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

DATE: May 12, 1998

TO: Judge Alicemarie H. Stotler, 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 April 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 three matters:

1. Amendments Approved for Later Submission to the Standing Committee. As you may recall, the Advisory Committee determined at its September 1997 meeting that, barring an emergency, no amendments to FRAP will be forwarded to the Standing Committee until the bench and bar have had several months to become accustomed to the restylized rules. However, the Committee is continuing to consider and approve proposed amendments to FRAP. 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 April meeting, the following were approved:

a. An amendment to FRAP 4(a)(1) that would provide that the time limitations of FRAP 4(a) (which apply in civil cases) and not those of FRAP 4(b) (which apply in criminal cases) would apply to appeals from orders granting or denying applications for writs of error *coram nobis*.

b. An amendment to FRAP 24(a)(2) that would eliminate a conflict between the rule and the Prison Litigation Reform Act of 1995 regarding the obligation of prisoners who are proceeding in forma pauperis to pay filing fees.

c. An amendment to FRAP 27(d)(1)(B) that would provide that, if a cover is voluntarily used on a motion, response to a motion, or reply to a response to a motion, it must be white.

d. An amendment to FRAP 28(j) that would place a 250 word limit on letters notifying the court of supplemental authorities, but remove the rule's prohibition against "argument" in those letters.

e. An amendment to FRAP 32(a)(2) that would require a tan cover to be used on supplemental briefs.

f. A Form 6, which would be added to the Appendix of Forms, and which would provide a suggested form for the certificate of compliance required by FRAP 32(a)(7)(C). (FRAP 32(a)(7)(C) requires that, when a brief exceeds a specific number of pages, the person submitting the brief must file a certificate of compliance with the type-volume limitation of FRAP 32(a)(7)(B).) In addition, the Committee approved an amendment to FRAP 32(a)(7)(C) that would provide that use of Form 6 must be regarded as sufficient to meet the requirements of FRAP 32(a)(7)(C).

g. An amendment to FRAP 32(c)(2)(A) that would provide that, if a cover is voluntarily used on a petition for rehearing or any other paper on which a cover is not required by FRAP, the cover must be white.

h. An amendment to FRAP 44 that would require parties to give written notice to clerks of challenges to the constitutionality of state statutes raised in cases in which the relevant state is not a party.

i. An amendment to FRAP 47(a)(1) that would provide (i) that a local rule may not be enforced before it is received by the Administrative Office, and (2) that all changes to local rules must take effect on December 1, except in cases of "immediate need."

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

2. Removal of Proposals Regarding Unpublished Decisions from Study Agenda. The Committee removed several items from its study agenda, one of which may be of particular interest to the Standing Committee.

As you may recall, at the January 1998 meeting of the Standing Committee, I reported that the Advisory Committee had decided to consider whether FRAP should be amended to address when a judgment may be entered without opinion, when a circuit court may designate one

of its opinions as unpublished, when unpublished opinions may be electronically disseminated (*e.g.*, via Westlaw or LEXIS), when unpublished opinions may be cited, and when unpublished opinions have precedential effect.

In January, I wrote to the chief judges of all of the circuits to invite their comments and the comments of their colleagues on these issues. I received responses from almost all of the chief judges, as well as from several other circuit judges. The judges were virtually unanimous — and, on the whole, quite emphatic — that the Committee should not propose rules addressing *any* of these topics. I also appeared in person at a March meeting of the chief judges, and they again made it clear that they would oppose any rulemaking on these issues.

The members of the Committee hold various views regarding the advisability of drafting rules governing the practice of disposing of appeals without opinion or with unpublished opinions. However, all of the members recognize that, in light of the strong sentiments of the chief judges (who make up half the voting membership of the Judicial Conference), such rules have virtually no chance of becoming law in the foreseeable future. For that reason, the Committee has decided to drop this matter from its study agenda.

I should note that several members of the Committee are concerned about the refusal of the Third, Fifth, and Eleventh Circuits to provide their unpublished opinions to LEXIS and Westlaw. (All other circuits do so.) I have appointed a subcommittee, chaired by Judge Diana Gribbon Motz, to consider whether and how those circuits might be encouraged to change their practice.

3. Reports Specifically Requested By the Standing Committee. The Standing Committee has requested that the Advisory Committees report on three issues:

a. Inquiry from the Executive Committee of the Judicial Conference Regarding the Shortening of the Rules Enabling Act Process. By letter dated February 25, 1998, Judge Terrell Hodges, Chair of the Executive Committee of the Judicial Conference, asked that each of the Advisory Committees share its views regarding "whether the Rules Enabling Act time frames could be shortened without doing violence to the rulemaking process." The consensus of the Advisory Committee on Appellate Rules was that the Rules Enabling Act process is too long, and the Committee encourages the Judicial Conference to solicit and study proposals for shortening the process. However, without having any such proposals before it, the Committee finds it difficult to be more specific.

b. Recommendation of the Technology Subcommittee Regarding the Receipt of Comments on Proposed Rules Via the Internet. By letter dated March 11, 1998, Gene W. Lafitte, Chair of the Standing Committee's Subcommittee on Technology, asked that each of the Advisory Committees share its views regarding the Subcommittee's proposal that, for a trial period of two years, members of the public would be permitted to comment on proposed rules by e-mail, but the reporters would not be required to summarize those comments (although the

comments would be acknowledged by the Administrative Office). The Advisory Committee on Appellate Rules favors the proposal.

c. Request of the Standing Committee Regarding Proposed Federal Rules of Attorney Conduct. At its January 1998 meeting, the Standing Committee asked each of the Advisory Committees to share its views regarding the regulation of attorney conduct and, more specifically, regarding the "Federal Rules of Attorney Conduct" drafted by Prof. Coquillette. This request was clarified at a separate meeting between Prof. Coquillette and the Advisory Committee Reporters that took place immediately after the Standing Committee meeting, and it was clarified further by a February 11, 1998 memorandum from Prof. Coquillette to the Chairs and Reporters of the Advisory Committees. Based upon the Standing Committee meeting, the separate meeting of the Reporters, and Prof. Coquillette's memorandum, the Advisory Committee on Appellate Rules understood that it was being asked to respond to the following questions:

> **Question No. 1:** As an original matter, would this Committee seek to amend FRAP 46 even if action were not being taken to address the problem of conflicting standards of attorney conduct in the district courts?

FRAP already contains a uniform national standard governing attorney conduct; indeed, it is the only set of rules that does so. FRAP 46(b)(1)(B) provides that a member of the bar of a court of appeals may be suspended or disbarred if he or she "is guilty of conduct unbecoming a member of the court's bar." The Committee believes that FRAP 46(b)(1)(B) is working satisfactorily and does not need to be amended.

> **Question No. 2:** If the FRCP and FRCrP are amended to adopt one or more of the proposed Federal Rules of Attorney Conduct, would this Committee be willing to amend FRAP 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts?

If one or more rules governing attorney conduct are adopted for the district courts, the Committee is willing to consider amending FRAP 46 to incorporate those rules, either directly or by reference. However, until the Committee knows what approach is adopted for the district courts, it cannot comment further.

> **Question No. 3:** If this Committee is inclined to amend FRAP 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts, are the amendment to FRAP 46 and the Advisory Committee Note drafted by Prof. Coquillette acceptable?

Prof. Coquillette drafted an amendment to FRAP 46 and an Advisory Committee Note, and he had originally asked that his work "be reviewed for technical errors and drafting suggestions" by the Committee. However, in April, Prof. Coquillette informed Prof. Schiltz (the Committee's Reporter) that the need for this input had become less urgent in light of several

recent developments, including the continuing division over Model Rule 4.2, the sentiment of many that Standing Committee work on the attorney conduct issue needs to be coordinated with the ABA's "Ethics 2000" project, and the decision of the Advisory Committee on Bankruptcy Rules to request the Federal Judicial Center's assistance in studying attorney conduct in the bankruptcy courts. Pursuant to Prof. Coquillette's suggestion, the Committee did not discuss the amendment to FRAP 46 drafted by Prof. Coquillette.

Question No. 4: Which of the four approaches being considered by the Standing Committee should be adopted for the district courts?

Prof. Coquillette's February 11 memo refers to four approaches that the Standing Committee could take in addressing the attorney conduct problem. The Advisory Committee's preference is that, with respect to the appellate courts, the Standing Committee do nothing. The Committee takes no position on which of the four options is appropriate for the district courts; rather, it defers to the views of the Advisory Committees that draft rules governing practice in those courts.

Question No. 5: Who should have primary responsibility for drafting the Federal Rules of Attorney Conduct?

The Committee believes that, if Federal Rules of Attorney Conduct are to be drafted, they should be drafted by a separate committee composed primarily of people who are experts in legal ethics, but also of members of the Advisory Committees. The Committee does not believe that the Advisory Committees should be asked to draft such rules themselves, or that the rules should be drafted by an ad hoc committee composed *entirely* of Advisory Committee members. With rare exceptions, the members of the Advisory Committees have little or no expertise about legal ethics, and they already have a lot of work to do in the areas that *are* within their expertise.

Question No. 6: Should the Federal Rules of Attorney Conduct be promulgated as a "stand alone" set of rules or as an appendix to the FRCP and/or the FRCrP?

The Committee takes no position on this issue; rather, it defers to the views of the Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules.

Question No. 7: Does the Standing Committee have authority under the Rules Enabling Act to promulgate rules governing attorney conduct?

The Committee does not doubt that the Rules Enabling Act provides authority to regulate attorney conduct when that conduct has a discernable relationship to court proceedings. However, the Committee is concerned that the Federal Rules of Attorney Conduct drafted by Prof. Coquillette sweep far more broadly. For example, they purport to govern conflicts of interest and confidentiality of information, even when those issues arise in a context that has no

connection to federal litigation. The Committee believes that, under the Rules Enabling Act, there are significant limits on how far the Standing Committee can go in regulating attorney conduct.

Question No. 8: Does the Committee wish to suggest any revisions to the ten Federal Rules of Attorney Conduct that Prof. Coquillette has drafted?

Prof. Coquillette had originally asked the Committee to review the Federal Rules of Attorney Conduct that he had drafted and "to point out to the Standing Committee where improvements can be made." However, in his telephone conversation with Prof. Schiltz, Prof. Coquillette said that, in light of the developments discussed in connection with Question No. 3, it was not necessary that the Committee provide such input at this time. Accordingly, the Committee did not discuss this issue at its April meeting.

DRAFT

Minutes of the Spring 1998 Meeting of the
Advisory Committee on Appellate Rules
April 16, 1998
Washington, D.C.

I. Introductions

Judge Will Garwood called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 1998, at 8:35 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Samuel A. Alito, Jr., Judge Diana Gribbon Motz, Judge Stanwood R. Duval, Jr., Hon. John Charles Thomas, Prof. Carol Ann Mooney, Mr. Michael J. Meehan, and Mr. Luther T. Munford. Mr. Stephen W. Preston, Deputy Assistant Attorney General, U.S. Department of Justice, was present representing the Solicitor General. Judge Phyllis A. Kravitch was present as the liaison from the Standing Committee, and Mr. Charles R. "Fritz" Fulbruge, III, was present as the liaison from the appellate clerks. Also present were Mr. Peter G. McCabe and Mr. John K. Rabiej from the Administrative Office and Mr. Joseph F. Spaniol, Jr., from the Standing Committee's Subcommittee on Style.

Judge Garwood announced that Judge Kravitch had replaced Judge Frank H. Easterbrook as the liaison from the Standing Committee and that Judge Alito had been appointed to fill the vacancy created by Judge Alex Kozinski's resignation, and Judge Garwood welcomed both Judge Kravitch and Judge Alito to the Committee. Judge Garwood also welcomed Judge Duval to the Committee. (Judge Duval was not able to attend the Committee's September 1997 meeting). Judge Garwood also welcomed Mr. Preston, who was substituting as the Solicitor General's representative for Mr. Douglas N. Letter.

After all those in attendance introduced themselves, Judge Garwood pointed out that Mr. Munford's term would be expiring on October 1. Judge Garwood expressed appreciation for Mr. Munford's dedicated service to the Committee and said that he hoped Mr. Munford would join the Committee at its October 1998 meeting.

II. Approval of Minutes of September 1997 Meeting

The minutes of the September 1997 meeting were approved without change.

III. Report on January 1998 Meeting of Standing Committee

Judge Garwood asked the Reporter to report on the Standing Committee's most recent meeting.

The Reporter said that Judge Garwood had informed the Standing Committee that this Advisory Committee would not be seeking authority to publish proposed changes to the Federal Rules of Appellate Procedure ("FRAP") until the bench and bar had been given a chance to become accustomed to the restylized rules. Assuming that the restylized rules take effect on December 1, 1998, the Advisory Committee will likely not send proposed amendments to the Standing Committee until late 1999 or early 2000. The Standing Committee was strongly supportive of the Advisory Committee's plan.

The Reporter also said that Judge Garwood had informed the Standing Committee that the Advisory Committee had approved a minor change to FRAP 31(b) to clarify that briefs must be served on all parties, and not just on those who are represented by counsel. Judge Garwood told the Standing Committee that, pursuant to the Advisory Committee's moratorium, the Advisory Committee was not seeking authorization to publish the amendment to FRAP 31(b) at this time.

Finally, the Reporter said that it was clear that the Standing Committee is growing increasingly frustrated with the proliferation of local rules, particularly in the district courts. The Standing Committee defeated by only one vote a motion to instruct the Advisory Committees to draft rules limiting the number of local rules that any one court could promulgate. It appears that bringing local rules under control may be a major priority of the Standing Committee over the next couple years.

Following the report on the Standing Committee meeting, Judge Garwood announced that the Supreme Court has approved the restylized rules, with only one change. As proposed by the Judicial Conference, FRAP 35(b)(1)(B) cited as an example of a "question[] of exceptional importance" meriting en banc consideration the fact that "the panel decision conflicts with the authoritative decisions of every other United States Court of Appeals that has addressed the issue." In other words, a panel decision would present an exceptionally important question only if it *created* an intercircuit split. As amended by the Supreme Court, FRAP 35(b)(1)(B) now provides as an example of a "question[] of exceptional importance" the fact that "the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." In other words, under the amendment, a panel decision on any issue on which an intercircuit conflict exists could be deemed to present a "question[] of exceptional importance," even if the panel decision did not create the conflict, and even if overturning the panel decision will not resolve the conflict.

The Committee next turned to the action items on its agenda.

IV. Action Items

A. Item No. 97-5 (FRAP 24(a)(2) — PLRA)

There is a conflict between the Prison Litigation Reform Act of 1995 ("PLRA") and FRAP 24(a)(2). FRAP 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." The PLRA appears to be to the contrary: It provides that a prisoner who brings an appeal from a civil action must "pay the full amount of a filing fee," and that a prisoner who is unable to pay the full amount of the fee at the time of filing must pay part of the fee and then pay the remainder in installments. At its September meeting, the Committee agreed that FRAP 24(a)(2) should be amended to resolve this conflict.

The Reporter introduced the following proposed amendment and Advisory Committee Note ("ACN"):

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) **Motion in the District Court.** Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) **Action on the Motion.** If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, except as otherwise required by law. If the district court denies the motion, it must state its reasons in writing.

Advisory Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are

unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

The Reporter said that the Subcommittee on Style had recommended that the phrase "except as otherwise required by law" be changed to "unless the law requires otherwise."

A member said that he would prefer not to make the change suggested by the Subcommittee on Style, as it implied that the appellate rules were not "law."

A member asked whether it was ever possible for a prisoner to avoid the obligation to pay a filing fee altogether. Another member responded that a prisoner could do so only if the balance in his prison trust fund account had been zero for the sixth months preceding filing, if the prisoner had made no deposits to the account prior to filing, and if the prisoner received no income while the appeal was pending.

Judge Kravitch said that she has seen a decline in meritless appeals brought by prisoners in the wake of the PLRA. Mr. Fulbruge said that the Fifth Circuit has not seen a similar decline.

A member expressed concern that, as worded, FRAP 24(a)(2) seems to imply that the presumption is that the filing fee will not be paid, whereas the presumption in the PLRA seems to be to the contrary. The member wondered whether FRAP 24(a)(2) should be reworded so that it was more consistent in tone with the PLRA. Another member disagreed, pointing out that the PLRA applies only to appeals brought by prisoners, whereas FRAP 24(a)(2) applies to all appeals brought in forma pauperis.

A member moved that the amendment and the ACN be approved, with the change recommended by the Subcommittee on Style. The motion was seconded. The motion carried (6-1).

B. Item No. 97-7 (FRAP 28(j) — permit brief explanation of supplemental authorities)

At present, FRAP 28(j) permits a party to notify the court of "pertinent and significant authorities" that come to the party's attention after the party's brief has been filed, but before decision. A party is authorized to notify the court of such authorities by letter, but parties are warned that "[t]he letter must state without argument the reasons for the supplemental citations" and that "[a]ny response . . . must be similarly limited." In fact, FRAP 28(j) is widely violated, as parties often are unable to resist the temptation to argue. A commentator has suggested amending the rule to permit brief arguments regarding supplemental authorities. At its September meeting, the Committee voted 4-3 to retain this suggestion on its study agenda.

The Reporter introduced the following proposed amendment and ACN:

Rule 28. Briefs

(j) **Citation of Supplemental Authorities.** If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 250 words. Any response must be made promptly and must be similarly limited.

Advisory Committee Note

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 250 words. All words found in footnotes will count toward the 250 word limit.

The Reporter said that the Subcommittee on Style had not recommended any changes to the proposed amendment or ACN.

Judge Kravitch expressed concern over the use of the word "promptly" and wondered whether more specific direction should be provided. A member responded that "promptly" is in the current version of FRAP 28(j), and that a proposal to make FRAP 28(j) more specific had been considered and rejected at the September meeting. Another member said that he doubted that more specific direction as to timing would be workable.

A member said that, if the purpose of the amendment is to encourage argument, the amendment would be ineffective, as by the time a party describes a supplemental citation and the reasons for the supplemental citation, little of the 250 word limit will remain for argument. Several members responded that, from the Committee's perspective, the purpose of the amendment is not to encourage argument, but to make FRAP 28(j) more enforceable. It is far easier for clerks to police a rule that imposes an absolute word limit than it is for clerks to police a rule that requires them to distinguish "reasons" from "argument." The Committee is willing to tolerate some argument as the price that must be paid to get better enforcement.

A member said that, as a practitioner, he favored the amendment. Under the current version of FRAP 28(j), practitioners have to guess at what will be considered "argument" — and, if they guess wrong, their FRAP 28(j) submissions can be rejected. Under the proposed amendment, practitioners could be confident that they are complying with the rule.

Another member spoke in support of the amendment. He said that the rule would "level the playing field" between ethical and unethical attorneys; under the current rule, unethical attorneys too frequently exploit the inability or unwillingness of courts to enforce FRAP 28(j). But the member questioned whether 250 words would be sufficient, particularly in cases involving multiple supplemental authorities or supplemental authorities that were relevant to multiple issues.

A member was concerned that, as written, the ACN may encourage unduly argumentative submissions. He suggested striking the words, "But Rule 28(j) no longer forbids 'argument,'" from the draft ACN.

Mr. Fulbruge warned that, if the amendment is enacted, clerks will get motions from parties asking for permission to exceed the 250 word limit. But he agreed that, under the amendment, FRAP 28(j) would be better enforced. Clerks are not confident in their ability to distinguish statements of reasons from argument, but clerks are confident in their ability to distinguish letters that exceed 250 words from those that do not. He suspects that, if the amendment becomes law, most clerks will "eyeball" FRAP 28(j) submissions and take the time to count the words only when the submissions substantially exceed one page.

Mr. Spaniol suggested limiting FRAP 28(j) submissions to "one page." Members of the Committee objected that such a limitation would lead to manipulation of margins, spacing, font size, and the like.

A member questioned the need to amend FRAP 28(j). She acknowledged that the rule's ban on argument is widely violated, but she saw this as a minor problem. Judges who don't want to read argumentative FRAP 28(j) submissions don't have to. She found FRAP 28(j) submissions helpful, and she wanted to see them even if they exceeded 250 words. She fears that, under the amended rule, the clerks will return submissions exceeding 250 words, and judges will never learn of pertinent new authorities. She said, however, that she has sympathy for the view that the amendment would "level the playing field" between lawyers who try in good faith to comply with the rules and those who do not. Other members of the Committee agreed with this last point.

A member moved that the amendment and the ACN be approved. The motion was seconded. The motion carried (unanimously).

C. Item No. 97-9 (FRAP 32 — cover colors for rehearing petitions, etc.)

FRAP currently specifies colors for the covers of the briefs of appellants (blue), appellees (red), intervenors (green), and amici curiae (green), as well as for the covers of reply briefs (gray) and separately bound appendices (white). FRAP also provides that a cover is not required on any other paper — and it is clear, in light of FRAP 32(d), that no circuit can *require* that covers be used when FRAP has provided to the contrary.

The problem is that several circuits have promulgated local rules providing that if covers are "voluntarily" used, the covers must be particular colors. Four circuits specify cover colors for petitions for panel rehearing or rehearing en banc, three circuits specify cover colors for answers to petitions for panel rehearing or responses to petitions for rehearing en banc, two circuits specify cover colors for supplemental briefs, and one circuit specifies cover colors for motions.

These conflicting local rules create a hardship for counsel who practice in more than one circuit. A commentator has asked that FRAP be amended to specify cover colors for petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing, responses to petitions for hearing or rehearing en banc, and supplemental briefs.

The Reporter introduced the following proposed amendments and ACNs:

Rule 27. Motions

(d) Form of Papers; Page Limits; and Number of Copies

(1) **Format.**

(B) A cover is not required but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

Advisory Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; ~~and~~ any reply brief, gray; and any supplemental brief, brown. The front cover of a brief must contain . . . .

Advisory Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs. Rule 32(a)(2) has been amended to require that brown covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

Rule 32. Form of Briefs, Appendices, and Other Papers

(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) The cover of a petition for panel rehearing, a petition for hearing or rehearing en banc, an answer to a petition for panel rehearing, and a response to a petition for hearing or rehearing en banc must be yellow. A ~~a~~ cover on any other paper is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~;~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

Advisory Committee Note

Subdivision (c)(2)(A). Rule 32(c)(2)(A) has been amended to require that yellow covers be used on petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing (when such answers are permitted under Rule 40(a)(3)), and responses to petitions for hearing or rehearing en banc (when such responses are permitted under Rule 35(e)). The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions

for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

As Rule 32(c)(2)(A) makes clear, a cover is not required on any other paper. However, Rule 32(c)(2)(A) has been amended to provide that if a cover is nevertheless used, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

The Reporter explained that, under the draft amendments, yellow covers would be required on petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing, and responses to petitions for hearing or rehearing en banc. Brown covers would be required on supplemental briefs. And FRAP would provide that, although covers on other papers are not necessary, if such covers are nevertheless used, the covers must be white. In this way, local rulemaking on the subject of cover colors would be completely preempted.

The Reporter said that the Subcommittee on Style had recommended the following changes in the draft amendments:

— In the *unamended* portion of FRAP 27(d)(1)(B), insert a comma after "A cover is not required" and before "but there must be."

— Begin the last sentence of the proposed FRAP 32(c)(2)(A) with "But" ("But if a cover is used . . . .") rather than with "If."

A member asked why white was chosen as the "default" cover color, given that the cover of appendices are white. He also asked why the same color — yellow — would be used on petitions for panel rehearing, petitions for hearing or rehearing en banc, answers to petitions for panel rehearing, and responses to petitions for hearing or rehearing en banc. He expressed concern that this would make it impossible for courts to distinguish among different types of papers without reading the caption carefully.

The Reporter responded that, under the current rules, all of these papers are supposed to have *no* covers, so courts are already required to read the captions to distinguish among them. As to the choice of white for the "default" color, the Reporter said that, first, the number of convenient colors is limited, and, second, that using a white cover most approximates using no cover, which is the preference of the rules.

A member asked whether "tan" would be more appropriate than "brown" as the cover color for supplemental briefs, as it suggests a lighter shade of brown — one that would permit type to be read more easily. The Reporter said that local rules refer to "brown" rather than "tan," but that he nevertheless thought the suggestion was a good one.

Mr. Preston said that the Solicitor General supports the amendment. The conflicting local rules create inconvenience for government attorneys and others with national appellate practices.

A member opposed the amendment. He said that, while he sympathizes with the desire for uniformity, he is afraid that the amendment would make life more difficult for solo practitioners and others who have limited appellate practices confined to one circuit.

A member asked whether it might be better to propose a rule that would simply prohibit circuit courts from enacting local rules on the subject of cover colors. Another member suggested proposing a rule that would say, in effect, that white covers on any other paper must be accepted. A discussion ensued about the extent to which FRAP should specify additional cover colors instead of just "preempting" local rulemaking.

The Reporter suggested the following: Amend FRAP 27(d)(1)(B) as proposed, leave FRAP 32(a)(2) unamended, and approve only the second of the two proposed amendments to FRAP 32(c)(2)(A) (that is, only the amendment that would add the sentence, "If a cover is used, it must be white.") Amending the rules in this manner would wipe out local rulemaking on the subject of cover colors by specifying, in effect, that any covers that are "voluntarily" used must be white. At the same time, it would not further complicate the rules by adding new cover colors for supplemental briefs, rehearing petitions, and so on. Several members expressed support for this approach.

A member objected. She said that she did not want the covers of supplemental briefs to be white. She would prefer that FRAP stay silent on the question of the color of the covers of supplemental briefs. The Reporter responded that this would leave conflicting local rules on that topic in place and harm the goal of uniformity.

A member asked whether FRAP 32 should be amended to specify the colors that should be used on briefs in cross-appeals. Several members responded that they did not perceive this to be a problem.

The Committee returned to the question of supplemental briefs. The Reporter suggested that, if the Committee objected to the use of white covers on supplemental briefs, FRAP 32(a)(2) should be amended as originally proposed.

A member moved the following:

1. That FRAP 27(d)(1)(B) be amended as proposed.

2. That FRAP 32(a)(2) be amended as proposed. And

3. That FRAP 32(c)(2)(A) be amended as follows:

(c) Form of Other Papers.

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

The motion was seconded. The motion carried (unanimously).

A member moved that, in the amendment to FRAP 32(a)(2) that had just been approved, the word "tan" be substituted for "brown." The motion was seconded. The motion carried (unanimously).

Judge Garwood noted that the ACN to FRAP 32(c)(2)(A) would have to be revised to reflect the changes that had been made in the proposed amendment. He asked the Reporter to attach a revised ACN as an appendix to the minutes of the meeting, and suggested that the Committee agree that the revised ACN would be treated as having been approved unless a member raised an objection to it at the October meeting. The Committee agreed to Judge Garwood's suggestion.

Reporter's Note: A revised ACN to FRAP 32(c)(2)(A) can be found in the Appendix.

D. Item No. 97-12 (FRAP 44 — notify state AG of constitutional challenges to state statutes)

FRAP 44 requires a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party to provide written notice of that challenge to the clerk. FRAP 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

Interestingly, the subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. Yet FRAP 44 does not require a party who questions the constitutionality of a state statute in a proceeding in which that state is not a party to provide written notice of that challenge to the clerk. Members of the Committee have expressed interest in remedying this omission.

The Reporter introduced the following proposed amendment and ACN:

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) **Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) **Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Advisory Committee Note

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a

constitutional challenge to any statute of that state. Curiously, though, § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

The Reporter said that the Subcommittee on Style had not recommended any changes to the proposed amendment and ACN.

A member objected to the use of the word "statute." He said that, in some states, AGs are required to defend the constitutionality of ordinances as well as statutes, and the notification obligation should extend to those enactments as well. Another member responded that § 2403(b) itself uses the word "statute" and that FRAP 44 should, as much as possible, track the language of § 2403(b).

A member asked why FRAP 44 was being split into two sections that use almost identical language. He asked whether there was a way of implementing § 2403(b) without splitting FRAP 44 into two. The Reporter responded that he did not think FRAP 44 could be drafted as the member suggested. Also, he said, splitting FRAP 44 into "section a" (addressing federal statutes) and "section b" (addressing state statutes) tracks the organization of § 2403, which is also split into "section a" (addressing federal statutes) and "section b" (addressing state statutes).

Judge Garwood reminded the Committee that this amendment grew out of a related suggestion by Judge Cornelia Kennedy to amend FRAP 44 to extend the notification requirement to constitutional challenges to federal *regulations*. He said that he agreed with the tentative decision made by the Committee at its September meeting not to pursue Judge Kennedy's suggestion, but that the matter was still open. By consensus, the Committee agreed that Judge Kennedy's suggestion should be dropped from the study agenda.

A member moved that the amendment and the ACN be approved, with one change: In the ACN, the word "But" should be substituted in place of "Curiously, though." The motion was seconded. The motion carried (unanimously).

The Committee took a 15 minute break.

E. Item No. 97-30 (FRAP 32(a)(7)(C) — certificate of compliance with type-volume limitation)

FRAP 32(a)(7) provides that a party's principal brief may not exceed 30 pages, unless it contains no more than 14,000 words or, if it uses a monospaced typeface, it contains no more than 1,300 lines of text. FRAP 32(a)(7) also provides that a party's reply brief may not exceed 15 pages, unless it contains no more than 7,000 words or, if it uses a monospaced typeface, it contains no more than 650 lines of text. If a party's principal brief does not exceed 30 pages (or

a party's reply brief does not exceed 15 pages), then the party need not certify compliance with the page limitations of FRAP 32(a)(7)(A). However, if a party's brief exceeds 30 pages (15 if the brief is a reply brief), then the party must certify that the brief complies with the word or line limitations of FRAP 32(a)(7)(B). FRAP 32(a)(7)(C) specifically states:

> (C) **Certificate of compliance.** A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:
>
> (i) the number of words in the brief; or
>
> (ii) the number of lines of monospaced type in the brief.

No example of the certificate required by FRAP 32(a)(7)(C) is provided in the Appendix of Forms to FRAP. Mr. Munford has suggested that a Form 6 be added to the Appendix to provide an illustrative form that parties could use (but would not be *required* to use) to meet their obligations under FRAP 32(a)(7)(C).

The Reporter introduced the following two alternative drafts of Form 6:

ALTERNATIVE A

Form 6. Certificate of Compliance With Rule 32(a)(7)(B)

Certificate of Compliance With Type Volume Limitations

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

or

This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

(s)_____

Attorney for _____

Dated: _____

ALTERNATIVE B

Form 6. Certificate of Compliance With Rule 32(a)(7)(B)

Certificate of Compliance With Type Volume Limitations

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

or

1. This brief complies with the type volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*].

or

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

The Reporter explained that "Alternative A" meets the bare bones requirements of FRAP 32(a)(7)(C): It requires the party to certify either that the brief meets the word limitation of FRAP 32(a)(7)(B) or that the brief uses a monospaced typeface and meets the line limitation of FRAP 32(a)(7)(B). In either case, the party would have to state the exact number of words or lines in the brief.

"Alternative B" contains the information found in "Alternative A," but goes on to provide information about whether the brief has been prepared in a proportionally spaced typeface or a monospaced typeface. If the former, the certificate identifies the word processing program used to produce the brief, the font size, and the type style name; if the latter, the certificate identifies the word processing program used to produce the brief, the type style name, and the number of characters per inch. This information is not required by FRAP 32(a)(7)(C), but it would assist the clerks in enforcing other provisions of FRAP 32 (particularly FRAP 32(a)(5) and (6)).

The Reporter also introduced two other alternative drafts, "Alternative C" and "Alternative D." "Alternative C" is identical to "Alternative A," except that, instead of asking a party to state the exact number of words or lines in the brief, it merely requires the party to certify that the brief does not exceed 14,000 words or 1,300 lines (7,000 words or 650 lines in the case of a reply brief). This would spare an attorney whose brief is in obvious compliance with the type volume limitations from having to re-count the words or lines of the brief if she makes last minute revisions. "Alternative D" is identical to "Alternative B," except that, like "Alternative C," it does not require a party to specify the precise number of words or lines in the brief, but only to certify that the number does not exceed 14,000 or 1,300, respectively (7,000 or 650, respectively, in the case of a reply brief).

The Reporter stated that "Alternative C" and "Alternative D" had been prepared at the suggestion of Judge Garwood, but that Judge Garwood had subsequently concluded that those two alternatives were inconsistent with the language of FRAP 32(a)(7)(C) (which requires that "[t]he certificate must *state* either: (i) the *number* of words in the brief; or (ii) the *number* of lines of monospaced type in the brief"). Judge Garwood confirmed that he had thought better of his suggestion and recommended that the Committee consider only "A" and "B."

A member said that he was disinclined to adopted "B." He said that there is no authority in FRAP 32 for requiring counsel to provide all of the information requested by "B." He recognized the use of Form 6 would not be mandatory, but he was still uncomfortable with the form requesting more than the information required by FRAP 32(a)(7)(C). Another member said that he shared the concern that "B" was not faithful to FRAP 32(a)(7)(C).

Mr. Fulbruge said that the clerks favored "B." He said that the additional information requested by "B" would be immensely helpful to clerks, particularly given the likelihood that more and more briefs will be filed on disk.

A member asked whether, if "A" were approved as an illustrative form, the circuits could adopt local rules requiring counsel to submit certificates patterned after "B" and *reject* briefs that follow "A," even though "A" appears in the appendix to FRAP. In response, another member pointed out that FRCP 84 states: "The forms contained in the Appendix of Forms are sufficient under the rules." He noted that no such statement appears in FRAP. He suggested that FRAP 32(a)(7)(C) be amended to provide that the use of Form 6 is "sufficient under the rules." After further discussion, the Committee reached a consensus that, if "A" is adopted as Form 6, FRAP 32(a)(7)(C) should expressly provide that use of "A" is sufficient.

Judge Garwood asked whether the Committee wished to go further and *require* the use of Form 6 (regardless of whether "A" or "B" were adopted). Mr. Fulbruge stated that he would require that Form 6 be used. He stressed the importance of a uniform national rule and said that the Fifth Circuit (which has adopted a local rule that closely tracks restylized FRAP 32) is already receiving a variety of certificates of compliance.

A member said that, if "A" were adopted, he might favor requiring its use. But, he said, if "B" were adopted, he would not make its use mandatory.

The Committee then discussed whether it preferred "A" or "B." Support was expressed for both versions. Those arguing in favor of "A" stressed its simplicity and ease of use. Those arguing in favor of "B" stressed how helpful it would be to clerks to have the additional information requested by "B."

One member pointed out that, if "A" were adopted, it would, as a practical matter, make it difficult for those circuits who wanted the additional information requested by "B" to get it, whereas if "B" were adopted, those circuits who did not want the additional information could ignore it or even provide in their local rules that it need not be supplied. Another member disagreed; he did not think that adopting "A" would make it difficult for courts to request the additional information described in "B."

A member asked for clarification on why the additional information requested by "B" would be useful. A member responded that the information would assist the clerks in enforcing the other requirements of FRAP 32 — such as those regarding typeface in FRAP 32(a)(5) and those regarding type styles in FRAP 32(a)(6). Mr. Fulbruge added that the assistance is much needed, and again said that the clerks would strongly prefer "B."

A member moved that the Committee approve "B" to be added as Form 6 to the Appendix of Forms. The motion was seconded.

Several members asked questions regarding the interpretation of "B." The Reporter agreed to try to reformat the form so that it was easier to understand.

A member suggested three "friendly amendments," which were accepted:

1. That the word "and" be inserted between, on the one hand, the alternative versions of paragraph (1), and, on the other hand, the alternative versions of paragraph (2).

2. That the caption be amended by striking "Rule 32(a)(7)(B)" and substituting in its place "Rule 32(a)."

3. That FRAP 32 be amended to make reference to Form 6 and to provide that it must be considered sufficient under FRAP 32(a)(7)(C).

The motion, as modified by the friendly amendments, carried (6-2).

Reporter's Note: An amendment to FRAP 32(a)(7)(C) (and accompanying ACN), as well as a reformatted version of Form 6, can be found in the Appendix.

After the motion was approved, a member asked whether Form 6 can be added to the Appendix of Forms without going through the Rules Enabling Act process, since use of the form would not be mandatory. Messrs. McCabe and Rabiej both said that it had long been the practice to use the Rules Enabling Act process for illustrative forms. Mr. Rabiej said that, while the Administrative Office ("A.O.") was looking into whether using the Rules Enabling Act process was legally required in such cases, he thought that, if FRAP 32 was going to be amended to provide that Form 6 was sufficient to meet the requirements of FRAP 32(a)(7)(C), both the amendment and the proposed form should go through the process.

F. Item Nos. 97-31 & 98-01 (FRAP 47(a) — uniform effective date for local rules and requirement of filing with A.O.)

Item Nos. 97-31 and 98-01 arise from concern over the impact of the proliferation of local rules on attorneys who practice in more than one circuit. Item No. 97-31 is a proposal made by the Local Rules Project, the American Academy of Appellate Lawyers, and the Standing Committee that a uniform effective date be established for changes to local rules. With a uniform effective date, attorneys would have to check only once each year for changes in the local rules in the circuits in which they practice. Item No. 98-01 is a proposal discussed at the Standing Committee's January meeting that no change in local rules be effective until the A.O. is notified of that change. The Standing Committee is concerned that courts have widely ignored the requirements of FRAP 47(a)(1), FRCP 83(a)(1), and FRCrP 57(c) that local rules be furnished to the A.O.

The Reporter introduced the following proposed amendment and ACN:

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) **Promulgation of Local Rules.**

(A) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is promulgated or amended. A local rule or internal operating procedure must not be enforced before it is received by the Administrative Office of the United States Courts.

(C) An amendment to the local rules or internal operating procedures of a court of appeals must take effect on the December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment.

Advisory Committee Note

Subdivision (a)(1). Rule 47(a)(1) has been divided into subparts. Former Rule 47(a)(1), with the exception of the final sentence, now appears as Rule 47(a)(1)(A). The final sentence of former Rule 47(a)(1) has become the first sentence of Rule 47(a)(1)(B).

Two substantive changes have been made to Rule 47(a)(1). First, the second sentence of Rule 47(a)(1)(B) has been added to bar the enforcement of any local rule or internal operating procedure — or any change to any local rule or internal operating procedure — prior to the time that it is received by the Administrative Office of the United States Courts. Second, Rule 47(a)(1)(C) has been added to provide a uniform effective date for changes to local rules and internal operating procedures. Such changes will take effect on December 1 of each year, absent exigent circumstances.

The changes to Rule 47(a)(1) are prompted by the continuing concern of the bench and bar over the proliferation of local rules. *See* Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1 (1997). That proliferation creates a hardship for attorneys who practice in more than one court of appeals. Not only do those attorneys have to become familiar with several sets of local rules, they also must be continually on guard for changes to the local rules. In addition, although Rule 47(a)(1) requires that local rules be sent to the Administrative Office, compliance with that directive has been inconsistent. By barring enforcement of any rule that has not been received by the Administrative Office, the Committee hopes to increase compliance with Rule 47(a)(1) and to ensure that current local rules of all of the courts of appeals are available from a single source.

The Reporter said that he chose December 1 as the uniform effective date for several reasons. First, it is, of course, the effective date of changes to FRAP, as well as to other federal rules. Specifying a December 1 effective date for local rules makes it possible for attorneys to acquaint themselves with changes to local rules at the same time that they are acquainting themselves with changes to national rules. Second, a uniform effective date of December 1 means that when a change in FRAP requires (or at least inspires) a change in local rules, there

will not be a "gap" between the changes to the national rules and the conforming changes to the local rules. Finally, December 1 fits nicely with the deadlines of the two major legal publishers.

The Reporter said that, in drafting the amendment, he had difficulty deciding what must occur before a local rule can be enforced. One possibility was to bar enforcement of changes in local rules until they are *sent* to the A.O. Another possibility was to bar enforcement until the changes were *received* by the A.O. There were other possibilities as well, such as barring enforcement of changes until they are posted on the Internet by the A.O. Every option has its drawbacks.

The Reporter drafted the amendment to bar enforcement of changes in local rules until they are *received* by the A.O. mainly because it would avoid disputes. A phone call to the A.O. can instantly verify whether it has received a rule change; by contrast, unless a rule change is sent by certified mail, it can be difficult to prove exactly when it was put in the mail. Also, the Reporter considered the possibility that rule changes might get lost in transit. Each court knows when it has mailed rule changes to the A.O., and each court has a vested interest in enforcing its local rules, so it makes sense to put the burden on courts to verify that rule changes actually reach the A.O.

Mr. Rabiej said that he is concerned about making receipt by the A.O. the determinative event. He fears that his office will be inundated by telephone calls from lawyers who want to verify that no changes in local rules have been received. He would prefer that the rule instead refer to Internet posting or some similar event that can be verified without calling his office.

A member said that he objected to "received" for a different reason; he thought that it was ambiguous. He said that barring enforcement of changes in local rules until they were "on file" with the A.O. would be clearer.

A member said that, while he understood Mr. Rabiej's concern, he did not think the A.O. would receive the volume of telephone calls that Mr. Rabiej feared. In almost all cases, courts will promulgate local rule changes months before they are to take effect. Particularly with a uniform effective date, there will be little reason for attorneys to be checking with the A.O.

A member objected to the phrase "immediate need," which, he said, failed sufficiently to convey that only the most extreme circumstances would justify making a change in a local rule effective on a day other than the uniform effective date. He suggested referring instead to "exigent circumstances." Judge Garwood responded that the "immediate need" language is taken directly from 28 U.S.C. § 2071(e).

The Committee discussed whether the rule should address internal operating procedures ("IOPs") as well as local rules. One member asked what the difference was between a local rule and an IOP. Mr. Fulbruge responded that, in theory, an IOP merely describes how a court organizes itself internally — *e.g.*, how cases get placed on the argument calendar and how papers regarding rehearing petitions are circulated. Changes in IOPs are made without public notice and

comment. Local rules, by contrast, establish general rules of practice; they are enforceable against attorneys and parties. Changes in local rules are made only after public notice and comment.

A member asked why the amendment drafted by the Reporter addressed IOPs, if what Mr. Fulbruge said is true. The Reporter responded that, in many circuits, IOPs are used as local rules. It is common for circuits to include in their IOPs filing deadlines, page limitations, cover colors, and the like, and to enforce those requirements against attorneys and parties.

A member said that IOPs are not *supposed* to be used in this manner. He pointed to the following provision of FRAP 47(a)(1): "A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order." Thus, he said, he would favor limiting the amendment to just local rules.

Another member disagreed. FRAP 47(a)(1) is being ignored by some circuits, and those circuits are in fact enforcing their IOPs against attorneys and parties. That being the case, the uniform effective date should apply to IOPs, as well as to local rules.

Several other members disagreed. They said that "genuine" IOPs should not be subject to a uniform effective date and that enforcement of "genuine" IOPs should not be barred until they are received by the A.O. Courts should be able to make changes in IOPs at any time, without notice, comment, or other restriction. If a court attempts to enforce an improper IOP — that is, an IOP that is in fact operating as a local rule — attorneys and parties can rely upon FRAP 47(a)(1) for protection.

A member asked about the choice of December 1 as the uniform effective date. She wondered whether January 1 would work better. She pointed out that, although it is rare, it is possible for Congress to make changes in a proposed amendment to FRAP as late as November 30. If Congress does so, circuits will not have time before December 1 to make conforming changes in their local rules.

Another member said that he favored December 1 over January 1. Last minute changes by Congress are quite rare. Circuits can protect against such changes by making amendments to their local rules contingent upon a proposed amendment to FRAP taking effect unchanged. Also, the proposed amendment would permit circuits to change local rules instantly in cases of "immediate need." Were Congress to alter a proposed amendment to FRAP at the last minute, that alteration might very well provide "immediate need."

The member continued by pointing out that using January 1 as the uniform effective date would create another problem — a problem that was much more likely to arise. Amendments to FRAP take effect on December 1. Often, those amendments require circuits to change their local rules. If those changes had to take effect on January 1, there would be a one month gap between

the effective date of the change in FRAP and the effective date of the conforming changes in the local rules.

A member suggested that the last paragraph of the draft ACN be eliminated. He found it more "preachy" than "explanatory." Other members disagreed. Although they conceded that the last paragraph may be a bit "preachy," they thought it important that the Advisory Committee make clear its frustration with the proliferation of local rules.

A member suggested that the citation to the Sisk article be removed from the ACN. Others supported the suggestion.

A member said that, although she would vote for the amendment, she continued to be concerned about the possible burden that it would place on the A.O. She admitted that she could not immediately think of a better alternative, but she might want to discuss the matter again before the amendment is sent to the Standing Committee.

Another member said that he doubted whether the amendment would create any appreciable burden on the A.O. The vast majority of changes in local rules will take effect on December 1, and the public will receive notice of those changes long before December 1. With rare exceptions, there simply will be no need for attorneys to call the A.O.

A member moved that the amendment and ACN be approved, with two changes:

1. IOPs should be removed from the scope of the amendment, and all reference to them should be removed from the ACN. And

2. The citation to the Sisk article should be removed from the ACN.

The motion was seconded. The motion carried (unanimously).

The Reporter said that he had neglected to bring to the attention of the Committee the changes in the amendment that had been recommended by the Subcommittee on Style.

First, the Subcommittee recommended that the caption of FRAP 47(a)(1) be changed from "Promulgation of Local Rules" to "Adoption and Amendment." After a brief discussion, the Committee accepted the suggestion by consensus.

Second, the Subcommittee recommended that proposed FRAP 47(a)(1)(C) be changed so that it would be written in the singular — that is, so that it would refer to "An amendment to a local rule" instead of to "An amendment to the local rules." A member pointed out that this would change the meaning of the rule. The addition of a *new* local rule — which should take effect on the uniform effective date and should be filed with the A.O. — would always constitute "[a]n amendment to the local *rules*," but might not constitute "an amendment to a local *rule*." By consensus, the Committee rejected the suggestion of the Subcommittee.

Third, the Subcommittee recommended deleting "must take effect" and substituting in its place "becomes effective." Several members objected that the Subcommittee's recommendation would make the rule sound less prescriptive and more descriptive. A member moved that the Subcommittee's suggestion be rejected. The motion was seconded. The motion carried (unanimously).

Finally, the Subcommittee recommended deleting "determines that there is an immediate need for the amendment" and substituting in its place "orders otherwise." The Reporter pointed out that the Subcommittee's suggestion would have significant substantive consequences, by changing the rule from one that permitted deviations from the uniform effective date only when there was an "immediate need" to one that permitted deviations for any reason or no reason. Several members agreed. By consensus, the Committee rejected the Subcommittee's suggestion.

A member moved that the phrase "promulgated or amended," which appears at the end of the first sentence of proposed FRAP 47(a)(1)(B), be changed to "adopted or amended," so as to be consistent with the new caption. The motion was seconded. The motion carried (unanimously).

G. Item No. 97-41 (FRAP 4 — orders entered on motion for writ of error *coram nobis*)

Judge Garwood announced that consideration of Item No. 97-41 would be postponed until after lunch, so that Solicitor General Waxman could be present for the discussion.

V. Discussion Items

Inquiry from the Executive Committee of the Judicial Conference Regarding the Shortening of the Rules Enabling Act Process

After the agenda book was compiled, Judge Garwood received a copy of a letter written by Judge W. Terrell Hodges, Chair of the Executive Committee of the Judicial Conference, to Judge Alicemarie H. Stotler, Chair of the Standing Committee, in which Judge Hodges asked that each of the Advisory Committees share its views regarding "whether the Rules Enabling Act time frames could be shortened without doing violence to the rulemaking process." Judge Garwood opened up Judge Hodges' question for discussion.

A member expressed support for the idea. He would eliminate the need for the Standing Committee to approve rules for publication, and thus cut several months out of the process. Other members disagreed. They pointed out that the Standing Committee now often returns proposed amendments to Advisory Committees for more work before publication; if the Standing Committee could not do so until after publication, the Rules Enabling Act process might actually be lengthened, as the first round of notice-and-comment would often be for naught.

Mr. Rabiej said that another possibility that had been discussed was publishing proposed amendments twice each year. He said that, while semiannual publication would speed the process, concerns had been expressed about the burden to the bench and bar. A member said that he thought that the bench and bar would trade the minor additional inconvenience for a speedier and more responsive process.

Mr. Rabiej said that the A.O. was now attempting to determine how much time various proposals would shave from the process. He said that one of the difficulties in making reforms is working around the statutory deadlines.

Mr. McCabe said that one option that had been suggested was a special expedited schedule for rulemaking that would apply when a rule had to be proposed in response to something that Congress had done or was considering doing.

After further discussion, the Committee agreed, by consensus, that it was the sense of the Committee that the Rules Enabling Act process was too lengthy and that the Judicial Conference should solicit and study proposals for shortening the process, but that, without having any such proposals before it, the Committee could not offer more specific advice.

A. Recommendation of the Technology Subcommittee Regarding the Receipt of Comments on Proposed Rules Via the Internet

The Standing Committee's Subcommittee on Technology has proposed that, for a trial period of two years, members of the public be permitted to submit comments on proposed amendments to FRAP and the other rules via e-mail. Reporters would not be obliged to summarize comments received via e-mail, although the A.O. would briefly acknowledge each comment by return e-mail. Mr. Gene W. Lafitte, Chair of the Subcommittee on Technology, has asked the Advisory Committees for their comments on the proposal.

Mr. Rabiej described the Subcommittee's proposal, answered a couple of questions about it, and informed the Committee that the Advisory Committee on Civil Rules and Advisory Committee on Bankruptcy Rules had already approved the proposal. After a brief discussion, the Committee reached a consensus that it, too, favored the proposal.

B. Item No. 97-14 (FRAP 46(b)(1)(B) — attorney conduct)

Judge Garwood announced that consideration of Item No. 97-41 would be postponed until after lunch, so that Solicitor General Waxman could be present for the discussion.

C. Item No. 91-17 (uniform plan for publication of opinions)

Judge Garwood reported that he wrote to the chief judges of all of the circuits to seek their input regarding the Committee's consideration of rules governing unpublished opinions. Almost all of the chief judges responded — as well as several other circuit judges — and the

judges were virtually unanimous in there opposition to *any* rulemaking on the topic. In March, Judge Garwood appeared in person at a meeting of the chief judges. Again, the chief judges were almost unanimous — and, on the whole, quite emphatic — that this Committee should not propose rules governing unpublished opinions.

Judge Garwood said that the chief judges seemed to be motivated in part by a fear that the Committee would propose rules that barred judges from designating opinions as unpublished. Judge Garwood said that he tried to assure the chief judges that the Committee had no such intention, but instead was concerned about such matters as the conflicting local rules regarding the citation and precedential effect of unpublished decisions. Judge Garwood said that, notwithstanding his assurances, the chief judges remained adamant that they did not want national rulemaking on the topic of unpublished decisions.

Judge Garwood pointed out that the chief judges make up half of the voting membership of the Judicial Conference, and that the other half of the voting membership — district court judges from each circuit — was likely to defer to the chief judges on this matter. It is thus clear to Judge Garwood that rules regarding unpublished decisions have no chance of clearing the Judicial Conference in the foreseeable future. For that reason, Judge Garwood suggested that the Committee remove Item No. 91-17 from its study agenda.

A member wondered whether the Committee might propose a rule addressing only the question of whether unpublished decisions should be treated as precedential. Judge Garwood responded that he had discussed that precise topic with the chief judges, and that they were overwhelmingly opposed to national rulemaking on even that narrow issue. A member added that, in her view, Chief Judge Arnold and others make a persuasive case that the Advisory Committee does not have authority to promulgate rules regarding the precedential effect of unpublished opinions. She also said that there is no chance that judges would accept any rules that limit their ability to designate opinions as unpublished. Unpublished opinions are a way of life; in the Fourth Circuit, for example, fewer that 20% of cases result in published opinions.

Mr. Preston asked whether, notwithstanding the strong reaction of the chief judges, it might still be worthwhile to pursue rulemaking on the isolated question of the citation of unpublished opinions. He said that conflicting local practices (both written and unwritten) on the subject create a hardship for government attorneys and others who practice in more than one circuit. He said that the Solicitor General would support a rule providing that unpublished opinions may be cited; such a rule would preempt local rules to the contrary.

Judge Garwood responded that he agreed with the Solicitor General in principle and doubts both the wisdom and constitutionality of local rules that purport to bar attorneys from citing unpublished opinions. Judge Garwood pointed out that attorneys can cite a wide variety of non-precedential sources, ranging from the opinions of district courts to law review articles to treatises to Hale's *Pleas of the Crown*. All of these sources are cited only for their persuasive value. He does not understand why a court would single out one source — unpublished opinions

— and bar their citation. But Judge Garwood said that it is nevertheless clear to him that any rules on the citation of unpublished opinions have no chance of clearing the Judicial Conference.

Ms. Judith McKenna from the Federal Judicial Center (who had joined the meeting a few minutes earlier) asked whether the chief judges understood that three circuits do not make their unpublished decisions available to LEXIS or Westlaw. Judge Garwood responded that they did; at their meeting, that fact was expressly mentioned.

At this point, L. Ralph Mecham, Director of the A.O., joined the meeting, welcomed the Committee to the Judicial Conference Center, and expressed appreciation to the Committee for its contribution to the rulemaking process.

Judge Garwood noted that also pending on the Committee's agenda were Item Nos. 97-10 and 97-28, proposals to bar the circuit courts from disposing of appeals by order. Judge Garwood said that he did not survey the chief judges on these proposals, in part because he was afraid that these proposals would draw such fierce opposition that they would detract from the questions about unpublished opinions. However, Judge Garwood did mention these proposals to the chief judges at their meeting, and the reaction was exactly as expected: The chief judges were unanimously and adamantly opposed to any rule that would require an opinion in every case.

A member said that he understood the need of courts to dispose of appeals by unpublished opinions. But he remained concerned about the way in which the practice gives an advantage to the Department of Justice, large insurance companies, and others who litigate frequently in the federal courts. Those litigants can collect and organize unpublished decisions, and thus have a better sense of a court's thinking on a particular issue than their opponents. However, the member said, he recognizes the strength of the chief judges' sentiment against rulemaking. Other members expressed similar concern, but likewise acknowledged the reality of the chief judges' opposition to rulemaking on this topic.

A member said that she was most bothered by the fact that three circuits do not even make their unpublished opinions available to LEXIS and Westlaw. She said that this aggravated the disparity between "rich" and "poor" — or at least between frequent litigators and infrequent litigators. She also said that, as a matter of policy, the public should have free and convenient access to the work of the circuit courts. She wondered what was the motivation for keeping unpublished opinions from LEXIS and Westlaw.

Mr. Fulbruge explained that the Fifth Circuit was one of the three circuits that did not provide their opinions to LEXIS and Westlaw. He stressed that the opinions were not "secret"; anyone can walk into the court's library and read any unpublished decision. But, in response to questions from the Committee, Mr. Fulbruge conceded that the unpublished opinions were not on computer and not organized in any way other than chronologically. Thus, anyone who wanted to look for unpublished opinions of the Fifth Circuit on a particular issue would have no alternative but to read through thousands of opinions.

Ms. McKenna said that, in addition to the Fifth Circuit, the Third and Eleventh Circuits did not provide their unpublished opinions to LEXIS and Westlaw. She said that while, technically speaking, the unpublished opinions of these circuits were not "secret," secrecy was the practical effect of the refusal to provide the opinions to LEXIS and Westlaw. She expressed the view that this practice gives rise to the *appearance* of courts working in secrecy, which is unfortunate. She added that the Second Circuit, after being accused by a newspaper reporter of using unpublished opinions in improper ways, decided to provide its unpublished opinions to LEXIS and Westlaw — not because it agreed with the reporter, but because it concluded that whatever was gained by withholding the opinions from LEXIS and Westlaw was not worth the suspicion that was created.

A member said that, in his experience, almost all unpublished opinions would be virtually useless to litigators or the court. Another member disagreed; in her experience, while most unpublished opinions are not helpful, occasionally they can assist litigants and influence judges.

Judge Alito said that his court, the Third Circuit, did not provide its unpublished opinions to LEXIS and Westlaw, and that he supported the decision. Judge Alito said that he didn't understand the purpose of designating opinions as "unpublished" and then giving them to LEXIS and Westlaw for electronic dissemination, which, in today's world, is the equivalent of publication. In his view, it is the other circuits — the ones who designate their opinions as "unpublished" but then, as a practical matter, "publish" them electronically — who are acting inconsistently.

A member wondered whether the Committee might propose a rule that would provide that an opinion would have to be published upon the request of any member of the court. Several members responded that, as a practical matter, that is already the practice in all circuits. No court will refuse the request of one of its judges that an opinion be published.

A member said that, given the opposition of the chief judges to rulemaking regarding unpublished opinions, she was willing to drop the subject from the Committee's study agenda. However, she said that she would like the Committee to try in some way to get the Third, Fifth, and Eleventh Circuits to provide their unpublished opinions to LEXIS and Westlaw. She said that she was not necessarily talking about proposing a rule; something as simple as a letter might work. Other members agreed.

Judge Alito expressed doubt that such a letter would change the minds of his colleagues on the Third Circuit. He said that the Third Circuit was well aware that it was in the minority in not providing unpublished opinions to LEXIS and Westlaw, but that most of the judges felt strongly about it and were unlikely to change their views.

The Committee continued to discuss whether unpublished opinions are valuable, and thus whether litigators who can afford to collect those opinions or research those opinions on LEXIS and Westlaw have an advantage. Some members of the Committee asserted that unpublished

opinions have very little value and thus having access to them confers no real advantage to a litigator. Other members disagreed.

One member said that he was concerned that a vicious circle was developing: One of the reasons why there are a lot of unpublished opinions is that there are a lot of frivolous appeals, but one of the reasons why there are a lot of frivolous appeals is that there are so few published opinions describing a court's thinking on various issues.

With that, the Committee broke for lunch. Following the lunch break, Solicitor General Waxman joined the Committee, and the Committee resumed its deliberations on Item No. 91-17.

Judge Garwood said that he was prepared to entertain the following motion: Item No. 91-17 would be removed from the Committee's study agenda, without prejudice to any specific proposals regarding unpublished opinions that might be made in the future. At the same time, Judge Garwood would appoint a subcommittee to discuss whether and how the Third, Fifth, and Eleventh Circuits might be encouraged to provide their unpublished opinions to LEXIS and Westlaw. A member made the motion suggested by Judge Garwood. The motion was seconded. The motion carried (unanimously).

Judge Garwood appointed a subcommittee consisting of Judge Alito, Judge Motz, and Mr. Meehan, asked Judge Motz to chair the subcommittee, and asked Judge Kravitch if she would work with the subcommittee in her capacity as liaison from the Standing Committee.

D. Item Nos. 97-10 & 97-28 (require opinions in every case)

Item Nos. 97-10 and 97-28 (regarding proposals to bar the courts of appeals from disposing of appeals without opinion) were discussed at the same time as Item No. 91-17 (regarding proposals to regulate the use of unpublished opinions). By consensus, the Committee agreed to remove these items from its study agenda.

IV. Action Items

G. Item No. 97-41 (FRAP 4 — orders entered on motion for writ of error *coram nobis*)

The Committee returned to Agenda Item IV(G), consideration of which had been postponed until after lunch so that the Solicitor General could participate in the deliberations.

Solicitor General Waxman briefly introduced Item No. 97-41. He said that there is a "live dispute" over whether the writ of error *coram nobis* is still available in federal court. In *United States v. Morgan*, 346 U.S. 502 (1954), the Supreme Court held, 5-4, that litigants could continue to seek a writ of error *coram nobis* in federal court, at least when the applicant had been convicted of a crime, served his full sentence, and been released from custody, but was

continuing to suffer some legal disadvantage on account of the conviction. However, in *Carlisle v. United States*, 517 U.S. 416, 429 (1996), the Court said in dicta that "'it is difficult to conceive of a situation in a federal criminal case today where [a writ of *coram nobis*] would be necessary or appropriate.'"

The Solicitor General said that the government was not asking the Committee to take a position on this issue. Rather, the concern of the government was much narrower: At present, the circuits are split on the question of whether the time to appeal an order granting or denying an application for a writ of error *coram nobis* should be as provided in FRAP 4(a) (which governs appeals in civil cases) or as provided in FRAP 4(b) (which governs appeals in criminal cases). The government seeks the Committee's help in resolving this split. The government prefers that the time limitations of FRAP 4(a) apply, but the government can accept the time limitations of FRAP 4(b). From the government's perspective, the important thing is to get a uniform national rule; the government is less concerned about which rule is adopted.

The Committee considered the following proposed amendment and ACN:

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, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

Advisory Committee Note

Subdivision 4(a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations in Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v.*

Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, 429 (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals in those cases in which federal courts determine that they have authority to issue the writ.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

A member noted that the draft amendment provided that an appeal from an order disposing of an application for a writ of error *coram nobis* "is an appeal in a civil case for purposes of Rule 4(a)." He wondered whether there were any other rules in FRAP — other than FRAP 4 — that treated civil and criminal cases differently. If so, he said, the amendment might have to be expanded to provide that *coram nobis* appeals should also be treated as civil cases for the purposes of those other rules. Neither the Solicitor General nor any other member of the Committee could think of any such rules.

A member was concerned about the ACN stating that the amendment "is merely meant to specify time limitations for appeals in those cases in which federal courts determine that they have authority to issue the writ." That phrase is misleading. The time limitations of FRAP 4(a) should apply even if the reason why the district court declines to issue the writ of error *coram nobis* is that it concludes that it does *not* "have authority to issue the writ." As written, though, the ACN suggests that only if the district court first concludes that it has authority to issue the writ would the time limitations of FRAP 4(a) apply.

A member said that the ambiguity could be eliminated if a period were inserted after the word "appeals" and the remainder of the sentence deleted. Another member agreed, and moved that the amendment and ACN be approved, with the change to the ACN that had been suggested. The motion was seconded.

A member asked how often appeals from grants or denials of applications for the writ of error *coram nobis* are heard. Another member said that, on his court, there were, on average, probably two or three such appeals heard each year. The Reporter said that he had briefly researched this question and found that such appeals were quite infrequent. The Solicitor General agreed, but said that he thought that amending FRAP 4 was still worthwhile. It is likely to be several years before the Supreme Court decides whether the writ still exists; in the meantime, there is a purely procedural conflict that can easily be resolved by amending FRAP.

A member asked whether the district courts treated applications for the writ as civil cases or as criminal cases. The practice of the district courts is relevant to whether the time limitations of FRAP 4(a) or FRAP 4(b) should apply, as the practice of the district courts creates expectations about the practice of the appellate courts.

The Solicitor General responded that an application for a writ of error *coram nobis* is similar to a motion under 28 U.S.C. § 2255. Section 2255 motions are treated as civil matters, and thus attorneys are likely to expect that applications for writs of error *coram nobis* will be treated similarly. If the shorter deadlines of FRAP 4(b) are applied to *coram nobis* appeals, attorneys will get "trapped" and bring challenges to the validity of the rule. But if the longer deadlines of FRAP 4(a) are applied, the only surprise awaiting attorneys will be that they have more time to file their appeals than they thought.

Mr. Spaniol asked whether adopting the amendment might make it more likely that the Supreme Court will continue to recognize the validity of the writ. A couple members responded that they thought not, given that the ACN clearly states that the Committee takes no position on that question.

The motion carried (unanimously).

V. Discussion Items

B. Item No. 97-14 (FRAP 46(b)(1)(B) — attorney conduct)

The Committee turned to Agenda Item V(B), consideration of which had been postponed until after lunch so that Solicitor General Waxman could participate in the deliberations. Judge Garwood asked the Reporter to introduce Item No. 97-14.

The Reporter said that the Standing Committee is determined to do something about the wide variety of local rules governing attorney conduct. At its last meeting, the Standing Committee indicated that it wanted the Advisory Committees to provide their views on several issues. The Reporter said that, as he understands it, the Standing Committee is looking for input on eight questions. Those questions are described in a memo that the Reporter distributed to the Advisory Committee.

The Reporter mentioned that, earlier this week, he received a call from Prof. Daniel Coquillette, the Reporter to the Standing Committee. Prof. Coquillette said that he would be unable to attend the Advisory Committee's meeting and participate in its deliberations on the eight questions. He asked, though, that the Reporter describe for the Committee some recent developments, as well as some of Prof. Coquillette's thoughts about the eight questions.

> **Question No. 1:** As an original matter, would this Committee seek to amend Rule 46 even if action were not being taken to address the problem of conflicting standards of attorney conduct in the trial courts?

The Reporter explained that what seems to be driving Standing Committee action on attorney conduct is the lack of uniform national standards. However, FRAP is the one set of rules that *contains* a uniform national standard governing attorney conduct — the "conduct unbecoming" standard of FRAP 46(b)(1)(B). Prof. Coquillette concedes that a uniform national standard applies in the appellate courts and that the appellate courts have had few problems with it. He nevertheless believes that FRAP 46 should be amended because "conduct unbecoming" is extremely vague.

> **Question No. 2:** If the FRCP and FRCrP are amended to adopt one or more of the proposed Federal Rules of Attorney Conduct, would this Committee be willing to amend Rule 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts?

Prof. Coquillette said that he understands the desire of this Committee to take a backseat role in the deliberations over attorney conduct standards. However, he very much hopes that if uniform rules are adopted for the district courts, FRAP 46 will be amended to incorporate those standards.

Question No. 3: If this Committee is inclined to amend Rule 46(b)(1)(B) to replace the "conduct unbecoming" standard with whatever approach is adopted for the district courts, are the amendment to Rule 46 and the Advisory Committee Note drafted by Prof. Coquillette acceptable?

Prof. Coquillette had originally asked for comments on an amendment to FRAP 46 and ACN that he had drafted. However, Prof. Coquillette told the Reporter that, for several reasons, such input had become less urgent. First, at the Advisory Committee meetings that Prof. Coquillette has attended so far this spring, it was clear that there are deep divisions over the proper approach to regulating attorney conduct, and it will take some time to resolve those disputes. Second, it has also become clear that there is a lot of sentiment for coordinating the Standing Committee's work on attorney conduct issues with the work of the ABA's "Ethics 2000" project. And third, the Advisory Committee on Bankruptcy Rules has asked the Federal Judicial Center to conduct a study to assist the Committee in deciding what approach it should take. That study will take at least a year.

Question No. 4: Which of the four approaches being considered by the Standing Committee should be adopted for the district courts?

As noted, the Standing Committee's activities on the attorney conduct issue arise from the Committee's concern about the variety of conflicting standards in the district courts. For that problem to be solved, one of two approaches must be adopted. First, the Standing Committee could recommend a single rule that would provide that state standards will govern attorney conduct in federal court. This approach — the "dynamic conformity" approach — would essentially put the Rules Committees — and the federal courts — out of the business of drafting attorney conduct standards. Second, the Standing Committee could recommend a comprehensive set of Federal Rules of Attorney Conduct ("FRAC"). This would put the Rules Committees — and the federal courts — deeply *in* the business of drafting attorney conduct standards. The disagreements over how attorney conduct in federal courts should be regulated essentially relate to where on the continuum between, on the one hand, total deference to state standards, and, on the other hand, comprehensive federal regulation the Standing Committee should come to rest.

The Reporter said that it is his impression that this general debate has been "hijacked" by the fight over the enforcement of Model Rule 4.2 against federal prosecutors. On one side of this debate are the state judges, who favor the dynamic conformity approach, and thus the application of Rule 4.2 against federal prosecutors. On the other side of this debate is the Justice Department, which opposes the dynamic conformity approach as being insufficiently protective of important federal interests, including the federal interest in not having Rule 4.2 enforced against federal prosecutors. The Reporter said that Prof. Coquillette and others seem to be trying to find a compromise position — for example, a very limited set of federal rules, with most attorney conduct issues being left to state regulation — but they will have trouble succeeding until the dispute over Rule 4.2 is resolved.

Prof. Coquillette informed the Reporter that the Advisory Committees that have already met this spring were deeply divided over this issue, with many members sympathizing with the position of the state judges, and many other members sympathizing with the position of the Justice Department.

Question No. 5: Who should have primary responsibility for drafting the Federal Rules of Attorney Conduct?

The Reporter said that, at the January meeting of the Standing Committee, Prof. Coquillette advocated that work on drafting the FRAC be done by the Advisory Committees or by an ad hoc committee comprised of members of each of the Advisory Committees. The Reporters to the Advisory Committees disagreed, arguing that the members of the Advisory Committees were not selected for their expertise on legal ethics and already have plenty of work to do.

In his telephone conversation with the Reporter, Prof. Coquillette said that it has "already been decided" that an ad hoc committee comprised of two members of each Advisory Committee and a representative of the Department of Justice will work on drafting the FRAC. As to the concerns about the lack of expertise of Advisory Committee members, Prof. Coquillette said that such expertise exists on the Standing Committee.

Question No. 6: Should the Federal Rules of Attorney Conduct be promulgated as a "stand alone" set of rules or as an appendix to the FRCP and/or the FRCrP?

Prof. Coquillette said that the Advisory Committees that have already discussed this question were of the view that its answer depends upon what approach is adopted. If the Standing Committee decides to adopt a single dynamic conformity rule, that rule should probably be part of the rules of appellate, civil, and criminal procedure. If the Standing Committee decides to adopt a comprehensive set of FRAC, those rules should probably be promulgated as a stand alone set of rules.

Question No. 7: Does the Standing Committee have authority under the Rules Enabling Act to promulgate rules governing attorney conduct?

Prof. Coquillette said that this issue, which had been pressed by the Reporters at the Standing Committee meeting, was "not a concern," as federal courts are already deeply involved in enacting local rules governing attorney conduct. The question for the Standing Committee is merely whether to replace the rules that already exist with national rules.

The Reporter said that he was not as confident as Prof. Coquillette about whether the Rules Enabling Act provides authority to promulgate rules governing attorney conduct. The Reporter said that he had no doubt that the Rules Enabling Act provided authority to regulate attorney conduct that was closely related to court proceedings — such as conduct that occurs in court or that impacts upon court proceedings. However, the rules drafted by Prof. Coquillette would sweep far more broadly and purport to govern such issues as conflicts of interests and the

confidentiality of information, even when those issues arise in a context that is far removed from federal litigation.

Question No. 8: Does the Committee wish to suggest any revisions to the ten Federal Rules of Attorney Conduct that Prof. Coquillette has drafted?

Prof. Coquillette said that the Committee need not worry about this question at this time, because, in light of the developments discussed in connection with Question No. 3, the need for this input has become less urgent.

Following the report of the Reporter, Judge Garwood opened the floor for comments.

A member said that he was unclear about the scope of the rules that the Standing Committee was contemplating. Would they address only the suspension, disbarment, or other discipline of attorneys? Would they affect the right of district courts to sanction conduct under FRCP 11 or their inherent authority? The Reporter responded that, as he understood the various proposals, none would affect the authority of district courts under FRCP 11; rather, the rules were addressed to when attorneys can be formally disciplined — such as by suspension — for unethical conduct.

The Solicitor General said that he shared the view of Prof. Coquillette that something had to be done about the enormous variety of conflicting local rules. He said that the situation is a mess, and that it has a negative impact on the Department of Justice. For example, when the Department is conducting a criminal investigation of conduct occurring in 17 states, there may be two dozen or more sets of rules — many of which conflict — governing the conduct of the attorneys involved in that investigation. The present situation is intolerable.

At the same time, the Solicitor General acknowledged that solving the problem will be difficult. The dynamic conformity approach would bring about vertical unity — that is, it would ensure that the standards that governed attorney conduct in a federal court in Illinois would be identical to those that governed attorney conduct in a state court in Illinois — but it would create horizontal disunity — that is, it would result in one set of standards governing attorney conduct in federal court in Illinois, and another set of standards governing attorney conduct in federal court in New York. The FRAC approach would create horizontal unity — the same standards would apply in all federal courts — but vertical disunity — different standards would apply within the same state, depending upon whether the attorney was in federal or state court.

The Solicitor General said that the Justice Department would prefer a comprehensive set of federal rules that would produce horizontal unity. Failing that, the Justice Department could accept a limited number of federal rules that addressed "important" or "core" matters of federal concern, and that left the regulation of remaining matters to the discretion of district courts. The one thing that was unacceptable to the Justice Department was any kind of "dynamic conformity" approach — that is, any kind of rule that directly or by implication incorporated state standards into federal rules. In the Department's view, such an approach would put federal interests at undue risk. If a state was to change one of its rules in a way that threatened federal interests, the

only alternatives for the Department would be Congressional action or the lengthy Rules Enabling Act process.

As to who should draft the federal rules preferred by the Department, the Solicitor General said that the Department had recommended the appointment of a separate committee comprised of experts in legal ethics. The Department agrees that this responsibility should not be assigned to the Advisory Committees. However, the Solicitor General said, if an ad hoc committee comprised of members of the Advisory Committees is appointed, the Department will certainly work with it.

A member asked about the status of the negotiations between the Department and the Conference of Chief Justices regarding Rule 4.2. The Solicitor General said that a working group appointed by the Department and the Conference had, after about a year of deliberations, come up with a compromise proposal. That proposal has been distributed among the chief justices for comment. If the chief justices support it, the Department will almost surely support it as well. The Solicitor General noted that the criminal defense bar opposes the compromise proposal.

A member asked the Solicitor General whether the Department had any problem with FRAP 46. The Solicitor General said that it did not.

Judge Garwood said that he, too, was satisfied with FRAP 46, and felt no particular need to change it. Several members agreed. One member pointed out that, a couple years ago, the Committee considered a proposal to amend FRAP 46, and the Committee decided not to pursue it. The Committee's view at that time was "if it ain't broke, don't fix it."

The Solicitor General agreed that the attorney conduct problem concerns the district courts, not the courts of appeals. The Solicitor General also said that the fight over Rule 4.2 was influencing the deliberations over this more general question. He said that the Rule 4.2 issue rarely arises in a way that is directly connected to litigation, but rather arises outside of court when, for example, a U.S. Attorney instructs an FBI agent to make contact with an undercover source.

The Reporter asked the Solicitor General whether, in light of that fact, the Rules Enabling Act provided authority for regulating out-of-court criminal investigations. The Solicitor General responded that the Act provided the necessarily authority, as almost always there is at least *some* connection between a federal criminal investigation and a court proceeding. A member pointed out, though, that some of the ten FRAC drafted by Prof. Coquillette purport to govern conduct that is not even remotely related to court proceedings.

After further discussion, the Committee reached a consensus on this much: FRAP 46 is working satisfactorily and does not need to be amended. If one or more rules governing attorney conduct are adopted for the district courts, this Committee is willing to consider amending FRAP 46 to incorporate those rules. However, until it knows what approach is in fact adopted for the district courts, this Committee cannot comment further. The Committee has no position on what

approach should be adopted for the district courts; it defers to the views of the Advisory Committees that draft rules governing practice in those courts.

The Committee then deliberated the question of who should have primary responsibility for drafting the FRAC. Several members expressed the view that members of the Advisory Committees should not have primary responsibility for this task, given their lack of expertise, and given the fact that they already have a lot to do. One member said that, in his opinion, if there are to be rules governing attorney conduct, they should be enacted by Congress.

A member said that if the Rules Enabling Act process is used to draft rules governing attorney conduct, a separate committee should be appointed. The Advisory Committees should not be asked to do this work. However, she thought that the Advisory Committees should be willing to contribute members to this separate committee.

Another member agreed. He said that if the committee appointed to write the rules is comprised solely of experts on legal ethics, those experts would have a vested interest in writing as many rules as possible. If the committee includes non-experts from the Advisory Committees, they can act as a "check" on the experts.

A member said that, regardless of how the committee is composed, it should work closely with the ABA's "Ethics 2000" project. The Solicitor General disagreed. He said that the work of the "Ethics 2000" project would not be done in 2000, and perhaps not even near 2000. Tying the drafting of the FRAC too closely to the work of the ABA could delay the federal rules for several years. In addition, there is no reason to believe that the "Ethics 2000" project will be any more sensitive to federal interests than the Conference of Chief Justices.

A member asked the Solicitor General whether the Justice Department was experiencing problems with the application of any Model Rule other than Rule 4.2. The Solicitor General said that there had been a problem with Rule 3.3 and Rule 3.8, as interpreted by one or two state courts, but, except for very occasional and very discrete issues, most of the problems experienced by the Justice Department related to Rule 4.2.

A member said that he agreed with a comment that had been made earlier: Including members of Advisory Committees on the committee that will draft the FRAC could act as an important "check." For example, the member said, someone on the committee should be willing to argue *against* making changes to FRAP 46.

Another member agreed. He expressed concern about the manner in which ethical rules were being transformed into liability rules. He said that he would oppose any comprehensive set of federal rules governing attorney conduct. In his view, if there are problems — such as the problems arising out of the application of Rule 4.2 — those problems should be addressed through precise, narrowly focused rules.

A member said that she expected that district courts may have a different take on this issue than appellate courts. Another member agreed. He can understand why district courts

would be jealous about guarding their ability to address conduct that occurs in court and reluctant to turn over the regulation of that conduct to the states. At the same time, he thought that the Standing Committee has no business making rules that would regulate what a lawyer does in his office, if his conduct has no connection to court proceedings.

After further discussion, the Committee reached a consensus that the Advisory Committees should have input into the drafting of the FRAC, primarily to act as a "check" on the process, but that the main responsibility for drafting those rules should reside with others — people who have expertise in legal ethics. The Committee also views the concern about the drafters not exceeding their authority under the Rules Enabling Act as serious; the rules should address only attorney conduct that has a discernable impact on court proceedings. As to whether the FRAC should be promulgated as a "stand alone" set of rules or as part of the FRCP or FRCrP, the Committee takes no view. Again, it is willing to defer to the sentiments of the Advisory Committee on Civil Rules and the Advisory Committee on Criminal Rules.

E. Item Nos. 95-4 & 97-1 (FRAP 26(a) — making time computation under FRAP consistent with time computation under FRCP and FRCrP)

The FRCP and FRCrP compute time differently than FRAP. FRCP 6(a) and FRCrP 45(a) provide that, in computing any period of time, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." By contrast, FRAP 26(a)(2) provides that, in computing any period of time, a litigant should "[e]xclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 7 days, unless stated in calendar days." Thus, deadlines of 7, 8, 9, and 10 days are calculated differently under the FRCP and FRCrP than they are under FRAP. Two commentators have asked that FRAP 26(a)(2) be amended to conform to FRCP 6(a) and FRCrP 45(a). They argue that the present difference serves no substantive purpose and creates a trap for unwary litigants.

To inform the discussion of these proposals, the Reporter prepared a draft amendment and ACN, as well as a list of all of the 7 and 10 day deadlines in FRAP that would, as a *practical* matter, be extended by at least two days if FRAP 26(a)(2) was amended as proposed. (There are no 8 or 9 day deadlines in FRAP.)

Judge Garwood introduced this agenda item and mentioned that Judge Richard Posner had recently written an opinion calling for FRAP 26(a)(2) to be amended as proposed. Judge Garwood pointed to another "trap" relating to time computation: According to FRAP 26(a)(2), when a deadline is stated in "calendar days" instead of in "days,"intermediate Saturdays, Sundays, and legal holidays are *not* excluded, even if the deadline is less than 7 days.

Judge Garwood said that, before the Committee makes a final decision on this proposal, it needs to look carefully at the 7 and 10 day deadlines in FRAP. Those deadlines — especially the 7 day deadlines — are grounded upon the assumption that intermediate Saturdays, Sundays, and legal holidays will be counted. If that will no longer be true, the Committee may want to shorten some of the 7 day deadlines to 5 days, or some of the 10 day deadlines to 7 or 8 days.

A member said that he did not favor the proposal. Changing the method of calculation would affect too many rules. There is nothing ambiguous about the rule; the only lawyers who fall into the "trap" are those who do not read the rule carefully, and he does not have much sympathy for them.

Several other members disagreed and expressed strong support for the proposal. In their view, there is no reason why time should be calculated differently under FRAP than it is under the FRCP or FRCrP. It creates a trap for unwary litigators, which is bad enough, but it is a trap that serves no substantive purpose whatsoever.

A member said that his court regularly has to deal with criminal cases in which parties have filed notices of appeal too late, upon the assumption that the 10 day deadline in FRAP 4(b) is calculated as it is under the FRCrP. The result is many needless dismissals, motions to extend, ineffective assistance of counsel claims, and the like.

A member asked that, prior to the next Advisory Committee meeting, the Reporter identify all instances in which FRAP deadlines are stated in *calendar* days. If there are few such instances, the Committee may want to eliminate the disparity between "days" and "calendar days," state all deadlines in "days," and count all days in the same manner — the FRCP/FRCrP manner. This might require adjusting some deadlines, though.

A member moved that the Committee approve in principle the suggestion that FRAP 26(a)(2) be amended so that, in computing any period of time, intermediate Saturdays, Sundays, and legal holidays will be excluded when the period is less than 11 days, rather than less than 7 days. However, the Committee will defer any definitive action on the proposal until its October meeting, so that members can examine the list of 7 and 10 day deadlines that will be affected and consider whether any of those deadlines should be shortened.

The motion was seconded. The motion carried (unanimously).

F. Item No. 95-5 (FRAP 32 — require digitally readable copy of brief, when available)

The Reporter said that this agenda item arose out of a suggestion by Judge Frank Easterbrook that FRAP 32 be amended to require that briefs be filed and served on computer disk. In January, Judge Garwood wrote to the appellate clerks and asked for their comments on this suggestion. All of the clerks, save those of the Third and Ninth Circuits, responded. The responses from the clerks varied substantially. Some clerks strongly opposed any national rulemaking on this topic, while others strongly supported it. On balance, the clerks were about evenly divided.

The Reporter said that implementing Judge Easterbrook's suggestion was far more complicated than may have first appeared. Before drafting could even begin on an amendment, a number of questions would have to be resolved. The Reporter provided a memo to the Committee in which many of those questions were described. The Reporter said that, in light of

the complexity of the task, the sharp disagreement among the clerks, the relative lack of experience that the clerks have in dealing with filings on computer disk, the work being done by the Subcommittee on Technology, the experiments with electronic filing that are ongoing, and the lingering concerns over computer viruses, he recommends that the Committee remove this item from its study agenda.

Several members agreed with the recommendation, for the reasons stated by the Reporter. Particular concern was expressed about the problem with viruses and about the need for more experimentation before national rules are adopted.

Mr. McCabe described some of the experiments with electronic filing technology that are now being conducted. He said that, as written, FRAP permits courts to experiment with technology. He would not mandate that courts accept briefs on disk or over the Internet until further experimentation can take place.

Mr. Fulbruge agreed. He added that many judges, law clerks, and others are unwilling to work with briefs or other materials that are available *only* electronically. Thus, if filing briefs on disk were required, someone — either the judge, or the clerk's office, or the attorneys — would still have to print out hard copies. Mr. Fulbruge thinks that a "paperless" appellate system is still many years away.

One member said that she sympathized with those judges who have poor vision and want briefs on disk so that the type can be enlarged, but nothing prevents those judges from requesting the parties to submit a digital copy of their briefs, and she suspects that few parties would refuse such a request. Another member pointed out that any court can now amend its local rules to request parties to submit briefs on disk, as several have done.

A member moved that Item No. 95-5 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

G. Item No. 95-8 (FRAP 4(a)(7) — repeal collateral order doctrine?)

Item No. 95-08 was placed on the Committee's study agenda by Mr. Munford, who was concerned that, read literally, FRAP 4(a)(7) might repeal the collateral order doctrine. FRAP 4(a)(1)(A) permits an appeal in a civil case to be filed "within 30 days after the judgment or order appealed from is entered." FRAP 4(a)(7), in turn, provides that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure." Under the terms of FRCP 58, a judgment is required to "be set forth on a separate document" — that is, on a document separate from any memorandum, opinion, or other document that describes the reasons for the entry of the judgment. Mr. Munford's concern was that, because collateral orders are generally not "set forth on a separate document" (but rather set forth on a document that describes the reasons for their issuance), they are not "entered in compliance with Rule[] 58" — and, because they are not "entered in compliance with Rule[] 58," they cannot be appealed under FRAP 4(a)(1)(A).

At the Committee's September meeting, Mr. Munford agreed to look into the matter further and, if he deemed it appropriate, to draft an amendment to FRAP 4 for the Committee to consider. Subsequent to the September meeting, Judge Garwood asked Mr. Munford to examine a closely related question involving the application of FRAP 4(a)(7) to orders that grant or deny the post-trial motions listed in FRAP 4(a)(4)(A).

Mr. Munford told the Committee that he had concluded that his original concern — the impact of FRAP 4(a)(7) on collateral orders — was not worth pursuing, and should be removed from the Committee's study agenda. He said that courts have consistently held that FRCP 58 does indeed apply to collateral orders. Mr. Munford said that, in light of that fact, it might be wise for the Advisory Committee on Civil Rules to redraft FRCP 58, which buries the separate document requirement in text that, on first glance, appears to apply only to judgments entered at the conclusion of a case. But he did not think that this Committee needed to devote any further attention to the matter, except insofar as collateral orders are affected by the "prematurity question" (see below).

Mr. Munford said that, by contrast, the question that Judge Garwood asked him to research — the application of FRAP 4(a)(7) to orders that grant or deny those post-judgment motions listed in FRAP 4(a)(4)(A) — was well worth the Committee's attention. The circuits are badly split on the subject, and one circuit has specifically asked this Committee for guidance.

The problem is this: Under FRAP 4(a)(4)(A), the time to file an appeal is tolled upon the filing of any of several post-trial motions — including a motion for judgment under FRCP 50(b), a motion to amend or make additional factual findings under FRCP 52(b), a motion for attorney's fees under FRCP 54 (if the district court extends the time to appeal under FRCP 58), a motion to alter or amend the judgment under FRCP 59, a motion for a new trial under FRCP 59, and a motion for relief from the judgment under FRCP 60 (if the motion is filed within 10 days after entry of judgment). According to FRAP 4(a)(4)A), when one of these motions is filed with the district court at the conclusion of a civil case, the time to file a notice of appeal in that case does not begin to run until "the entry of the order disposing of the last such remaining motion." That gives rise to at least three questions:

1. The "Applicability" Question: Does FRCP 58 apply to the "order" referred to in FRAP 4(a)(4)(A) — that is, to "the order disposing of the last such remaining motion"?

Suppose that, in a diversity case arising out of an automobile accident, the jury returns a verdict for the plaintiff, and the district court enters judgment accordingly. The defendant then files a timely motion for a new trial under FRCP 59. A few days later, the district court issues a five page memorandum denying the motion and describing the reasons for doing so. Has the time for the defendant to appeal the judgment begun to run?

If FRCP 58 does *not* apply, the answer is "yes." The defendant must file a notice of appeal within 30 days.

If FRCP 58 *does* apply, the answer is "no," because the order denying the new trial motion was not "set forth on a separate document." Until the order *is* entered in compliance with FRCP 58, the time for the defendant to appeal continues to be tolled. In theory, the defendant could wait 20 or 30 years, move the court to enter its order denying the new trial motion in the form required by FRCP 58, and then appeal the 20 or 30 year old judgment. This result is dictated by a literal reading of FRAP 4(a)(7), which states that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered in compliance with [FRCP] 58."

Mr. Munford said that this question arises with some frequency, because when courts *deny* the post-judgment motions listed in FRAP 4(a)(4)(A), they usually do so in orders that describe the reasons for the denial. Those orders are not "entered in compliance with Rule[] 58" for purposes of FRAP 4(a)(7) because they are not usually "set forth on a separate document." By contrast, this issue does not often arise when courts issue orders *granting* post-judgment motions, as such orders — which generally direct that a judgment be vacated or amended — are usually entered in compliance with FRCP 58.

According to Mr. Munford, the circuits have split badly on the "applicability" question:

a. The First and Fifth Circuits (as well as at least one decision of the Ninth) hold that FRCP 58 always applies to orders disposing of post-judgment motions. Thus, in theory, if a district court does not enter its order denying such a motion on a separate document as required by FRCP 58, the losing party can wait forever to appeal. When the party decides that it wants to appeal, it need merely ask the district court to enter its (very old) order denying the post-judgment motion on a separate document and, after the district court does so, the party will have 30 days to appeal the (very old) judgment. In order to prevent that result, the First Circuit invented a "three month rule" — that is, the First Circuit, without any textual support in FRAP, held that a party loses its right to request the district court to enter an order on a separate document (thus triggering the 30 day time to appeal) three months after receiving notice of the order.

b. The Second and Seventh Circuits (as well as at least one decision of the Ninth) hold that FRCP 58 applies when post-judgment relief is *granted*, but not when such relief is *denied.* In other words, when the district court *grants* a motion for post-judgment relief, the time to appeal does not begin to run until the district court enters its order in compliance with FRCP 58. When a district court *denies* a motion for post-judgment relief, the time to appeal begins to run, even if the order denying the relief does not comply with FRCP 58.

c. The Eleventh Circuit holds that FRCP 58 never applies to motions for post-judgment relief. Whether such a motion is granted or denied, the time to appeal begins to run as soon as the order is entered, whether or not the order complies with FRCP 58. This, of course, is contrary to the literal terms of FRAP 4(a)(7).

2. The "Prematurity" Question: If FRCP 58 applies to the "order" referred to in FRAP 4(a)(4)(A) — that is, if the time to bring an appeal in a civil case does not begin to run until an

order granting or denying post-judgment relief is entered in compliance with FRCP 58 — what happens if a party brings an appeal *before* such an order is entered?

Suppose that, in a diversity case arising out of an automobile accident, the jury returns a verdict for the plaintiff, and the district court enters judgment accordingly. The defendant then files a timely motion for a new trial under FRCP 59. A few days later, the district court issues a five page memorandum denying the motion and describing the reasons for doing so. The district court is in a circuit that holds that the time to appeal does not begin to run until the order denying the motion for post-judgment relief is entered in compliance with FRCP 58, so, at this point, the time to appeal has not begun to run. What happens if the defendant nevertheless files a notice of appeal, without first asking the district court to enter its order in compliance with FRCP 58?

According to Mr. Munford, the circuits have also split on the "prematurity" question:

a. Some circuits dismiss the appeal. Essentially, they instruct the appellant to go back to the district court, ask the court to enter its order denying post-judgment relief in a form that complies with FRCP 58, and then appeal again.

b. Other circuits apply a "one way waiver" doctrine. If the party who lost below brings a "premature" appeal, the appeal is allowed to proceed. These circuits consider it a waste of time to dismiss an appeal, only to have the appellant get a FRCP 58 order from the district court and appeal again. However, if the party who lost below wishes to do so, she can choose not to appeal until the district court's order denying her motion for post-judgment relief is entered in compliance with FRCP 58. Again, in theory, the party could wait forever. In the view of these circuits, if the winner wants to protect against that possibility, the winner should make certain that the district court enters its order in compliance with FRCP 58.

3. The "Timing" Question: Mr. Munford briefly mentioned one other complication:

Suppose that, in a diversity case arising out of an automobile accident, the jury returns a verdict for the plaintiff, and the district court enters judgment accordingly. The defendant then files a timely motion to amend the judgment under FRCP 59. On June 1, the district court issues an order granting the motion, and instructs the clerk to amend the judgment. On June 3, the judgment is actually amended. When did the time for appeal begin to run? On June 1 or on June 3? Does it matter whether the June 1 order was entered in compliance with FRCP 58?

Mr. Munford did not describe any case law on this question, but said the Committee should address this question if the Committee amends FRAP 4 to address the "applicability" and "prematurity" questions.

Mr. Munford distributed a proposal for amending FRAP 4. Under Mr. Munford's proposal, the three questions would be answered in the following ways:

a. The "Applicability" Question: FRCP 58 would apply to all judgments and orders, except for orders denying the motions for post-judgment relief listed in FRAP 4(a)(4)(A). The

time to appeal would begin to run upon entry of such orders, even if they were not entered in compliance with FRCP 58.

b. The "Prematurity" Question: The "one way waiver" doctrine would be incorporated into FRAP. When motions for post-judgment relief were *denied* by an order that did not comply with FRCP 58, there would be no need for a "waiver" doctrine, as, under Mr. Munford's first proposal, the time to appeal would begin to run immediately. Thus, an appeal could not be "premature." When motions for post-judgment relief were *granted*, however, a "premature" appeal would still be possible.

Under Mr. Munford's proposal, if an order granting post-judgment relief does not comply with FRCP 58, the rights of the parties to appeal would be preserved until 30 days after a FRCP 58 order was entered. In theory, an appeal could be brought many years later, but, in practice, that is highly unlikely to occur. If a party brought a "premature" appeal — that is, if a party filed a notice of appeal before the order granting post-judgment relief was entered in compliance with FRCP 58 — the appeal would be permitted to proceed.

c. The "Timing" Question: Under Mr. Munford's proposal, the time to appeal would begin to run from the date that the judgment was amended, and not from the date that the court ordered the judgment to be amended.

After a brief discussion, the Committee reached a consensus that, in principle, it agreed with Mr. Munford's proposal, but desired to give it more study. A member moved that the proposal be placed on the agenda for the Committee's October meeting as an "action" item. The motion was seconded. The motion carried (unanimously).

H. Items Awaiting Initial Discussion and Prioritization

The Committee postponed until October consideration of all items that were awaiting initial discussion, with one exception: The Committee briefly discussed Item No. 97-32, a proposal from the Methods Analysis Program that FRAP 12(a) be amended so that appellate cases no longer had to be docketed "under the title of the district-court action." Instead, the caption for an appellate case would reflect only the names of those who were actually parties to the appeal.

Mr. Fulbruge introduced the proposal, and began to field questions about it, when Judge Garwood interrupted to ask whether, given that it was after 5:00 p.m., the Committee wanted to defer further discussion of Item No. 97-32 and the other items awaiting initial discussion until tomorrow or until the October meeting.

A member moved that discussion of Item No. 97-32 and the other items awaiting initial discussion be postponed until the October meeting. The motion was seconded. The motion carried (unanimously).

VI. Additional Old Business and New Business (If Any)

No additional old business or new business was raised.

VII. Scheduling of Dates and Location of Fall 1998 Meeting

The Committee agreed that it will meet in New Orleans on October 15 and 16, 1998.

VIII. Adjournment

By unanimous consent, the Advisory Committee adjourned at 5:10 p.m.

Respectfully submitted,

Patrick J. Schiltz
Reporter

Reporter's Note: Attached as an appendix to these minutes are copies of all amendments and ACNs approved by the Committee. In some cases, the Committee may have approved an amendment or ACN upon the understanding that it would be redrafted in a particular way, but the Committee has not yet reviewed the redrafted version.

APPENDIX

To the Minutes of the Spring 1998 Meeting of the Advisory Committee on Appellate Rules

Reporter's Note: This appendix contains copies of all amendments to the Federal Rules of Appellate Procedure and Advisory Committee Notes approved by the Advisory Committee on Appellate Rules at its spring 1998 meeting. In some cases, the Committee may have approved an amendment or Note upon the understanding that it would be redrafted in a particular way, but the Committee has not yet reviewed the redrafted version.

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, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

Advisory Committee Note

Subdivision 4(a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error *coram nobis* is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations in Rule 4(b) (which apply in criminal cases). *Compare United States v. Craig*, 907 F.2d 653, 655-57, *amended* 919 F.2d 57 (7th Cir. 1990), *cert. denied*, 500 U.S. 917 (1991); *United States v. Cooper*, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and *United States v. Keogh*, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); *with Yasui v. United States*, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and *United States v. Mills*, 430 F.2d 526, 527-28 (8th Cir. 1970), *cert. denied*, 400 U.S. 1023 (1971) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error *coram nobis* in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error *coram nobis* to set aside the conviction. *United States v. Morgan*, 346 U.S. 502 (1954). As the Court recognized, in the *Morgan* situation an application for a writ of error *coram nobis* "is of the same general character

as [a motion] under 28 U.S.C. § 2255." *Id.* at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error *coram nobis*. In addition, the strong public interest in the speedy resolution of criminal appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the *Morgan* situation, as the party seeking the writ of error *coram nobis* has already served his or her full sentence.

Notwithstanding *Morgan*, it is not clear whether the Supreme Court continues to believe that the writ of error *coram nobis* is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become "'difficult to conceive of a situation'" in which the writ "'would be necessary or appropriate.'" *Carlisle v. United States*, 517 U.S. 416, ___ (1996) (quoting *United States v. Smith*, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error *coram nobis*. Litigants may bring and label as applications for a writ of error *coram nobis* what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

Rule 24. Proceeding in Forma Pauperis

(a) Leave to Proceed in Forma Pauperis.

(1) Motion in the District Court. Except as stated in Rule 24(a)(3), a party to a district-court action who desires to appeal in forma pauperis must file a motion in the district court. The party must attach an affidavit that:

(A) shows in the detail prescribed by Form 4 of the Appendix of Forms, the party's inability to pay or to give security for fees and costs;

(B) claims an entitlement to redress; and

(C) states the issues that the party intends to present on appeal.

(2) Action on the Motion. If the district court grants the motion, the party may proceed on appeal without prepaying or giving security for fees and costs, unless the law requires otherwise. If the district court denies the motion, it must state its reasons in writing.

Advisory Committee Note

Subdivision (a)(2). Section 804 of the Prison Litigation Reform Act of 1995 ("PLRA") amended 28 U.S.C. § 1915 to require that prisoners who bring civil actions or appeals from civil actions must "pay the full amount of a filing fee." 28 U.S.C. § 1915(b)(1). Prisoners who are unable to pay the full amount of the filing fee at the time that their actions or appeals are filed are generally required to pay part of the fee and then to pay the remainder of the fee in installments. 28 U.S.C. § 1915(b). By contrast, Rule 24(a)(2) provides that, after the district court grants a litigant's motion to proceed on appeal in forma pauperis, the litigant may proceed "without prepaying or giving security for fees and costs." Thus, the PLRA and Rule 24(a)(2) appear to be in conflict.

Rule 24(a)(2) has been amended to resolve this conflict. Recognizing that future legislation regarding prisoner litigation is likely, the Committee has not attempted to incorporate into Rule 24 all of the requirements of the current version of 28 U.S.C. § 1915. Rather, the Committee has amended Rule 24(a)(2) to clarify that the rule is not meant to conflict with anything required by the PLRA or any other law.

Rule 27. Motions

(d) Form of Papers; Page Limits; and Number of Copies

(1) **Format.**

(B) A cover is not required, but there must be a caption that includes the case number, the name of the court, the title of the case, and a brief descriptive title indicating the purpose of the motion and identifying the party or parties for whom it is filed. If a cover is used, it must be white.

Advisory Committee Note

Subdivision (d)(1)(B). A cover is not required on motions, responses to motions, or replies to responses to motions. However, Rule 27(d)(1)(B) has been amended to provide that if a cover is nevertheless used on such a paper, the cover must be white. The amendment is intended to promote uniformity in federal appellate practice.

Rule 28. Briefs

(j) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed — or after oral argument but before decision — a party may promptly advise the circuit clerk by letter, with a copy to all other parties, setting forth the citations. The letter must state ~~without argument~~ the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. The body of the letter must not exceed 250 words. Any response must be made promptly and must be similarly limited.

Advisory Committee Note

Subdivision (j). In the past, Rule 28(j) has required parties to describe supplemental authorities "without argument." Enforcement of this restriction has been lax, in part because of the difficulty of distinguishing "state[ment] . . . [of] the reasons for the supplemental citations," which is required, from "argument" about the supplemental citations, which is forbidden.

As amended, Rule 28(j) continues to require parties to state the reasons for supplemental citations, with reference to the part of a brief or oral argument to which the supplemental citations pertain. But Rule 28(j) no longer forbids "argument." Rather, Rule 28(j) permits parties to decide for themselves what they wish to say about supplemental authorities. The only restriction upon parties is that the body of a Rule 28(j) letter — that is, the part of the letter that begins with the first word after the salutation and ends with the last word before the complimentary close — cannot exceed 250 words. All words found in footnotes will count toward the 250 word limit.

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(2) **Cover.** Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; ~~and~~ any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

Advisory Committee Note

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed — or adequately addressed — in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. *See, e.g.*, D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of Brief.

(7) **Length.**

(C) **Certificate of compliance.**

(i) A brief submitted under Rule 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

- the number of words in the brief; or
- the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule 32(a)(7)(C)(i).

Advisory Committee Note

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

Rule 32. Form of Briefs, Appendices, and Other Papers

(c) Form of Other Papers.

(1) **Motion.** The form of a motion is governed by Rule 27(d).

(2) **Other Papers.** Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A ~~a~~ cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2)~~;~~. If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

Advisory Committee Note

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. *See, e.g.*, Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40-1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35-6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

Rule 44. Case Involving a Constitutional Question When the United States or the Relevant State is Not a Party

(a) **Constitutional Challenge to Federal Statute.** If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General.

(b) **Constitutional Challenge to State Statute.** If a party questions the constitutionality of a statute of a State in a proceeding in which that State or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the attorney general of the State.

Advisory Committee Note

Rule 44 requires that a party who "questions the constitutionality of an Act of Congress" in a proceeding in which the United States is not a party must provide written notice of that challenge to the clerk. Rule 44 is designed to implement 28 U.S.C. § 2403(a), which states that:

> In any action, suit or proceeding in a court of the United States to which the United States or any agency, officer or employee thereof is not a party, wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question, the court shall certify such fact to the Attorney General, and shall permit the United States to intervene . . . for argument on the question of constitutionality.

The subsequent section of the statute — § 2403(*b*) — contains virtually identical language imposing upon the courts the duty to notify the attorney general of a *state* of a constitutional challenge to any statute of that state. But § 2403(b), unlike § 2403(a), was not implemented in Rule 44.

Rule 44 has been amended to correct this omission. The text of former Rule 44 regarding constitutional challenges to federal statutes now appears as Rule 44(a), while new language regarding constitutional challenges to state statutes now appears as Rule 44(b).

Rule 47. Local Rules by Courts of Appeals

(a) Local Rules.

(1) **Adoption and Amendment.**

(A) Each court of appeals acting by a majority of its judges in regular active service may, after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice. A generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order. A local rule must be consistent with — but not duplicative of — Acts of Congress and rules adopted under 28 U.S.C. § 2072 and must conform to any uniform numbering system prescribed by the Judicial Conference of the United States.

(B) Each circuit clerk must send the Administrative Office of the United States Courts a copy of each local rule and internal operating procedure when it is ~~promulgated~~ adopted or amended. A local rule must not be enforced before it is received by the Administrative Office of the United States Courts.

(C) An amendment to the local rules of a court of appeals must take effect on the December 1 following its adoption, unless a majority of the court's judges in regular active service determines that there is an immediate need for the amendment.

Advisory Committee Note

Subdivision (a)(1). Rule 47(a)(1) has been divided into subparts. Former Rule 47(a)(1), with the exception of the final sentence, now appears as Rule 47(a)(1)(A). The final sentence of former Rule 47(a)(1) has become the first sentence of Rule 47(a)(1)(B).

Two substantive changes have been made to Rule 47(a)(1). First, the second sentence of Rule 47(a)(1)(B) has been added to bar the enforcement of any local rule — or any change to any local rule — prior to the time that it is received by the Administrative Office of the United States Courts. Second, Rule 47(a)(1)(C) has been added to provide a uniform effective date for changes to local rules. Such changes will take effect on December 1 of each year, absent exigent circumstances.

The changes to Rule 47(a)(1) are prompted by the continuing concern of the bench and bar over the proliferation of local rules. That proliferation creates a hardship for attorneys who practice in more than one court of appeals. Not only do those attorneys have to become familiar with several sets of local rules, they also must be continually on guard for changes to the local rules. In addition, although Rule 47(a)(1) requires that local rules be sent to the Administrative Office, compliance with that directive has been inconsistent. By barring enforcement of any rule that has not been received by the Administrative Office, the Committee hopes to increase compliance with Rule 47(a)(1) and to ensure that current local rules of all of the courts of appeals are available from a single source.

Form 6. Certificate of Compliance With Rule 32(a)

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

☐ this brief contains [*state the number of*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

☐ this brief has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

☐ this brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

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

FRAP Item	Proposal	Source	Current Status
95-3	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
95-4	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
95-7	Amend FRAP 4(a)(5) to make it clear that a "good cause" extension is available after expiration of original period. (Related to No. 96-2.)	Luther T. Munford, Esq.	Awaiting initial discussion Retained on agenda with low priority 9/97
96-2	Amend FRAP 4(b) so that an extension of time to file a notice of appeal can be granted in a criminal case even without excusable neglect. (Related to No. 95-7.)	Hon. Richard A. Posner (CA7)	Awaiting initial discussion Retained on agenda with low priority 9/97
97-1	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
97-4	Amend FRAP 15(c)(1) re: informal rulemaking.	Advisory Committee & Jack Goodman, Esq.	Awaiting initial discussion Retained on agenda with medium priority 9/97
97-5	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
97-7	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
97-9	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

FRAP Item	Proposal	Source	Current Status
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
97-19	Amend FRAP 4(b)(1)(B)(ii) to clarify whether, in multi-defendant criminal cases, the government must file its notice of appeal within 30 days after the *first* notice of appeal is filed by a defendant or within 30 days after the *last* notice of appeal is filed by a defendant.	Advisory Committee	Awaiting initial discussion Retained on agenda with high priority 9/97
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. Munford, 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. Munford, 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

FRAP Item	Proposal	Source	Current Status
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
97-34	Amend FRAP 3(d)(1) to specify when the district clerk must forward updated docket entries to the appellate clerk.	Methods Analysis Program	Awaiting initial discussion
97-35	Amend unspecified rules to establish uniform standards for the docketing of complex cases by district courts, bankruptcy courts, and BAPs.	Methods Analysis Program	Awaiting initial discussion
97-36	Amend FRAP 25(a)(4) to permit the clerk to refuse to accept for filing documents that do not comply with the rules.	Methods Analysis Program	Awaiting initial discussion
97-37	Amend unspecified rules to require counsel who represents a criminal defendant at trial to continue to represent the defendant on appeal unless relieved by the appellate court. (Related to No. 97-38.)	Methods Analysis Program	Awaiting initial discussion
97-38	Amend unspecified rules to prohibit district courts from permitting counsel who has represented a criminal defendant at trial to withdraw before a notice of appeal is filed. (Related to No. 97-37.)	Methods Analysis Program	Awaiting initial discussion
97-39	Amend FRAP 15(c) to require the petitioner to list respondents and to attach a copy of the agency order to the petition for review.	Methods Analysis Program	Awaiting initial discussion
97-40	Amend unspecified rules to require advance notice and pre-filings in state and federal death penalty cases.	Methods Analysis Program	Awaiting initial discussion
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

FRAP Item	Proposal	Source	Current Status
97-42	Amend FRAP 3(d) to permit clerk to serve notice of filing of appeal by fax or e-mail.	Michael E. Kunz Michael N. Milby William S. Brownell District Court Clerks	Awaiting initial discussion
97-43	Amend FRAP 22 to prescribe a time period for seeking a certificate of appealability.	John J. McCarthy	Awaiting initial discussion
97-44	Amend unspecified rules to permit appeal of district court's refusal to stay enforcement of judgment pending resolution of post-trial motions.	Michael F. Dahlen, Esq.	Awaiting initial discussion
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
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