the Committee authority to propose rules that vitiate existing statutes, such authority should be exercised sparingly. The circuit split over the Hyde Amendment is not important enough to justify the exercise of such authority.

Mr. Letter added that, although one public defender told him that criminal defense attorneys would welcome the extension of the time to appeal from 10 to 30 days, other criminal defense attorneys expressed no objection to the current 10-day period. Mr. Letter pointed out that the 10-day period has existed for over 70 years and has been internalized by the bench and bar. Moreover, as a result of the 2002 amendment to the time computation provisions of Rule 26, criminal defendants now effectively have 14 to 17 days to file an appeal. This is ample time, especially as, in the vast majority of cases, a notice of appeal is filed almost immediately after a judgment of conviction is entered.

The Committee discussed the Department's recommendation at length. Most members agreed that the particular proposal that the Department had studied should not go forward. Members were concerned about slowing down the criminal appeals process and about approving a rule that would directly conflict with a statute.

At the same time, members expressed interest in continuing to try to find a solution to the problem of having to distinguish "civil" from "criminal" appeals. One member noted that, although there may be no circuit splits (other than the split over the Hyde Amendment), it is still far too difficult for attorneys and pro se litigants to figure out whether some appeals — such as appeals from various post-judgment orders — are "civil" or "criminal."

A couple of members suggested that Rule 4 be amended to provide, in essence, that the time limitations of Rule 4(b) apply to direct appeals of criminal convictions, and the time limitations of Rule 4(a) apply to all other appeals. The Reporter reminded the Committee that, at a previous meeting, a member had proposed that Rule 4 be amended to provide something like the following: "As used in this rule, 'appeal in a civil case' means every appeal except a direct appeal from a judgment of conviction entered under Fed. R. Crim. P. 32(k)."

After additional discussion — during which members questioned how many 10-day appeal deadlines might be changed to 30-day deadlines under such a rule — Mr. Letter agreed that the Department will study the proposal and make a recommendation to the Committee at a future meeting.

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

The Reporter introduced the following proposed amendment and Committee Note:

Rule 26. Computing and Extending Time

* * * * *

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

Committee Note

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

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

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

To illustrate further: A paper is served by mail on Thursday, August 11, 2005. The prescribed time to respond is 30 days. Whether or not there are intervening legal holidays, the prescribed period ends on Monday, September 12 (because the 30th day falls on a Saturday, the prescribed period extends to the following Monday). Under Rule 26(c), three calendar days are added — Tuesday, Wednesday, and Thursday — and thus the response is due on Thursday, September 15, 2005.

The Reporter reminded the Committee that it had referred to the Advisory Committee on Civil Rules the proposal of attorney Roy H. Wepner that Appellate Rule 26(c) be amended to clarify precisely how deadlines that are extended under its "3-day rule" should be calculated. The proposal was referred to the Civil Rules Committee because the same ambiguity has long existed under Civil Rule 6(e).

In August, the Civil Rules Committee published for comment an amendment to Rule 6(e) that would resolve the uncertainty. Under the proposal, a party would first have to calculate the "prescribed period" without reference to the 3-day extension. After the party identified the day on which the "prescribed period" would otherwise expire, the party would add three days. The paper would be due on the third day, unless the third day was a Saturday, Sunday, or legal holiday, in which case the paper would be due on the next day that was not a Saturday, Sunday, or legal holiday.

The Reporter said that the proposal of the Civil Rules Committee seems sound. It comports with the understanding of most practitioners, and it adopts the most generous of the various counting options — thereby ensuring that no attorneys will be trapped into missing deadlines. The Reporter said that he had patterned the draft amendment to Appellate Rule 26(c) after the proposed amendment to Civil Rule 6(e), with two exceptions:

First, the Reporter asked the Committee to consider whether the words "would otherwise expire" should be added after "prescribed period." The Reporter said that, although the proposed amendment to Civil Rule 6(e) does not use "would otherwise expire," he thought that the amendment would be clearer if it did. Second, the Reporter pointed out that he had added language to the Committee Note to clarify how deadlines should be calculated when the "prescribed period" ends on a Saturday, Sunday, or legal holiday. The Reporter said that he did

not think that either the proposed amendment to Civil Rule 6(e) or the accompanying Committee Note was sufficiently clear on this point.

After a brief discussion, the Committee agreed that the clarifying phrase "would otherwise expire" should be added to the amendment. One member expressed concern about creating an inconsistency with the proposed amendment to Civil Rule 6(e). Judge Levi (who formerly chaired the Civil Rules Committee) said that the Civil Rules Committee did not feel strongly about the precise wording of the proposed amendment to Civil Rule 6(e) and would be open to suggestions for improvement. If differences remain, the Standing Committee can examine the two proposals, approve the proposal that it prefers, and make conforming changes to the other proposal.

A member moved that the proposed amendment to Rule 26(c) — including the phrase "would otherwise expire" — be approved. The motion was seconded. The motion carried (unanimously).

Later in the meeting, a member asked to revisit the amendment to Rule 26(c). He suggested that the amendment would be even clearer if the phrase "under Rule 26(a)" was added after "would otherwise expire." The additional language would point practitioners directly to the time calculation rules of Rule 26(a) and would underscore that those rules should be used in calculating the "prescribed period."

A member moved that the proposed amendment to Rule 26(c) be further amended by adding the words "under Rule 26(a)" after "would otherwise expire." The motion was seconded. The motion carried (unanimously).

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

The Reporter introduced the following proposed amendment and Committee Note:

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

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

Committee Note

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

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

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

The Reporter said that, pursuant to the Committee's instructions, he had drafted an amendment to Rule 7 to resolve the circuit split over whether the "costs" secured by a Rule 7 bond are limited to the "costs" that are identified in Rule 39 or instead also include attorney's fees that are defined as "costs" in a fee-shifting statute. At its May 2003 meeting, the Committee decided that Rule 7 bonds should not be used to secure attorney's fees and asked the Reporter to draft an implementing amendment.

The Reporter said that drafting the amendment proved to be more difficult than he had anticipated. The amendment cannot simply cross-reference the "costs" mentioned in Rule 39, as Rule 39 does not contain a definition of "costs." The amendment also cannot simply cross-reference the "costs" mentioned in 28 U.S.C. § 1920; although the statute does define "costs," it omits the cost of "premiums paid for a supersedeas bond or other bond to preserve rights pending appeal," which cost is specifically mentioned in Rule 39. The Reporter considered drafting an amendment that would provide, in effect, that "costs" do not include attorney's fees, but a rule that defines a word in terms of what it does *not* include may open the door to litigation about what it *does* include. The Reporter said that, in the end, he decided that "costs on appeal" should be defined to mean "the costs that may be taxed under 28 U.S.C. § 1920 and the cost of premiums paid for a supersedeas bond or other bond to preserve rights pending appeal."

After a brief discussion, a member moved that the proposed amendment to Rule 7 be approved. The motion was seconded. The motion carried (unanimously).

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

At its May 2003 meeting, the Committee asked the Department of Justice to study and make a recommendation regarding a proposal by Judge John M. Roll that Rule 11 or 12 be amended to require district courts to retain possession of the exhibits that were introduced into evidence in a case when that case is on appeal. Judge Roll expressed two concerns about the practice of many district courts of returning trial exhibits to the parties while their cases are pending on appeal. First, Judge Roll is concerned about the ability of appellate courts to quickly retrieve exhibits from parties. Second, Judge Roll is concerned about the possibility that exhibits will be destroyed, misplaced, or altered by the parties while the case is on appeal.

Mr. Letter said that the Department recommends that the Committee not pursue Judge Roll's proposal. Mr. Letter said that the Department agreed with Judge Roll that the practice of returning exhibits to the parties was problematic for exactly the reasons that Judge Roll gave. But an amendment to Rule 11 or 12 forcing all district courts to retain exhibits in all cases would not be practical. The district courts are simply not equipped with the facilities, personnel, or funds to retain trial exhibits — exhibits that could be dangerous (such as a gun introduced in a criminal case) or large (such as a diesel engine introduced in a patent case). Moreover, conditions vary dramatically from district-to-district in light of such factors as the geographical scope of the district, the size and subject matter of the caseload handled by the district, and the physical facilities available to the district. In light of those realities, a uniform national rule was not workable. Instead, the courts should continue to deal with the concerns raised by Judge Roll on a case-by-case basis.

A member asked whether the Department was aware of cases in which exhibits had been lost after being returned to the parties. Mr. Letter said that such cases existed, but they were rare. He also pointed out that, even if clerks were required to retain all exhibits, exhibits would still be misplaced.

A member asked whether it was common for appellate judges to have difficulty retrieving exhibits from the parties. The appellate judges and Ms. Waldron responded that such problems are rare and almost never cause the court to delay a decision. In the vast majority of cases, the appellate court does not need to examine the exhibits introduced at trial — for example, the gun found in the defendant's car or the drugs purchased by the undercover agent. Judges are usually able to make a decision based upon the briefs and paper record. When the court needs to examine an exhibit, a phone call to one of the attorneys almost always results in the exhibit being promptly delivered.

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

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

Under Rule 44, a party who challenges the constitutionality of a federal statute in a case in which the federal government is not a party is required to notify the clerk of the challenge, and the clerk is then required to notify the Attorney General. Rule 44 is derived from 28 U.S.C. § 2403.

Civil Rule 24(c) contains a similar provision, but it has largely escaped the notice of district judges and trial attorneys, most likely because it is buried in a rule regarding intervention. As a result, the federal government often has not received timely notice — or, indeed, *any* notice — of constitutional challenges to federal statutes. The Civil Rules Committee has proposed to remedy this problem by adopting a new Civil Rule 5.1. That rule would differ in several respects from current Rule 44 — most significantly, in requiring *both* the parties *and* the clerk to notify the government.

At its May 2003 meeting, the Committee asked the Department of Justice to make a recommendation regarding whether Appellate Rule 44 should be amended to conform to proposed Civil Rule 5.1. Mr. Letter said that the Department has studied the matter and concluded that no changes in Rule 44 are warranted. Mr. Letter said that, unlike current Civil Rule 24(c), Rule 44 has been working well, and there is no reason to amend the rule to impose the "double notice" obligation that would be imposed under proposed Civil Rule 5.1.

A member moved that Item No. 03-04 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

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

The Department of Justice has proposed an amendment to Rule 3. Under the amendment, all parties to a case before a district court would be deemed parties to the case on appeal, and all parties to the case on appeal — save those who actually file a notice of appeal — would be deemed appellees. Parties who had no interest in the outcome of the appeal could "opt out" of the case by filing a notice of withdrawal with the clerk. An "appellee" who supported the position

of an appellant would have to file its brief within 7 days after the brief of that appellant was due. And an appellee who supported the position of an appellant would not be permitted to file a reply brief.

The Committee first discussed the proposed amendment at its May 2003 meeting. In the course of that discussion, Prof. Mooney said that the Committee had considered a similar proposal about 10 years ago, but she did not have a good memory of the details of the proposal or the reasons for its rejection. The Committee tabled further discussion to give the Administrative Office an opportunity to research the records of the Committee.

Professor Mooney's recollection proved correct. Records discovered by Mr. Rabiej and Mr. Ishida indicate that a proposal by Judge Frank Easterbrook to pattern Rule 3 after what is now Supreme Court Rule 12.6 (and what was then Supreme Court Rule 12.4) — a proposal that was similar to the current proposal by the Solicitor General — was considered by the Committee in 1992 but eventually rejected, in part because it was unanimously opposed by the clerks and the chief deputy clerks of the circuits. The nub of the clerks' opposition — and the main reason for the Committee's rejection — was the belief that the Supreme Court's rule might work for a court that decides fewer than 200 cases on the merits every year, but would not work for a circuit that must annually dispose of several thousand appeals. The Committee concluded that whatever benefits the rule would provide were outweighed by the administrative burden that the rule would impose on the parties and clerks.

Mr. Letter said that the Department continues to believe that its proposal should be approved. Mr. Letter said that, in his view, the Department's proposal would actually help the clerks. Under the proposal, the clerks would have to ask only two questions in determining who were parties to an appeal and whether each party was an appellant or an appellee: (1) Was the person or entity a party to the district court action? If "yes," the person or entity is a party to the appeal (unless the person or entity affirmatively notifies the clerk's office that it has no interest in the case). If "no," the person or entity is not a party to the appeal (unless it successfully moves to intervene). (2) Did the person or entity file a notice of appeal? If "yes," the person or entity is an appellant. If "no," the person or entity is an appellee.

The Committee discussed the Department's proposal at considerable length. (Judge Roberts joined the meeting by phone during the discussion.) Members of the Committee expressed two major concerns:

First, some members expressed skepticism about the seriousness of the problem that the proposed amendment addresses. Mr. Letter said that the government had experienced ambiguity about its status in about five appeals over the past five years. Some members do not believe that five cases in five years reflects a serious problem. These members also pointed out that, even in these rare cases, the government can easily ask the court for clarification. Other members thought the problem worth solving and pointed out that it arises on occasion in litigation in which the government is not a party.

Second, members expressed a great deal of concern about the administrative burden that the proposed rule would impose upon clerks and parties. These members believe that few parties are likely to take the trouble to "opt out" of a case — even a case in which they have little interest. Rather, parties are likely to remain in the appeal so that they can receive the briefs and other papers and keep an eye on the case. As a result, there will be cases in which hundreds of parties in the district court will be deemed parties in the court of appeals — and every one of those hundreds of parties will have to be served with the briefs and other papers — even though very few of those parties will have a real stake in the appeal. Mr. Letter argued in response that, because a party who does not opt out risks being negatively affected by the appellate decision, parties may opt out more frequently than members seem to assume. Moreover, Mr. Letter said that he did not think it unreasonable to ask parties to serve all other parties — even those who are "inactive."

Members agreed that, while the Department's proposal made sense as a starting point, what was needed was a more efficient way of identifying the "real" parties to the appeal before briefs and other papers must be served. Ms. Waldron said that, in the Third Circuit, all parties to the district court action are initially presumed to be parties to the appeal — as would be true under the Department's proposed rule. However, parties who are interested in *remaining* parties must file a notice of appearance. Those who do not are dropped from the appeal. Thus, the onus is on a party to take affirmative action to participate in the appeal. As a result, the Third Circuit does not experience cases in which dozens of litigants who are not really interested in an appeal are defined as "parties" and need to be served.

The Reporter pointed out that the Third Circuit system would not work nationally under the current rules, as nothing in FRAP requires the filing of a notice of appearance. A member suggested that the Committee consider whether to amend FRAP to implement the Third Circuit system nationally. In other words, the rules would provide that all parties to a case before a district court would *initially* be deemed parties to the case on appeal — but a party who did not file a notice of appearance within 10 days or so would be deemed to have withdrawn. Other members agreed that such a proposal would be worth considering.

At the request of Judge Alito, Mr. Letter agreed to ask the Department to give further thought to its proposal and to consider in particular the implementation of a "notice-of-appearance" system similar to the Third Circuit's. Judge Alito also asked Ms. Waldron to survey her fellow clerks to assess the seriousness of the problem of defining parties to an appeal and to assess whether a national "notice-of-appearance" system was likely to work.

By consensus, the Committee agreed to table further discussion of Item No. 03-06.

The Committee took a 15-minute break.

V. Discussion Items

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

Judge Alito reminded the Committee that Item Nos. 02-08, 02-16, and 02-17 arose out of complaints by the ABA Council of Appellate Lawyers about variations in local circuit rules regarding appendices, briefs, and the covers of briefs. At the Committee's request, the Department of Justice agreed to study these variations and make a recommendation to the Committee. Judge Alito asked Mr. Letter to describe the Department's conclusions.

Mr. Letter said that the Department recommended that no action be taken with respect to appendices. There is enormous variation among local circuit rules regarding appendices; indeed, no two circuits have the same rules. As a result, it is not possible simply to tweak a national rule and thereby eliminate minor variations in circuit practice. Rather, imposing national 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. Although there is no logical reason for the local variations — and although a national rule would be welcomed by the Department and most practitioners — the Department recognizes that there is almost no chance that a rule wiping out all local variations would be approved by the Standing Committee or the Judicial Conference.

Mr. Letter said that the Department also recommended no action with respect to the covers of briefs. All circuits seem to follow the same rules, with two minor exceptions: The Second Circuit requires the docket number to be set forth on the cover in very large typeface, and the Tenth Circuit requires the name of the lower court judge to appear on the cover. Moreover, those two exceptions cannot be enforced against practitioners under Rule 32(e), which requires the courts of appeals to accept briefs that comply with Rule 32.

Mr. Letter said that the Department does recommend that Rule 28 be amended to bring about more uniformity in the rules governing briefs and to require circuits to accept briefs that comply with Rule 28. Mr. Letter explained that there are more than a dozen differences in the local rules regarding briefs — and, because there is nothing like Rule 32(e) in Rule 28, practitioners have no choice but to follow each circuit's local rules. The Department recommends that Rule 28 be amended to incorporate the most popular of the local variations and to add a provision similar to Rule 32(e) that would force every circuit to accept briefs that comply with Rule 28, even if those briefs do not comply with the circuit's local rules. Specifically, the Department recommends that Rule 28 be amended as follows:

(1) A new provision would require briefs to begin with an "introductory statement." The statement would include the identity of the judge or agency whose decision was being appealed, a citation to the decision being appealed if it was included in a

federal reporter, a description of related cases, and, at the option of the party submitting the brief, a statement about whether oral argument is appropriate.

(2) The statement of the case — now required by Rule 28(a)(6) — would no longer include a description of "the course of proceedings."

(3) The statement of facts — now required by Rule 28(a)(7) — would include a description of the "prior proceedings."

(4) Copies of all unpublished decisions cited in the brief would have to be attached to the brief or included in an addendum that accompanies the brief.

The Committee gave extended consideration to the Department's recommendations.

Most members agreed with the Department's recommendation regarding appendices. Although members shared the frustration of the ABA with the variations — and although members agreed that the variations cannot be justified by local conditions — members reluctantly conceded that there was no chance that a uniform national rule could be imposed on every circuit. Judges feel very strongly about their local rules regarding appendices. The circuit judges on the Judicial Conference would almost certainly oppose a uniform rule, and the district judges on the Conference would almost certainly defer to the circuit judges. Moreover, members feared that even surveying the chief judges about their local rules could create a backlash that would reduce the chances of getting approved more modest changes to the rules regarding briefs. By consensus, the Committee agreed to remove Item No. 02-08 from its study agenda.

There was considerable disagreement among members of the Committee regarding the Department's proposal on briefs. Some members argued that the Committee was going too far in "micro-managing" appellate practice — in trying to make every brief look the same. Other members warned that judges feel as strongly about their local rules regarding briefs as they do about their local rules regarding appendices — and judges are likely to oppose attempts to impose different rules on them or to force them to accept briefs that do not comply with their local rules. Two of the appellate judges on the Committee said that their colleagues would surely oppose the Department's proposal.

Other members disagreed. They pointed out that the changes being proposed by the Department to the rules regarding briefs were much more modest than the kind of changes that would have to be made to the rules regarding appendices. They also pointed out that circuits might welcome some of the changes. The fact that a local variation has been adopted by, say, two-thirds of the circuits is strong evidence that the variation is a good idea. A circuit that does not follow the variation may never have considered it and might not object if a national rule imposed it.

One member asked whether a middle road was possible. He said that, as far as he was concerned, the most serious problem was that clerks reject briefs that do not comply with local rules, rather than filing them and asking the parties to make corrections. Perhaps the rules could be amended so that circuits could still apply their local rules, but clerks could not reject briefs that do not comply with them. The Reporter pointed out that this is precisely what the rules provide; under Rule 25(a)(4), clerks are already barred from rejecting a brief "solely because it is not presented in proper form as required by . . . any local rule." Ms. Waldron said that, in the Third Circuit, noncompliant briefs are filed and attorneys are asked to correct the deficiencies. The member responded that, in his experience, not all clerks are honoring Rule 25(a)(4).

One member asked whether Rule 28 could be amended to incorporate all of the local variations identified by the Department. In that way, a uniform national rule could be imposed, and every circuit would be happy because briefs would include everything that it wants. Mr. Letter and the Reporter responded that such an approach would require at least a dozen amendments to Rule 28, making Rule 28 ungainly. The Reporter also pointed out that, just as judges might object to a rule that omits from briefs information that they want, so too judges might object to a rule that requires briefs to include information that they do not want.

In the course of the Committee's discussion, several members commented on some of the specific changes that the Department had proposed to Rule 28.

Regarding the proposed "introductory statement": No member expressed opposition to amending Rule 28 to require the information identified by the Department. However, some members suggested that, rather than create a new category of information, it would be better to amend the descriptions of the existing categories to include the new information. For example, rather than requiring a new "introductory statement" to identify the judge or agency whose order is being reviewed, that information could be included in the statement of the case (which already requires a description of "the disposition below").

Regarding the requirement that all unpublished decisions cited in the brief be attached to the brief: The Reporter pointed out that this requirement would be much broader than proposed Rule 32.1, which requires that copies of unpublished opinions be served and filed only when those opinions are "not available in a publicly accessible electronic database." The Reporter also questioned whether judges would really want copies of unpublished opinions attached to the briefs. This could substantially increase the size of briefs — briefs that many judges carry while traveling or take home at night — while not providing much useful information. Members agreed with the concerns raised by the Reporter.

Regarding the proposal to strike "the course of proceedings" from the statement of the case: Members disagreed over the merits of the Department's proposal. Some members favored the proposal. They argued that there is widespread confusion among practicing attorneys about what is supposed to be included in the statement of the case. That confusion gives rise to two problems. The first is that many attorneys file statements that are much too long and that include

a great deal of irrelevant information about the proceedings below. The second is that many attorneys include in their statements of facts the same information about the proceedings below that they include in their statements of the case. One member said that the D.C. Circuit expects parties to include a very brief description of the proceedings below in their statements of the case and then to expand upon that description in their statements of the facts.

Other members opposed the proposed change. They argued that the rule was clear as written. In the statement of the case, a party should describe the proceedings before the district court or agency whose decision is being reviewed. In the statement of facts, a party should describe the facts that gave rise to the legal dispute. As to the variations in practice, these members argued that the variations were harmless; if a party wants to devote several pages to the proceedings below, then the only one being harmed is that party. Members also argued against using Rule 28 to "micro-manage" briefs — to essentially write the briefs of attorneys for them.

One member said that, in his state, the Supreme Court merely requires a "statement of facts and proceedings below" and gives attorneys the freedom to decide how much to say about the facts giving rise to the litigation and how much to say about the proceeding below. Attorneys sometimes use that freedom unwisely, but attorneys are going to make mistakes no matter how specifically the rules dictate the contents of briefs. The member urged that Rule 28 be amended to condense the "statement of the case" and the "statement of facts" into a similarly straightforward directive. Other members expressed support for the suggestion.

Judge Levi agreed that any proposed changes to Rule 28 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 Advisory Committee to be a good idea. Rather, if proposed changes to Rule 28 are to stand a chance of gaining Conference approval, the Committee will have to present solid empirical support for the changes. For example, the Judicial Conference is likely to be impressed by evidence that, say, two-thirds of the circuits have adopted a particular practice that the Committee seeks to make uniform — or, alternatively, that only one circuit has adopted a practice that the Committee seeks to preclude. The Conference is also likely to be impressed if members of the bar get behind a proposal. In short, before the Committee proposes any changes to Rule 28, it needs to do some empirical work.

Several members concurred with Judge Levi. By consensus, the Committee agreed to table further discussion of Item Nos. 02-16 and 02-17 and to request the Federal Judicial Center to collect further information for the Committee. Specifically, the Committee would like the FJC to identify every local circuit rule regarding the contents of briefs that varies from Rule 28. The Committee would also like to get some sense of the reason for each variation. Does the variation reflect a recent decision by the circuit's judges or is it a longstanding rule whose purpose can no longer be recalled by any member of the court? Does the variation address a serious problem that the circuit was experiencing or does it exist because of a request made by a long-retired member

of the court? Is the variation rigorously enforced by the clerk's office or does the office look the other way? Judge Alito said that he would draft a formal request to the FJC.

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

The Reporter introduced the following proposed amendment and Committee Note:

Rule 35. En Banc Determination

*** * * * ***

(g) Disclosure of Vote.

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

(b) **Petition Denied.**

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

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

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

(b) disclose whether a vote was taken; and

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

Committee Note

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

New subdivision (g) has been added to ensure that, in every case in which a court considers a petition for hearing or rehearing en banc, the court will identify the judges who participated (and, by implication, those who did not participate) in the consideration of the petition. There is a strong public interest in ensuring that "[a] judge . . . disqualif[ies] himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned." Code of Conduct for United States Judges, Canon 3C(1). The need for vigilance has been underscored in recent years by media reports regarding the inadvertent failure of judges to disqualify themselves in cases in which they had "a financial interest in the subject matter in controversy." Canon 3C(1)(c). At the same time, no important public interest appears to be furthered by keeping secret the identities of the judges who determined whether a case should be heard or reheard en banc.

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

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

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

The Reporter reminded the Committee that Judge A. Wallace Tashima — a member of the Standing Committee — had suggested that the Committee consider amending Rule 35 to require judges to disclose how they vote on rehearing petitions. The Reporter said that he had drafted an amendment to Rule 35 that would implement Judge Tashima's suggestion. Under the draft amendment, disqualifications would have to be disclosed in every case in which a party petitioned for hearing or rehearing en banc. Votes would be disclosed only when petitions for rehearing en banc were *denied*. Votes would not be disclosed when rehearing petitions were *granted*, nor would votes be disclosed when petitions to hear a case initially en banc were either granted or denied. In these latter situations, the court would be giving further consideration to the case, raising the appearance of unfairness if votes were disclosed. Morever, in these latter situations, judges would later cast a vote — either on the merits of the case or on a petition to rehear a panel decision en banc — that would be disclosed.

The Committee first discussed the question of disclosing votes. Every Committee member who spoke expressed opposition to the proposal. In the vast majority of cases, no vote is taken, so there is nothing to disclose to parties. In the few cases in which a vote on a rehearing petition is called for, judges cast "no" votes for such a wide variety of reasons that disclosing such votes would give the parties little useful information. And even judges who cast "yes" votes often do not want those votes disclosed for fear of needlessly embarrassing a colleague. The consensus of the Committee was that, given that the vast majority of circuits do not "involuntarily" disclose votes, and given that most Committee members think that disclosing votes would be a bad idea, and given that this issue does not directly affect practitioners, the Committee should go no further with the proposal.

Regarding disclosing disqualifications, a couple of Committee members argued that there was a legitimate public interest in making certain that judges disqualify themselves when they should. Others disagreed. Judges must review hundreds of rehearing petitions every year. Most are plainly meritless — and most do not attract a single vote to rehear. For that reason, judges do not screen rehearing petitions for disqualifications nearly as carefully as they screen cases that

they hear on the merits. Undoubtedly, judges who should technically disqualify themselves from considering a rehearing petition often fail to do so, but those failures virtually never make a difference because so few rehearing petitions even attract a single vote — much less the votes of enough judges to make the question close.

If all disqualifications had to be publicly disclosed, then judges would have to spend much more time screening rehearing petitions so as not to get mentioned in articles about the failure of judges to recuse themselves (similar to those articles published by the *Kansas City Star* and *Washington Post*). At a time when judges are already overwhelmed, forcing judges to shift their time away from deciding cases on the merits and toward screening rehearing petitions for disqualifications would be unwise.

A member moved that Item No. 03-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).

C. Items Awaiting Initial Discussion

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

Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits. Under the prison mailbox rule, a paper is considered timely filed if it is deposited by an inmate in his prison's internal mail system on or before the last day for filing. The rule provides that "[t]imely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

The circuits disagree about what should happen when a dispute arises over whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding — holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue.

In a brief discussion, Committee members agreed that the issue was worth considering. Committee members seemed to agree both that dismissal was too harsh a consequence for the failure to file an affidavit and that district courts should not be required to hold hearings on whether a paper was timely filed. Rather, the tentative consensus of the Committee appeared to be that the failure to file an affidavit should be called to the inmate's attention, and the inmate should be given a chance to correct the omission before his appeal is dismissed or other action taken against him.

Mr. Letter said that he would like an opportunity to ask the U.S. Attorneys about their experience with this issue and get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended. By consensus, the Committee agreed to table further discussion of Item No. 03-08.

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

Mr. Letter introduced Item No. 03-09, a recent proposal of the Department of Justice.

Under Rule 4(a)(1)(B), the 30-day deadline to bring an appeal in a civil case is extended to 60 days "[w]hen the United States or its officer or agency is a party." Similarly, under Rule 40(a)(1), the 14-day deadline to petition for panel rehearing is extended to 45 days in a civil case in which "the United States or its officer or agency is a party."[1] (By virtue of Rule 35(c), the extended deadline of Rule 40(a)(1) also applies to petitions for rehearing en banc).

Mr. Letter said that it is unclear whether the extended deadlines provided in Rule 4(a)(1) and Rule 40(a)(1) apply when an "officer" of the United States is sued in her *individual* capacity. Mr. Letter said that this ambiguity does not exist in the Civil Rules. Civil Rule 12(a)(3)(A) extends the deadline for responding to a summons and complaint from 20 to 60 days for "[t]he United States, an agency of the United States, or an officer or employee of the United States sued in an official capacity," and Civil Rule 12(a)(3)(B) goes on specifically to provide that:

> An officer or employee of the United States sued in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States shall serve an answer to the complaint . . . within 60 days after service on the officer or employee, or service on the United States attorney, whichever is later.

Mr. Letter said that the Department would like to see Appellate Rule 4(a)(1) (and Appellate Rule 40(a)(1)) amended so that the Appellate Rules are as clear as the Civil Rules about the deadlines that apply when an officer of the United States is sued in an individual capacity. Specifically, the Department proposes that Rule 4(a)(1)(B) be amended as follows:

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[1]The identical phrase — "the United States or its officer or agency" — is also used in Rule 29(a) (regarding amicus curiae briefs), while the phrase "the United States, its agency, or officer" is used in Rule 39(b) (regarding assessment of costs) and the phrase "the United States or its agency, officer, or employee" is used in Rule 44(a) (regarding notice of constitutional challenges).

Rule 4. Appeal as of Right — When Taken

(a) Appeal in a Civil Case.

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

* * * * *

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

The Department proposed that similar language be added to Rule 40(a)(1).

Members asked a number of questions about how the rule would work in practice. How would it apply to a case in which the Department decided not to represent the officer or employee in the district court after determining that the officer's or employee's alleged actions were not connected to duties performed on behalf of the United States? What if the officer or employee was challenging that determination? How would the rule apply in a case in which the Department represented the officer or employee in the district court — after determining that the officer's or employee's alleged actions were indeed connected to duties performed on behalf of the United States — but the district court later disagreed and held that the actions were not so connected?

Members also pointed out that the proposed amendment to Appellate Rule 4(a)(1)(B) was far broader than the corresponding provisions of the Civil Rules. Civil Rule 12(a)(3) provides an extension only when an officer or employee is sued "in an official capacity" or "in an individual capacity for acts or omissions occurring in connection with the performance of duties on behalf of the United States." An officer or employee who is sued in an individual capacity for acts or omissions that did *not* occur in connection with duties performed on behalf of the United States is not entitled to the extension.

By contrast, the draft amendment to Appellate Rule 4(a)(1)(B) provides an extension in any case in which an "officer" or "employee" of the United States is sued. The amendment makes clear that these cases "*includ[e]*" 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 the performance of duties on behalf of the United States." But the amendment does not *limit* the extension to such cases. Thus, a secretary for a federal agency who has a car accident while driving to church on a Sunday morning and is sued in federal court could take advantage of the extension.

By consensus, the Committee agreed to table further discussion of Item No. 03-09 to give the Department time to consider the questions raised by Committee members and to redraft the proposed amendment so as to narrow its scope.

VI. Additional Old Business and New Business

There was no additional old business or new business.

VII. Dates and Location of Spring 2004 Meeting

The Committee will next meet on April 13 and 14 in Washington, D.C.

VIII. Adjournment

By consensus, the Committee adjourned at 12:30 p.m.

Respectfully submitted,

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Patrick J. Schiltz
Reporter