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

DATE: May 13, 1999

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 activities of the Advisory Committee on Appellate Rules can be found in the minutes of the Committee's April 1999 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 three 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, which took effect on December 1, 1998. However, the Advisory Committee is continuing to consider and approve proposed amendments. All amendments approved by the Advisory 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 April 1999 meeting, several amendments were approved:

a. Last year the Committee approved an amendment to FRAP 26(a)(2) 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.

At the Advisory Committee's April 1999 meeting, we approved amendments that would shorten a couple of the deadlines in FRAP to take into account the new method of calculation. Specifically, we approved:

i. an amendment to FRAP 27(a)(3)(A) to shorten the time within which a party must file a response to a motion from 10 days to 7 days after the motion is served;

ii. an amendment to FRAP 27(a)(4) to shorten the time within which a party must file a reply to a response to a motion from 7 days to 5 days after the response is served; and

iii. an amendment to FRAP 41(b) to provide that a court's mandate must issue "7 *calendar* days" (instead of "7 days") after the time to file a petition for rehearing expires (or after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate).

b. We also approved an amendment to FRAP 32 that would require every brief, motion, or other paper filed with a court to be signed by the attorney or unrepresented party who files it. Surprisingly, no provision of FRAP now requires that briefs or other papers be signed.

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 April meeting.

2. Reconsideration of Amendments to FRAP 4(a). In my last report to the Standing Committee, I mentioned that the Advisory Committee had approved the following three amendments to FRAP 4(a):

a. 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;

b. 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) be entered on a separate document in compliance with FRCP 58 before the time to appeal the order begins to run; and

c. an amendment to FRAP 4(a)(7) that would permit (but not require) a party to appeal a judgment or order that is required to be entered on a separate document in compliance with FRCP 58 but that has not yet been so entered.

At our April 1999 meeting, the Committee reconsidered the second and third of these changes. For reasons that are described in the minutes of our meeting, the Committee agreed in principle that orders that *grant*, as well as orders that *deny*, one of the post-judgment motions listed in FRAP 4(a)(4)(A) should be deemed entered for purposes of calculating the time to appeal when the order is entered on the docket in compliance with FRCP 79(a). Entry on a separate document in compliance with FRCP 58 would no longer be required. At its October 1999 meeting, the Committee will consider whether FRAP 4(a)(7) should be further amended to provide that the time to appeal *all* orders — whether or not the order disposes of a post-judgment motion listed in FRAP 4(a)(4)(A) — should begin to run when the order is entered on the docket, leaving the separate document requirement applicable only to judgments.

The Committee also decided to put a "cap" on the length of time that a party can wait to appeal a judgment or order that is required to be entered on a separate document in compliance with FRCP 58 but that is not. At present, a party literally can wait forever to appeal such a judgment or order, as, under FRAP 4(a)(7), the time to appeal such a judgment or order does not begin to run until it is entered in compliance with FRCP 58. The Committee approved in principle an amendment to FRAP 4(a)(7) that would provide that the time to appeal a judgment or order that is required to be entered in compliance with FRCP 58 would begin to run upon the earlier of (a) entry of the judgment or order in compliance with FRCP 58 or (b) 150 days after entry of the judgment or order on the docket in compliance with FRCP 79(a).

3. Comments on Electronic Service Rules. The Advisory Committee reviewed the electronic service amendments to the civil rules drafted by Prof. Cooper.

a. The Committee agrees that electronic service should not be imposed upon unwilling parties and that courts should not be able to forbid parties who have consented to electronic service from using it. The Committee prefers the "Capra" formulation of the proposed amendment to FRCP 5(b)(2)(D).

The Committee does not understand why FRCP 5(b)(2)(D) has been drafted to require the consent of parties to "other means" of service — such as Federal Express or third party carriers. The appellate rules have authorized such service without the consent of the parties since 1996 (see FRAP 25(c)). The Committee suggests that FRCP 5(b)(2) be redrafted so that "electronic" service (to which parties must consent) is mentioned in one subsection and "any other means" of service (to which parties need not consent) is mentioned in another.

b. The Committee agrees that, although courts should not be able to *forbid* the use of electronic service when the parties consent, they should have considerable discretion to use local rules to *regulate* that service. At present, the draft amendments say nothing about such discretion, and the Committee Note mentions it only with respect to the "means of consent." The Committee thinks it important that the ability of courts to use local rules to regulate electronic service be expressly mentioned in the text of a rule (just as the ability of courts to use local rules to regulate electronic filing is expressly mentioned in FRCP 5(e)).

c. The Committee agrees that only "FRCP 5 service" (as well as "FRCP 77(d) service"), and not "FRCP 4 service," should be made electronically. Like the Advisory Committee on Bankruptcy Rules, the Committee does not believe that requests for waiver of service under FRCP 4(d) should be made electronically.

d. The Committee understands the decision to use "transmission" as the effective date of electronic service. However, it is concerned about the not uncommon situation in which the sender of an electronic message is informed that the message was not delivered to its intended recipient. In this situation, is service still effective upon transmission? The Committee believes that either the text of the rule or the Committee Note should address this situation.

e. The Committee expressed a concern about extending the "three day rule" of FRCP 6(e) to electronic service or to any means of service other than mail service. The practitioners on the Committee pointed out that, in choosing a means of service, lawyers often seek to give their opponents as little time to respond as possible. Extending the three day rule to electronic service will discourage its use, as attorneys will not want their opponents to have three extra days to respond to something that they are likely to receive instantaneously. Instead, attorneys will use the mail.

The Committee generally prefers Prof. Cooper's "Alternative 1," which would leave FRCP 6(e) unchanged. Mail is distinguishable from electronic service, in that mail is completely out of the control of attorneys for several days, while attorneys can, if they wish, check their e-mail daily.

f. The Committee supports giving courts the discretion to use local rules to authorize clerks to make consented-to electronic service on behalf of parties.