

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

**ANTHONY J. SCIRICA**  
CHAIR

**PETER G. McCABE**  
SECRETARY

**CHAIRS OF ADVISORY COMMITTEES**

**WILL L. GARWOOD**  
APPELLATE RULES

**ADRIAN G. DUPLANTIER**  
BANKRUPTCY RULES

**PAUL V. NIEMEYER**  
CIVIL RULES

**W. EUGENE DAVIS**  
CRIMINAL RULES

**FERN M. SMITH**  
EVIDENCE RULES

**DATE:** December 7, 1998

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

**FROM:** Judge Will Garwood, Chair  
Advisory Committee on Appellate Rules

Detailed information about the recent and future activities of the Advisory Committee on Appellate Rules can be found in the minutes of the Committee's October 1998 meeting and in the Committee's docket, both of which are attached to this report. At this time, the Committee is not seeking Standing Committee action on any proposals.

I wish to report on four matters:

**1. Amendments Approved for Later Submission to the Standing Committee.** As you may recall, the Advisory Committee has determined that, barring an emergency, no proposed amendments to FRAP will be forwarded to the Standing Committee until the bench and bar have had an opportunity to become accustomed to the restylized rules. However, the Committee is continuing to consider and approve proposed amendments. All amendments approved by the Committee will be held until they are presented as a group to the Standing Committee, most likely at its January 2000 meeting.

At the Advisory Committee's October meeting, the following amendments were approved:

- a. An amendment that would abrogate FRAP 1(b). FRAP 1(b) now states that "[t]hese rules do not extend or limit the jurisdiction of the court of appeals." That is unlikely to remain true, given that the Supreme Court now has authority to use FRAP (as well as the other rules of practice and procedure) to define when a ruling of a district court is final for purposes of 28 U.S.C. § 1291 and to authorize interlocutory appeals that are not already provided for by 28 U.S.C. § 1292.

- b. An amendment to FRAP 4(a)(4) that would clarify that the time to appeal an order that amends a judgment runs from the later of the entry of the amended judgment or the entry of the order directing that the judgment be amended.
- c. An amendment to FRAP 4(a)(7) that would eliminate the requirement that an order denying one of the post-judgment motions listed in FRAP 4(a)(4)(A) must be entered on a separate document in compliance with FRCP 58.
- d. An amendment to FRAP 4(a)(7) that would permit (but not require) a party to appeal an order or judgment that is required to be entered on a separate document in compliance with FRCP 58 but that has not yet been so entered.
- e. An amendment to FRAP 4(a)(5)(A)(ii) that would clarify that a district court may extend the time to file a notice of appeal in a civil case for either excusable neglect or good cause, regardless of whether the extension is sought before or during the 30 days after the original deadline for appealing expires. At present, some circuits hold that only the good cause standard applies to requests made before the original deadline expires, and only the excusable neglect standard applies thereafter.
- f. An amendment to FRAP 15(f) that would provide that when, under governing law, an agency order is rendered non-final and non-appealable by the filing of a petition for rehearing (or similar petition) with the agency, any petition to review or application to enforce that agency order will be held in abeyance by the court and become effective when the agency disposes of the last such finality-blocking petition. The amendment would align the treatment of premature petitions for review of agency orders with the treatment of premature notices of appeal under FRAP 4(a)(4)(B)(i).
- g. An amendment to FRAP 26 that would provide that intermediate Saturdays, Sundays, and legal holidays will be excluded when computing deadlines under 11 days but will be counted when computing deadlines of 11 days and over. At present, the demarcating line in FRAP is 7 days, while the demarcating line in the FRCP and FRCrP is 11 days. The amendment would ensure that deadlines are computed in the same way under all three sets of rules. We anticipate that, at our April 1999 meeting, the Advisory Committee will approve amendments that would shorten a few of the deadlines in FRAP to take into account the new method of calculation.

The full text of these amendments, as well as the accompanying Committee Notes, can be found in the appendix to the minutes of the Committee's October meeting.

**2. Use of the Term "Advisory Committee Note."** At the June 1998 meeting of the Standing Committee, Prof. Coquillette informed the Reporters for the Advisory Committees that they should use the term "Committee Note," rather than "Advisory Committee Note," in drafting

amendments and notes. The Advisory Committee on Appellate Rules will accede to the request, but members of the Committee asked me to inform the Standing Committee that they would prefer to continue to use the term “Advisory Committee Note,” which, in their view, is more accurate substantively and is almost universally used within the legal profession. *See, e.g.,* Letter from Chief Justice William H. Rehnquist to Speaker of the House Newt Gingrich (Apr. 24, 1998) (transmitting amendments to FRAP and accompanying “Advisory Committee notes”).

**3. Amendment to FRAP 47(a).** At its April 1998 meeting, the Advisory Committee approved an amendment to FRAP 47(a)(1) that would provide that a local rule may not be enforced before it is received by the AO, and that all changes to local rules must take effect on December 1, except in cases of “immediate need.” At the June 1998 meeting of the Standing Committee, Judge Stotler asked us to share with the other advisory committees the text of the amendment and committee note, as well as the relevant portion of our minutes. We have done so.

To date, we have received input on the amendment from only the Advisory Committee on Bankruptcy Rules. That Committee expressed the view that (a) the enforcement of local rules should be contingent upon their being *published* in a manner prescribed by the AO (rather than upon their being *received* by the AO), and (b) changes to local rules should be effective whenever a majority of a court’s judges so desire, whether or not there is “immediate need” for the change.

The Advisory Committee on Appellate Rules discussed the views of the Advisory Committee on Bankruptcy Rules and respectfully disagrees. A “publication” requirement would not accomplish the goal of creating a single national repository for all local rules currently in force in the federal courts and would not comply with 28 U.S.C. § 2071(d) (which expressly requires that local rules be *provided* to the AO, and not merely that they be published as the AO directs). Moreover, the strict “immediate need” standard (which is borrowed from 28 U.S.C. § 2071(e)) is necessary to bring about uniformity; permitting local rules to take effect on a date other than December 1 at the whim of a majority of a court’s judges would not appreciably improve the current situation.

**4. Disclosure and Recusal Obligations.** We were informed by the AO that the Committee on Codes of Conduct is considering various proposals for assisting judges in meeting their disclosure and recusal obligations, including the possible incorporation of a rule similar to FRAP 26.1 in the FRCP, FRCrP, and FRBP. We were asked for our “preliminary views” regarding this proposal. The Advisory Committee briefly discussed the proposal and, on balance, thought it worthwhile. Also, the Advisory Committee discussed the possibility of broadening FRAP 26.1. Although there was consensus that FRAP 26.1 is far from ideal — among other problems, the recusal statute (28 U.S.C § 455) applies to a much broader array of financial interests than does FRAP 26.1 — members of the Advisory Committee also recognized that, as has proven true in the past, attempting to broaden FRAP 26.1 would involve an extremely difficult drafting exercise. If the Standing Committee decides that a provision similar to FRAP 26.1 should be included in all of the rules of practice and procedure, the question of broadening FRAP 26.1 would perhaps be best addressed by an ad hoc committee comprised of members of all of the advisory committees.

**Advisory Committee on Appellate Rules  
Table of Agenda Items — Revised December 1998**

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
95-03	Amend FRAP 15(f) to conform to new FRAP 4(a)(4)(B)(i).	Hon. Stephen F. Williams (CADC)	Awaiting initial discussion Retained in part on agenda with medium priority 9/97 Draft approved 10/98 for submission to Standing Committee after 12/1/98
95-04	Amend computation of time to conform to Civil Rules method. (Related to No. 97-1.)	James B. Doyle, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee after 12/1/98
95-07	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period.	Luther T. Mumford, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 10/98 for submission to Standing Committee after 12/1/98
97-01	Amend FRAP 26(a) so that time computation is consistent with FRCP 6(a). (Related to No. 95-4.)	Advisory Committee & Los Angeles County Bar Assn.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee after 12/1/98
97-05	Amend FRAP 24(a)(2) in light of Prisoner Litigation Reform Act.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-07	Amend FRAP 28(j) to allow brief explanation.	Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-09	Amend FRAP 32 — cover color for petition for rehearing/rehearing en banc, response to either, and supplemental brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98

<u>FRAP Item</u>	<u>Proposal</u>	<u>Source</u>	<u>Current Status</u>
97-12	Amend FRAP 44 to apply to constitutional challenges to state laws.	Advisory Committee	Awaiting initial discussion Retained on agenda with low priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-14	Amend FRAP 46(b)(1)(B) to replace the general "conduct unbecoming" standard with a more specific standard or, alternatively, supplement FRAP 46(b)(1)(B) by recommending a model local rule governing attorney conduct.	Standing Committee	Awaiting initial discussion Retained on agenda with low priority 9/97 Discussed and retained on agenda 4/98
97-18	Amend or delete FRAP 1(b)'s assertion that the "rules do not extend or limit the jurisdiction of the courts of appeals."	Hon. Frank H. Easterbrook (CA7)	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 10/98 for submission to Standing Committee after 12/1/98
97-21	Amend FRAP 31(b) to clarify that briefs must be served on unrepresented parties, as well as on "counsel for each separately represented party."	Advisory Committee	Awaiting initial discussion Draft approved 9/97 for submission to Standing Committee after 12/1/98
97-22	Amend FRAP 34(a)(1) to establish a uniform federal rule governing party statements as to whether oral argument should or should not be permitted.	Advisory Committee	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-30	Amend FRAP 32(a)(7)(C) to require use of a standard certificate of compliance with type-volume limitation.	Luther T. Mumford, Esq.	Awaiting initial discussion Retained on agenda with high priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-31	Amend FRAP 47(a)(1) to require that all new and amended local rules take effect on December 1.	Luther T. Mumford, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97 Draft approved 4/98 for submission to Standing Committee after 12/1/98
97-32	Amend FRAP 12(a) to require the appellate caption to identify only the parties to the appeal.	Methods Analysis Program	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from appellate clerks
97-33	Amend FRAP 3(c) to require that an appellant file with the notice of appeal a statement identifying all appellants, all appellees, and counsel for all represented parties.	Methods Analysis Program	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from appellate clerks

97-41	Amend FRAP 4 to specify time for appeal of order granting or denying writ of coram nobis.	Solicitor General Waxman	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee after 12/1/98
98-01	Amend FRAP 47(a) to provide that local rules do not become effective until filed with the Administrative Office.	Standing Committee	Awaiting initial discussion Draft approved 4/98 for submission to Standing Committee after 12/1/98
98-02	Amend FRAP 4 to clarify the application of FRAP 4(a)(7) to orders granting or denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A). (Related to former item No. 95-08)	Hon. Will Garwood (CA5) Luther T. Munford, Esq.	Awaiting initial discussion Discussed and retained on agenda 4/98 Draft approved 10/98 for submission to Standing Committee after 12/1/98
98-03	Amend FRAP 29(e) to increase the time for amici to file their briefs and to clarify the status of local rules on amicus briefs, and amend FRAP 31(a)(1) so that the time to file a reply brief runs from the filing of the amicus brief rather than the service of the appellee's brief.	Paul Alan Levy, Esq. Public Citizen Litigation Group	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice, et al.
98-06	Amend FRAP 4(b)(3)(A) to clarify whether and to extent the filing of a FRCrP 35(c) motion for correction of sentence tolls the time to file appeal.	Hon. Will Garwood (CA5)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice
98-07	Amend FRAP 22(a) to permit circuit judges to deny applications for writs of habeas corpus.	Hon. Kenneth F. Ripple (CA7)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting specific proposal from Department of Justice
98-08	Amend unspecified rules to provide for appeals from Tax Court decisions that meet the criteria of FRCrP 54(b).	Hon. Richard A. Posner (CA7)	Awaiting initial discussion Discussed and retained on agenda 10/98; awaiting report from Department of Justice