

United States Senate  
Committee on the Judiciary

Questionnaire for Judicial Nominees  
**Attachments to Question 12.c.**

Amy Coney Barrett  
Nominee to be Associate Justice  
of the Supreme Court of the United States

March 18, 2020

Robert P. Deyling  
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Dear Mr. Deyling:

We write to express our deep concern with the exposure draft of Advisory Opinion No. 117, recently issued by the Judicial Conference’s Code of Conduct Committee. We believe the exposure draft conflicts with the Code of Conduct, misunderstands the Federalist Society, applies a double standard, and leads to troubling consequences. The circumstances surrounding the issuance of the exposure draft also raise serious questions about the Committee’s internal procedures and transparency. We strongly urge the Committee to withdraw the exposure draft.

Judges have long participated in and contributed to our robust legal community. The Judicial Code of Conduct urges that judges “not become isolated from the society in which [we] live[.]”<sup>1</sup> To that end, Canon 4 of the Code allows judges to serve as members—and even officers—of “nonprofit organization[s] devoted to the law, the legal system, or the administration of justice.”<sup>2</sup> The commentary to Canon 4 “encourage[s]” judges to “contribute to the law” through membership in “a bar association, judicial conference, or other organization dedicated to the law,” including those focused on “revising substantive and procedural law.” For good reason. We are all better served when judges expose themselves to a wide array of legal ideas. And we would like to think that those organizations benefit from having judges participate in them.

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<sup>1</sup> Canon 4 Commentary.

<sup>2</sup> Canon 4(A)(3). Moreover, Canon 4 authorizes judicial participation in community affairs more broadly: “A judge may engage in extrajudicial activities, including law-related pursuits and civic, charitable, educational, religious, social, financial, fiduciary, and governmental activities, and may speak, write, lecture, and teach on both law-related and nonlegal subjects.”

Membership in the Federalist Society is wholly consistent with the Code. Until recently, the Committee agreed. It previously recognized that members of the judiciary may join the American Constitution Society and donate to the Federalist Society.<sup>3</sup> Given these prior opinions and the text of the Code, we are disturbed by the draft’s new position that membership in the Federalist Society violates the Code.

The Committee offered a few reasons for its departure from the text and its long-held understanding of the Code. First, the Federalist Society purportedly advocates for “factional” policy positions rather than the “general improvement of the law.”<sup>4</sup> Second, the mission of the Federalist Society would cause the public to “view judges holding membership in [the Society] to hold, advocate, and serve ... conservative interests.”<sup>5</sup> And third, although the Federalist Society is not a “political organization,” membership “implicate[s] Canon 5’s broad prohibition against political activity.”<sup>6</sup> All of these arguments rest on a flawed understanding of the Federalist Society and of the Code itself.

Take the claim that the Federalist Society advocates particular policies, rather than the general improvement of the law. The draft fails to identify a single “policy position” taken by the Federalist Society. That is because—to the best of our collective knowledge—the Federalist Society has *never*, in its several decades of existence, lobbied a policymaking body, filed an amicus brief, or otherwise advocated any policy change. We are at a loss to understand how membership can be seen as “indirect advocacy”<sup>7</sup> of the organization’s policy positions when the organization itself takes no policy positions.

The most the Committee can say is that the Federalist Society “describes itself as ‘a group of conservatives and libertarians dedicated to reforming the current legal order’” and that it has “promoted appreciation for the ‘role of separation of powers; federalism; limited, constitutional government; and the rule of law in protecting individual freedom and traditional

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<sup>3</sup> Exposure Draft 4–5.

<sup>4</sup> *Id.* at 6–7.

<sup>5</sup> *Id.* at 7.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

values.”<sup>8</sup> These broad, bedrock principles lie at the foundation of our American constitutional order. Joining an organization that supports these principles simply cannot prohibit judicial service. Adherence to these principles at most suggests partiality in favor of the Constitution itself, which all judges must support and defend.

Moreover, the Committee has previously approved judicial membership in organizations that advocate far more specific legal positions. For example, it has blessed membership in the American Law Institute,<sup>9</sup> which seeks to “clarify, modernize, and otherwise improve the law.”<sup>10</sup> The Institute pursues this goal by publishing restatements and model codes, which advocate detailed changes to all aspects of the law. The Federalist Society’s approach to reform is comparatively mild. Instead of taking specific legal or policy positions, it facilitates open, informed, and robust debate. Indeed, anyone who attends a Federalist Society event will encounter a diversity of views far exceeding that of many law school faculties. Although not all of us are members of the Federalist Society, all of us who have attended its events can attest to this. As the *New York Times* has reported, Federalist Society events “scrupulously include liberals as well as conservatives.”<sup>11</sup> Every current member of the Supreme Court has participated in at least one Federalist Society event, as have hundreds of current and former federal judges of all judicial philosophies. So have countless progressive scholars and attorneys, including Jack Balkin, William Eskridge, Michael Gerhardt, Heather Gerken, Neal Katyal, Reva Siegel, Geoffrey Stone, Nadine Strossen, and Laurence Tribe.<sup>12</sup> Judicial membership in such organizations should be encouraged, not banned.

The Committee is wrong to term the activities of the Federalist Society as “political.”<sup>13</sup> Canon 5 of the Code forbids judges from joining or contributing to any “political organization,” but “does not prevent a judge from engaging in activities described in Canon

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<sup>8</sup> Exposure Draft 6 (quoting Federalist Society, *Our Background*, <https://fedsoc.org/our-background>).

<sup>9</sup> See Advisory Op. No. 93.

<sup>10</sup> American Law Institute, *About ALI*, <https://www.ali.org/about-ali>.

<sup>11</sup> Neil A. Lewis, *A Conservative Legal Group Thrives in Bush’s Washington*, *New York Times* (Apr. 18, 2001), <https://www.nytimes.com/2001/04/18/us/a-conservative-legal-group-thrives-in-bush-s-washington.html>.

<sup>12</sup> See generally Federalist Society, *Contributors*, <https://fedsoc.org/contributors>.

<sup>13</sup> Exposure Draft 7.

4.”<sup>14</sup> To avoid any conflict with Canon 4, the commentary to Canon 5 narrowly defines a “political organization” as “a political party, a group affiliated with a political party or candidate for public office, or an entity whose principal purpose is to advocate for or against political candidates or parties in connection with elections for public office.” Canon 5’s prohibition plainly does not apply to a law-related organization like the Federalist Society. Accordingly, Federalist Society programs cannot fairly be described as “political,” especially given the diversity of views reflected by judicial and other participants.

The exposure draft’s conclusions also rest on a double standard. As the draft acknowledges, the Federalist Society was formed as an alternative to the largest national voluntary bar association, the American Bar Association. Yet the Committee opposes judicial membership in the Federalist Society while permitting judicial membership in the ABA. This disparate treatment is untenable.

For some time now, the ABA has taken “public and generally liberal positions on all sorts of divisive issues.”<sup>15</sup> What’s more, the ABA does so by directly advocating for particular outcomes in particular cases.<sup>16</sup> Not long ago, the ABA submitted an amicus brief in a pending Supreme Court case related to abortion.<sup>17</sup> The ABA also filed amicus briefs in other contentious cases like *Masterpiece Cakeshop*<sup>18</sup> and *Trump v. Hawaii*.<sup>19</sup> And before that, the ABA weighed in on cases involving gender identity,<sup>20</sup> affirmative action,<sup>21</sup> same-sex marriage,<sup>22</sup> and

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<sup>14</sup> Canon 5(C).

<sup>15</sup> Adam Liptak, *Legal Group’s Neutrality Is Challenged*, N.Y. Times (Mar. 30, 2009), <https://www.nytimes.com/2009/03/31/us/31bar.html>.

<sup>16</sup> See generally ABA, *Amicus Library*, <https://www.americanbar.org/groups/committees/amicus/1998-present>.

<sup>17</sup> Brief for the American Bar Association as Amicus Curiae Supporting Petitioners, *June Med. Servs. L.L.C. v. Gee*, 140 S. Ct. 35 (mem.) (2019) (No. 18-1323), 2019 WL 6524880.

<sup>18</sup> Brief for the American Bar Association as Amicus Curiae Supporting Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018) (No. 16-111), 2017 WL 5152968.

<sup>19</sup> Brief for the American Bar Association as Amicus Curiae Supporting Respondents, *Trump v. Hawaii*, 138 S. Ct. 2392 (2018) (No. 17-965), 2018 WL 1605656.

<sup>20</sup> Brief for the American Bar Association as Amicus Curiae Supporting Respondent, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (mem.) (2017) (No. 16-273), 2017 WL 894897.

<sup>21</sup> Brief for the American Bar Association as Amicus Curiae Supporting Respondents, *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6754979.

<sup>22</sup> Brief for the American Bar Association as Amicus Curiae Supporting Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-571, 14-574), 2015 WL 1045422.

the Second Amendment.<sup>23</sup> In fact, over the last decade, the ABA has filed more than 100 amicus briefs in many of our nation’s most charged cases.<sup>24</sup> The Federalist Society has not filed even one. Likewise, the ABA routinely lobbies Congress,<sup>25</sup> while the Federalist Society does nothing of the sort.

Despite the ABA’s open political advocacy, and its support for specific outcomes in pending cases, the Committee has blessed judicial membership in the ABA while banning judicial membership in the Federalist Society. The explanation for this differential treatment? The Committee says that the Federalist Society and the American Constitution Society are different because “[a] reasonable and informed public would view judges holding membership in these organizations to hold, advocate, and serve liberal or conservative interests.”<sup>26</sup> But it is strikingly inconsistent to prohibit membership in the Federalist Society because *the public* might view it as conservative, while blessing membership in the ABA because *the ABA* considers itself non-partisan. To make matters worse, this double standard rests on a critically flawed factual premise, for it is simply not true that the Federalist Society takes legal or policy positions.

As this inconsistency shows, the Committee’s “evolving public perception” standard<sup>27</sup> requires either discriminatory application or sweeping prohibitions. Neither option is defensible. If this standard were limited to prohibit membership in only one organization that takes no legal, policy, or political positions—the Federalist Society—the Committee’s approach would constitute rank discrimination based on its erroneous perception of a Federalist Society viewpoint. On the other hand, if the “evolving public perception” standard were fairly applied to all organizations that might take positions on one or another legal issue, the consequences would be startling. Among other things, judges’ membership in specialty bars, law school communities, and even churches would be called into question.

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<sup>23</sup> Brief for the American Bar Association as Amicus Curiae Supporting Petitioners, *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290), 2008 WL 136349.

<sup>24</sup> ABA, *Amicus Library*, <https://www.americanbar.org/groups/committees/amicus/1998-present>.

<sup>25</sup> Rhonda McMillion, *16 Success Stories for ABA Advocacy During the 115th Congress*, ABA J. (Dec. 21, 2018), [http://www.abajournal.com/news/article/top\\_aba\\_lobbying\\_successes\\_in\\_the\\_115th\\_congress](http://www.abajournal.com/news/article/top_aba_lobbying_successes_in_the_115th_congress).

<sup>26</sup> Exposure Draft 7.

<sup>27</sup> *Id.* at 12.

Consider specialty-bar associations. These associations provide networking and mentoring opportunities for students, lawyers, and judges of various backgrounds. But they often take policy positions and advocate for legal change.<sup>28</sup> Likewise, many file amicus briefs in charged Supreme Court cases.<sup>29</sup> And if a “reasonable and informed public” could impute to judicial members of the Federalist Society positions that the Society does not in fact take, then it surely could also impute to judicial members of specialty-bar associations the various positions that those organizations do officially take. Thus, under the Committee’s new position, judges should not participate in specialty-bar groups.

Judicial involvement in law schools would fare no better. Many members of the judiciary teach at law schools. Some are even tenured faculty. If the public comes to perceive certain law schools as liberal or conservative, must judges resign their posts? Law schools frequently litigate to advance specific legal positions, either directly or through funded clinics.<sup>30</sup> More broadly, they take policy positions on pending legislation, executive actions, and judicial nominations.<sup>31</sup> Under the exposure draft’s standard, it is difficult to see how judges could continue to maintain any formal affiliation with these law schools.

The exposure draft’s “evolving public perception” standard could sweep in even religious organizations as well. Surely judges can be members of their churches, temples, and mosques; to suggest otherwise would raise serious constitutional questions under the No

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<sup>28</sup> For example, the Hispanic National Bar Association is “committed to advocacy on issues of importance to the 58 million people of Hispanic heritage living in the U.S.” Hispanic Nat’l Bar Ass’n, *About Us*, <https://hnba.com/about-us/>. The National LGBT Bar Association files amicus briefs and advocates for legal changes at the state and national level. LGBT Bar, *Advocacy*, <https://lgbtbar.org/programs/advocacy/>. And the National Native American Bar Association frequently supports legislation. Nat’l Native Am. Bar Ass’n, *Resolutions, Letters of Support, and Other Initiatives*, <https://www.nativeamericanbar.org/initiatives-2/>.

<sup>29</sup> See, e.g., Brief for Coalition of Bar Associations of Color (National Bar Association, Hispanic National Bar Association, National Asian Pacific American Bar Association, and National Native American Bar Association) as Amici Curiae Supporting Respondents, *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016) (No. 14-981), 2015 WL 6668478.

<sup>30</sup> See, e.g., *Christian Legal Soc’y v. Martinez*, 561 U.S. 661 (2010); *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47 (2006); *Gutter v. Bollinger*, 539 U.S. 306 (2003); Thomas Kaplan, *Yale Law, Newly Defeated, Allows Military Recruiters*, N.Y. Times (Oct. 1, 2007), <https://www.nytimes.com/2007/10/01/nyregion/01yale.html>; Yale Law Sch., *Challenging the Refugee and Travel Ban* (Feb. 1, 2017), <https://law.yale.edu/yls-today/news/challenging-refugee-and-travel-ban>. In *Fisher* alone, over 70 colleges and universities participated as amici.

<sup>31</sup> See, e.g., Alexandra Chaidez & Aidan Ryan, *Harvard Spent \$600K Lobbying Congress in 2018*, Harvard Crimson (Feb. 4, 2019), <https://www.thecrimson.com/article/2019/2/4/Harvard-spends-600k-lobbying/>.

Religious Test Clause and the First Amendment. But the Committee’s “evolving public perception” test would prohibit membership in any church, temple, or mosque that takes a “policy position” on contested issues of the day. And there are many religious organizations that do that—on topics ranging from abortion, to capital punishment, to climate change. Why can judges be members of some groups that take policy positions—like churches—but not other groups that do not take policy positions—like the Federalist Society? Perhaps the Committee would say that churches are not legal societies, but that distinction cannot be right. Political rallies are not legal societies either. Yet the Canons and the Committee plainly prohibit judicial participation in those.

In short, the “evolving public perception” standard could lead to the disqualification of judges who participate in specialty bars, judges who teach, and judges of faith—to pick just three obvious examples. Moreover, these judges would be disqualified not because they violated their oath to decide cases impartially regardless of their individual backgrounds, and not because they violated the text of the Code of Conduct, but only because “evolving public perception” somehow demanded it. Such a standard finds no support in the text or structure of the Code, or in past precedent interpreting it. The “evolving public perception” standard should be abandoned.

Finally, the issuance of this exposure draft raises several procedural questions. Since its inception, the federal judiciary has insisted that each judge on a collegial body may state his or her individual views on the question presented. Yet reports suggest that no member of the Committee was permitted to dissent, despite some members’ strong disagreement with the exposure draft. Other reports suggest that at least one member of the Committee was barred from voting on the draft. And the Committee’s reversal of its prior, settled interpretation—without any relevant change in the Code—raises further concerns.

We cannot know what has gone on behind closed doors, so we take no position on the propriety of what has or has not occurred within the Committee. But we do believe that the Committee’s procedures raise pressing questions. If the Committee adheres to its opinion, we think that it is obligated to address the following issues:

- Was the Committee unanimous in its support of this policy? If not, how many members dissented, and what were their reasons?
- Were members of the Committee allowed to note and explain their dissents? If not, why not? Does any regulation of the Judicial Conference authorize the suppression of dissent?
- Are any members of the Committee also members of the ABA? If so, did these members recuse themselves from working and voting on the exposure draft?
- What specific circumstances justify the Committee's overruling of its prior, settled position that the Code permitted judicial membership in the ACS?

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Some of us are appellate judges, some of us are trial judges, and some of us serve on specialized courts. Some of us are members of the Federalist Society, and some of us are not. Some of us regularly speak at Federalist Society events, some of us do so occasionally, and some of us have never done so. We serve jurisdictions spanning the United States and hold different views on many legal topics. But today, we are in firm agreement about one thing: The Committee should withdraw Draft Advisory Opinion No. 117.

Sincerely,

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CARL J. NICHOLS  
U.S. District Court for the District of Columbia

HOWARD C. NIELSON, JR.  
U.S. District Court for the District of Utah

ROBERT T. NUMBERS, II  
U.S. Magistrate Judge for the Eastern District of North Carolina

REED O'CONNOR  
U.S. District Court for the Northern District of Texas

DIARMUID F. O'SCANNLAIN  
U.S. Court of Appeals for the Ninth Circuit

MARTHA M. PACOLD  
U.S. District Court for the Northern District of Illinois

GERALD J. PAPPERT  
U.S. District Court for the Eastern District of Pennsylvania

MICHAEL H. PARK  
U.S. Court of Appeals for the Second Circuit

KEITH A. PESTO  
U.S. Magistrate Judge for the Western District of Pennsylvania

PETER J. PHIPPS  
U.S. Court of Appeals for the Third Circuit

SARAH E. PITLYK  
U.S. District Court for the Eastern District of Missouri

MARK T. PITTMAN  
U.S. District Court for the Northern District of Texas

DAVID J. PORTER  
U.S. Court of Appeals for the Third Circuit

GENE E. K. PRATTER  
U.S. District Court for the Eastern District of Pennsylvania

LORETTA A. PRESKA  
U.S. District Court for the Southern District of New York

R. DAVID PROCTOR  
U.S. District Court for the Northern District of Alabama

SHARON PROST  
U.S. Court of Appeals for the Federal Circuit

A. RAYMOND RANDOLPH  
U.S. Court of Appeals for the District of Columbia Circuit

NEOMI RAO  
U.S. Court of Appeals for the District of Columbia Circuit

WILLIAM M. RAY, II  
U.S. District Court for the Northern District of Georgia

CHAD READLER  
U.S. Court of Appeals for the Sixth Circuit

DANNY C. REEVES  
U.S. District Court for the Eastern District of Kentucky

JULIUS N. RICHARDSON  
U.S. Court of Appeals for the Fourth Circuit

FERNANDO RODRIGUEZ JR.  
U.S. District Court for the Southern District of Texas

ELENI M. ROUMEL  
U.S. Court of Federal Claims

LEE RUDOFISKY  
U.S. District Court for the Eastern District of Arkansas

RODOLFO A. RUIZ II  
U.S. District Court for the Southern District of Florida

ALLISON J. RUSHING  
U.S. Court of Appeals for the Fourth Circuit

ARTHUR J. SCHWAB  
U.S. District Court for the Western District of Pennsylvania

MICHAEL Y. SCUDDER  
U.S. Court of Appeals for the Seventh Circuit

STEVEN C. SEEGER  
U.S. District Court for the Northern District of Illinois

DAVID B. SENTELLE  
U.S. Court of Appeals for the District of Columbia Circuit

LAURENCE H. SILBERMAN  
U.S. Court of Appeals for the District of Columbia Circuit

EUGENE E. SILER, JR.  
U.S. Court of Appeals for the Sixth Circuit

CHARLES R. SIMPSON III  
U.S. District Court for the Western District of Kentucky

RAAG SINGHAL  
U.S. District Court for the Southern District of Florida

JERRY E. SMITH  
U.S. Court of Appeals for the Fifth Circuit

MILAN D. SMITH, JR.  
U.S. Court of Appeals for the Ninth Circuit

BRANTLEY STARR  
U.S. District Court for the Northern District of Texas

WILLIAM S. STICKMAN IV  
U.S. District Court for the Western District of Pennsylvania

DAVID R. STRAS  
U.S. Court of Appeals for the Eighth Circuit

RICHARD F. SUHRHEINRICH  
U.S. Court of Appeals for the Sixth Circuit

RICHARD J. SULLIVAN  
U.S. Court of Appeals for the Second Circuit

RICHARD C. TALLMAN  
U.S. Court of Appeals for the Ninth Circuit

DAVID A. TAPP  
U.S. Court of Federal Claims

HOLLY TEETER  
U.S. District Court for the District of Kansas

JAMES A. TEILBORG  
U.S. District Court for the District of Arizona

GERALD B. TJOFLAT  
U.S. Court of Appeals for the Eleventh Circuit

JOSEPH L. TOTH  
U.S. Court of Appeals for Veterans Claims

MICHAEL J. TRUNCALE  
U.S. District Court for the Eastern District of Texas

TIMOTHY M. TYMKOVICH  
U.S. Court of Appeals for the Tenth Circuit

PATRICK URDA  
U.S. Tax Court

GREGORY F. VAN TATENHOVE  
U.S. District Court for the Eastern District of Kentucky

LAWRENCE VANDYKE  
U.S. Court of Appeals for the Ninth Circuit

RICHARD L. VOORHEES  
U.S. District Court for the Western District of North Carolina

JUSTIN WALKER  
U.S. District Court for the Western District of Kentucky

JOHN M. WALKER JR.  
U.S. Court of Appeals for the Second Circuit

HENRY R. WILHOIT, JR.  
U.S. District Court for the Eastern District of Kentucky

W. KEITH WATKINS  
U.S. District Court for the Middle District of Alabama

T. KENT WETHERELL, II  
U.S. District Court for the Northern District of Florida

J. HARVIE WILKINSON III  
U.S. Court of Appeals for the Fourth Circuit

DON R. WILLETT  
U.S. Court of Appeals for the Fifth Circuit

STEPHEN F. WILLIAMS  
U.S. Court of Appeals for the District of Columbia Circuit

ALLEN WINSOR  
U.S. District Court for the Northern District of Florida

VICTOR J. WOLSKI  
U.S. Court of Federal Claims

JOSHUA D. WOLSON  
U.S. District Court for the Eastern District of Pennsylvania

LISA GODBEY WOOD  
U.S. District Court for the Southern District of Georgia

SUSAN WEBBER WRIGHT  
U.S. District Court for the Eastern District of Arkansas

PATRICK WYRICK  
U.S. District Court for the Western District of Oklahoma

**DRAFT Minutes of the Spring 2016 Meeting of the  
Advisory Committee on Appellate Rules**

April 5, 2016  
Denver, Colorado

**Attendance and Introductions**

The Chair, Judge Steven M. Colloton, called the meeting of the Advisory Committee on Appellate Rules to order on Tuesday, at 9:00 a.m., at the Colorado Supreme Court in Denver, Colorado.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Gregory G. Katsas, Esq., Neal K. Katyal, Esq., Judge Brett M. Kavanaugh, Judge Stephen Joseph Murphy III, and Kevin C. Newsom, Esq. Gregory Garre, Esq. participated by telephone. Solicitor General Donald Verrilli was represented by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division.

Reporter Gregory E. Maggs was present and kept these minutes. Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Marie Leary, Esq., Research Associate, Appellate Rules Committee, Federal Judicial Center; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office. Mr. Derek Webb, law clerk to Judge Sutton, participated by telephone.

Judge Colloton began the meeting by introducing Chief Justice Nancy E. Rice of the Colorado Supreme Court. Chief Justice Rice welcomed the Committee to the courthouse and spoke of the history of the building. Judge Colloton also welcomed Judge Kavanaugh to his first meeting.

**Approval of the Minutes of the October 2015 Meeting**

A spelling error on page 11 of the draft minutes of the October 2015 Meeting was identified and corrected. The draft minutes were then approved.

## Report on the January 2016 Meeting of the Standing Committee

Judge Colloton reported that the Standing Committee had approved two proposals from the Appellate Rules Committee for publication and public comment. One was Item 13-AP-H, which concerned proposed amendments to Rule 41(b) and (d) regarding the stays of a mandate. The other was Item 15-AP-C, which concerned proposed amendments to Rule 31(a)(1) and Rule 28.1(f)(4) to lengthen the time for filing a reply brief from 14 days to 21 days.

Judge Colloton said that a third proposal, Item No. 14-AP-D, which concerns amicus briefs filed by party consent under Appellate Rule 29(a), prompted suggestions from the Style Consultants and substantive comments from the Committee Members. Judge Colloton therefore decided to bring the item back for further discussion at today's Committee meeting.

### Item No. 12-AP-D (Civil Rule 62: Bonds)

Mr. Newsom led the discussion of this item. He began by reporting the status of proposed revisions to Civil Rule 62 and addressed the discussion draft of this rule on page 70 of the Agenda Book. He explained that the revision to Rule 62 aims to accomplish three things: (1) to extend the automatic stay to 30 days; (2) to allow a party to provide security other than a bond; and (3) to require only one security for all stayed periods. He also explained that the Advisory Committee Note was edited to make it more concise.

Mr. Newsom then turned to the proposed conforming amendments to Appellate Rules 8, 11, and 39, addressing the discussion drafts of these rules on pages 61-64 of the Agenda Book. The Committee agreed with the general approach of the drafts and the policy decision to make Rule 8(b) apply to providers of security other than sureties. The Committee decided to amend the discussion draft in the following three ways:

- (1) Rule 8(a)(1)(B) [lines 6-7]: The bracketed phrase "[provided to obtain the stay of a judgment or order of a district court pending appeal]" should be included but edited to say "provided to obtain the stay."
- (2) Rule 8(a)(2)(E) [line 15]: The word "appropriate" should be deleted.
- (3) Rule 8(b) [lines 16-20]: The wording of this section should be rephrased to say: "If a party gives security in any form, including a bond, other security, stipulation, or other undertaking, with one or more sureties or other security providers, each security provider submits . . . ." The subsequent references to "surety" in the provision should then be replaced with "security provider."

The Committee addressed the discussion draft of Rule 11(g) at length. It considered various possible amendments but ultimately did not alter the discussion draft. The Committee did not make any amendments to the discussion draft of Rule 39(e).

Mr. Newsom moved to approve the discussion draft as amended and to send it to the Standing Committee for publication. The motion was seconded and approved.

#### **Item No.12-AP-F (Civil Rule 23: Class Action Settlement Objectors)**

Judge Colloton introduced this item, which concerns class action settlement objections. Class members sometimes object to settlements not because they have good faith objections but instead because they want to receive payments to withdraw their objections so that the settlements can go forward. Judge Colloton explained that the Civil Rules Committee decided to address this matter through what it calls "the simple approach." Under this approach, Civil Rule 23(e)(5)(B) would be amended to provide that "no payment or other consideration" can be given to an objector in exchange for withdrawing an objection without the district court's approval. The simple approach would not require amending the Appellate Rules.

Judge Colloton asked the Committee to consider whether the proposed "simple approach" was a good solution to the problem of class action objections. He also asked the Committee to consider whether requiring a district court to approve consideration paid to an objector impermissibly interferes with an appellate court's jurisdiction.

Mr. Derek Webb spoke regarding his memorandum included in the Agenda Book at page 109. He informed the Committee that the Civil and Appellate rules allow a district court to continue to act in a variety of situations even though a notice of appeal has been filed.

Two judge members expressed agreement with the "simple approach" of the Civil Rules Committee. An attorney member expressed some concern about the policy behind the approach. He was not sure that the district court would always know the case better than the court of appeals. He offered the example of a case in which there was a proposed payment to withdraw an objection after oral argument in the court of appeals. He asked, "Should the district court really decide whether the payment should be made?" The attorney member, however, thought that such situations might be rare.

Judge Sutton saw some potential for conflict between the district court and court of appeals. He noted that nothing in the proposed revision of Civil Rule 23 would require or prevent the dismissal of an objection by a court of appeals. He suggested that another, possibly better, approach might have been to require a court of appeals to ask the district court for an indicative ruling under Appellate Rule 12.1 before deciding whether to dismiss an objection. He said that this option

remains open to the courts of appeals and suggested that the Advisory Committee Note could address this point.

Following further discussion, Judge Colloton summarized the apparent views of the Committee as follows: The Appellate Rules Committee prefers not to address the issue of class action objectors with an appellate rule, and whether the proposed revision of Civil Rule 23 is desirable is ultimately a policy question for the Civil Rules Committee.

#### **Item No. 16-AP-A (Appellate Rule 4(b)(1) and Criminal Case Notice of Appeals)**

The Reporter introduced this item, which concerns a proposal to amend Appellate Rule 4(b)(1)(A) to increase the period for filing a notice of appeal in a criminal case from 14 days to 30 days. The reporter explained that the Committee previously had considered and rejected essentially the same proposal when it addressed Item 11-AP-E. The Committee discussed Item 11-AP-E at its Spring 2012 and Fall 2012 meetings and then voted to remove the item from the Agenda without taking action.

A judge member said that limiting the period for filing a notice of appeal to 14 days was necessary for having prompt appeals. He also noted that the interests of lawyers may differ from clients; lawyers may want more time but clients may want speedier action. Expressing the view of the Department of Justice, Mr. Byron said no real need has been shown for the amendment. Other speakers emphasized that the Committee had previously considered and decided the matter.

Judge Colloton asked whether there should be further study. No member believed that further study was required. A motion to remove the item from the Committee's agenda was seconded and approved.

#### **Item No. 14-AP-D (Appellate Rule 29(a) on Amicus Briefs Filed with Party Consent)**

Judge Colloton introduced this item, which concerns amicus briefs filed by party consent. He reminded the Committee that it had proposed a modification of Appellate Rule 29(a) at its October 2016 meeting. He then explained that the Standing Committee was generally favorable to the proposal but identified issues that may require further consideration.

Judge Colloton began by discussing the policy issue of whether a court should be able to reject not only amicus briefs filed by party consent but also amicus briefs filed by the government. An attorney member said that the rules should continue to provide the government a right to file an amicus brief. Mr. Byron said that the Department of Justice's position was that the government should have a right to file an amicus brief.

Judge Colloton then addressed the discussion draft line-by-line. The sense of the Committee was to make the following revisions:

- (1) line 3: strike the hyphen in "amicus-curiae"
- (2) line 5: adopt the "except" clause rather than the separate "but" sentence proposed by the Style Consultants
- (3) line 6: strike "by local rule"
- (4) line 6: replace "prohibit" with "prohibit or strike"

At the suggestion of a judge member, the Committee also decided to replace the Advisory Committee Note for the proposed amendment to Appellate Rule 29(a) on page 140 of the Agenda Book with the following: "The amendment authorizes orders or local rules, such as those previously adopted in some circuits, that prohibit the filing of an amicus brief by party consent if the brief would result in a judge's disqualification. The amendment does not alter or address the standards for when an amicus brief requires a judge's disqualification."

The Committee approved a motion to submit the revised version of the Rule to the Standing Committee.

#### **Item No. 08-AP-R (Appellate Rules 26.1 and 29(c) on Disclosures)**

Judge Colloton introduced this item, which concerns Appellate Rules 26.1 and 29(c). These rules currently require corporate parties and amici curiae to file corporate disclosure statements. The purpose of these disclosure requirements is to assist judges in deciding whether they need to recuse themselves. Judge Colloton explained that some local rules go further. He explained that, in the memorandum included at page 159 of the Agenda Book, Professor Daniel Capra had tried to pull together suggestions for additional disclosure requirements without necessarily advocating for them. Judge Colloton said that the initial decisions for the Committee were (1) whether to include some or all of the proposed disclosures; (2) whether to conduct more study; or (3) whether to drop the matter.

A judge member asked the attorney members how burdensome they considered such disclosure requirements. An attorney member said that some disclosure requirements are very burdensome. The committee discussed the requirement of disclosing witnesses. Several members suggested that the cost was not worth the benefit. An attorney member also said that disclosing affiliates of corporations would be burdensome. He said that such disclosures are sometimes required in state courts.

Judge Sutton asked whether the list of required disclosures would carry with it a presumption that recusal was necessary when the listed information was disclosed. An attorney member asked whether the Advisory Committee Note could address this potential concern by saying that the additional disclosure requirements do not change the recusal standards.

Another attorney member asked how strong the need was for changing the current rules. Mr. Byron, speaking for the Justice Department, agreed that additional disclosure requirements would be burdensome and that it was not clear how beneficial they would be.

Judge Sutton said that the current rule requires disclosure of things that by statute automatically require disclosure. The proposed rule would go further. He also said that the proposal should not go to the Standing Committee for publication at this time because the Bankruptcy Rules Committee was still working on its own disclosure requirements.

Judge Colloton questioned the need for requiring parties to disclose the identity of judges, asking whether there were many judges who have to recuse themselves because of the identity of a judge during earlier proceedings in a case.

Several committee members expressed concern that disclosing the identity of all lawyers who had worked on a matter could be very burdensome, especially if there had been an administrative proceeding below. But a countervailing consideration was that judges still may have to recuse themselves based on the participation of a lawyer.

The Committee discussed the question whether clauses (a)(2), (a)(3), and (a)(4) should use the term “proceeding” or “case” or some other term. A judge member pointed out that some appeals come directly from agencies. Another judge member suggested that the word "matter" might be better. Another judge member suggested that perhaps local rules should address matters coming directly to the court of appeals from administrative proceedings.

Judge Colloton asked whether the draft of Rule 26.1(e) corresponded to any similar provision in the draft revision to the Bankruptcy Rules. The Committee decided that the reporter should coordinate with the Criminal Rules and Bankruptcy Rules Committees.

It was the sense of the committee that the following action should be taken with respect to the discussion drafts of Rule 26.1 and Rule 29(c) beginning on page 150 of the Agenda Book.

- (1) The “except clause” in line 3 should be deleted so that Rule 26.1 applies to all parties.
- (2) The term “affiliated” in line 5 should be deleted. A Fourth Circuit local rule requires disclosure of affiliates. But the term is complicated to define.

- (3) The term “matter” rather than “case” or “proceeding” should be in lines 10, 12, and 14
- (4) The “good cause” exception in lines 17 and 18 should be included. The formulation differs from the formulation in the criminal law rules. The exception has to be included at the end of the sentence because of everything else at the start of the sentence. The substance is the same.
- (5) There was no objection to the proposed language in lines 31-32 regarding persons who want to intervene.
- (6) The Advisory Committee note should make clear that the Committee is not trying to change the recusal requirements.
- (7) The Committee had no objection to the proposed change to Rule 29(c)(5)(D).

The Committee determined that no amendment should be proposed at this time, and that the matter should be carried over for further consideration. The Chair may receive input from the Standing Committee at its June 2016 meeting.

#### **Item 12-AP-B (Appellate Rules Form 4 and Institutional Account Statement)**

This Item concerns a proposal to add the parenthetical phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to one of the questions in Appellate Form 4. The reporter introduced the time and summarized the arguments in Reporter Struve's memorandum for and against the adding the parenthetical phrase.

After a brief discussion, the Committee decided to take no action for two reasons. First, the language of the Form already tracks the applicable statute. Second, although the parenthetical phrase might prevent the filing of institutional account statements unnecessarily, the consequence was not very burdensome to either confinement institutions or prisoners. A motion to remove this item from the agenda was made, seconded, and approved.

#### **Item No. 15-AP-E (Appellate Rules Form 4 and Social Security Numbers)**

The reporter introduced this item, which included five proposals. The first proposal was to amend Appellate Form 4 to remove the question asking litigants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The reporter presented this item. As discussed in the memorandum on page 215 of the Agenda Book, the clerks of the courts of appeals report that this information is no longer needed for any purpose. The Committee

discussed the matter briefly and decided that the question should be deleted. The Committee will send a proposal for publication to the Standing Committee.

The second proposal was to amend Appellate Rule 25(a)(5) to prohibit filings from containing any part of a social security number. The Committee decided to take no action on this matter because Appellate Rule 25(a)(5) incorporates the privacy standards from the Civil Rules. Any change should come from the Civil Rules.

The third proposal was to amend Appellate Rule 24(a)(1) to add a presumption that an affidavit filed in support of a motion for leave to proceed in forma pauperis would be sealed. The Committee previously had discussed this matter at its October 2015 meeting. Following a brief discussion, the sense of the Committee was that the proposal should be rejected.

The fourth proposal was that Appellate Rule 32.1(b) should be amended to require litigants to provide pro se applicants with unpublished opinions that are not available without cost from a publicly accessible database. An attorney member suggested that this proposal raised a substantive policy question about how much financial assistance should be given to pro se litigants and that this question was better addressed by Congress than by a Rules Committee. Another attorney member pointed out that the proposal concerned all pro se litigants, not just those seeking leave to proceed in forma pauperis. Some pro se litigants might be able to afford access to commercial databases. Another member of the Committee asked whether a court might order a party to provide unpublished opinions on an individual basis. The sense of the Committee was that the proposal should be rejected.

The fifth proposal was to amend Appellate Rule 25(d)(2)(D) to allow pro se litigants to file or serve documents electronically. A member suggested that the Committee should consider this proposal as part of its general consideration of electronic filing issues.

A motion was made to present the first matter (concerning social security numbers) to the Standing Committee for publication, to remove the second, third, and fourth matters from the agenda, and to fold the fifth matter into the rest of the other agenda items concerning electronic filing. The motion was seconded and approved.

#### **Item No. 15-AP-F (Appellate Rule 39(e) and Recovery of Appellate Fees)**

The reporter introduced this item, which the Committee discussed for the first time at the October 2015 Meeting. The item concerns the procedure by which an appellant who prevails on appeal may recover the \$5 fee for filing a notice of appeal and the \$500 fee for docketing an appeal. Rule 39(e)(4) says that the fee for filing a notice of appeal is taxable as a cost in the district court.

In most circuits, the \$500 docketing fee is seen as a cost taxable in the court of appeals, but at least three circuits require appellants to recover this fee in the district court.

The Committee considered the question whether Rule 39 should be amended. The clerk representative said that the clerks in most circuits want to tax the whole thing in the court of appeals. Mr. Byron suggested the possibility of deleting (e)(4). A judge member said that he thought that the rule was correct as written.

Following further discussion the sense of the Committee was that the Chair should communicate with the chief judges of the various circuits about the problem, with the goal of finding a resolution without amending the rules. The motion to remove the item from the agenda was made, seconded, and approved.

### **Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, 15-AP-D, 15-AP-H (Electronic Filing and Service)**

These items concern electronic filing, signature, service, and proof of service. The reporter described the progress that the Civil Rules Committee had made on revising the Civil Rules to address these subjects. Several members of the Committee expressed agreement with the four major characteristics of the reform: First, parties represented by counsel must file electronically absent an exception, such as an exception for good cause. Second, use of the court's electronic filing system constitutes a signature. Third, parties will serve papers through the court's electronic filing system. Fourth, no proof of service is required for papers served through the electronic filing system.

The Committee concluded that the reporter should prepare a discussion draft of Appellate Rule 25 that would follow the most recent draft of Civil Rule 5. The reporter would then circulate the draft to the committee members by email. The goal is to present a proposed revision of Appellate Rule 25 to the Standing Committee in June.

The Committee also directed the reporter to determine whether other Appellate Rules would also require amendment to address electronic filing.

### **Memo on Circuit Splits**

The Committee also considered a memorandum prepared by Mr. Webb. The memorandum listed a number of circuit splits on issues under the Appellate Rules. The Committee decided to study three of these issues for possible inclusion on its agenda in the future: (1) whether delay by prison authorities in delivering the order from which the prisoner wishes to appeal can be used in computing time for appeal under Rule 4(c); (2) whether the costs for which a bond may be required under Rule 7 can include attorney's fees; and (3) whether "the court" in Rule 39(a)(4) refers to the

appellate court or the district court. The Committee also agreed to study the other issues in the memorandum further.

## **Adjournment**

Judge Colloton thanked Justice Eid for her 6 years of service on the Committee and for providing her input from the perspective of a state court. Judge Colloton also thanked Prof. Barrett for her service on the Committee and for hosting the meeting in Chicago. Judge Colloton noted that this was the last meeting for Judge Sutton at the Appellate Rules Committee. He also noted that this was the last meeting for Mr. Gans and himself. He noted that Mr. Gans has served for in clerk's office of the Eighth Circuit for 33 years. Judge Colloton thanked him for his insight and polling of his colleagues.

Judge Sutton announced that Judge Neil Gorsuch will be the new chair of this committee. Judge Sutton thanked Judge Colloton for his four years of service, care, and fair-mindedness. Judge Sutton also read comments from former reporter Cathie Struve who complimented and thanked Judge Colloton for his service as chair of the Committee.

The meeting adjourned.

## **DRAFT**

### Minutes of the Fall 2015 Meeting of the Advisory Committee on Appellate Rules October 29-30, 2015

Chicago, Illinois

#### **I. Attendance and Introductions**

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 29, 2015, at 9:00 a.m., at the Notre Dame Law Suite in Chicago, Illinois.

In addition to Judge Colloton, the following Advisory Committee members were present: Professor Amy Coney Barrett, Judge Michael A. Chagares, Justice Allison H. Eid, Mr. Gregory G. Katsas, Mr. Neal K. Katyal, Judge Stephen Joseph Murphy III, and Mr. Kevin C. Newsom. Solicitor General Donald Verrilli was represented by Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice, and by Mr. H. Thomas Byron III, Appeals Counsel of the Appellate Staff of the Civil Division, both of whom were present. Judge Brett M. Kavanaugh was absent.

Reporter Gregory E. Maggs was present and kept these minutes. Associate Reporter Catherine Struve participated by telephone for all but brief portions of the meeting.

Also present were Judge Jeffrey S. Sutton, Chair of the Standing Committee on Rules of Practice and Procedure; Ms. Rebecca A. Womeldorf, Secretary of the Standing Committee on Rules of Practice and Procedure and Rules Committee Officer; Mr. Michael Ellis Gans, Clerk of Court Representative to the Advisory Committee on Appellate Rules; Professor Daniel R. Coquillette, Reporter, Committee on Rules of Practice and Procedure; and Ms. Shelly Cox, Administrative Specialist in the Rules Committee Support Office of the Administrative Office.

Judge Robert Michael Dow Jr., a member of the Advisory Committee on Civil Rules arrived at 11:30 a.m. and left at 12:30 p.m. Mr. Alex Dahl of Lawyers for Civil Justice also attended portions of the meeting as an observer.

Judge Colloton called the meeting to order. He thanked Professor Barrett for her efforts in making the Notre Dame Law Suite available to the Committee for this meeting. Judge Colloton mentioned that Judge Peter T. Fay and Judge Richard G. Taranto had completed their service on the Committee. Judge Colloton welcomed Judge Murphy as a new member. Judge Colloton also explained that Judge Kavanaugh is a new member but was unable to attend. Judge Colloton thanked Professor Struve for her long and diligent service as the reporter and her great assistance during the transition, and the Committee applauded. Judge Colloton introduced Professor Maggs as the new

reporter for the committee. Judge Colloton also announced that Ms. Marie Leary, Research Associate for the Appellate Rules Committee was unable to attend.

## **II. Approval of the Minutes of the April 2015 Meeting**

Judge Colloton directed the Committee's attention to the approval of the minutes from the April 2015 meeting. An attorney member asked about the Committee's policy regarding the identification of speakers in its meetings. He observed that the minutes mostly did not identify speakers by name but sometimes included identifying information. Professor Coquillette said that the tradition was not to identify members of the Committee when they speak because of concerns about outside lobbying and about the ability of speakers to speak freely.

Two attorney members favored having the minutes identify speakers. Another attorney member spoke in favor of identifying speakers, noting that it was a public meeting. A judge member said that the practice of not identifying members had been in place for many years. He believed that the practice should be the same across committees. But he further said that he did not think that identifying members in the minutes would affect lobbying. Mr. Letter said that representatives of the Department of Justice should be identified as such, which has been the practice. The Committee did not vote on whether to change the traditional practice, leaving the matter open for further consideration.

An attorney member called the Committee's attention to page 19 of the minutes [Agenda Book at 39], and asked Judge Colloton whether a representative of the Committee had spoken to the Fifth Circuit about its local rules on the length of briefs. Judge Colloton said that no conversation had yet occurred with the Fifth Circuit because it seemed premature. The proposed amendment to the federal rules is still pending, and if it is adopted, then the Fifth Circuit might opt out of the new length limits or modify its local rule.

The minutes of the Spring 2015 meeting were approved by voice vote.

Judge Colloton mentioned that the minutes of the Standing Committee's May 2015 meeting were not available in time for inclusion in the Agenda Book for this meeting. He summarized the meeting, noting that the Standing Committee had approved all of the amendments proposed by the Appellate Committee. The Judicial Conference also has approved the proposed amendments, and they have gone to the Supreme Court. Judge Sutton said that the Standing Committee was grateful to the Appellate Rules Committee for preparing the proposed amendments.

## **III. Action and Discussion Items**

### **A. Item No. 13-AP-H (FRAP 41)**

Judge Colloton introduced Item No. 13-AP-H, reminding the Committee that the item concerns possible amendments to Rule 41 that would (1) clarify that a court of appeals must enter an

order if it wishes to stay the issuance of the mandate; (2) address the standard for stays of the mandate; and (3) restructure the Rule to eliminate redundancy.

Judge Colloton recounted that at its April 2014 meeting, the consensus of the Committee was that the words "by order" should be restored to Rule 41(b). Thus, a court would have to enter an order if it wished to stay the issuance of the mandate.

On the issue of the standard for ordering a stay, the Committee discussed whether to add an "extraordinary circumstances" test to Rules 41(b) and 41(d)(4). A judge member said that the standard under Rule 41(d)(4) was in fact already extraordinary circumstances and that the proposed amendment would be merely a codification of existing practice. The judge member said that it is not clear what the current standard is under Rule 41(b).

An attorney member asked whether judges should have to state their reasoning for an extension. Several members were opposed to adding such a requirement.

The consensus of the Committee was to add the "extraordinary circumstances" test to both Rules 41(b) and 41(d)(4). The Committee then discussed how to phrase the wording. An academic member suggested that Rule 41(b) and (d)(4) should be phrased consistently. An attorney member suggested that the phrase "unless extraordinary circumstances exist" for Rule 41(d). The Committee also agreed to this proposal by consensus.

The Committee then considered Professor Kimble's style suggestions as shown in the Agenda Book. The Committee approved the suggested changes, including his proposal to delete the word "certiorari" in Rule 41(d)(1) and (d)(4).

The Committee then set this item aside so that the Reporter could prepare a document showing all of the changes proposed at the meeting. The Committee resumed discussion of this item at the end of the meeting. The Reporter circulated electronically a document showing the changes.<sup>1</sup>

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<sup>1</sup> The circulated electronic document contained the following text, which the Committee approved:

**Rule 41. Mandate: Contents; Issuance and Effective Date; Stay**

(a) **Contents.** Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) **When Issued.** The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time by order. The court may extend the time only in extraordinary circumstances or under Rule 41(d).

(c) **Effective Date.** The mandate is effective when issued.

(d) **Staying the Mandate Pending a Petition for Certiorari.**

~~(1) **On Petition for Rehearing or Motion.** The timely filing of a~~

An attorney member of the Committee asserted that Rule 41(b) is warranted by the interest in finality which warrants a high bar. The member also asserted that Rule 41(d)(4) codifies the Supreme Court's decisions.

After reviewing the changes, Committee approved the revised version of the rule by consensus. A judge member moved to send the draft, as approved, to the standing committee. An academic member seconded the motion. The Committee approved the motion by voice vote.

### **B. Item No. 08-AP-H (Manufactured Finality)**

Judge Colloton introduced Item No. 08-AP-H and recounted its history. He explained that this item concerns efforts of a would-be appellant to “manufacture” appellate jurisdiction after the disposition of fewer than all the claims in an action by dismissing the remaining claims. The Committee first discussed this matter in November 2008 and then revisited it at seven subsequent meetings. At the April 2015 meeting, by consensus, the Committee decided to take no action on the topic of manufactured finality. A judge member moved to remove the item from the agenda, and another judge member seconded the motion. Without further discussion, the Committee approved the motion by voice vote.

### **C. Item No. 08-AP-R (FRAP 26.1 & 29(c) disclosure requirements)**

Judge Colloton introduced Item No. 08-AP-R. He reminded the Committee that local rules in various circuits impose disclosure requirements that go beyond those found in Rules 26.1 and 29(c), which call for corporate parties and amici curiae to file corporate disclosure statements. Judge Colloton said that the issue is whether additional disclosures should be required and, if so, which additional disclosures.

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~~petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.~~

~~(2) Pending Petition for Certiorari.~~

~~(A) (1) A party may move to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The motion must be served on all parties and must show that the certiorari petition would present a substantial question and that there is good cause for a stay.~~

~~(B) (2) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.~~

~~(C) (3) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.~~

~~(D) (4) The court of appeals must issue the mandate immediately on receiving ~~when~~ a copy of a Supreme Court order denying the petition ~~for writ of certiorari is filed~~, unless extraordinary circumstances exist.~~

The Committee turned its attention to the discussion drafts of Rules 26.1 and 29 [Agenda Book 117-119].

A judge member said that, as a general matter, judges would prefer more disclosure up front so that they do not spend time on a case before a conflict is discovered. An attorney member said that an opposing consideration was that requiring more disclosure could be onerous to attorneys.

The committee then turned its attention to specific issues in the discussion draft. The summary of the Committee discussion in these minutes has been re-ordered to follow the structure of the rules.

Rule 26.1(a)(1): Members of the Committee discussed the draft proposal to add the words "or affiliated." Given the indefiniteness of this phrase, the Committee considered whether the words should be omitted.

Rule 26.1(a)(2): Members of the Committee were concerned that merely requiring a party to list the "trial" judges in prior proceedings might be insufficient. In a habeas case, for example, both trial and appellate judges may have taken part in prior proceedings. A judge member proposed that the word "trial" should be removed.

Rule 26.1 (a)(3): An attorney member said the term "partners and associates" should be changed to "attorneys" or "lawyers." He also asked whether the term "law firms" was appropriate, given that entities other than law firms, such as public interest organizations, might represent parties in a lawsuit. He suggested replacing "law firms" with "legal organizations."

Rule 26.1(d): Mr. Letter observed that in antitrust cases, requiring the disclosure of an organizational victim could be problematic because there could be thousands of victims.

Rule 26.1(f): The Committee considered whether the word "intervenor" should be replaced with the term "putative intervenor." The Committee also considered whether subsection (f) should be deleted as unnecessary because, following intervention, intervenors would be parties and would be covered by the rule.

Rule 29(c)(5)(D): The discussion of this provision focused on two questions. One question was whether (D) should be deleted. Two attorney members said that attorneys often do not list everyone who worked on a brief. One of the attorney members asked this hypothetical: "If a lawyer read a brief and gave a few comments, would that have to be disclosed?" A judge member asked this hypothetical: "If a judge's son or daughter wrote a brief, should that have to be disclosed or not?" An academic member asked whether there were actual examples of past problems. A judge member thought that the rule was unrealistically strict. The second question discussed was, if (D) is not deleted, whether the phrase "contributed to" was too broad. A judge member suggested using the word "authored" because it would not include those who merely reviewed a brief and made

comments. Mr. Letter asked whether the Supreme Court has experience with what the word "authored" meant.

Following all of the discussion, the sense of the Committee appeared to be that the draft should be revised, to delete "trial" in Rule 26.1(a)(2); to replace "partners and associates" with "lawyers" and to replace "law firms" with "legal organizations" in Rule 26.1(a)(3); and either to strike Rule 29(c)(5)(D) or to replace the phrase "contributed to the preparation" with "authored in whole or part." The Committee did not make definite conclusions with respect to the other issues. Judge Colloton said that he did not think the item was ready to send to the Standing Committee.

#### **D. Item No. 12-AP-F (FRAP 42 Class Action Appeals)**

Judge Colloton introduced Item No. 12-AP-F, which concerns possible problems when objectors to class action settlements ask for consideration to drop their appeals. Judge Colloton then turned the discussion over to Judge Dow, who discussed the work of the Civil Committee. Judge Dow began by saying that Prof. Catherine Struve's memorandum [Agenda Book at 145-171] was directly on point.

Judge Dow explained that while it would be an error to say that all class action settlement objectors are bad, some objectors may be causing delays with extortionate appeals. He explained that a class member may lay low while a class action settlement is negotiated, file a pro forma objection to the settlement in the district court, and then surface by filing an appeal. After filing the appeal, the objector then may call counsel and ask for money to make the appeal go away.

Judge Dow said that the proposed changes have two parts. First, objectors must state their grounds for objection to a class action settlement under the proposed Federal Rule of Civil Procedure 23(e)(5)(A) [Agenda Book, at 203-204]. Second, a district court would have to approve any withdrawal of an objection under the proposed Rule 23(e)(5)(C) [Agenda Book at 204]. This requirement of approval would not only allow district judges to prohibit "a payoff" but also likely would discourage extortionate objections. Judge Dow said that the appellate and civil committees need to work together to determine the implementation.

A judge member asked whether the proposed Rule 23(e)(5)(C) was a permissible Civil Rule given that it effectively would limit what happens in the appellate courts. The judge member also asked how a payment would come to the attention of the court of appeals absent a rule that the objector or class counsel must disclose the payment. Another judge said that courts would not usually become involved in the withdrawal of an appeal. Judge Dow agreed that the Federal Rules of Appellate Procedure also should address the issue. Mr. Byron asked whether the sketch of Appellate Rule 42(c) [Agenda Book at 141] would suffice. Mr. Letter asked whether a payoff to a class action objector would be less of a concern if the money was coming out of the class counsel's fees. Judge Sutton asked whether an "indicative rule" under proposed Rule 42(c) would work. An attorney member said that proposed Rule 42(c) was inconsistent with general practice because it would require the court of appeals to refer a matter to the district court. Mr. Byron did not think it was inconsistent,

and Judge Sutton suggested that the procedure contemplated would be like sending a case back for a determination of whether there is jurisdiction. Mr. Letter also thought that if there was nothing in the Appellate Rules about withdrawing appeals, litigants might not know to look at Civil Rule 23. The clerk representative asked what the district court would do with the case when it was sent back. Judge Dow suggested that perhaps Rule 42 should require disclosure and approval of a fee. Judge Sutton suggested that an alternative would be for class counsel to seek an expedited appeal to reduce the pressure for class objectors. Mr. Letter said that the procedure might be burdensome because parties settle with appellants all the time. Prof. Coquillette suggested that it is an attorney conduct problem.

Judge Dow said that he would take this matter to back to Civil Rules Committee to discuss the issues. He emphasized that the sketch of proposed Rule 42(c) is a work in progress.

Mr. Dahl asked about the "indicative ruling" under Rule 23(e)(5): If the district court does approve the payment, could the objector appeal the indicative ruling? Judge Colloton suggested that it would remain in the Court of Appeals.

The Committee was in recess for lunch.

#### **D. Item No. 15-AP-C (Deadline for Reply Briefs)**

Judge Colloton introduced Item No. 15-AP-C. He summarized past discussions, which had recognized that most appellants now have effectively a total of 17 days to serve and file reply briefs because of the 14 days provided by Rule 31(a)(1) and the 3 additional days provided by Rule 26(c). The proposed revision of Rule 26(c) to eliminate the 3 additional days when appellants serve and file documents electronically will effectively reduce the time for serving and filing a reply brief to 14 days. Judge Colloton said that the questions for the Committee are whether to modify Rule 31(a) to extend the period from 14 days and, if so, whether the extended period should be 17 days or 21 days.

Judge Colloton noted that one question previously raised had been whether extending the time for filing and serving a reply brief would reduce the time before oral argument. On this point, he noted that statistics suggest that the extension from 14 days to 21 days would be unlikely to have a material effect because in federal courts of appeal the mean period from the filing of the last appellate brief to oral argument is currently 3.6 months [see Agenda Book at 265]. In addition, the clerk representative recalled that a study had shown that no courts had waited until a reply brief is filed before scheduling oral argument.

An attorney member said that 14 days was too short for preparing and filing a reply brief. He further said that he would prefer 21 days to 17 days, explaining that the time for filing and serving a reply brief was already shorter than the time for filing other briefs. He believed that the benefit to attorneys and clients would come at very little cost to the system. Another attorney member said that attorneys in practice had internalized the 17-day period. He noted also that the period for filing a reply brief starts when the response is actually filed, not when it is due, and the uncertainty of when

the response will be filed also may make filing a reply in 14 days difficult. He supported 21 days. Professor Coquillette supported 21 days because 21 days is a multiple of 7 days, which helps keep the reply brief due on a weekday. The appellate clerk liaison agreed that multiples of 7 days are slightly easier for the clerks office to work with. An attorney member believed that additional time will help lawyers produce better briefs. An appellate judge member said that the Supreme Court of Colorado has the same schedule as the current federal rule. Another appellate judge emphasized that there should be a replacement for the lost three days and that 21 days made more sense than 17 days.

The sense of the Committee was to modify the Rules to extend the period for filing and serving reply briefs from 14 days to 21 days. Judge Colloton suggested that the Committee's reporter prepare a marked-up draft showing the exact changes to Rules 31(a)(1) and 28.1(f)(4). The Committee would then have an opportunity to vote on the proposed changes by email.

#### **E. Item No. 14-AP-D (amicus briefs filed by consent of the parties)**

Judge Colloton introduced Item No. 14-AP-D, which came to the advisory committee's attention through discussion at the June meeting of the Standing Committee. He explained that some circuits have created local rules that appear to conflict with Rule 29(a). Although Rule 29(a) says that an amicus may file a brief if all parties have consented to its filing, some local rules bar filing of amicus briefs that would result in the recusal of a judge. Judge Colloton said that questions for the Committee are whether Rule 29(a) is optimal as written or whether Rule 29(a) should be revised to permit what the local rules provide.

An appellate judge member explained how allowing the filing of an amicus brief in some cases might require a judge to recuse himself or herself. Although this possibility might not happen often in panel cases, he explained that it could happen when a court hears a case en banc.

An attorney member supported the position of the local rules. He proposed adding this sentence to the end of Rule 29(a): "The court may reject an amicus curiae brief, including one submitted with all parties' consent, where it would result in the recusal of any member of the court." An appellate judge member asked whether there was a way to reword the proposal because it seemed odd to reject a brief after it had been filed.

Mr. Byron suggested that Rule 29(a) could be amended to allow circuits to adopt local rules. An attorney member responded that a broad authorization might be problematic because a circuit might bar all amicus briefs.

After further discussion, it was the sense of the Committee that the local rules were reasonable and that Rule 29(a) should be amended to allow the kinds of local rules that have been adopted by the D.C., Second, Fifth, and Ninth Circuits. Judge Colloton asked the Committee's reporter to draft and circulate proposed language for revising Rule 29(a) to achieve the Committee's objective. He suggested that the Committee could vote on a proposed amendment by email.

## **F. Item No. 12-AP-D (Civil Rule 62/Appeal Bonds)**

Judge Colloton briefly recounted the history of this agenda item and thanked all those who had worked on it. Judge Colloton then invited Mr. Newsom to discuss the matter. Mr. Newsom began by asking the Committee to compare the current version of Federal Rule of Civil Procedure 62 to the proposed "September 2015 Draft" revision of Rule 62 [Agenda Book at 294]. Mr. Newsom then identified four principal points for consideration: (1) Under the current rule, there is a gap between the automatic 14-day stay of a judgment and the deadline for filing anything attacking the judgment. (2) Most appellants currently obtain a single bond (or other form of security) to cover both the post-judgment period and the appeal period, but the current rule seems to anticipate two different bonds. (3) Although the current rule contemplates that appellants will give a bond as security, sometimes appellants provide a letter of credit or other form of security. (4) The current rule does not specify an amount for the bond.

Mr. Newsom explained that the proposed Rule 62(a)(1) would extend the automatic stay from 14 to 30 days, unless the court orders otherwise. This extension would address the current gap between the 14-day stay of judgment and the deadline for filing an appeal or other attack on the judgment. Mr. Newsom explained that a court might "order otherwise" if the court is concerned about the possibility that the losing party might try to hide assets during the period of the stay. The proposed revision of Rule 62(a)(2) authorizes a stay to be secured by a bond or by other form of security, such as a letter of credit or an escrow account. Mr. Newsom noted that the proposed rule does not contemplate that the appellant would have to post more than one form of security. The proposed rule, like the current rule, does not specify an amount of the bond or other security. Proposed Rule 62(a)(3) authorizes a court to grant a stay in its discretion.

An attorney member was concerned about what might happen if a judge did not grant a stay to the appellant and the appellee lost on appeal. Mr. Newsom explained that the proposed revision of Rule 62(c) would allow a district court to impose terms if the district court denied a stay.

An attorney member was concerned that the proposed revision of Rule 62(b) would allow a court to refuse a stay for good cause even though an appellant had provided security. The attorney member thought that this proposed rule was contrary to current practice. The attorney member asserted that practitioners currently assume that if a client who has lost at trial posts a sufficient bond, the client is entitled to a stay. An appellate judge member asked whether the proposed Rule 62(b) should be rewritten to make clear that ordinarily a stay would be granted. Another appellate judge member asked whether this portion of the proposed Rule 62(b) should be eliminated.

Mr. Byron suggested that the appellee might have other options besides needing the denial of a stay.

Mr. Letter reminded the Committee that in a case in which the government is involved there is an automatic 60-day period in which to file an appeal. *See* Fed. R. App. P. 4(a)(1)(B). As a result, even extending the automatic stay from 14 to 30 days will still lead to a gap.

Judge Sutton said that the current version of Rule 62 is somewhat ambiguous. He wondered whether that ambiguity might not be beneficial because it affords discretion.

Judge Colloton reminded the Committee that the proposal concerned a Federal Rule of Civil Procedure, rather than a Federal Rule of Appellate Procedure. But he emphasized that the Committee may want to provide feedback to the Civil Rules Committee because the issue affects appellate lawyers. He suggested communicating to the Civil Rules Committee that concerns were raised among appellate lawyers that the current rule, in practice, has meant that there is a right to a stay if the appellant posts a bond, and that the proposed Rule 62(b) appears to represent a shift in policy, such that a stay upon posting security is not assured.

Summing up the discussion, Mr. Newsom asked whether the Committee thought it was acceptable for proposed Rule 62(a)(2) to require only a single bond and to allow for alternative forms of security other than bonds, and for proposed Rule 62(a)(1) to extend the period of the automatic stay from 14 days to 30 days. This was the sense of the Committee.

#### **G. Item No. 12-AP-B (FRAP Form 4 and institutional-account statements)**

The reporter introduced Item No. 12-AP-D, which concerns Federal Rules of Appellate Procedure Form 4. Question 4 requires a prisoner "seeking to appeal a judgment in a civil action or proceeding" to attach an institutional account statement. The proposal is to add the phrase "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)" to Question 4 so that prisoners would not have to attach such statements in habeas cases. The reporter noted that Form 4 was amended in 2013 but the word processing templates for Form 4 which are available at the U.S. Courts website had not yet been updated and still contain the pre-2013 language.

The clerk representative said that institutional account statements are currently filed in many cases in which they are not needed. He further said that filed forms are not made public.

Mr. Letter said that he would ask the Bureau of Prisons to determine whether preparing the account statements is burdensome. The clerk representative said that he would inquire about whether the form is burdensome for clerks of courts.

The reporter said that he would notify those responsible of the need to update the word processing forms available on the U.S. Courts website.

The sense of the Committee was to leave the matter on the agenda until more information is obtained and the word processing templates are corrected.

#### **H. Item No. 14-AP-C (Issues relating to *Morris v. Atchity*)**

The reporter introduced Item No. 14-AP-C, which is a proposed rule that would require

courts to resolve issues raised by litigants. The reporter reminded the Committee that the item was included on the agenda for the April 2015 meeting, but the Committee did not have time to address it.

Following a brief discussion of the points raised in Professor Daniel Capra's memorandum [Agenda Book at 369-370], an attorney member moved that Committee take no action and remove the item from the agenda. Another attorney member seconded the motion. The Committee approved the motion by voice vote.

**I. Item Nos. 08-AP-A, 11-AP-C, 11-AP-D, 15-AP-A, and 15-AP-D  
(Possible amendments relating to electronic filing)**

Judge Chagares introduced these items. The Committee's discussion focused on three issues. The first issue was whether pro se litigants should be permitted to file electronically. Judge Chagares said that a consensus appears to be emerging among the Advisory Committees that pro se litigants should be barred from using electronic filing unless local rules allow. Professor Coquillette cautioned that it may be undesirable to allow the circuits to adopt their own approaches because of the benefits of uniformity.

The clerk representative said that the Eighth Circuit allows pro se prisoners to file electronically and the clerk's office then uses the filing to serve the parties electronically. He said that this approach has not been problematic to date, but he cautioned that a handful of pro se litigants conceivably might abuse the system.

Judge Chagares said that the Advisory Committees have been discussing how to handle signatures on electronically filed and served documents. He suggested that the rules should specify that logging in and sending constitutes signature.

Finally, Judge Chagares addressed the current rules requiringg a filing to contain a proof of service. He suggested that proof of service should not be required when there is electronic filing.

Judge Colloton explained that the Committee at this time did not need to reach any final conclusion, but instead only to develop a sense of the issues. He suggested that the Committee should wait until the Advisory Committees on the Civil and Criminal Rules have considered the matters, and that the advisory committees should coordinate their approaches. This was the sense of the Committee.

**J. Item No. 15-AP-E (FRAP amendments relating to social security numbers etc.)**

The reporter introduced Item No. 15-AP-E, which concerns four proposals, namely: (1) that filings do not include any part of a social security number; (2) that courts seal financial affidavits filed in connection with motions to proceed in forma pauperis; (3) that opposing parties provide certain types of cited authorities to pro se litigants; and (4) that courts do not prevent pro se litigants from

filing or serving documents electronically. The reporter noted that the Committee had just discussed the fourth issue in connection with the previous item.

The social security number issue concerns Federal Rule of Civil Procedure 5.2(a)(1), which allows filed documents to contain only the last four digits of a person's social security number. Although this is a rule of civil procedure, the matter concerns this Committee because Federal Rule of Appellate Procedure 25(a)(5) makes Rule 5.2 applicable to appeals. In addition, Form 4 specifically asks movants seeking leave to proceed in forma pauperis to provide the last four digits of their social security numbers. The clerk representative believed that these last four digits are no longer used for any purpose. He noted that similar forms (i.e., AO 239/240, "Application to Proceed in District Court Without Prepaying Fees or Costs") are used in the district courts.

After a brief discussion, based on the information available at the meeting, it was the sense of the Committee that Form 4 should not ask movants for the last four digits of their social security number. It was also the sense of the Committee that motions for leave to proceed in forma pauperis should not be sealed. A judge member expressed the view that these petitions are court documents and that the other party in a lawsuit should not be prevented from seeing them. No votes, however, were taken on either issue.

The proposal to require litigants to provide cited authorities to pro se litigants concerns local district court rules, but Federal Rule of Appellate Procedure 32.1(b) already partly addresses the concerns raised in the proposal. An attorney member asked whether Rule 32.1(b) refers only to free publicly accessible databases or would include databases like Westlaw and Lexis for which payment is required. Another Committee member responded that the Advisory Committee Note to Rule 32.1 says that publicly accessible databases could include "a commercial database maintained by a legal research service or a database maintained by a court."

Judge Colloton suggested that the item be retained on the agenda for the spring meeting. The Appellate Committee will see what the Civil Committee recommends before taking action.

#### **K. Item No. 15-AP-F (Recovery of Appellate Docketing Fee after Reversal)**

The reporter introduced this new item, which concerns the procedure by which an appellant who prevails on appeal may recover the \$500 docketing fee. The majority of circuits allow recovery of this fee as costs in the circuit court but a few courts require litigants to recover this fee in the district court. The proposal was to amend Rule 39 to require courts to follow what is now the majority approach.

A judge member question whether an amended rule was necessary. It may be that the circuits that do not allow for the recovery of costs in the circuit courts are not following the current rule. The clerk representative said that the Eighth Circuit has not always been consistent in its approach. He further said that he would raise the issue with other clerks of court to determine their practice.

The Committee took no action on the matter and left it on the agenda.

**L. Item No. 15-AP-G (discretionary appeals of interlocutory orders)**

The reporter introduced Item No. 15-AP-G, explaining that its proponent requested a "general rule authorizing discretionary appeals of interlocutory orders, leaving it to the court of appeals to sort through those requests on a case by case basis." The reporter briefly summarized the proponent's argument as outlined in the memorandum on the item [Agenda Book at 491-494].

A judge member said that in Colorado all orders are appealable with leave of the Supreme Court. In her experience, the process often took a lot of time. She said that the trial courts typically will stay the litigation while the interlocutory appeal is pending.

A judge member and an attorney member spoke against the proposal, questioning both its benefits and the authority to pass such a rule.

Following brief discussion, an attorney member moved that the Committee take no action on Item No. 15-AP-G and remove the item from the agenda. The motion was seconded. After brief discussion, the Committee voted by voice to remove the item.

**IV. Concluding matters**

Judge Colloton explained that the reporter would circulate for vote by email the final proposed language for two items. For Item No. 14-AP-D, the reporter will circulate a revised version of Rule 29(a), as amended to authorize local rules that would prevent the filing of an amicus brief based on party consent when filing the brief might cause the disqualification of a judge. For Item 15-AP-C, the reporter will circulate revised versions of Rules 31(a)(1) and 28.1(f)(4), amended to extend the deadline for filing and serving a reply brief from 14 days to 21 days.

Judge Colloton said that proposed revisions of Rules 26.1 and 29(c) concerning disclosure requirements were not ready for circulation. The consensus among the Committee was that Item No. 08-AP-R should be held over until the spring.

The Committee adjourned at 5:00 pm.

**Minutes of Spring 2015 Meeting of  
Advisory Committee on Appellate Rules  
April 23-24, 2015  
Philadelphia, PA**

**I. Introductions**

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 23, 2015, at 9:00 a.m. at the James A. Byrne United States Courthouse in Philadelphia, Pennsylvania. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Justice Allison H. Eid participated by telephone for all but a brief portion of the meeting during which no action items were discussed and no votes were taken. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice (“DOJ”), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General.<sup>1</sup> Judge Jeffrey S. Sutton, Chair of the Standing Committee; Ms. Rebecca A. Womeldorf, the Standing Committee’s Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Frances F. Skillman, Paralegal Specialist in the Rules Committee Support Office of the Administrative Office (“AO”) were also present. Chief Judge Theodore A. McKee; Judge Anthony J. Scirica; Professor Daniel J. Capra, associate reporter to the Committee; Ms. Marie Leary from the Federal Judicial Center (“FJC”); Mr. Frederick Liu of Hogan Lovells; Mr. Robert A. Zauzmer, Chief of Appeals, U.S. Attorney’s Office for the Eastern District of Pennsylvania; Mr. Howard J. Bashman; and Ms. Saranac Hale Spencer of The Legal Intelligencer attended portions of the meeting.

Judge Colloton welcomed Ms. Womeldorf as the new head of the Rules Office. Judge Colloton noted Ms. Womeldorf’s impressive background, including her long experience as a litigator in Washington, D.C. Judge Colloton also noted that the Committee was fortunate to have, as its new associate reporter, Professor Daniel J. Capra, and he stated that Professor Capra would be joining the meeting later that day. Professor Struve observed that Professor Capra had taught her much of what she knew about serving as a reporter, and she expressed her appreciation to Professor Capra for agreeing to join her as a fellow reporter to the Committee.

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<sup>1</sup> Mr. Letter was unable to attend the second day of the meeting.

On the afternoon of the first day of the meeting, Chief Judge McKee joined the meeting for a time. Judge Colloton welcomed Chief Judge McKee and thanked him for extending the Third Circuit's hospitality to the Appellate Rules Committee. Judge Colloton also expressed appreciation for the excellent logistical support provided by the Court's staff. Chief Judge McKee welcomed the Committee members to Philadelphia and encouraged their efforts.

## **II. Approval of Minutes of October 2014 Meeting**

A motion was made and seconded to approve the minutes of the Committee's October 2014 meeting. The motion passed by voice vote without dissent.

## **III. Report on January 2015 Meeting of Standing Committee**

Judge Colloton noted that the Appellate Rules Committee had had no action items to present to the Standing Committee at its January 2015 meeting. However, Judge Colloton had described to the Standing Committee a number of the Appellate Rules Committee's ongoing projects, and he had obtained the Standing Committee's input on those projects.

## **IV. Other Information Items**

Professor Struve reminded the Committee members that on December 1, 2014, the amendments to Rule 6 (concerning bankruptcy appeals) had taken effect.

Later in the meeting, Professor Struve provided the Committee with updates on two recent Supreme Court decisions, *Jennings v. Stephens*, 135 S. Ct. 793 (2015), and *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015). *Jennings* concerned the operation of the cross-appeal rule and the certificate-of-appealability requirement in habeas cases. *Jennings*, who had been sentenced to death, sought federal habeas relief on three theories of ineffective assistance of counsel. Two of those theories – based on a case called *Wiggins* – were accepted by the district court as a basis for habeas relief. The third theory – based on a case called *Spisak* – was rejected by the district court. The district court ordered the State to release *Jennings* unless, within a set period, it gave him a new sentencing hearing or changed his sentence from death to imprisonment. The State appealed the judgment. *Jennings* neither filed a cross-appeal nor sought a certificate of appealability. On appeal, the Fifth Circuit rejected *Jennings*' attempt to use the *Spisak* theory in defense of the judgment below. The Supreme Court, over a dissent, held that this was error, and that *Jennings* could argue the *Spisak* theory on appeal without either cross-appealing or seeking a certificate of appealability. The Supreme Court relied on its precedent stating that an appellee (without cross-appealing) can defend the judgment below on any ground appearing in the record, even if the ground in question was rejected by the district court. Here, the Court reasoned, upholding *Jennings*' *Spisak* claim would yield the same relief that he obtained by means of his *Wiggins* claims. Thus, neither a cross-appeal nor a certificate of appealability was needed. In the course of its discussion the Court noted that it is unclear

whether the certificate-of-appealability requirement applies to a habeas petitioner who is the cross-appellant (rather than the appellant).

In *Gelboim*, the Court addressed the question of a judgment’s finality in the context of multidistrict litigation – a question that required the Court to discuss the interaction of 28 U.S.C. § 1291 (appeals from final decisions), 28 U.S.C. § 1407 (multidistrict litigation), and Civil Rule 54(b) (certification for immediate appeal of an order addressing fewer than all claims or parties). In this case, the Court held, the petitioners’ complaint kept its independent status despite its inclusion in the MDL. Accordingly, the petitioners could appeal the dismissal of their complaint without awaiting the disposition of all the other cases involved in the MDL. The Court noted that it was not addressing how finality would work in an instance where multiple cases are consolidated for *all* purposes rather than (as here) for *limited* purposes.

## **V. Action Items – For Consideration After Publication**

### **A. Item No. 07-AP-E (FRAP 4(a)(4) and “timely”)**

Judge Colloton invited Professor Struve to summarize the public comments on the proposal to amend Rule 4(a)(4). The amendment addresses the circuit split concerning whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as “timely” under Rule 4(a)(4). A number of circuits have ruled that the Civil Rules’ deadlines for post-judgment motions are nonjurisdictional claim-processing rules. In this view, when a district court purports to extend the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But does the motion count as a “timely” one that, under Rule 4(a)(4), tolls the time to appeal? In the Third, Seventh, Ninth, and Eleventh Circuits, the answer is no. However, the Sixth Circuit has held to the contrary. The proposed amendment would implement the majority view.

Of the six commentators who submitted comments on this proposal, five supported it. The sole opponent disagreed with the Committee’s decision to adopt the majority view; this commentator argued that it is anomalous that the district court can decide an untimely motion on its merits (absent an objection to the motion’s untimeliness) but that such an untimely, unobjected-to motion does not extend the time to appeal under Rule 4(a)(4). This commentator also argued that the proposed rule sets a trap for unwary litigants – i.e., that the rule does not make clear to litigants the fact that such motions lack tolling effect. Professor Struve noted that the Committee had previously discussed whether to include in the text of the Rule an explicit statement that an untimely motion is not rendered timely (for purposes of Rule 4(a)(4)) by “a court order that sets a due date that is later than permitted by the Federal Rules of Civil Procedure, another party’s consent or failure to object, or the court’s disposition of the motion.” The Committee had decided, instead, to place that explanation in the Committee Note. The commentator’s concern about the clarity of the published Rule, Professor Struve suggested, might provide a reason to revisit that choice.

An appellate judge member responded that placing the explanatory language in the Rule text would distend what is already a very long rule. On the other hand, this member noted, the additional language is not that long compared to the existing rule. Another member asked whether the Rule text, as published, would alert pro se litigants to the issue; there is no guarantee, this member noted, that such litigants will read the Committee Note. An attorney member stated, however, that the list of situations noted above (a court order erroneously extending a deadline, a lack of party objection to untimeliness, or a court's disposition of an untimely motion on its merits) might not be a complete list of the situations that a litigant might think render an untimely motion a timely one. If the list is incomplete, this member suggested, it may be misleading to place it in the text of the Rule. Another appellate judge member expressed agreement with the approach taken in the Rule as published.

A motion was made and seconded to approve the Rule and Committee Note as published. The motion passed by voice vote without dissent.

**B. Item No. 07-AP-I (FRAP 4(c) / inmate filing)**

Judge Colloton invited Professor Struve to summarize the public comments on the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and new Form 7. As published, the amendments would make clear that prepayment of postage is required for an inmate to benefit from the inmate-filing provisions, but that the use of an institution's legal mail system is not. The amendments would clarify that a document is timely filed if it is accompanied by a declaration, notarized statement, or other evidence showing that the document was deposited by the due date and that postage was prepaid. Forms 1 and 5 would be revised to mention new Form 7, which shows a declaration meeting the Rule's requirements. The amendments would also clarify that if sufficient evidence does not accompany the initial filing, then the court of appeals has discretion to permit the later filing of the declaration or notarized statement.

The Committee commenced by discussing the aspect of the published Rule amendments that would delete the requirement that the inmate use a "system designed for legal mail" if one is available. Based on initial inquiries that disclosed no purpose for this requirement, the Committee had thought that its deletion would streamline the Rule and avoid possible confusion over what qualifies as a system designed for legal mail. One commentator expressed support for the deletion of this requirement. Another commentator, however, opposed its deletion, and pointed out that the State of Florida logs the date of legal mail but does not do the same with non-legal mail. Date-logging, this commentator argued, provides important evidence of the date of deposit in the institution's mail system. To investigate whether other states make a similar distinction in treatment of legal and non-legal mail, Professor Struve enlisted the assistance of the Director and Chief Counsel of the National Association of Attorneys General Center for Supreme Court Advocacy. The resulting inquiry generated responses from 21 states and the District of Columbia, and disclosed that a number of other States take an approach similar to Florida's (i.e., they record the date of legal mail but not non-legal mail). Some other states do not

date-log any inmate mail, and still other states have systems in which the criteria for date-logging inmate mail are more difficult to categorize.

Mr. Letter reported that in facilities run by the U.S. Bureau of Prisons, it is up to the inmate whether to use the legal mail system or the regular mail system. Legal mail is always date-logged, and regular mail is not. Asked whether this fact leads the DOJ to oppose the deletion of the legal mail system requirement, Mr. Letter responded that, to the contrary, the DOJ supports deletion of that requirement. Deletion of the requirement would permit the inmate to choose which system to use, and would bring the Appellate Rules into closer parallel with Supreme Court Rule 29.2, which does not include such a requirement. But, he added, the DOJ does not feel strongly about this.

An appellate judge member observed that, before publishing the proposed amendments for comment, the Committee did not see a purpose for the legal mail system requirement. The comment period, he observed, had disclosed that the requirement actually does have a function. Mr. Letter noted, as well, that there may be significant delays in processing mail in an institution's regular (non-legal) mail system.

Responding to the argument that date-logging can provide important evidence of the date of deposit, an attorney member asked whether there is evidence concerning how often inmates mis-state the date of deposit. Professor Struve responded that there is no such evidence, other than an anecdotal account in the comment submitted by the opponent of the requirement's deletion.

Discussion turned to the question of how the Rule should describe the requirement if the requirement were retained. Professor Struve observed that it might not always be obvious to an inmate whether a particular system counts as a "system designed for legal mail." Indeed, Professor Struve noted, a few of the states who had responded to the survey had systems in which the presence or absence of date-logging did not correlate neatly with a distinction between legal and non-legal mail. Perhaps one could adopt, instead, a functional definition, referring, for example, to "a mail system that will document the date of a mailing." That formulation, however, had generated style objections from Professor Kimble.

An appellate judge member asked whether, as a practical matter, an inmate can make sure to use the legal mail system (where one exists) by simply writing "Legal Mail" on the outside of the envelope. Mr. Gans confirmed that envelopes containing inmates' filings often bear such a legend. The appellate judge member noted that, if the reference to a system designed for legal mail were to be retained, a state that wished to ensure that inmates use a special mail system could clearly label that system a "Legal Mail System."

Another member, though, suggested that a functional definition might be more accessible for inmates, because an inmate who is unsure which system to use could ask a corrections officer which system (if any) logs the date of inmate mail. An appellate judge member agreed that the

functional definition would be preferable. This member emphasized that the requirement should be retained because many states, including Colorado, rely upon the use of a system that will log the date.

An appellate judge member suggested that one course of action would be to retain the requirement as it stands in the existing Rule. Professor Struve asked whether the existing language (referring to a system designed for legal mail) could be a source of confusion. She noted a Tenth Circuit opinion in which the court had warned of possible confusion. In that instance, though, the court was concerned that an inmate might think something counted as a system designed for legal mail when it actually did not. (That particular type of confusion would be problematic in circuits where certain requirements currently apply only if the inmate uses a regular (non-legal) mail system.) The converse sort of confusion (thinking that a system is not designed for legal mail when it really is) may be less likely to occur.

An appellate judge member asked what would happen if an inmate guessed wrong – i.e., if an inmate thought that there was no system designed for legal mail, but there actually was. Mr. Letter stated that the DOJ did not think this was an issue. An attorney member stated that during his three years as Alabama’s Solicitor General, the issue never arose. Another appellate judge member observed that the inmate filing rules are designed for pro se inmate litigants, and he argued that it is important to make those rules user-friendly, even if it takes some extra language. Mr. Letter observed that the new Form 7 would be helpful to inmates.

An appellate judge participant observed that Chief Judge Diane Wood has commenced a project focusing on inmate litigation. The appellate judge member who favored the functional definition suggested that the rule might refer to a system that “documents the date of a mailing” or might direct the inmate to “use the system that logs the date” of a mailing. Professor Struve noted that she had had difficulty formulating a functional definition that would encompass the existing variety of institutional practices. Different institutions may log the date at different points in the process – for example, when the inmate hands the mailing to a corrections officer, or when the mailing enters the institution’s mail room, or when the mailing leaves the mail room. By consensus, the Committee determined that it should retain the requirement that an inmate use a system designed for legal mail (where such a system exists). Professor Struve agreed to revise the Rule text and Committee Notes for the Committee’s review later in the meeting.

Professor Struve next highlighted a commentator’s suggestion that the proposed Rules be revised to authorize the inmate to file the declaration either contemporaneously with the underlying filing or later. The commentator recognized that the published proposal gives the court discretion to permit the declaration’s later filing, but argued that the timing of the declaration’s submission should be up to the inmate, not the court. Inmates, this commentator worried, may have trouble understanding and complying with procedural requirements. An appellate judge member recalled that the Committee had considered this point, and had structured the published proposal with the intention of giving inmates an incentive to file the declaration contemporaneously with the underlying filing. Contemporaneous submission of the

declaration helps to ensure its accuracy. By consensus, the Committee decided not to adopt the commentator's suggestion.

Professor Struve noted that two commentators had proposed authorizing courts to excuse a failure to prepay postage. Committee members had previously concluded that, in an appropriate case, an institution's failure to provide postage to an indigent inmate could be addressed by an as-applied constitutional challenge. As to the possibility of authorizing the court to excuse nonpayment of postage for good cause, participants in the Committee's prior discussions were concerned that such a provision would encourage satellite litigation. By consensus, the Committee decided not to adopt the commentators' suggestions.

Professor Struve observed that the need to ensure that pro se inmate litigants understand the inmate-filing rules – a need highlighted in one of the comments discussed above – helps to underscore reasons to retain the extra verbiage in the provisions' last phrase (“the court exercises its discretion to permit the later filing ...”). As noted in the “style” document that Professor Struve had circulated to Committee members prior to the meeting, Professor Kimble had objected to the draft's use of the phrase “exercises its discretion to permit,” on the ground that the phrase was both unnecessary and inconsistent with the Committees' style conventions. (Professor Kimble feels that similar language in restyled Civil Rule 72(b)(1) is distinguishable.) A member of the Standing Committee had expressed a similar view. Professor Struve asked whether members felt that the rule should instead say simply “the court permits the later filing ...” One reason for retaining the longer phrase, Professor Struve suggested, is that an unskilled reader might read the shorter phrase as a declarative statement (i.e., as a statement that the court *does* permit the later filing) rather than a conditional phrase (i.e., referring to *situations in which the court chooses to* permit the later filing). As the commentator pointed out, Rules 4(c)(1) and 25(a)(2)(C) are distinctive in that their intended users are pro se litigants. Three attorney members stated that the Committee should retain the longer phrase. Professor Struve proposed that, as shown in the “style” document, language could be added to the Committee Note to explain the choice of the longer phrase. By consensus, the Committee agreed to this change.

The Committee next turned to the Rules' references to notarized statements. Prior to publication, a participant in the Standing Committee's discussion of the proposed amendments had asked whether those references should be deleted. Declarations, it was suggested, would be more convenient for inmates and inmates might lack access to notaries. However, none of the public comments had suggested deleting the references to notarized statements. Professor Struve's research had disclosed that notaries are available in at least some correctional institutions. In addition, Professor Struve noted, the inmate-filing rules applicable to habeas and Section 2255 proceedings and to filings in the U.S. Supreme Court all refer in the alternative to declarations and notarized statements. By consensus, the Committee decided to retain the references to notarized statements.

The Committee then discussed the proposed changes to Form 7 as shown in the “style” document. The Committee approved the change to the present tense (“Today, [insert date], I am depositing ....”). The Committee adopted Professor Kimble’s style changes with one exception: In the inmate’s declaration (at the end of the form) “that the foregoing is true and correct,” Professor Kimble had suggested substituting “this” for “the foregoing.” Mr. Byron expressed concern that the re-styled sentence might be taken as a tautology – namely, it might be taken as a mere declaration that the particular sentence itself (rather than the preceding text) was true and correct. By consensus, the Committee decided not to change “the foregoing” to “this.” The Committee decided not to adopt a commentator’s suggestion that, in the “notes to inmate filers” that are added to Forms 1 and 5, an explanatory parenthetical should follow the citation to Rule 4(c)(1). Instead, a Committee member proposed (and the Committee later approved) the insertion of the word “timing,” so that these notes would refer to the “timing benefit” of Rule 4(c)(1).

The Committee asked Professor Struve to revise the proposed Rule and Form amendments and Committee Notes to implement the choices noted above. She prepared a new draft overnight, and the Committee reviewed the draft the next morning.

Professor Struve pointed out that Professor Kimble had observed that the numbered subdivisions of Appellate Rules 4(a) and 4(b) have headings, and he had suggested that the numbered subdivisions in Rule 4(c) should too. He acknowledged that the Appellate Rules, overall, follow no uniform practice in this regard, but he argued that any given Rule should be internally consistent. Professor Struve predicted that it would be difficult to draft headings for Rules 4(c)(1), (2), and (3) that were informative, accurate, and not misleading. An appellate judge member stated that he saw no reason to add headings to those rules. An attorney member pointed out that amended Rule 4(c)(1) would be only two sentences long; a two-sentence rule, he suggested, did not require a heading. By consensus, the Committee decided not to add headings to Rules 4(c)(1), (2), and (3).

Professor Struve highlighted certain features of the proposed Rule and Form amendments as set out in the newly-circulated draft. The requirement that the inmate use the institution’s legal mail system was reinstated. However, due to the structure of the amended rule, that requirement was now stated in a new sentence at the start of the rule. Following style guidance from Professor Kimble, the new first sentence referred to “an institution” and “an inmate confined there”; in what would now become the second sentence, “an inmate confined in an institution” became, simply, “an inmate.” Conforming amendments were made to the Committee Note, and language was added to the Note to explain the Rule’s use of the phrase “exercises its discretion to permit.” (The draft showed the changes to Rule 4(c)(1); the same changes would be made to Rule 25(a)(2)(C).)

Professor Struve also pointed out the forms included in the newly-circulated draft. To clarify references to Rule 4(c)(1) in the “Note to inmate filers” in Forms 1 and 5, references to the “benefit” of that Rule had become references to its “timing benefit.” A new “Note to inmate

filers” was added to Form 7 to point out the legal-mail-system requirement. Other changes implemented the choices made by the Committee the previous day.

A motion was made to approve the amendments to Rules 4(c)(1) and 25(a)(2)(C) and Forms 1 and 5, and new Form 7, as set out in the newly-circulated draft. The motion passed by voice vote without dissent.

### **C. Item No. 08-AP-C (the “three-day rule”)**

Judge Colloton invited Professor Struve to summarize the public comments and inter-committee deliberations on this item, which concerns the proposal to eliminate electronic service from the “three-day rules” in the Appellate, Civil, Criminal, and Bankruptcy Rules. Under Appellate Rule 26(c), “[w]hen a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire ... , unless the paper is delivered on the date of service stated in the proof of service.” The Rule currently provides that the three additional days apply not only to service by commercial carrier (when delivery is not same-day) and service by mail, but also to electronic service. In light of the now-standard use and smooth functioning of electronic service, the Advisory Committees (under the guidance of the Standing Committee’s CM/ECF Subcommittee) decided that the time has come to eliminate the three extra days in instances where service is made electronically.

The public comments on the proposal spanned a range of views. Some commentators supported the proposal. Others, while acknowledging reasons for excluding electronic service from the three-day rule, sought other changes to offset the effect of that amendment. And still other commentators opposed the proposal entirely. Opponents worried that elimination of the three-day rule for electronic service would leave litigants vulnerable to unfair behavior by opponents (such as electronic service late at night before a holiday weekend). Motions for extensions of time, they warned, may not provide an adequate remedy and, in any event, are inefficient. Opponents stressed that reply briefs and motion papers may be complex and that the loss of the three days will cause hardship in preparing those filings. Focusing in particular on Rule 31(a)(1)’s deadline for reply briefs, a number of commentators stated that the prevalence of electronic service has made the nominal 14-day deadline a “de facto” 17-day deadline. If electronic service is to be excluded from the three-day rule, they argued, then Rule 31(a)(1)’s deadline should become 17 days (or perhaps more than 17 days). Other commentators proposed that one or two (instead of three) days be added for deadlines that are computed from the date of electronic service. One commentator proposed that the Committee adopt a rule that would address the computation of a time period when a party must act within a set time after service and the document served is submitted with a motion for leave to file or is not accepted for filing.

The DOJ proposed that concerns over the hardships that might ensue from the deletion of electronic service from the three-day rule should be addressed in a Committee Note recognizing the need for extensions of time in appropriate cases. The other advisory committees had already met and discussed this proposal. The Criminal Rules Committee strongly favored adding such

language to the Committee Note, but the Bankruptcy and Civil Rules Committees favored not adding the language.

An attorney member stated that the commentators voiced persuasive concerns about the deadline for reply briefs. Fourteen days, this member reported, is a very short time frame. And it can be difficult, as a practical matter, for a litigant to seek an extension of time. For instance, in order to take advantage of the safe harbor in the Eleventh Circuit's rule, the litigant must make the motion at least 14 days in advance of the due date.<sup>2</sup> Another attorney member agreed with this concern, but also noted that he would not wish to slow the progress of the Rule 26(c) proposal. An appellate judge participant observed that the Committee could add to its agenda a new item concerning a possible extension of Rule 31(a)(1)'s 14-day deadline for reply briefs.

An attorney member asked whether it would be possible to send the proposed amendment forward along with the three-day-rule proposals for the other sets of rules, but to delay the effective date of the amendment to Appellate Rule 26(c). Professor Struve observed that it would, technically, be possible to do so: 28 U.S.C. § 2074 provides that a rule amendment transmitted by the Court to Congress by May 1 of a given year "shall take effect no earlier than December 1 of the year in which such rule is so transmitted unless otherwise provided by law." Mr. Letter, however, cautioned that it would be disruptive to have an interval during which the three-day rule in the Appellate Rules worked differently from the three-day rules in the Civil, Criminal, and Bankruptcy Rules.

An attorney member observed that the concern about the deadline for reply briefs may be unique to the Appellate Rules; there may not be an analogously tight deadline (measured from an opponent's service of a document) in the rules that govern practice in the lower courts. An appellate judge member observed, as well, that the effective decrease from 17 days to 14 days is a proportionally large reduction.

The Committee members then discussed the possibility that these concerns could be addressed by means of a letter that Judge Colloton would write to the Chief Judges of the courts of appeals. The letter could highlight the issue in case the courts of appeals might wish to consider adopting an interim local provision that could address such concerns pending consideration of a possible national rule amendment on the deadline for reply briefs. An attorney member asked whether such a letter would be made publicly available; litigants, he suggested, might wish to be able to cite it to the court when making requests for extensions.

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<sup>2</sup> Eleventh Circuit Rule 31-2(b) provides: "When a party's first request for an extension of time to file the brief or appendix is filed 14 or more days in advance of the due date for filing the brief or appendix, and the requested extension of time is denied in full on a date that is seven or fewer days before the due date, or is after the due date has passed, the time for filing the party's brief or appendix will be extended an additional seven days beyond the initial due date or the date the court order is issued, whichever is later, unless the court orders otherwise."

Judge Colloton asked the judge members of the Committee for their reactions. An appellate judge member stated that he was unsure whether a similar issue would be likely to come up in connection with the Civil, Criminal, or Bankruptcy Rules. Another appellate judge member stated that he had not been attuned to the issue. A third appellate judge member expressed support for the idea of a letter to the Chief Judges. This member also suggested that a 21-day deadline for reply briefs would be desirable. Mr. Letter asked whether measures to address concerns about the reply-brief deadline should also address concerns about deadlines for motion papers. An attorney member responded that concerns over deadlines for motion papers could be handled through extensions of time.

Professor Struve asked what the Committee wished to do about the DOJ's proposal for adding language to the Committee Note to recognize the need for extensions in appropriate cases. An appellate judge participant observed that there are concerns about adding such language to the Committee Note every time that the Committee amends a rule concerning a length or time limit. Mr. Byron responded that the shift to electronic service, and the ensuing proposal to amend the three-day rule, has raised a unique problem. An appellate judge member stated that he agreed with the view – expressed by participants in the Civil Rules Committee's discussions – that it is undesirable to distend the Committee Notes with this kind of language. An attorney member, though, noted that the reality is that, with the availability of electronic service, most briefs are served between the hours of 6:00 p.m. and midnight.

A motion was made to approve the proposed amendment to Rule 26(c) as published, without the DOJ's proposed addition to the Committee Note. An attorney member expressed doubt that any lawyers actually move for extensions of time. The Committee returned to the topic of a letter that Judge Colloton could send to the Chief Judges of the courts of appeals. The letter would focus on the issue of reply brief deadlines during the transitional period when the amendment to the three-day rule has taken effect and a possible amendment to Rule 31(a)(1) is under consideration. Judge Colloton will draft a letter to facilitate further discussion at the Committee's fall 2015 meeting. Amendments to the three-day rule would not take effect until December 1, 2016.

Turning back to the motion, Judge Colloton asked whether the motion contemplated giving him discretion to accede to the addition of the DOJ's proposed Committee Note language if warranted in light of later discussions among the advisory committees and the Standing Committee. It was agreed that the motion did include that grant of discretion. An attorney member asked how quickly an amendment to Rule 31(a)(1)'s reply brief deadline could take effect. Professor Struve stated that – because such an amendment would be published for comment, at the earliest, in summer 2016 – a Rule 31(a)(1) amendment would take effect at least two years later than the pending amendments to Rule 26(c) and the other three-day rules. The motion was seconded and passed by voice vote without dissent.

By consensus, the Committee added to its study agenda a new item concerning a possible extension to Rule 31(a)(1)'s deadline for reply briefs.

#### **D. Item No. 12-AP-E (length limits)**

Judge Colloton introduced this item, which concerns amendments to the length limits for briefs and other documents. The first issue for the Committee's consideration, he suggested, is whether to adopt word limits for documents other than briefs. Such a change seems to make sense, but then the question becomes the page-to-word conversion ratio. Employing the 280 words per page conversion ratio that had been used in adopting the 1998 amendments to Rule 32 would effectively increase the length permitted under the existing page limits in Rules 5, 21, 27, 35, and 40. The 280 words per page conversion ratio, Judge Colloton noted, was derived from a 1990s study of commercially printed Supreme Court briefs. The Committee's published proposal instead employed a 250 words per page conversion ratio, which was supported by the findings in a 1993 D.C. Circuit Advisory Committee study. During the comment period, one commentator stated that briefs filed under the current Appellate Rules average 240 words per page. A recent study by Mr. Gans of rehearing petitions filed in the Eighth Circuit suggested that those filings average 255 words per page. Thus, it seems that something in the neighborhood of the 250 words per page ratio used in formulating the published proposals was a good measure.

The second issue, Judge Colloton stated, is what to do about the length limits for briefs. The published proposal would reduce the length limit for principal briefs from 14,000 words to 12,500 words. If the Committee instead used a conversion ratio of 260 words per page, that would generate a 13,000-word limit. Rule 32(e), as amended, would make clear that any circuit that wished to accept longer briefs could do so.

Underpinning the published proposal was a concern that the 280 words per page conversion ratio was not the best measure of equivalence. Judge Easterbrook's comment explained that the ratio was derived from a study of the number of words in commercially printed Supreme Court briefs. Other evidence, such as the 1993 D.C. Circuit Advisory Committee study and Mr. Gans's 2013 study of briefs filed in 1995-1998, indicated that briefs filed in the courts of appeals were different in length from commercially printed Supreme Court briefs. And the mid-1990s were a time when, as the Standing Committee observed, computer software enabled lawyers to file briefs that were technically compliant with the existing page limit but were as much as 40 percent longer than a normal brief. Judge Easterbrook's comment also reported a 1990s study finding that law firm briefs produced without printing averaged about 13,000 words.

A substantial number of judges, Judge Colloton observed, believe that briefs are too long. The judges of the D.C. Circuit unanimously favor the proposal. All of the active judges of the Tenth Circuit likewise support the proposal. Judge Chagares has reported that a majority of judges on the Third Circuit support it.

Judge Colloton turned next to the idea of adjusting the published length limit for principal briefs from 12,500 to 13,000 words. 12,500 words may be the best estimate of the length of traditional briefs filed in the courts of appeals, and that measure may best address judges' concerns. Moreover, there is no evidence that there were problems with the rule in effect in the

D.C. Circuit (prior to the 1998 amendments) that limited briefs to 12,500 words. On the other hand, a 13,000-word limit may best approximate the length of briefs filed in the courts of appeals just prior to the 1998 amendments. And revising the limit from the published 12,500 words to 13,000 words would accommodate to some extent the objections that appellate lawyers have registered about the proposal while still recognizing the validity of the concerns that judges and others have expressed about the current rule.

Alternatively, Judge Colloton noted, the Committee could decide to withdraw the proposal, as urged by many distinguished appellate lawyers. The principal argument here is that some complex cases require 14,000 words. No judge likely believes that there are no cases that warrant 14,000 words, but the question is how many?

Judge Colloton pointed out that Mr. Gans's most recent study had looked at data concerning briefs recently filed in the Eighth and D.C. Circuits. The study found that approximately 20% of briefs in Eighth Circuit argued cases contain between 12,500 and 14,000 words; in the D.C. Circuit, the number is closer to 25%. As the Solicitor General suggests, in the small number of cases that are complex enough to warrant 14,000 words, the litigant can move for permission to file an overlength brief. And an advisory committee note like that suggested by DOJ could address this potential need.

Commentators have argued that the burden on courts of adjudicating such motions will outweigh the work that courts will be spared by shortening the length limits; but that is a question for the courts to decide. An advantage of the pending proposal is that it allows individual circuits to choose whether to accept longer briefs than permitted by the national Rules. By contrast, the framework put in place by the 1998 amendments forced circuits to accept 14,000-word briefs even if they preferred a shorter limit.

In considering whether to withdraw the proposal, Judge Colloton suggested, the Committee should consider why the Rules should require circuits to accept 14,000-word briefs that some courts say they do not need and do not want. The Committee could show deference to the commentators who opposed the proposal by adjusting the proposed word limit upwards from 12,500 to a larger number of words. But Judge Colloton expressed confidence in the judges of the circuits who say that 12,500 or 13,000 words is a sufficient length limit under which to resolve cases. Judges want the information that they need in order to decide cases correctly. But many judges in their collective experience are saying that briefs are too long, and that judgment warrants some deference from the Committee.

Judge Colloton acknowledged that members of the Committee may have varying views on the subject, and he recognized that each member would try to do what he or she believes is best for the system. The chair then solicited views from the Committee about the pending proposal.

An attorney member stated that, as far as his own practice is concerned, he does not much care whether the length limits are reduced. When he was clerking for Justice Souter, this attorney recalled, the Justice required two-page bench memos, and the law clerks found a way to comply with that requirement. This member stated that he was taken somewhat by surprise by the bar's near-uniform adverse reaction to the published proposal. Especially persuasive, in his view, were commentators' concerns about the shrinking opportunities for oral argument and about the need for length in multi-party cases. Less compelling, he suggested, were the arguments suggesting that there are many cases in which 14,000 words are truly necessary in order to make the right arguments. Most of the commentators' concerns would be equally applicable to practice in the trial court. In district court, he noted, lawyers have less than 14,000 words in which to brief summary judgment motions. When the limit is 25 pages, this member noted, he simply files the best 25-page brief that he can. The member expressed an expectation that, where more length is needed, the courts of appeals would grant permission for additional length. The member stated that he would strongly prefer a consensus judgment by the Committee – for example, a decision to change the limit to 13,000 words and to include other “softeners” to mitigate the impact of the change. He stated that he would prefer such a resolution to *either* rejecting the views of top lawyers *or* abandoning the proposal. He would like to give deference to the concerns of both judges and lawyers.

Another attorney member stated that, with trepidation, he opposed reducing the length limits for briefs, whether to 12,500 words or to 13,000 words. There is, he stated, an informational problem. Judges and lawyers have been talking past one another. Judges perceive that briefs are too long. But it is hard for judges to know what they would be missing if briefs were shorter. Lawyers do not know in advance which arguments will persuade the judges. In the *Hamdan* case, for example, he and his colleagues did not predict that an argument concerning Hamdan's exclusion from the courtroom would prove dispositive;<sup>3</sup> facing a shorter length limit, he stated, they would have omitted that argument. Time and time again, he has been surprised by the arguments that a judge seizes on. This member stated that he was not moved by arguments about the history of the 1998 amendments. He was moved, however, by the practitioners' reaction to the published proposal. He was concerned, as well, that the proposal would effect a drastic reduction in the length of reply briefs. Judge Silberman's comment, this member stated, convinced him that judges face a problem from unduly long briefs. But the key is to find the appropriate solution. Practitioners will be the ones who implement the solution. Briefing in the district court, he argued, is different from briefing on appeal. District court decisions do not create precedent. In the trial court, one is concerned with making a record and preserving issues for appeal. The Committee, this member argued, should be Burkean in its approach.

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<sup>3</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 614 (2006) (stating that the rights of the accused under the order governing military commission procedure were “subject ... to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to ‘close’”).

An appellate judge member expressed great respect for those who had submitted comments and those who had testified at the Committee's April 1, 2015, hearing. The Committee had before it the views of lawyers who are the cream of the crop and who argue complex and serious cases. But those sorts of cases are not representative of the bulk of the docket. The Eleventh Circuit has twelve authorized judgeships, and in some recent years three or four of those judgeships have been vacant. Suppose that the Eleventh Circuit decides roughly 6,200 cases in a year, and suppose that 200 of those cases are complex. The other 6,000 are not. Lawyers need not repeat an argument multiple times in a brief. The courts are inundated with pages that lack meaning. A typical case has one or two issues and does not require a 14,000-word brief. Shorter briefs would enable judges to do their jobs better. Five or six years ago, the Eleventh Circuit shortened oral argument time from 20 minutes to 15 minutes. Lawyers opposed that change, but they adjusted.

Mr. Letter stated that the DOJ deferred to the sense of the Committee concerning the conversion of existing page limits to word limits. As for the selection of a word limit, that is a judgment that circuit judges are best able to make. The comments submitted by the judges of the Tenth Circuit and the D.C. Circuit support a decrease in the word limits for briefs. Informal comments by judges also support such a decrease. The DOJ supports such a decrease, but with the proviso stated in the DOJ's comment. Some cases will require additional brief length. For instance, when multiple criminal defendants are involved in an appeal, the Government often must draft a single consolidated brief responding to the briefs filed by all the defendants. The DOJ urged the addition, in either Rule text or Committee Note, of language recognizing the need for extra length when appropriate.

An attorney participant expressed support for the reduction in brief length to either 12,500 words or 13,000 words. Based both on the data and on his own experience, this attorney concluded that briefs had become longer as a result of the 1998 amendments. Prior to 1998, there had been no outcry that the 50-page length limit was too short; this fact, the attorney stated, provided an important benchmark. He greatly respected the commentators, and he acknowledged that concerns could arise in marginal cases. However, he suggested, cases have not become more complex since 1998. Lawyers would encounter difficulty deciding which arguments to cut even if the limit were 16,000 words. Methods exist for shortening briefs. There is a gulf between the views of lawyers and judges. Lawyers should give weight to judges' views, including the experiences that judges recount with run-of-the-mill cases that are not handled by the elite bar. Rather than abandon the proposal, this participant suggested, the Committee could send it on to the Standing Committee. The proposal would benefit from debate in the Standing Committee.

An attorney member stated that he opposed the proposal with trepidation. He had not been particularly moved by the arguments concerning the history of the 1998 amendments. However, based on his own experience, he felt that a limit of 12,500 words would harm his ability to advocate for his client – not in every case, but in a not unusual number of cases. The rules, this member argued, should account for those hard cases. Judges see only the final product; they do not see the initial draft that contained every argument that the lawyer wanted to

make. The member acknowledged the size of judges' caseload and the volume of briefs that they receive. He believed that a 14,000-word limit was better than a 13,000-word limit, which in turn was preferable to a 12,500-word limit.

An appellate judge member stated that he understood where the lawyers were coming from. The judges and the lawyers, he observed, share a common goal – namely, ensuring that justice is served. He believed that the ends of justice could be served with shorter briefs, even though additional length would be necessary in some cases. This member expressed support for the DOJ's proposed addition to the Committee Note. And he expressed an expectation that courts would take seriously a lawyer's request for additional length where additional length is warranted. If a court wished to have more detail on a particular issue, it could request supplemental briefing. The member suggested that the Committee consider adopting a word limit of 13,000 for principal briefs and a conversion ratio of 260 words per page for documents other than briefs.

Another appellate judge member expressed support for the proposal – with a word limit of either 12,500 or 13,000 – so long as the proposal included confirmation that overlength briefs can be permitted, including by local rule. He stated that he was not persuaded by arguments about the history of the 1998 amendments. The choice of a word limit, he stated, is not precise; it is a judgment call. Higher limits invite briefs containing more issues and more words. There are pluses and minuses as to each. Higher limits permit raising of some valid issues that otherwise may be omitted or waived through inadequate briefing, and different aspects of a decision on review may necessarily raise different issues, which may implicate radically different consequences. But higher limits invite less party/attorney sifting of good issues from bad. The number of issues aside, higher limits permit more words, and sometimes additional words are very important to judges – as when they are used to clarify the record or (more rarely) to clarify a legal question. But other times more words are not helpful – for example, when they are used for repetition of thematic-level information in multiple locations in the brief (introduction, statement of facts, summary of argument, argument). A shorter limit would provide an incentive to present each point crisply and once and would discourage repetition of thematic points. This member stated that, although he had some doubts about the increased burden of considering motions to file overlength briefs that would seem to follow from lowering the default length limits, the process does not seem unmanageable. It was important, in this member's view, that the proposal, while decreasing the length limit, would allow a circuit to adopt a local rule providing for a higher limit.

Responding to Mr. Letter's expression of concern about multiple-defendant criminal appeals, an appellate judge member reported that the Eleventh Circuit gets many such cases and routinely gives the Government additional briefing length in those instances. Another appellate judge member reported that the Eighth Circuit likewise accords extra length to the Government when it must respond to briefing by multiple defendants. Mr. Letter stated, however, that a not insignificant number of DOJ lawyers around the country strongly feared that their motions for

extra length would be denied. These concerns, he noted, were founded on anecdotal reports by highly experienced DOJ lawyers concerning the practices followed in some circuits.

An attorney member stated that the worries expressed by those experienced DOJ lawyers validated the concerns of the private bar. He also predicted that repetition would continue to be a problem in briefs no matter what the length limit was. Other approaches, he suggested, could better address the judges' concerns with poor briefing. Efforts could be undertaken to educate the bar in methods of good writing, and courts could even require attorneys to revise and re-file briefs that are unduly repetitive. As to the circuits' ability to adopt local rules setting longer limits, this member noted that such a measure would only provide a realistic safety valve if the bar were represented on the committee that drafted a circuit's local rules. Even within the Committee, he stated, it is uncomfortable, as a practitioner, to voice the bar's concerns. The Committee should not assume that circuits will be willing to adopt local rules increasing the length limits. And the Committee should not change the rules unless it is sure that the amended rule would be better than the status quo.

Judge Sutton observed that the Committee had received input from expert members of the appellate bar. But, he observed, it was hard to know the reaction of other segments of the bar. Judges and lawyers tend to disagree on the issue of length limits. The Rules Committees, he noted, are designed to incorporate differing perspectives. While the issue of brief length limits is important, that issue paled in comparison to the significance of recent Civil Rules amendments. And the latter amendments had been unanimously adopted by the Civil Rules Committee because both sides had ceded ground. Whatever one's views on whether the 1998 amendments had changed the length of briefs, the pre-1998 50-page limit itself had resulted from an arbitrary choice at a prior point in time. The DOJ's proposed Committee Note language and the availability of local rulemaking provided important ways to address commentators' concerns. It was, he suggested, worthwhile for the Committee members to try to work toward a consensus and find common ground.

The attorney member who had spoken initially in support of a reduction to 13,000 words raised a question about the length of reply briefs. Might the Committee wish, he asked, to set the limit for principal briefs at 13,000 words but leave the limit for reply briefs at 7,000 words? An appellate judge member, however, responded that reply briefs tend to be significantly longer than necessary; two other appellate judge members agreed. Mr. Letter added that he would be concerned about lowering the limit for principal briefs without a corresponding reduction in the length of reply briefs. In criminal cases the Government is often the appellee. If anything, Mr. Letter suggested, reply briefs should be one-third the length of principal briefs (rather than one-half).

The Committee arrived at a consensus in favor of a 13,000-word limit for principal briefs. Language would be added to the Committee Notes of Rules 28.1 and 32 to address the need for additional length in appropriate cases. The language sketched at page 404 of the agenda book would provide a working draft of the addition to those Notes. Rule 32(e) would be amended as

shown on page 12 of the previously-circulated “style” document to make clear the ability of a circuit, by local rule or order, to increase any of the length limits stated in the Appellate Rules. A motion was made to adopt the 13,000-word limit for principal briefs; to add appropriate language to the Committee Notes for Rules 28.1 and 32; and to amend Rule 32(e) as stated. The motion was made subject to the Committee’s later approval of the Note language. The motion was seconded and passed by voice vote without dissent. Judge Sutton promised the Committee that he would make sure that the concerns of the private bar were aired in the Standing Committee’s discussion of the proposal. An appellate judge member noted that the Committee would monitor the effect of the changes.

A motion was made to adopt word limits for documents other than briefs, using a conversion ratio of 260 words per page. The motion was seconded and passed by voice vote without dissent. By consensus, the Committee members decided not to add the DOJ’s proposed Committee Note language to the Committee Notes for Rules 5, 21, 27, 29, 35, or 40. Also, the Committee agreed that the published proposal’s line limits for documents other than briefs should be deleted.

Professor Struve drew the Committee’s attention to a commentator’s suggestion that proposed Rule 32(f)’s list (of items than can be excluded when computing length) should be augmented to include “any required statement of related cases in a brief.” Mr. Letter observed that local rules set varying requirements. He queried whether Rule 32(f) should permit the exclusion of any item that is required by local rule. (Rule 32(f) would incorporate by reference any local rule that excluded a particular item from the length calculation, so the question was whether Rule 32(f) should also exclude items that were required by local rule but that were not excluded, by local rule, from the length calculation.) Professor Struve noted that some items required by local rule may involve matters that go to the substance of the appeal. An appellate judge member observed that it would be difficult to draft language, for Rule 32(f), that would encompass only the items (required by local rule) that should be excluded from the length calculation.

Professor Struve asked the Committee about the commentator’s suggestion that the statement required by Rule 35(b) (concerning the reasons for granting en banc review) should be excluded from the length limit for petitions for hearing or rehearing en banc. Professor Struve recalled that the Committee had discussed this question at its spring 2014 meeting and had decided that the statement should not be excluded. By consensus, the Committee decided to adhere to that prior determination.

The Committee approved of deleting Rule 32(a)(7)(A)’s reference to Rule 32(a)(7)(C) in the light of the proposed deletion of the latter provision. Professor Struve observed that a commentator had noted that the Rules do not define “monospaced face,” and had suggested that the term should be defined, “now that it will be used in several places.” Professor Struve suggested that the Committee’s decision to delete the proposed line limits from

Rules 5, 21, 27, 35, and 40 had removed the impetus for this suggestion. By consensus, the Committee decided not to define “monospaced face.”

The Committee approved style suggestions by Professor Kimble that would change “comply with Rule 32(g)” to “include a certificate under Rule 32(g)” and that would flip the order in which Rules 5, 21, 27, 35, and 40 referred to word limits and page limits. The Committee approved Professor Kimble’s style changes to Form 6 as shown in the “style” document. The Committee adjourned at 3:53 p.m. on the 23rd, with the understanding that Professor Struve would prepare a revised draft of the proposed length-limits amendments for the Committee’s consideration the next day.

The Committee reconvened on the morning of Friday March 24th and commenced by discussing the revised length-limits draft. Judge Colloton directed the Committee’s attention to the revised Committee Notes. The Committee members focused on the second paragraph of the proposed Committee Note to Rule 32 as shown on page 8 of the newly-circulated draft. That paragraph contained a variant of the DOJ’s proposed language concerning the need for additional length in some instances.

An attorney member highlighted a concern about Fifth Circuit Rule 32.4 (which was reproduced at page 397 of the agenda book). Not only does that Rule require that a motion for leave to file an overlength brief be submitted at least 10 days in advance of the brief’s due date, but also the Rule requires that a draft of the brief accompany the motion. The attorney member stated that it is hard to imagine anyone moving for extra length in a circuit that has such a rule. Not only would it be difficult to comply with the Rule’s timing, but also it is hard to imagine a lawyer being willing to share an advance copy of the brief with the other side. Although the attorney member hesitated to say that the Committee should interfere with a circuit’s local rules, it would make sense, he suggested, that there be a streamlined procedure for a motion that merely seeks an extra 1,000 words (for a total of 14,000 words).

An appellate judge member questioned whether it would be appropriate for a Committee Note to a national Rule to include an instruction directed toward one Circuit’s local rules. The attorney member responded that, during the previous day’s discussions, he had not realized the problem that such a local rule might present for motions for extra length. He could not imagine his clients agreeing to give their opponent a draft brief in advance. Perhaps, he suggested, there was a way for the Committee to address this concern informally – i.e., to encourage the Fifth Circuit to adopt a streamlined procedure for motions that merely seek leave to employ the old 14,000-word limit. Another attorney member agreed that the Fifth Circuit’s rule set a strong disincentive to motions for extra length. Judge Colloton observed that it was unknown whether the Fifth Circuit would apply a new length limit of 13,000 words or vary by local rule. In any event, he thought it likely that the chief judge of the Fifth Circuit, a former Chair of the Appellate Rules Committee, would be sensitive to the concerns expressed, and that the Committee chair could notify the chief judge informally of concerns raised about the local rule. The bar also could advise the court of its views on the local rule.

The Committee returned its attention to the proposed Committee Note to Rule 32. An appellate judge member questioned the draft's reference to the need for a brief to include information "explaining relevant background or legal provisions governing a particular case." Mr. Byron explained that judges sometimes look to the DOJ to explain a complex statutory framework. The appellate judge member suggested that the Note might instead refer to the need "to include unusually voluminous information explaining relevant background or legal provisions."

Turning to proposed Rule 32(f)'s list of items that can be excluded when computing a document's length, an appellate judge member asked whether it would be clear that Rule 32(f)'s reference to "any item specifically excluded by rule" encompassed items excluded by a local rule. Professor Struve promised to ask Professor Kimble whether the rule should say "excluded by rule" or "excluded by these rules or a local rule."

Mr. Gans asked whether the Committee members were comfortable with the numerical limits stated in the newly-circulated draft. Professor Struve had raised a question concerning Rule 28.1(e)'s length limits for briefs on cross-appeals. Current Rule 28.1(e)(2)(B)(i) sets a limit of 16,500 words for the appellee's principal and response brief. Dividing 16,500 words by 280 words and multiplying by 260 words, one arrives at a limit of roughly 15,320 words. An attorney member suggested that the limit for the appellee's principal and response brief should be 15,300, and that the limits for rehearing petitions should be 4,000 words instead of 3,900. Another attorney participant suggested that it could be useful to include a table (akin to that in Supreme Court Rule 33.1(g)) setting out the various length limits stated in the Appellate Rules.

At this point, the Committee temporarily halted its discussion of the length-limits proposals so that revised Committee Note language could be printed and circulated to the Committee members.

When the Committee returned to its consideration of the length-limits proposal, it had before it the following proposed addition to the Committee Notes to Rules 28.1 and 32: "In a complex case, a party may need to file a brief that exceeds the type-volume limitations specified in these rules, such as when necessary to include unusually voluminous information explaining relevant background or legal provisions, or to respond to multiple briefs by opposing parties or amici."

An appellate judge member stated that the Note language should stress the unusual nature of the cases in which additional length will be necessary. An appellate judge participant asked whether attorneys would prefer the statement to be even more brief – perhaps omitting "such as" and the language that followed. Mr. Byron stated, however, that he was bound to press, on behalf of the Solicitor General, for inclusion of the examples that followed "such as." After further discussion, the Committee settled on the language quoted in the preceding paragraph, but with "when necessary" (and the last comma) deleted.

The Committee then turned back to its discussion of word limits. Mr. Gans expressed concern that the variety of the word limits at which the Committee had arrived (by using the conversion ratio of 260 words per page) might burden the clerk's offices when they had to check certificates of compliance with the length limits or when they had to run a word count on suspiciously-long filings. An attorney member suggested, however, that 14,000 words is itself an unusual number, and that any word limit numbers will require attorneys and court staff to memorize the limits or refer to a source. He proposed that the Committee could address this concern by adding the length-limit table that had been discussed earlier that morning. The Chair advised that he and Professor Struve would circulate to the Committee, after the meeting, a draft of the proposed table.

A motion was made to approve the amendments to Rules 5, 21, 27, 28.1, 32, 35, and 40, and Form 6, as shown in the draft that had been circulated that morning, subject to the following revisions: (1) Rule 28.1(e)(2)(B)'s word limit for the appellee's principal and response brief in a cross-appeal would be 15,300 words; the language drafted that morning would be added to the Committee Notes to Rules 28.1 and 32; and a table or chart of the length limits in the Appellate Rules would be circulated to the Committee for its review and approval after the meeting. The motion was seconded and passed by voice vote without opposition.

**E. Item No. 13-AP-B (amicus briefs on rehearing)**

Judge Colloton reminded the Committee that this item arose from a suggestion that the Committee adopt a national rule addressing amicus filings during a court's consideration of whether to grant panel or en banc rehearing. Not all circuits have local provisions addressing such filings, and practitioners understandably would like to know the rules on basic issues such as length and timing. The published proposal would add a new Rule 29(b) that would set default rules governing amicus filings during a court's consideration of whether to grant rehearing. A circuit could adopt local rules that differed from the national default rules. The adoption of new Rule 29(b) would ensure that practitioners in any circuit would be able to find the governing rules – whether in the national rule or in a local circuit rule.

Professor Struve noted that Rule 29(b)(4), as published, would set a length limit of 2,000 words. The Committee had arrived at that proposal by taking the length limit for the party's petition (15 pages), cutting it in half, rounding up (to eight pages), and multiplying by 250 words per page. The commentators who addressed this feature of the published proposal advocated a longer limit; specific suggestions ranged from 2,240 words to 4,200 words. Commentators pointed out that rehearing petitions may be filed in difficult cases; that the party's petition may not be well-written and may neglect the decision's larger implications; and that the Rules require amici to include various components such as the statement of the amicus's identity, interest, and authority and (usually) the authorship-and-funding disclosure.

The Chair asked whether the Committee might wish to consider revising the proposal to set a limit of 2,600 words (i.e., 10 pages multiplied by 260 words per page). An attorney

member agreed that the limit should be longer than 2,000 words. This member suggested that amicus briefs are not a big burden on the courts, though he also queried how useful they are. An appellate judge member responded that he finds amicus briefs at the rehearing petition stage much less helpful; such briefs, he reported, tend not to do much more than register a vote. For that reason, this member stated, he would be inclined to accord amici more length. The attorney member then suggested a limit of 3,000 words. An attorney participant responded that the limit for the party's rehearing petition would be 3,900 words; given that fact, he suggested, 3,000 words seemed like a lot to give to the amicus. Another attorney member stated that he assumed that judges would prefer a relatively focused amicus brief – not one that regurgitates the party's discussion of the merits. The attorney member who had suggested 3,000 words responded that – in light of the compressed time frame for amicus filings at the rehearing stage – amici tend to be sophisticated entities with sophisticated counsel; such amici, he argued, would make good use of the length permitted to them. The appellate judge member observed that when a party seeks rehearing en banc, its petition typically must compress into the allotted length both its arguments for panel rehearing and its arguments for rehearing en banc; and the party must also give adequate treatment of the facts. In light of those constraints on the party, an amicus filing in connection with a petition for rehearing en banc can be more helpful. By consensus, the Committee decided to increase Rule 29(b)(4)'s length limit to 2,600 words.

The Chair observed that Rule 29(b)(5), as published, would set the due date for amicus filings in support of a rehearing petition at three days after the petition is filed. Members had noted that a time lag longer than three days could cause inefficiency in instances where a judge calls for a response immediately after a petition is filed. In such an instance, the party opposing rehearing might have to revise its already-drafted response after belatedly receiving an amicus filing in support of the petition. Commentators, however, had argued that the published three-day time lag was too short, especially in instances where there is no coordination between the party and the amicus. Commentators had proposed longer periods (ranging from five to ten days). One commentator had proposed a two-step process in which the would-be amicus would have three days within which to file a notice of intent to file an amicus brief, but an additional seven to ten days in which to file the actual brief (along with a motion for leave to file).

An attorney member stated that he was intrigued by the two-step proposal. The mechanism was more complex than the published proposal, but complexity would not be a problem because the relevant actors are sophisticated. An appellate judge participant observed that one of the goals of the proposal was to nudge the circuits to specify the basic rules for amicus filings during consideration of a petition for rehearing. He asked whether Rule 29(b), as drafted, would permit a circuit to set a deadline shorter than the one in the national Rule. Professor Struve stated that the Rule would permit this. An appellate judge member suggested that, in the light of circuits' ability to "vary down," perhaps the national Rule should set a deadline of seven days instead of three. By consensus, the Committee agreed to change Rule 29(b)(5)'s deadline (for amicus filings in support of the petition or in support of neither party) to seven days after the filing of the petition.

Professor Struve directed the Committee's attention to a commentator's suggestion that the Rule should address amicus filings after the grant of rehearing en banc or after a remand from the Supreme Court. An attorney member stated that the Committee should not pursue that suggestion. By consensus, the Committee decided not to place that suggestion on its study agenda. Professor Struve asked whether the line limit should be deleted from proposed Rule 29(b)(4); the Committee agreed that it should be deleted. Professor Struve asked whether proposed Rule 29(b)(5)'s due date for amicus filings in opposition to a rehearing petition should be revised; the Committee decided that it should not.

A motion was made to approve the proposed amendments to Rule 29, subject to (1) the revision of Rule 29(b)(4)'s length limit to 2,600 words and (2) the revision of Rule 29(b)(5)'s deadline for amicus filings in support of the petition (or in support of neither party) to seven days after the petition's filing. The motion was seconded and passed by voice vote without opposition.

#### **VI. Item No. 15-AP-B (update cross-reference to Rule 13 in FRAP 26(a)(4)(C))**

Judge Colloton invited Professor Struve to introduce this item, which concerns a technical amendment presented for final approval without publication. Professor Struve reminded the Committee that, in 2013, Rule 13 (governing appeals as of right from the United States Tax Court) was revised and became Rule 13(a), and a new Rule 13(b) (addressing permissive appeals from the Tax Court) was added. At that time, Professor Struve noted, the Committee did not pursue a conforming amendment to Rule 26(a)(4)(C); that Rule's reference to "filing by mail under Rule 13(b)" should have become a reference to "filing by mail under Rule 13(a)(2)." Professor Struve now sought to remedy that oversight by requesting that the Committee approve the amendment to Rule 26(a)(4)(C) to update that cross-reference.

A motion was made and seconded to give final approval to the proposed amendment to Rule 26(a)(4)(C). The motion passed by voice vote without dissent.

#### **VII. Discussion Items**

##### **A. Item No. 11-AP-D (changes to FRAP in light of CM/ECF)**

Judge Colloton invited Professor Struve to introduce this item, which encompasses possible amendments to Rule 25 that would address electronic filing, electronic service, and proof of electronic service. Professor Struve noted that the sketch of possible amendments set out at pages 835-41 of the agenda book had been superseded by the April 18, 2015 sketch that she had circulated to the Committee members by email. The latter sketch accounted for certain changes that had been adopted in the draft amendments to Civil Rule 5.

Professor Struve noted that the proposed amendments to Appellate Rule 25 would require electronic filing (subject to exceptions for good cause and by local rule) and would authorize

electronic service through the court's transmission facilities on a registered user of those facilities. The proposal would also provide that the notice of electronic filing generated by CM/ECF serves as proof of service on anyone served by means of the court's electronic transmission facilities. The proposal includes special provisions for pro se litigants. Rather than being required to file electronically, pro se litigants would need permission by court order or local rule in order to file electronically. By tying the authorization for electronic service to the recipient's status as a registered user of the court's transmission facilities, the provision on service would in effect incorporate the good-cause and local-rule exceptions (and the special treatment of pro se litigants). Other sorts of electronic service would still require consent.

An attorney member noted that it is customary for a paralegal to file papers in CM/ECF on a lawyer's behalf using the lawyer's login information. This member, focusing on the draft provision relating to proof of service, observed that Supreme Court Rule 29.5 requires the proof of service to "contain, or be accompanied by, a statement that all parties required to be served have been served ...." Mr. Gans responded that the proof of service should include information on any parties served non-electronically. Mr. Byron asked whether it would be possible for CM/ECF to be modified to include a requirement that the filer check a box stating that all parties required to be served have been served. Professor Struve suggested that a question of that nature would fall within the jurisdiction of the Committee on Court Administration and Case Management.

Mr. Byron asked whether the proposed rule's reference to "the court's transmission facilities" should be revised to read "the court's electronic transmission facilities."

By consensus, the Committee retained this item on its study agenda.

**B. Item No. 13-AP-H (*Ryan v. Schad and Bell v. Thompson* / FRAP 41)**

Judge Colloton invited Professor Struve to introduce this item, which addresses the timing of the issuance of the mandate under Rule 41. Rule 41(b) states that "[t]he court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later," and also provides that "[t]he court may shorten or extend the time." Under Rule 41(d), a party can seek a stay pending the filing of a certiorari petition; if the stay is granted and the petition is filed, the stay continues until the Supreme Court's final disposition of the petition. Rule 41(d)(2)(D) directs that the mandate must issue "immediately when a copy of the Supreme Court order denying the petition ... is filed."

Professor Struve noted that a subcommittee composed of Justice Eid, Judge Taranto, and Professor Barrett had been studying questions relating to Rule 41. One question is whether stays of the mandate require an order or whether a court can accomplish such a stay merely by omitting to issue the mandate. The Supreme Court has noted but not decided this question. The original Rule 41 had set a deadline for issuance of the mandate "unless the time is shortened or enlarged

by order.” The words “by order” were deleted as part of the 1998 restyling of the Appellate Rules. The Subcommittee felt that it would make sense for the Rule to require that stays be accomplished by order.

Another question is whether the court of appeals has discretion to extend the stay of its mandate after the denial of certiorari. Judge Colloton noted that in both *Bell v. Thompson*, 545 U.S. 794 (2005), and *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), the Court assumed (without deciding) that Rule 41 authorizes a further stay of the mandate following the denial of certiorari, but held that the circumstances of those cases did not justify such a stay. The Court ruled that such a further stay was proper, if at all, only in “extraordinary circumstances.” The Subcommittee had been considering whether Rule 41 should be amended to address this point – either by incorporating the extraordinary-circumstances test or by barring such further stays even in extraordinary circumstances. Judge Colloton noted that a court of appeals has authority to recall its mandate in extraordinary circumstances; one might ask whether it would serve any purpose to require a court of appeals to issue and recall its mandate instead of simply staying it.

Professor Struve observed that the salience of the topic had been illustrated by recent events in *Henry v. Ryan*, 748 F.3d 940, 941 (9th Cir.), *reh’g en banc granted*, 766 F.3d 1059 (9th Cir.), *and on reh’g en banc*, 775 F.3d 1112 (9th Cir. 2014) (en banc). Mr. Henry, under sentence of death, appealed the federal district court’s denial of habeas relief. Henry relied in part on a case called *Eddings*. The Court of Appeals affirmed, ruling that even if there had been an *Eddings* error, Henry had failed to show a substantial and injurious effect on his sentence. In November 2013 the Court of Appeals denied panel rehearing and rehearing en banc. Henry did not request a stay of the mandate at that point, but nonetheless, the mandate did not issue. In March 2014, the Court of Appeals granted en banc review in a different case in order to address whether *Eddings* error is structural. In April 2014, Henry asked the panel to reconsider its November 2013 denial of rehearing in light of the grant of en banc review in the other case; this filing appears to have been the first in which Henry mentioned a stay. The panel denied Henry’s motion, but a judge of the court requested a vote on whether to take that denial en banc. Next, the Supreme Court denied Henry’s certiorari petition; that same day, Henry moved in the Court of Appeals for a stay of the mandate pending the outcome of the en banc call. Subsequently, a majority of the nonrecused active judges voted to rehear en banc the denial of Henry’s April 2014 motion. Judge Fletcher, concurring in the grant of rehearing en banc, argued that the “extraordinary circumstances” test applies only when the mandate was stayed solely for the purpose of allowing time for a party to petition for certiorari. The State then sought a writ of mandamus from the Supreme Court, and the Supreme Court asked the Court of Appeals to file a response to the mandamus petition. However, before the due date for the response, the Court of Appeals concluded its en banc proceedings in Henry’s case, denied Henry’s request for a stay, and directed issuance of the mandate.

Judge Tallman, who had dissented from the grant of rehearing en banc in *Henry*, subsequently wrote to the Committee to propose that Rule 41 be amended to “permit a court of appeals to stay issuance of its mandate only by order and only in exceptional circumstances.”

Judge Tallman noted the issue was of particular concern in criminal cases, in light of the interest in the finality of convictions. In the sketch that Judge Tallman initially provided to the Committee, he proposed amending the last sentence of Rule 41(b) to read: “The court may shorten or extend the time only by order and only in exceptional circumstances.” Judge Tallman later reviewed the draft language that the Committee had considered at its fall 2014 meeting, and he stated that he would not object to adding a reference to stays based on “extraordinary circumstances” in Rule 41(d)(2)(D). However, he emphasized the importance of including the extraordinary-circumstances requirement in Rule 41(b) as well. Otherwise, he stated, the courts of appeals will use Rule 41(b) to stay mandates in cases that do not fall under Rule 41(d)(2).

The Subcommittee discussed Judge Tallman’s suggestions and concluded that Judge Tallman had identified a gap in Rule 41. In the Subcommittee’s view, it would be worthwhile to add an extraordinary-circumstances requirement to Rule 41(b). The language would be drafted so as to avoid a clash with Rule 41(d)(2)(A), which authorizes stays of the mandate pending the filing of a certiorari petition and which sets a test for such stays (“good cause” and a “substantial question”) that is distinct from the extraordinary-circumstances test. The draft prepared by the Subcommittee would, accordingly, list the extraordinary-circumstances test and the Rule 41(d)(2)(A) test as alternative bases for a further stay of the mandate. The Subcommittee had considered whether adding this language to Rule 41(b) would bar stays in other circumstances where a stay might be desirable, but had concluded that compelling cases could be handled under the extraordinary-circumstances test.

Judge Colloton solicited Committee members’ views on the idea of adding an extraordinary-circumstances test to Rule 41(b). An attorney member stated that his only concern related to the possibility that the court of appeals might not detail its findings concerning the existence of extraordinary circumstances. The rule, he suggested, should require such findings, because a further stay of the mandate should occur only in rare circumstances. Professor Struve observed that a list of the Appellate Rules that currently refer to findings was set out on page 880 of the agenda book. The attorney member also pointed out the language in the draft Committee Note, on page 15 of the “style” document, which included a sentence stating that “[t]he court of appeals must set out its findings concerning the facts that constitute the extraordinary circumstances.”

An appellate judge member objected, however, that the courts of appeals do not make findings. Another attorney member stated that he preferred the language set out in footnote 36 on page 14 of the “style” document. That footnote suggested that the Rule could say “unless the court expressly identifies the extraordinary circumstances that justify ordering a further stay” or “unless the court issues an order identifying the extraordinary circumstances that justify a further stay.” Another member agreed that the “expressly identifies” language would be a good choice. Another appellate judge member suggested that the Rule might direct that any stay be “based on extraordinary circumstances set forth in the order.” A third appellate judge member stated the view that either of those formulations would work. A consensus developed that one of these

formulations should be used in both Rule 41(b) and (as re-numbered) Rule 41(d)(4), and that the extraordinary-circumstances test should be added to Rule 41(b).

Professor Struve drew the Committee's attention to another feature of the proposed draft. A Subcommittee member had suggested that current Rule 41(d)(1) is redundant: Given that Rule 41(b) sets the mandate's presumptive issuance date (in a case where there is a timely rehearing petition or stay motion) at seven days after entry of the order denying the petition or stay motion, it seems unnecessary for Rule 41(d)(1) to specify that the mandate is stayed until disposition of that petition or motion. The existence of these parallel provisions in Rules 41(b) and (d)(1) appears to be an artifact of the way in which the Rule developed over time. An appellate judge member suggested revising the proposed Committee Note to Rule 41(d) (shown at page 15 of the "style" document) by adding "former" and "new," where appropriate, to more clearly distinguish the proposed subdivisions from the existing ones.

Judge Sutton asked the Committee whether it might wish to hold the proposed amendment to Rule 41 for later presentation to the Standing Committee. The Rules Committees, he noted, have a practice of "bundling" proposed amendments so as to publish several proposals during the same cycle. If the Committee took this approach, it could also send forward, along with the Rule 41 proposal, any proposal concerning Rule 31(a)(1) and the timing of reply briefs. An appellate judge member asked whether the Committee might vote to approve the Rule 41 proposal at the current meeting and forward it to the Standing Committee, which might approve it in May 2015 but hold it for publication in a later cycle. Judge Sutton suggested, however, that the Standing Committee might be better able to focus its attention on the Rule 41 proposal if it were presented at the Standing Committee's January 2016 meeting. The dockets for the January meetings, he observed, tend to be lighter. By consensus, the Committee resolved to consider the Rule 41 proposal for potential approval at its October 2015 meeting.

### **C. Item No. 08-AP-R (disclosure requirements)**

Judge Colloton invited Professor Capra to present this item, which focuses on disclosures required by local circuit provisions but not required by the Appellate Rules' disclosure provisions (contained in Rules 26.1 and 29(c)). Previously, a subcommittee composed of Judge Chagares, Professor Katyal, and Mr. Newsom had researched these issues. More recently, Professor Capra analyzed the issues and prepared sketches of possible Rule amendments.

Professor Capra explained that he had focused on identifying local rule requirements, not in the current Appellate Rules, that the Committee might be interested in discussing. His memo took a "building block" approach, discussing each requirement in turn and showing its addition to a consolidated sketch of possible Rule amendments. Some of the possible amendments, Professor Capra noted, seemed more viable than others.

Professor Capra first directed the Committee's attention to the topic, discussed at page 923 of the agenda book, that concerned a judge's connection with a prior or current participant in

the litigation. The sketch on page 923 illustrated a rule that would elicit information about a judge's prior participation in the case. The sketch on page 924 showed a rule that would also elicit information about lawyers who had previously appeared in the case. That information, Professor Capra suggested, could be compiled fairly easily.

Professor Capra turned next to the question of disclosures in criminal appeals. The key issue here, he suggested, was whether the Appellate Rules should be amended to include a provision paralleling Criminal Rule 12.4(a)(2). That Rule requires the Government to file a statement identifying an organizational victim and – if that victim is a corporation – also requires the Government to disclose the ownership information referred to in Criminal Rule 12.4(a)(1) (the cognate provision to Appellate Rule 26.1(a)) “to the extent that it can be obtained through due diligence.” The sketch set out at page 926 of the materials illustrates an amendment that would add to Appellate Rule 26.1 a provision paralleling Criminal Rule 12.4(a)(2). Such an amendment, Professor Capra predicted, would not affect many appeals; but it would have the virtue of increasing uniformity across the Appellate and Criminal Rules. The Committee would coordinate with the Criminal Rules Committee on these issues.

Turning to the question of disclosures in bankruptcy cases, Professor Capra observed that the Code of Conduct Committee's Advisory Opinion No. 100 provided guidance concerning the participants (in a bankruptcy proceeding) that should be considered parties for purposes of the disclosure rules. The guidance from that Advisory Opinion is not currently reflected in the disclosure provisions in either the Appellate Rules or the Bankruptcy Rules. But the Bankruptcy Rules Committee has indicated a lack of interest in proceeding with an amendment on the topic of disclosures – a reluctance that weighs against proceeding with a bankruptcy-disclosure amendment to the Appellate Rules. For illustrational purposes, Professor Capra set out on page 927 of the agenda book a sketch showing an amendment that would incorporate into Appellate Rule 26.1 additional disclosure requirements for appeals in bankruptcy proceedings.

Next, Professor Capra observed that the Appellate Rules direct a corporate party or amicus to disclose “any parent corporation and any publicly held corporation that owns 10% or more of its stock.” Some local rules, Professor Capra noted, require disclosure of ownership interests other than stock. This makes sense; because recusal rules focus on financial interest, it should make no difference whether the ownership interest is in stock or in some other unit. The sketch at page 928 of the agenda book illustrated an amendment that would require disclosure of ownership interests other than stock. At page 929, the sketch would extend the disclosure obligation to encompass ownership interests held by publicly held entities other than corporations. Page 930 of the agenda book showed an amendment that would extend Rule 26.1's disclosure obligations to non-governmental entity litigants other than corporations.

Professor Capra noted that he had sketched, at page 931 of the agenda materials, an amendment that would require disclosure concerning corporate affiliates. However, guidance from the Codes of Conduct Committee indicates that recusal is not automatically required when the judge has an ownership interest in a party's corporate affiliate. Accordingly, it does not seem

worthwhile to amend Rule 26.1 to require disclosures concerning a party or amicus's corporate affiliates (beyond entities that have an ownership interest in the party or amicus).

Professor Capra next turned to the question of disclosure requirements applicable to intervenors. Intervention on appeal, he noted, is sufficiently rare that the Committee had previously decided not to pursue amendments that would govern the general topic. (Appellate Rule 15(d) addresses intervention in the specific context of proceedings for review or enforcement of an agency order.) Moreover, Professor Capra pointed out, once intervention has been granted, the intervenor should be viewed as having the status of a party and should thus be seen as subject to Rule 26.1's existing disclosure requirements for parties generally.

Professor Capra pointed out that, depending on the Committee's decisions with respect to the disclosure obligations for parties, changes to Rule 29(c)(1)'s disclosure requirement for amici might become necessary in order to ensure a proper fit between that Rule and Rule 26.1. Some disclosures, he noted, need not be required of amici because a party would already have disclosed the relevant information.

Responding to a suggestion by a member of the Standing Committee, the sketch on page 937 illustrated an amendment that would elicit the names of witnesses who had testified in a case. Professor Capra observed that, on the one hand, instances where a judge's relation to a witness causes recusal are likely to be relatively rare. But on the other hand, it should not be very burdensome for a party to disclose any relevant witness list.

Professor Capra pointed out that the Committee would also need to consider whether any additional disclosure requirements should apply to individuals as well as entities. If the Committee decided to apply some disclosure requirements to individual litigants, it would likely be necessary to restructure the Rule 26.1 sketches shown in his memo.

An attorney member thanked Professor Capra for his work on this topic and stated that he generally agreed with Professor Capra's assessments. This member suggested that the provision sketched on page 923 of the agenda book – designed to elicit information concerning a judge's prior participation in the litigation – should not be limited to participation as a trial judge. Thus, the member suggested deleting the word “trial.”

Turning to the sketch on page 924 of the agenda book, which focused on appearances by law firms and lawyers, the attorney member suggested that it would be better to refer to “attorneys” rather than “partners and associates.” Some firms, he noted, create positions other than partner and associate, such as “counsel.” An appellate judge member asked about that sketch's reference to firms and lawyers who “are expected to appear” for the party. Another attorney member noted that it could be difficult for a firm to predict in advance which associates it might staff on a matter. An appellate judge member noted that the sketch on page 924 was based on Federal Circuit Rule 47.4(a)(4), which requires disclosure of “[t]he names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are

expected to appear for the party in this court.” The Federal Circuit, he reported, has discerned no difficulties with this provision. It is important, this member stressed, to get a lot of information early on. If the information is not provided until later, the court will deny an entry of appearance by a new attorney if that attorney’s appearance would cause a recusal.

An attorney member stated that the sketch shown on page 936 – which would require amici to disclose whether “a lawyer or law firm contributed to the preparation of the brief, and, if so, [to] identif[y] each such lawyer or firm” – would require disclosures beyond those required by the Supreme Court’s rules. If the Supreme Court’s rule does not require such information, the member suggested, neither should the Appellate Rules. Supreme Court Rule 37.6 requires that amici (other than specified governmental amici) must “indicate whether counsel for a party authored the brief in whole or in part and whether such counsel or a party made a monetary contribution intended to fund the preparation or submission of the brief, and shall identify every person other than the amicus curiae, its members, or its counsel, who made such a monetary contribution.” Professor Capra queried whether the Supreme Court’s rule would elicit the information necessary to discern situations in which a Justice’s family member worked on the amicus brief. The member responded that the Stern and Gressman treatise takes the view that such work would count as a monetary contribution.<sup>4</sup> An appellate judge member expressed doubt about the merit of the treatise’s view, because the ordinary meaning of “monetary contribution” does not include an attorney’s labor on a brief.

An attorney member, turning to the question of disclosures by intervenors, stated that he agreed with Professor Capra that, once intervention is granted, the intervenor is subject to the same disclosure obligations as any other party. But, this member asked, what about disclosures *before* the grant of intervention? Mr. Byron reported that, in proceedings for review of agency rulemaking, he very frequently sees intervenors seeking to come in on both sides. Most such instances occur in proceedings in the D.C. Circuit, but some also occur in the regional circuits. Professor Capra noted the possibility of adding a rule provision to address such instances.

An appellate judge member expressed skepticism about the desirability of requiring disclosure of witness lists. Another appellate judge member stated that information relevant to recusal is very important to judges; however, he asked whether the disclosures being discussed would be onerous for lawyers.

An attorney member suggested that some of the information – concerning participation by attorneys and judges – could be compiled relatively readily. Another attorney member, however,

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<sup>4</sup> See Stern et al., *Supreme Court Practice* § 13.14 at 756 n. 62 (“Some nonparty organizations, desirous of helping an impecunious amicus present its views to the Court, may assist in writing the amicus brief. The nonparty organization, by paying its own lawyers, would thereby seem to be making a ‘monetary contribution to the preparation’ of the amicus brief. Unless and until the Clerk’s Office advises otherwise, prudence dictates that such a ‘monetary contribution’ be revealed to the Court.”).

warned that a list of lawyers who had participated in a case could end up being 15 pages long. One of the appellate judge members noted that, in the Eighth Circuit, the Circuit Clerk's office runs the recusal check based on the list (available in CM/ECF) of the lawyers who appeared in the district court. Another appellate judge member asked whether that sort of check would suffice to determine the names of the lawyers who had appeared before an agency. Mr. Gans responded that his office adds that information in manually. An attorney member suggested that it would be useful for judges to have this information. An appellate judge member noted that it is important to limit any required disclosures to the names of those who have actually appeared in a proceeding. The attorney member suggested that a provision could be tailored so that it only requires disclosure of the names of firms and lawyers who appeared in an agency proceeding. An appellate judge member asked whether the rule might state that there is no need to disclose any names of lawyers whose participation is already listed in the CM/ECF system. Mr. Gans noted that the Clerk's Offices should already be checking for lawyers' prior participation, because Judicial Conference policy requires such checks. Professor Capra noted that a rule on this topic should also account for any related state proceedings; the rule could do so by requiring the disclosure of any firms or lawyers not already listed in CM/ECF. Mr. Gans suggested that the Clerk's Office could send the lawyers the list his office generated from CM/ECF, and the lawyers could then disclose only the names not already on the list. An attorney member suggested that, alternatively, the rule might target particular types of prior proceedings (agency proceedings and state-court proceedings). An appellate judge member responded that it would be better to have a single source for all of the information. This member questioned whether lists generated using CM/ECF would always be complete; and he suggested that if the information is submitted by the attorneys, then the court can apply a kind of estoppel based on the disclosures. An attorney member noted, however, that creating this sort of list would be costly for litigants.

An appellate judge participant, commenting on the disclosures project as a whole, expressed concern that some might question why a disclosure would be required unless the information elicited by that disclosure required recusal. That is to say, the addition of a particular disclosure requirement might generate a perception that information responsive to that requirement necessitates recusal. And problems sometimes arise when a litigant takes certain steps in an effort to generate a recusal. Proceeding with this project, he suggested, would entail consultation with the Codes of Conduct Committee and the Committee on Court Administration and Case Management. Judge Colloton noted that the subcommittee was attuned to the concern that new disclosure requirements should be connected to recusal obligations and that the Committee would engage in appropriate consultation.

An appellate judge member noted that some disclosures (such as those concerning attorneys' prior participation) were relevant to individual litigants, not only to entities. He asked whether the rule should be adjusted to account for that. On the other hand, he noted, perhaps compliance would be more burdensome for individual litigants.

By consensus, the Committee retained this item on its study agenda.

**D. Item No. 08-AP-H (manufactured finality)**

Judge Colloton observed that the Civil / Appellate Subcommittee had resumed its discussions of this item, which concerns a litigant's efforts to "manufacture" a final judgment – in order to secure appellate review of the disposition of fewer than all claims within an action – by dismissing all other claims with respect to all parties. The Committee had previously discussed the circuits' varying approaches to this topic. For example, the Second Circuit recognizes a concept of "conditional prejudice," whereby a litigant can achieve a final judgment by dismissing its remaining claims with the understanding that the dismissal of those claims is with prejudice unless there is a reversal on appeal. A number of other circuits have ruled, to the contrary, that dismissals with conditional prejudice do not produce an appealable final judgment.

Professor Struve stated that the Civil / Appellate Subcommittee had formulated four options for consideration by the advisory committees. First, the rulemakers might decide not to take any action on this item, leaving it for further development in the caselaw. Second, the rulemakers might adopt a "simple" rule stating that a dismissal, with prejudice, of all remaining claims achieves finality. Third, the rulemakers could adopt a rule stating that *only* such a dismissal with prejudice achieves finality. Or fourth, the rulemakers could try to draft a rule that explicitly addresses the topic of dismissals with "conditional prejudice." The Civil Rules Committee, which met first, had discussed these four options, and had voted thirteen to one in favor of the first option.

Judge Colloton asked the Committee members whether they felt that the rulemakers should draft a rule on this topic. Mr. Letter stated that it would be worthwhile to adopt a rule, even if it were the minimalist rule described in the Subcommittee's second option. There is value, Mr. Letter suggested, in promoting nationwide uniformity and assisting less-skilled practitioners in understanding the rules of appellate jurisdiction. Mr. Letter stated that, in his view, it would be a good idea to address the issue of conditional prejudice. The Second Circuit, he suggested, takes the correct approach to this issue. Recognizing the finality of a judgment that results from a conditional dismissal with prejudice will prevent hardship to litigants. Moreover, such dismissals are likely to be relatively rare, and the resulting appeals will not unduly burden courts.

An attorney member asked whether Mr. Letter would propose that the district courts should serve any gate-keeping role in such a conditional-prejudice framework. Mr. Letter responded that he did not think so. Such appeals, he suggested, should be available at the litigant's option. If it sufficed to rely upon gate-keeping by the district court, then one could simply employ the existing avenues of Civil Rule 54(b) certification and of appeals under 28 U.S.C. § 1292(b). Some district judges, Mr. Letter suggested, may wish – for perfectly worthy reasons – to keep cases from going up to the courts of appeals. A discussion ensued concerning the policy reasons behind the Civil Rule 54(b) mechanism.

An appellate judge participant observed that the topic of manufactured finality has been on the Committee’s agenda for a long time. It is always useful, he noted, for the Committee to pay attention to circuit splits relating to the Appellate Rules. The Civil Rules Committee did not, however, think that there is enough of a circuit split to justify rulemaking efforts, given the difficulties that such rulemaking would entail. Some issues, he suggested, are better dealt with by caselaw. And even the “simple” second option noted above, he cautioned, could prove tricky – for instance, it might be interpreted to supplant the Second Circuit’s approach to conditional-prejudice dismissals.

An appellate judge member suggested that the best idea is for the Committee to do nothing. Though he understood why attorneys might like a rule that approves the conditional-prejudice concept, such a provision would weaken the final judgment rule.

By consensus, the Committee decided to take no action on the topic of manufactured finality. The chair noted, however, that if the division in authority warrants a uniform national rule, the rulemakers have an important role to play in making policy decisions about finality – as the Supreme Court made clear in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

#### **E. Item No. 12-AP-D (Civil Rule 62 / appeal bonds)**

Judge Colloton invited Mr. Newsom to introduce this item, which arises from Mr. Newsom’s proposal that the Committee consider possible changes to Civil Rule 62’s treatment of appeal bonds. Mr. Newsom explained that he had made this proposal because the appeal-bond process can be quite mysterious, even for experienced appellate practitioners. Mr. Newsom reported that the Civil / Appellate Subcommittee was still in the process of studying the proposal, so his remarks were in the nature of a progress report.

Amendments to the Rule, Mr. Newsom noted, could address a number of issues. First, there is the structure of the current Rule 62: it is hard, he suggested, to understand how subdivisions (a), (b), and (d) fit together. Second, there is a potential gap between Civil Rule 62(a)’s 14-day automatic stay and the stays available under Civil Rule 62(b) (pending disposition of a post-judgment motion) and Civil Rule 62(d) (pending appeal). The deadline for motions under Civil Rules 50, 52, and 59 is now 28 days after entry of judgment, while the deadline for most civil appeals is 30 days after entry of judgment. Third, rule amendments could address the form of the security. It is not always necessary to provide a bond. In some instances there may be better options, such as a letter of credit, or the deposit of a check in escrow. Rule 62(b) allows for flexibility in the form of the security, whereas Rule 62(d) requires a supersedeas bond. Fourth, and relatedly, lawyers would prefer to obtain a single form of security that will see them through the whole sequence (from postjudgment motions through the appeal), but Rule 62(d)’s comparative lack of flexibility may make that goal harder to achieve. Fifth, rule amendments could address the amount of the security. And the rule could address whether courts have

discretion to grant a stay without a full bond, on one hand, or to modify or dissolve a stay, on the other hand.

An appellate judge member observed that rule amendments designed to address these issues would take the form of amendments to a Civil (not an Appellate) Rule. Mr. Newsom agreed, but observed that the topic is one that may be of concern primarily to appellate lawyers. Obtaining a stay of the judgment, he noted, is often the first thing that the appellate lawyer must take care of. Professor Struve mentioned that, during the Civil Rules Committee's discussion of this topic at its recent meeting, the judge members of that Committee had reported that they had not seen any problems in the functioning of the current Rule. To this report, an attorney member of the Appellate Rules Committee responded that although the topic is treated in a Civil Rule, it is an *appellate* lawyers' problem. Judge Colloton noted that Mr. Newsom will continue to work with the Civil / Appellate Subcommittee on this item. An appellate judge member stated that he has been very impressed with the work on this topic by Mr. Newsom and Professor Cooper. An attorney participant expressed support for the idea of proceeding with the project.

### **VIII. Adjournment**

The Committee adjourned at 11:50 a.m. on April 24, 2015.

Respectfully submitted,

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Catherine T. Struve  
Reporter

**Minutes of Fall 2014 Meeting of  
Advisory Committee on Appellate Rules  
October 20, 2014  
Washington, D.C.**

**I. Introductions**

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, October 20, 2014, at 9:00 a.m. at the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice (“DOJ”), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee’s Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office (“AO”); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center (“FJC”) were also present. Mr. Robert Deyling, Counsel to the Committee on Codes of Conduct and Assistant General Counsel at the AO, attended part of the meeting, as did Mr. Joe S. Cecil and Ms. Catherine R. Borden of the FJC.

**II. Approval of Minutes of April 2014 Meeting**

A motion was made and seconded to approve the minutes of the Committee’s April 2014 meeting. The motion passed by voice vote without dissent.

**III. Report on June 2014 Meeting of Standing Committee**

Judge Colloton noted that the Standing Committee had approved for publication the Advisory Committee’s proposals concerning inmate-filing provisions, length limits, and amicus filings in connection with rehearing. The Standing Committee, he observed, had made a few changes to the proposals prior to publication, and the Appellate Rules Committee had ratified those changes by email after the meeting.

The Reporter noted that Standing Committee members had provided additional guidance on aspects of the proposals. Two of those suggestions concern the inmate-filing provisions. The published proposal would amend Rules 4(c)(1) and 25(a)(2)(C) to make clear that a document filed by an inmate is timely if it is accompanied by evidence showing that the document was deposited in the institution’s internal mail system on or before the due date and that postage was prepaid. If such evidence does not accompany the filing, proposed Rules 4(c)(1)(B) and

25(a)(2)(C)(ii) provide that the filing is nonetheless timely if the court of appeals “exercises its discretion to permit” the later filing of an appropriate declaration or notarized statement establishing timely deposit and prepayment of postage. A member suggested that “exercises its discretion to permit” be shortened to “permits”; one question for the Committee will be whether the longer phrase is worth retaining in order to emphasize the court of appeals’ discretion whether to permit the later filing of the declaration or statement. A member also suggested that the rules be revised to omit any reference to notarized statements; the question here is whether there is any reason to include notarized statements as an alternative, given that executing a declaration in compliance with 28 U.S.C. § 1746 presumably is easier for inmates than finding a notary.

Other suggestions concerned the proposed revisions to Rule 29. Proposed Rule 29(b) addresses amicus filings in connection with rehearing. Proposed Rule 29(b)(2) provides that non-governmental amici must obtain court leave to make such amicus filings; the prior draft’s provision permitting non-governmental amicus filings based on party consent was deleted during the Standing Committee meeting in response to members’ concerns about the possibility of strategic use of amicus filings to prompt recusal of particular judges. The discussion of such efforts to cause recusals through amicus filings also prompted a suggestion that the Committee consider whether the current Rule 29 which authorizes amicus filings at the merits stage based on party consent should be revised.

Another suggestion concerned the proposal to amend the length limits in the Appellate Rules. The proposal would set type-volume limits for filings prepared using a computer; as with Rule 32’s current type-volume limits, the new type-volume limits would state alternatives in terms of line limits and word limits. A Standing Committee member asked whether it is necessary to retain line limits in addition to word limits. Mr. Gans noted that line limits would make type-volume limits a viable alternative for those who prepare their briefs using a typewriter.

Judge Colloton observed that, with respect to length limits, one important question is whether the proposals would permit a circuit to enlarge the length limits for briefs. The Reporter responded that Rule 32(e) explicitly permits the adoption of local rules that enlarge the length limits for briefs. However, Rule 28.1 which applies to cross-appeals does not include a provision similar to Rule 32(e); it might be worthwhile, the Reporter suggested, for the Committee to consider adding such a provision to Rule 28.1. The Reporter surmised that such an addition would not require re-publication of the proposals. A judge member of the Appellate Rules Committee observed that, in voting on the proposal at the Committee’s spring 2014 meeting, he had relied on the idea that circuits could choose to authorize longer length limits for briefs.

Judge Colloton pointed out that the fall 2014 agenda materials included a memo describing the deliberations that led to the adoption of the 1998 amendments to Rule 32. The Committee’s records, the Reporter observed, indicated that the 1998 amendments were supported

repeatedly by the assertion that, for briefs prepared on a computer, 50 pages was roughly equivalent to 14,000 words.

#### **IV. Discussion Items**

##### **A. Item No. 08-AP-R (disclosure requirements)**

Judge Colloton introduced this item, which concerns local circuit provisions that impose disclosure requirements beyond those set by the Appellate Rules. Judge Colloton noted that Judge Chagares, Professor Katyal, and Mr. Newsom had agreed to form a subcommittee on this topic, and he thanked them for their research. He thanked Mr. Deyling for attending the meeting in order to share the perspective of the Committee on Codes of Conduct. A central question, Judge Colloton noted, is whether there is information currently elicited by local circuit provisions but not required by the Appellate Rules that would be relevant to a judge's determination whether to recuse from a matter. A related question is whether, as to some types of information, the Appellate Rules Committee needs further guidance in order to assess the implications of such information for recusal determinations. Judge Colloton reported that the Chair of the Committee on Codes of Conduct had designated Judge Paul Kelly of the Tenth Circuit, a member of the Codes of Conduct Committee, to serve as a liaison to the Appellate Rules Committee in connection with this project.

Judge Colloton invited Judge Chagares, Professor Katyal, and Mr. Newsom to summarize the results of their research. Judge Chagares observed that recusal issues present a minefield for judges; despite judges' best efforts, it is possible that something relevant to recusal might be overlooked. He stated that, of the topics on which he had focused, the two key sets of issues concerned criminal appeals and bankruptcy appeals. Appellate Rule 26.1, Judge Chagares noted, applies to all types of appeals. However, some attorneys assert that Rule 26.1 does not apply to criminal appeals. The Third Circuit Clerk, at Judge Chagares's request, surveyed the other Circuit Clerks concerning corporate disclosures in criminal cases. The responses reported some resistance by attorneys to the application of Rule 26.1 in criminal cases, as well as a few instances in which a circuit had not been enforcing the rule in criminal cases. A benefit of the survey, Judge Chagares noted, was that it had sensitized the Circuit Clerks to the issue, which should improve enforcement of the Rule. Because appeals involving corporate criminal defendants are very rare, Judge Chagares suggested, it should not be necessary to consider amending Rule 26.1 to address this issue. Judge Chagares pointed out that, unlike Criminal Rule 12.4, Appellate Rule 26.1 does not require disclosures concerning crime victims. As to local provisions on this topic, the Third Circuit requires disclosures concerning organizational victims, while the Eleventh Circuit requires disclosures concerning all victims.

Judge Chagares noted the distinct challenges posed by bankruptcy appeals. Not everyone involved in the bankruptcy proceeding below is a party for purposes of analyzing recusal issues. An Advisory Opinion on this topic (Advisory Opinion No. 100), Judge Chagares observed, provided helpful guidance. The opinion states that parties, for this purpose, include the debtor,

members of the creditors' committee, the trustee, parties to an adversary proceeding, and participants in a contested matter. The Third Circuit's local provision on point roughly tracks this guidance; so does the Eleventh Circuit's provision, but that provision also requires disclosure of entities whose value may be substantially affected by the outcome.

Judge Colloton invited Judge Chagares to summarize his findings on the third topic that he had investigated—namely, a judge's connection with participants in the litigation. Judge Chagares noted that instances may arise when a judge on an appellate panel previously participated in the litigation. For example, Judge Chagares recalled an instance when a then-recently-elevated appellate judge discovered that an appeal involved a defendant whom he had arraigned while serving as a Magistrate Judge.

The Reporter noted that Criminal Rule 12.4 requires the government to make disclosures concerning organizational victims. In 2009, the Criminal Rules Committee—at the suggestion of the Codes of Conduct Committee—considered whether to expand Rule 12.4 to require disclosures concerning individual victims and to require disclosures by the organizational victims themselves. The Committee ultimately decided not to propose amendments making such changes; participants in the Committee discussions noted that requiring disclosures concerning individual victims would raise privacy concerns.

Professor Coquillette reminded the Committee that, under Appellate Rule 47, local circuit rules must be consistent with federal statutes and with the Appellate Rules. He observed that the requirement of “consistency” raises interesting questions: For instance, if the Appellate Rules impose a limited set of requirements concerning a given topic, can circuits impose additional local requirements concerning that same topic? The Reporter observed that, when Rule 26.1 was initially adopted, the drafters saw the Rule as setting minimum requirements to which a particular circuit was free to add.

An appellate judge member asked what disclosure requirements apply in proceedings under 28 U.S.C. §§ 2254 and 2255. The Reporter undertook to research this question. The member also asked whether Criminal Rule 12.4 defines the term “victim.” The Reporter responded that Criminal Rule 1(b)(12) defines “victim” to mean a “crime victim” as defined in the Crime Victims' Rights Act.

Mr. Deyling stated that the topics discussed thus far seemed to him like topics worth exploring. He explained that the Codes of Conduct Committee's 2009 suggestion concerning crime victims arose from the Committee's desire to ensure that the courts' electronic conflicts screening program was picking up all the relevant conflicts. The Codes of Conduct Committee has altered its view, over time, concerning the significance of a judge's interest in a crime victim. The Committee's current view—which accords with the view found in relevant caselaw—is that recusal is necessary only if a judge has a substantial interest in a victim.

Judge Colloton, summarizing the Committee's discussion up to this point, suggested that

the Appellate Rules Committee might consider whether to adopt a provision reflecting Advisory Opinion No. 100's guidance concerning bankruptcy matters. The Committee could also consider adopting a provision requiring some disclosures concerning victims. On the other hand, he suggested, perhaps some caution is warranted because a provision requiring broad disclosure might suggest that certain interests require recusal when in fact they do not. It was noted that, in some instances, the recusal standard presents a judgment call that the judge must make based upon adequate information.

Judge Colloton invited Mr. Newsom to present his findings concerning the topics that he researched. Mr. Newsom turned first to disclosures by intervenors. It is rare, he observed, for intervention to occur in the first instance on appeal. But when such intervention does occur, the intervenor should be required to make the same disclosures as any party. Indeed, Mr. Newsom noted, some circuits have local provisions requiring intervenors to make the same types of disclosures as named parties.

Mr. Newsom next discussed local provisions requiring disclosures by amici. Local provisions take varying approaches concerning which amici must make disclosures and what those amici must disclose. As to the nature of the disclosure, a few circuits require amici to identify parent corporations (or, in one rule, parent companies); some other circuits require disclosure of any entities with a financial interest in the amicus brief. The subcommittee did not feel that it would be necessary for a national rule to require the latter sort of disclosure.

Mr. Newsom also noted local provisions that require disclosure of the identity and nature of parties to the litigation — such as the identity of pseudonymous parties, or the members of a trade association. The idea behind such provisions, he observed, is to require disclosure concerning interested persons whose identity is not otherwise ascertainable from the filings on appeal.

Judge Colloton invited Mr. Deyling to comment on recusal issues that might be raised by amicus participation. Mr. Deyling conceded that the Codes of Conduct Committee had not provided comprehensive guidance on that topic, even in the Committee's unpublished compendium of summaries of its unpublished opinions. (That compendium, he explained, contains responses to specific requests for advice.) For the most part, Mr. Deyling noted, the Committee had not required recusal because of the participation of an organizational amicus, except in rare situations — for example, where a judge's spouse was involved in the affairs of an amicus. Advisory Opinion No. 63 states that the participation of an amicus that is a corporation does not require recusal if the judge's interest in the amicus would not be substantially affected by the outcome of the litigation and if the judge's impartiality could not reasonably be questioned. Judge Colloton noted that the Appellate Rules Committee might seek further guidance from the Codes of Conduct Committee concerning recusal issues raised by amicus filings.

A member asked whether there might be a concern that parties might engineer the

participation of a particular amicus in an effort to generate a recusal. Another member agreed that this could be a concern; he noted that when he is considering whether to file an amicus brief, he tries to avoid doing so in situations where the filing might trigger a recusal.

Mr. Deyling expressed agreement with Mr. Newsom's suggestion that an intervenor should be treated like any other party for purposes of disclosures. He noted as well that if an intervenor's participation raises a recusal issue, that issue will arise even before intervention is granted in connection with the *request* to intervene.

Judge Colloton observed that, when a judge owns shares in a member of a trade association and the trade association is a party to a lawsuit, the recusal issue will focus on whether the judge's interest in the member would be substantially affected by the outcome of the proceeding. Disclosure of the trade association's members would permit the judge to assess this question. Mr. Deyling noted that the question is who has the burden of discerning and disclosing such information.

Mr. Newsom pointed out that questions concerning real parties in interest can arise in a variety of situations. Mr. Byron noted that the Appellate Rules do not define who is a "party" or who counts as an "appellee"; what about those who do not actually participate in the litigation but who may benefit from it? Mr. Letter recalled that the Committee had previously considered defining "appellee" in the Appellate Rules, but the Committee had decided not to do so.

Summarizing this portion of the discussion, Judge Colloton noted that the Committee would further investigate questions relating to intervenors and amici, and that the Committee might seek further guidance concerning recusal obligations triggered by an amicus's participation.

Judge Colloton invited Professor Katyal to report on the results of his research. Professor Katyal noted that he had focused on disclosures concerning corporate relationships. The bottom line, he suggested, is that there is no need to change the disclosure requirements to address these topics. However, if the Committee is considering other possible amendments concerning disclosure requirements, then it might consider what parties other than corporations should be required to make disclosures under Rule 26.1. The D.C. Circuit's local provision, he observed, requires all nongovernmental, non-individual entities to make disclosures under Rule 26.1; this requirement encompasses, for example, joint ventures and partnerships. A prudent attorney representing such an entity would likely comply with existing Rule 26.1, but the Rule could be amended to cover such entities explicitly. The Reporter noted that Judge Easterbrook's comment which initially provided one of the sources for this agenda item had pointed out that Rule 26.1 is underinclusive because it covers only corporations and not other types of business entities.

The Committee might also consider what types of ownership interests might be encompassed within an amended disclosure rule. The D.C. Circuit's local provision requires

disclosure of any ownership interest not merely stock ownership that is greater than 10 percent. Professor Katyal noted that if the Committee were inclined to expand Rule 26.1 in this respect, it could propose amending the Rule to refer to “any publicly held entity that owns 10 percent or more of an ownership interest in the party.” Such an amendment, he suggested, could be modestly helpful.

By contrast, Professor Katyal said, some other local requirements such as the Eleventh Circuit’s requirement that corporate parties disclose their full corporate title and stock ticker symbol do not seem worthwhile candidates for inclusion in the national Rule. An appellate judge noted that the Eleventh Circuit had adopted its local disclosure requirements in an effort to avoid recusal problems. Mr. Gans reported that the Circuit Clerks face a complex task when assessing corporate disclosures; sometimes he finds that it is necessary to call counsel to obtain further information (including both some information currently required by Rule 26.1 and some additional information). Mr. Deyling noted that a judge’s interest in a party’s *subsidiary* would not trigger a recusal obligation.

By consensus, the Committee retained this item on its agenda. Judge Colloton noted that the Committee might seek further guidance from the Codes of Conduct Committee on particular issues.

#### **B. Item Nos. 09-AP-D & 11-AP-F (response to Mohawk Industries)**

Judge Colloton noted that, over the summer, he and the Reporter had worked with Judge Fay, Mr. Katsas, and Mr. Letter to consider whether it would be advisable to pursue an amendment that would address the appealability of orders concerning attorney-client privilege. He invited the Reporter to introduce the topic. The Reporter noted that it is difficult for a party aggrieved by a trial court’s denial of a claim of attorney-client privilege to obtain review of that ruling. Mandamus review is relatively narrow. Disobeying a disclosure order in the hopes of generating a criminal contempt sanction is a problematic strategy, both because it requires a party to violate a court order and because there is no guarantee that the resulting sanction would fit within the category of *criminal* contempt sanctions (which are immediately appealable) rather than *civil* contempt sanctions (which typically are not). To obtain review under 28 U.S.C. § 1292(b), the would-be appellant not only must meet the criteria stated in that statute but also must obtain permission from both the district court and the court of appeals.

These difficulties, the Reporter noted, have generated proposals such as that by Ms. Amy Smith to grant the court of appeals discretion to hear interlocutory appeals from attorney-client privilege rulings. The subcommittee had taken seriously the possibility of creating such an avenue. But such a project would present drafting challenges. Which sorts of attorney-client privilege rulings should be encompassed within the provision? Should the provision also encompass work-product-protection rulings? Rulings concerning other types of privilege?

The Reporter noted that one relevant consideration is the degree to which such a new

provision would burden the courts of appeals. This question had been the subject of some debate in the *Mohawk Industries* case itself. The petitioner in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), and the Chamber of Commerce of the United States of America as an amicus in that case, had attempted to assess the experience of the Third, Ninth, and D.C. Circuits each of which permitted collateral-order appeals from privilege rulings at the time that the Court decided *Mohawk Industries*. They found that on average only one such appeal per year had occurred in the three circuits combined. This finding accorded with Justice Alito's observation, during oral argument in *Mohawk Industries*, that he did not recall such appeals presenting problems in the Third Circuit while he was serving as a judge of that court. On the other hand, the Reporter pointed out, the one-appeal-per-year figure might be unduly low, because during the early part of the twelve-year period that was studied the availability of collateral-order review for privilege orders may not have been clear in all three circuits. And most of the appeals that occurred were taken by sophisticated litigators; if a Rule were adopted to create an avenue for interlocutory appeal, the greater visibility of such a provision might raise awareness and, thus, increase the number of attempted appeals. The Reporter pointed out that the pool of attorney-client privilege rulings is a large one. A search on WestlawNext for one year's worth of district-court opinions that used the term "attorney client privilege" pulled up over 1,000 decisions (mostly unreported).

During discussions held in summer 2014, members of the subcommittee had expressed interest in knowing the extent to which parties, post-*Mohawk Industries*, were able to obtain mandamus review of attorney-client privilege rulings. The Reporter had performed a non-exhaustive search for cases on point. She noted that, in order to obtain a writ of mandamus, the applicant must show that there is no other adequate means of relief, that the applicant has a clear and indisputable right to the writ, and that issuance of the writ is appropriate under the circumstances. The courts of appeals have considerable flexibility in deciding whether to employ mandamus review. While circuits vary in their willingness to employ mandamus review of privilege rulings, it seems plain that mandamus provides a tool with which a court of appeals, if it chooses, can address lower-court confusion or remedy severe adverse effects that would otherwise result from a disclosure order. Sometimes a court of appeals will deny redress on the ground that relief will later be available on review of the final judgment. But a strong showing of harm increases the chances of mandamus review, especially if an amicus filing or other information indicates that the ruling is also adversely affecting third parties. Novel and important questions are more likely to trigger mandamus review, but review can also occur where the lower court badly misapplied established law, where the ruling is especially harmful, or where federalism or separation-of-powers concerns are present.

Because issuance of the writ requires an elevated showing of error on the lower court's part, some have noted that there is a stigma attached to having entered an order that triggers issuance of the writ. But, the Reporter noted, it is possible that a petitioner might achieve its goal even if the court of appeals decides not to issue the writ. The order of decision sketched by the D.C. Circuit in *In re Kellogg Brown & Root, Inc.*, 756 F.3d 754 (D.C. Cir. 2014) ("*KBR*"), is interesting in this regard. In *KBR*, the court of appeals granted a writ of mandamus and vacated a

district court order that, the court found, had created a lot of uncertainty about the scope of the attorney-client privilege in business settings. The *KBR* court stated that the first question, in reviewing a request for such a writ, is whether the district court's privilege ruling was erroneous; if the ruling was erroneous, then the remaining question is whether the error is of a kind that would warrant issuance of the writ. *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), also illustrates the potential for a party to secure a desired ruling even if it does not actually secure issuance of the writ. The Federal Circuit had found no error and denied a writ of mandamus; the Supreme Court reversed. The Court left it for the Federal Circuit to determine on remand whether to issue the writ in the light of the Court's opinion but the Court also stated its assumption that, even if the writ did not issue, the Court of Federal Claims would follow the Court's holding on the relevant attorney-client privilege question.

Judge Colloton invited members of the subcommittee to share their thoughts on the matter. An attorney member stated that, with reluctance, he had concluded that it would not make sense to proceed with an amendment on this topic. The difficulty of obtaining interlocutory review is troubling, he noted, because while review of a final judgment can redress the erroneous *use* in a lawsuit of privileged information, such review cannot remedy the actual *disclosure* of that information. If mandamus review were unavailable for privilege rulings, he would be concerned; and even though such review does appear to be available, he is concerned that courts will not employ mandamus where the challenged ruling presents a close question. However, it would be an ambitious undertaking to draft a rule similar to Civil Rule 23(f) (which authorizes the courts of appeals to permit appeals from class certification orders). And, at present, there is not a great deal of evidence that key rulings are slipping through the cracks.

Mr. Letter expressed agreement with this analysis. An appellate judge member stated that it would be undesirable to create an avenue for permissive appeals from privilege rulings, because there would be a large number of requests for permission to take such appeals.

A motion was made and seconded to remove this item from the Committee's agenda. The motion passed by voice vote without opposition.

### **C. Item No. 13-AP-H (Ryan v. Schad and Bell v. Thompson / FRAP 41)**

Judge Colloton introduced this item, which encompasses two principal questions: whether a court of appeals has discretion to stay its mandate following a denial of certiorari, and whether such a stay can result from mere inaction (i.e., from the court's failure to issue the mandate). Judge Colloton noted that a group composed of Justice Eid, Judge Taranto, and Professor Barrett had worked over the summer to consider possible amendments addressing these questions. Judge Colloton invited the Reporter to provide an overview of those discussions.

The Reporter first discussed the proposal to amend Rule 41(b) to require that stays of the mandate be effected by order rather than by inaction. Original Rule 41(b) had referred to the court's ability to enlarge "by order" the time before the mandate would issue. The words "by

order” were deleted during the 1998 restyling of the Appellate Rules. The Eleventh Circuit has adopted a local rule that helps to address the problem of stays through inaction, but most circuits do not have local provisions addressing this issue. And the opinions concurring in and dissenting from the grant of rehearing en banc in *Henry v. Ryan*, 766 F.3d 1059 (9th Cir. 2014), illustrate that this issue will continue to arise periodically.

On the question of the court of appeals’ authority (if any) to stay the mandate after the denial of certiorari, the Reporter observed that the subcommittee had considered three options: Rule 41 could be amended to state explicitly that there is no such authority; or the Rule could be amended to provide for such stays in extraordinary circumstances; or the Committee could decide not to amend the Rule. Existing caselaw suggests that the authority to stay the mandate may arise not only from Rule 41 but also partly from the courts’ inherent authority and partly from statutory authority. Caselaw suggests, for instance, that courts have inherent authority to stay the mandate in order to investigate whether a party committed a fraud on the court of appeals (caselaw recognizes power to recall the mandate in such circumstances, and logically, that caselaw should also support the authority to stay the mandate before it issues). 28 U.S.C. § 2106, which authorizes an appellate court to “require such further proceedings to be had as may be just under the circumstances,” may also authorize stays of the mandate. The Reporter suggested that a Rule amendment could validly channel the courts’ inherent authority in this area—for example, by banning stays of the mandate after denial of certiorari but leaving in place the courts of appeals’ authority to *recall* the mandate in extraordinary circumstances.

An appellate judge member of the subcommittee stated that he was on the fence about the choices to be made here. He wondered whether the Rule could be amended to refer to the Supreme Court’s discussion of the power to recall the mandate in “grave, unforeseen contingencies.” This member expressed concern about the idea of amending the Rule in a way that relies (as a safety valve) on a power (to recall the mandate) that the Rules do not mention. If the Committee simply left the Rule untouched, this member said, he would worry less about the possibility that a court would conclude that the Rule displaces the inherent power to recall the mandate.

Another appellate judge member of the subcommittee stated that she favored the option (shown on pages 204-05 of the agenda materials) that would amend Rule 41(d)(2)(D) to state that “[u]nless it finds that extraordinary circumstances justify it in ordering a further stay, the court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.” The third member of the subcommittee stated that she did not think the amendments that were under consideration would transgress the limits set by the Rules Enabling Act. This member expressed support for amending Rule 41 to require that any stays be accomplished “by order.” She was torn about whether to amend the Rule to address the question of the court’s power to stay the mandate; if such an amendment were to be pursued, she too would favor the option shown on pages 204-05 of the agenda materials.

Judge Colloton observed that Judge Fletcher, concurring in the grant of rehearing en banc

in *Henry v. Ryan*, argued that the “extraordinary circumstances” test discussed in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005), applies only when the mandate was stayed solely for the purposes of allowing time for a party to petition for certiorari not when there were other reasons for the stay.

An appellate judge member stated that he did not like the way that the current Rule is written. He suggested that the Rule should permit the court of appeals to issue a further stay “if it finds that extraordinary circumstances exist,” and he stated that the Rule should require that the court explain those findings in the order. Another appellate judge suggested that the Committee consider whether there is a phrase, other than “extraordinary circumstances,” that better captures the very narrow set of circumstances that the *Schad* and *Bell* Courts envisioned as potential bases for a further stay of the mandate.

The Reporter asked whether an amendment inserting the extraordinary-circumstances test into Rule 41(d)(2)(D) should be accompanied by an amendment to Appellate Rule 2. Rule 2 states that “a court of appeals may to expedite its decision or for other good cause suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b).” Would the availability of authority to suspend the rules under Rule 2 frustrate the purpose of amending Rule 41? The Reporter suggested that it would not be necessary to amend Rule 2; it seems unlikely that a court would, in a given case, find that no extraordinary circumstances warranted a stay under Rule 41, but that there was good cause under Rule 2 to suspend the requirements of Rule 41. Committee members indicated agreement with the view that no amendment to Rule 2 was needed.

A member asked whether it would be worthwhile to hold off on any amendment to Rule 41 in order to see whether the Supreme Court grants review on the question of the stay of the mandate in *Henry v. Ryan*. An appellate judge asked, though, whether there would be any harm in proceeding with a proposed amendment in the meantime. The member responded that it might be better to hold off on the amendment if the Committee believes that the circumstance addressed by the amendment occur only rarely. And, this member suggested, there is always some risk of unintended consequences any time that a rule is amended.

An attorney member asked whether the Committee could publish for comment the proposal to amend Rule 41 to require that stays be effected “by order,” and simultaneously solicit comment on whether the Rule should be amended to address the question of the court of appeals’ authority to stay the mandate after denial of certiorari. Professor Coquillette responded that the typical way to solicit such comment would be to publish a proposed amendment addressing the authority question and also to highlight the issue in the memo that accompanies the published proposals. The attorney member observed that, if the Committee were to commence the process for adopting an amendment addressing the authority question, the Committee could withdraw the proposal if subsequent developments rendered it moot. Mr. Letter expressed agreement with this point. An appellate judge member noted that the Ninth Circuit’s en banc decision in *Henry v. Ryan* would be informative.

Turning back to the language of the option favored by some Committee members which would amend Rule 41(d)(2)(D) to forbid a court of appeals to order a further stay “[u]nless it finds that extraordinary circumstances justify” such a stay an appellate judge member asked whether it is necessary to include the reference to a finding, or whether instead “it finds that” could be deleted. Another appellate judge member noted that if the propriety of such a stay is challenged in the Supreme Court, the party defending the stay will articulate the basis for the stay. Mr. Letter suggested, though, that including the requirement of a finding might help to ensure that the court of appeals carefully considers the basis for the stay before entering the stay order.

By consensus, the Committee retained this item on the agenda, with the expectation of discussing it further at the Committee’s spring 2015 meeting.

**D. Item Nos. 08-AP-A, 11-AP-C, and 11-AP-D (changes to FRAP in light of CM/ECF)**

Judge Colloton invited the Reporter to introduce these items, which concern matters relating to the shift to electronic filing and service. The Standing Committee's Case Management / Electronic Case Filing (“CM/ECF”) Subcommittee, with Judge Chagares as its Chair and Professor Capra as its Reporter, has been leading a discussion among the advisory committees concerning possible amendments that would take account of the shift to electronic transmission and storage of documents and information. The Appellate Rules Committee has published for comment an amendment to Appellate Rule 26 that would abrogate the “three-day rule” as it applies to electronic service; similar proposals concerning the relevant Civil, Criminal, and Bankruptcy Rules have also been published for comment.

The Subcommittee has also discussed the possibility of drafting amendments that would adopt global definitions to adjust the Rules to the world of electronic filing and case management. The first portion of the Subcommittee’s proposed template rule on this subject (set out at page 226 of the agenda book) would define “information in written form” to include electronic materials. This provision, the Reporter noted, seems both unproblematic and useful. The second portion of the template would define various actions that can be done with paper documents to include the analogous action performed electronically.

Adopting that second part of the template in the Appellate Rules would, the Reporter suggested, be more complicated. Such a rule should not pose problems for the operation of the starting points and end points of time periods under the Appellate Rules. The proposed template rule allows action to be taken electronically but does not address the ancillary effects of an actor’s choice of electronic or other means of taking the action; thus, provisions addressing whether a filing is timely by reference to the filing method should be unaffected by the adoption of the template. It is more important, the Reporter argued, to focus on rules that discuss actions that might be taken electronically, rather than on Rules that address the ancillary timing effects of choices among different methods of filing or service.

One key topic concerns the filing of a notice of appeal as of right from a judgment of a district court, a bankruptcy appellate panel (“BAP”), or the United States Tax Court. The Appellate Rules set the time period for filing the notice of appeal, and they specify that the notice must be filed in the relevant lower court. As to notices of appeal filed in the Tax Court, the Appellate Rules specify the manner of filing the notice and they also specify how to determine the timeliness of the notice. The Appellate Rules also set special timeliness rules that can be employed by an inmate who files a notice of appeal. And the Appellate Rules (like the other sets of national Rules) include a time-computation provision that says how to determine when the “last day” of a period ends. But the Appellate Rules do not specify how to file a notice of appeal in a district court or with a BAP. Rather, Appellate Rule 1(a)(2) directs litigants who file a document in a district court to comply with the district court’s practices. The template rule says that it governs actions discussed “[i]n these rules,” so adopting that template as part of the Appellate Rules would not affect the manner of filing a notice of appeal in a district court or with a BAP. However, the template would affect the operation of Appellate Rule 13(a)(2), which specifies how to file the notice of appeal in the Tax Court; when read together with Rule 13(a)(2), the template would authorize electronic filing in the Tax Court. That would countermand the current practice of the Tax Court, which does not permit notices of appeal to be filed electronically (though it does have an electronic filing system for other types of filings). If the Appellate Rules Committee were to propose adopting the second part of the template, it would seem advisable to make an exception for notices of appeal from the Tax Court.

To get a sense of other types of actions on which the Committee might wish to focus when considering the operation of the second part of the template rule, the Reporter reviewed local circuit provisions relating to electronic filing and service. Some local circuit provisions state that certain actions may be taken electronically; other such provisions state that certain actions may *not* be taken electronically. Using those sets of provisions as a starting point, it is possible to see that there are some types of actions for which the application of the template rule would be harmless and even beneficial. Thus, for example, it may be useful to provide that actions such as the entry of judgments, or service by the clerk on a CM/ECF user, or non-case-initiating filings by a CM/ECF user, or service between parties who are CM/ECF users, can be done electronically. But there might be problems with a national rule that permits electronic completion of some other types of actions – such as filing case-initiating documents, or filing documents prior to a matter’s docketing in the court of appeals, or filings under seal. It might not be easy, the Reporter suggested, to draft exemptions that would cover all of these areas.

Instead, the Reporter proposed that the Committee consider the possibility of adopting provisions that would mandate electronic filing and authorize electronic service, subject to certain exceptions. Currently, Appellate Rule 25(a)(2)(D) authorizes local rules to mandate electronic filing (subject to reasonable exceptions). The Appellate Rules do not currently authorize local rules to require electronic service; rather, the Appellate Rules allow electronic service only with the litigant’s written consent. However, all of the circuits have local provisions specifying that registration to use CM/ECF constitutes consent to electronic service (which typically would mean service by means of the notice of docket activity generated by CM/ECF).

The circuits all presumptively require attorneys to file electronically, though they permit exemptions on a showing of sufficient cause. The circuits vary in whether and when they permit pro se litigants to file electronically.

The Reporter noted that the Civil Rules Committee, at its fall meeting, would be considering a proposal for a national rule that would make electronic filing mandatory (subject to exceptions based on good cause or on local rules). The proposal would also authorize electronic service (other than for initial process) irrespective of party consent (also subject to the good-cause and local-rule exceptions). The Reporter suggested that the Appellate Rules Committee might wish to consider amending the Appellate Rules to require CM/ECF filing (unless good cause is shown for, or a local rule permits or requires, paper or another non-CM/ECF mode of filing) and authorize service by means of the CM/ECF system's notice of docket activity (unless good cause is shown for exempting, or a local rule exempts, the person to be served from using CM/ECF). Judge Colloton noted that the Reporter's suggested language would authorize local rules to "permit or require" paper filings, whereas the language to be considered by the Civil Rules Committee referred only to local rules that "allow" paper filings. The Reporter argued that it would be desirable to authorize local rules to require paper filings, given the range of circumstances in which local circuit provisions currently evince a preference for paper filings.

Professor Coquillette noted that the importance of paper filings for certain purposes had also been a topic of discussion in the Bankruptcy Rules Committee. In particular, he observed, the Bankruptcy Rules Committee had discussed in some detail the topic of "wet" versus electronic signatures. Mr. Letter noted that the question of signatures has not seemed to present problems outside of the bankruptcy context. Professor Coquillette asked whether the e-filing and e-service provisions would be affected by the adoption of the next generation (NextGen) version of CM/ECF. Mr. Gans noted that the NextGen system is already being tested in the Second Circuit. One relevant change, he reported, would concern payment for filing case-initiating documents. Currently, the need to pay the filing fee presents a barrier to electronic filing of some case-initiating documents. The NextGen system will enable filers to make such payments via pay.gov.

Judge Colloton, summarizing the discussion thus far, noted that the Reporter was proposing that the Committee consider adopting part (a) of the Subcommittee's template rule (the portion stating that "[i]n these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information") and that the Committee consider adopting national rules presumptively requiring electronic filing and presumptively authorizing electronic service (subject to the noted exceptions). He suggested that the Reporter convey to the Civil Rules Committee's Reporter the Appellate Rules Committee's discussion about the desirability of authorizing local rules to require, as well as to allow, paper filings. The Reporter undertook to draft proposed amendments to Appellate Rule 25 (concerning electronic filing and service) for consideration at the Committee's spring meeting.

The Reporter turned next to the proposal to amend Appellate Rule 25(d) so that it no longer requires a proof of service in instances when service is accomplished by means of the notice of docket activity generated by CM/ECF. Because twelve of the thirteen circuits have local provisions that make clear that the notice of docket activity does not replace the certificate of service, the Chair and Reporter had asked Mr. Gans to survey his colleagues to ascertain their views on this topic.

Mr. Gans reported that the local circuit provisions likely reflected the view that it would be improper to dispense with the certificate of service so long as Rule 25(d) seemed to require one. A majority of the Circuit Clerks favor amending Rule 25(d) to remove the certificate-of-service requirement in cases where all the litigants participate in CM/ECF though they think that Rule 25(d) should continue to require the certificate of service when any of the parties is served by a means other than CM/ECF. But a substantial minority of the Circuit Clerks favor retaining the certificate-of-service requirement across the board. Sometimes attorneys may err in thinking that a particular litigant can be served through CM/ECF when that is not in fact the case (for instance, when a party who was filing electronically in the district court has not yet registered to file electronically in the appellate court). And when the clerk's office is checking to ensure that proper service occurred, the certificate of service can provide a starting point. But, Mr. Gans noted, the existence of a certificate of service does not remove the need for the clerk's office to check each filing against the service list to make sure that proper service occurred. It is time, he suggested, to eliminate the certificate-of-service requirement for cases where all filers are CM/ECF participants.

Judge Colloton directed the Committee's attention to the sketch on pages 242-43 of the agenda materials, which illustrated a possible amendment to Rule 25(d). An appellate judge member questioned the sketch's reference to "a notice of docket activity generated by CM/ECF." The Rules, he noted, do not usually use acronyms such as "CM/ECF," and it would be better to refer instead to the "official electronic filing system." The Reporter promised to revise the wording of the sketch in preparation for the Committee's spring meeting.

## **V. New Business**

Judge Colloton noted that a federal appellate judge had suggested that the Committee consider amending the Appellate Rules to state that Appellate Rule 29 establishes the exclusive means by which a non-litigant may communicate with the court about a pending case, and that non-litigants must not contact judges of the court directly. Judge Colloton invited the Reporter to discuss this suggestion.

The Reporter noted that, in certain rare emergencies, it may be necessary for a litigant's counsel to make direct contact with a judge of the court of appeals for example, to make an emergency request for a stay of execution. But it is difficult to imagine circumstances that would justify a non-litigant in making a direct contact with an appellate judge about a pending case. Indeed, if a judge received such a communication, Canon 3(A)(4) of the Code of Conduct for

United States Judges would direct the judge to notify the parties about the communication and allow them an opportunity to respond. However, most circuits do not have local provisions specifying that such communications are inappropriate. The only pertinent provision (encompassing non-party communications) that the Reporter was able to find was Federal Circuit Rule 45(d), which provides that all correspondence and calls concerning cases “must be directed to the clerk.” Other circuits may use less formal means to make the same point; for example, the Seventh Circuit’s web page on “Contact Information” makes clear that all inquiries and contacts should be directed to the Clerk’s Office.

An initial question for the Committee, the Reporter suggested, is whether national rulemaking on this topic is warranted. Mr. Letter noted that care would be required in drafting rules concerning non-party communications to the court. In cases involving national security issues, the government as a non-party might engage in ex parte, in camera communications with a district judge. Thus, any rule limiting ex parte communications by non-parties might require a carve-out for situations implicating national security. An attorney member noted as well that if such a rule were adopted, it might be implicated by casual mentions of a case at a cocktail party.

An appellate judge member suggested that this issue is likely to arise only very rarely and that there is no need for a national rule on the subject. Two other appellate judge members expressed agreement with this suggestion. Judge Colloton asked Mr. Gans what would happen if the Judge received an unsolicited letter from a non-party and forwarded it to the Clerk’s Office. Mr. Gans stated that he would send the non-party a generic response; the Clerk’s Office, he noted, often receives communications forwarded to the Office by the Chief Judge. Mr. Gans expressed doubt about the need for rulemaking on this topic.

Judge Colloton wondered if the reason for the rulemaking suggestion is that a judge might wish to have a provision in the Rules that can be cited to a lay person. Professor Coquillet suggested, however, that if the goal is to educate non-lawyers, a statement on the court’s website is likely to be more effective than a provision in the Rules. Mr. Byron questioned whether it would be appropriate for the Appellate Rules to attempt to regulate the conduct of non-lawyers who are not parties to a proceeding in the court of appeals.

A motion was made that this item not be added to the Committee’s study agenda. The motion was seconded and passed by voice vote without opposition.

## **VI. Other information items**

Judge Colloton noted that the Civil / Appellate Subcommittee has been re-convened. Judge Scott Matheson will chair the Subcommittee. Judge Fay, Mr. Newsom, and Mr. Letter have agreed to serve as the Appellate Rules Committee’s representatives on the Subcommittee. The Subcommittee will focus its efforts on two items. One is the topic of “manufactured finality” i.e., the doctrine that addresses efforts by a would-be appellant to “manufacture”

appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. The second item concerns the operation of Civil Rule 62, which addresses supersedeas bonds.

Judge Colloton reported that the Criminal Rules Committee had formed a subcommittee to consider a proposal by Judge Jon Newman that Criminal Rule 52(c) be amended to permit appellate review of unraised sentencing error that did not rise to the level of plain error so long as the error was prejudicial and redressing it would not require a new trial. The Appellate Rules Committee's Reporter had participated in the Subcommittee's conference calls on this topic. After speaking with Judge Newman by telephone to discuss his proposal, the Subcommittee members had decided not to recommend proceeding with the proposed amendment.

Judge Colloton observed that the Civil Rules Committee's Rule 23 Subcommittee is planning to convene mini-conferences to obtain the views of knowledgeable participants concerning various aspects of class action practice. Judge Robert Dow, the Chair of the Subcommittee, has agreed that the topics of inquiry will include appeals by class action objectors. Mr. Rose noted that the Subcommittee might hold such an event in connection with the Civil Rules Committee's April 2015 meeting in Washington, D.C.

#### **VII. Date of spring 2015 meeting**

Judge Colloton reminded the Committee members that the Committee's spring meeting would be held on April 23 and 24, 2015.

#### **VIII. Adjournment**

The Committee adjourned at 1:45 p.m. on October 20, 2014.

Respectfully submitted,

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Catherine T. Struve  
Reporter

**Minutes of Spring 2014 Meeting of  
Advisory Committee on Appellate Rules  
April 28 and 29, 2014  
Newark, New Jersey**

**I. Introductions**

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 28, 2014, at 10:00 a.m. at the Seton Hall University School of Law. The following Advisory Committee members were present: Judge Michael A. Chagares, Justice Allison H. Eid,<sup>1</sup> Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Mr. Gregory G. Katsas, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice (“DOJ”), was present representing the Solicitor General. Judge Jeffrey S. Sutton, Chair of the Standing Committee; Mr. Jonathan C. Rose, the Standing Committee’s Secretary and Rules Committee officer; Mr. Gregory G. Garre, liaison from the Standing Committee; Ms. Julie Wilson, Attorney Advisor in the Administrative Office (“AO”); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center (“FJC”) were also present. Judge Adalberto Jordan, liaison from the Advisory Committee on Bankruptcy Rules, and Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated in portions of the meeting by telephone.

Judge Colloton began by expressing thanks to Patrick E. Hobbs, the Dean of Seton Hall University School of Law, for hosting the Committee’s meeting. Dean Hobbs in turn thanked Judge Chagares for suggesting that the meeting be held at Seton Hall, and noted that the Law School would welcome future visits from any of the Rules Committees.

Judge Colloton welcomed the Committee’s newest member. Mr. Katsas, a partner at Jones Day, has a distinguished record of appellate arguments in every circuit as well as in the United States Supreme Court. Mr. Letter observed that during Mr. Katsas’s service in senior positions in the DOJ, Mr. Katsas gained high regard among the career civil servants there.

**II. Approval of Minutes of April 2013 Meeting**

A motion was made and seconded to approve the minutes of the Committee’s April 2013 meeting. The motion passed by voice vote without dissent.

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<sup>1</sup> Justice Eid attended the meeting on April 28 but not on April 29.

### **III. Report on January 2014 Meeting of Standing Committee**

Judge Colloton noted that he had given a report on the activities of the Appellate Rules Committee at the Standing Committee's January 2014 meeting. Due to the cancellation of the Appellate Rules Committee's fall 2013 meeting, he observed, there were no Appellate Rules action items for the January 2014 Standing Committee meeting.

The Reporter reminded the Committee that amendments to Appellate Rules 13, 14, 24, 28, and 28.1, and to Form 4, had taken effect on December 1, 2013. The proposed amendments to Appellate Rule 6, concerning appeals in bankruptcy cases, have been adopted by the Supreme Court and submitted to Congress; absent any contrary action by Congress, those amendments will take effect on December 1, 2014.

Judge Sutton observed that some lawyers are slow to adjust to the requirements of amended Rule 28(a) concerning the "statement of the case." Mr. Gans reported that his office has been educating lawyers about the new rule.

### **IV. Action Items – For Publication**

Judge Colloton recalled that the Committee's fall 2013 meeting had been cancelled due to the lapse in appropriations. During the year that passed between the spring 2013 and spring 2014 meetings, he asked members of the Committee to work with him and the Reporter on proposals to address a number of items on the Committee's agenda.

#### **A. Item No. 07-AP-I (FRAP 4(c) / inmate filing)**

Judge Colloton reminded the Committee that Item No. 07-AP-I arises from a suggestion by Judge Diane Wood that courts have experienced difficulty in interpreting Rule 4(c)(1)'s inmate-filing provision. Some courts treat the question of prepayment of postage differently depending on whether the inmate uses an institution's legal mail system (in which event these courts do not require prepayment of postage) or an institution's general mail system (in which event prepayment of postage is a precondition for applying Rule 4(c)(1)'s inmate-filing provision). Questions also have arisen concerning the declaration mentioned by Rule 4(c)(1); is such a declaration necessary in cases where other evidence shows the timely deposit of the notice of appeal in the institution's mail system? And, when a declaration is required, must it be included with the notice of appeal or can the inmate supply the declaration later?

The working group that addressed these questions included Justice Eid, Professor Barrett, and Mr. Letter. The group took as a starting point Supreme Court Rule 29.2, which provides in part: "If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid."

The group set out to answer three policy questions: First, should Rule 4(c)(1) require prepayment of postage as a condition for the application of the provision's inmate-filing rule? The working group suggested that the rule should require prepayment of postage. Second, should the availability of Rule 4(c)(1)'s inmate-filing rule depend on the inmate's use of an institution's legal mail system? The working group suggested that the provision should not require the inmate to use a legal mail system. The input received from the federal Bureau of Prisons (BOP) indicates that the distinction between legal mail systems and general mail systems often serves other goals, such as assuring the privacy of legal mail. There does not appear to be any institutional interest that would be served by requiring the inmate to use the legal (as opposed to general) mail system. Third, how should Rule 4(c)(1) treat the role of the declaration? The proposal set forth in the agenda materials would provide that a filing is timely if it is timely deposited in the institution's mail system with postage prepaid and is accompanied by the declaration. If the inmate does not include the declaration with the initial filing and other evidence accompanying the filing does not show its timeliness, then the court would have discretion whether or not to permit the inmate to establish timeliness by belatedly filing the declaration.

Judge Colloton invited the Reporter to introduce, for comment by the Committee members, the proposed text of the amendment and the proposed Committee Note. The Reporter pointed out that two restyled options for the text of Rule 4(c) were set out in her April 25 memorandum to the Committee and that the proposed Committee Note was set out in her April 22 memorandum; although the April 25 memo did not include a draft of Rule 25(a)(2)(C), the Rule 25(a)(2)(C) proposal could be revised to track the approach selected for Rule 4(c)(1).

With respect to the second restyled draft of Rule 4(c)(1) in the April 25 memo, a member suggested reordering subparts (c)(1)(A)(i) and (ii) so that the Rule would refer to the contemporaneously-provided declaration before going on to discuss other evidence of timeliness or a later-filed declaration. This ordering is preferable, she explained, because it highlights the preferred course of action—namely, including the declaration along with the filing. An appellate judge member expressed agreement with this reordering. Another appellate judge member also agreed with this proposed reordering, and stated that, more generally, she supports the proposed amendments to Rule 4(c). The current Rule's reference to a "system designed for legal mail" is undesirable, she suggested, because the Rule does not make clear what qualifies as such a system. Mr. Letter agreed that the reference to a "system designed for legal mail" should be deleted. Informal consultations with Chris Vasil, the Chief Deputy Clerk of the U.S. Supreme Court, and with Kenneth Hyle, the Deputy General Counsel of the BOP, disclosed no reason for retaining the legal-mail-system provision. And, Mr. Letter suggested, it seems preferable for the Appellate Rules' inmate-filing provisions to track the U.S. Supreme Court's inmate-filing provision as closely as possible.

Judge Colloton observed that Supreme Court Rule 29.2, unlike current Appellate Rule 4(c)(1), appears to require that the declaration "accompan[y]" the document that is being filed. In practice, though, if an inmate files a document without the declaration or notarized statement,

the Supreme Court will return the document to the inmate but then will accept it as timely filed if the inmate refiles the document with a declaration stating that the original mailing was deposited in the prison mailbox before the last date for filing with postage prepaid. The proposed amendments to Appellate Rules 4(c)(1) and 25(a)(2)(C) take a similar approach: They provide that the document is timely if “accompanied by” a satisfactory declaration, but also give the courts of appeals discretion to permit the later filing of a declaration.

An attorney member expressed agreement with the substantive choices reflected in the proposed amendments. He raised a question about the second restyled version of Rule 4(c)(1); as set out in the April 25 memo, the restyled rule would offer two alternatives—subdivision (A) and subdivision (B)—for establishing timeliness under the inmate-filing provision. Subdivision (B) includes the term “such a declaration or notarized statement.” To know which declaration or statement this refers to, the reader must turn to subdivision (A)—but it does not make sense to rely on a referent located in subdivision (A), because (A) and (B) are alternatives. The Reporter suggested that this difficulty could be addressed by revising subdivision (B) to refer to subdivision 4(c)(1)(A)(i).

An appellate judge member noted that the text of the proposed rule addresses three possible ways to show timeliness: by means of a declaration included with the filing; by means of other evidence that accompanies the filing; or by means of a later-filed declaration. He asked whether this rule text would accommodate an instance where evidence other than a declaration is proffered after the fact. It was suggested that, in such an instance, the inmate could append copies of the relevant evidence to a declaration. Turning to the proposed Form 7—which shows the suggested contents of the declaration—the judge member noted that the Form states that “first-class postage is being prepaid either by me or by the institution on my behalf.” The member asked whether “is being prepaid” should be placed in brackets and paired with another bracketed alternative, “was prepaid.” The latter, he suggested, would be the appropriate choice if the inmate were to file the declaration belatedly. The Reporter responded that “is being prepaid” was designed to reflect the overall preference that the inmate include the declaration along with the initial filing.

The appellate judge member also asked whether the Form, when referring to payment of postage by the institution, should say something like “based on my understanding, postage is being paid by the institution on my behalf.” Such a formulation, he suggested, might be preferable because an inmate might not know with certainty whether the institution will pay the postage. Other participants, though, suggested that an inmate would be justified in saying “is being prepaid” if he or she has a reasonable expectation (grounded in the institution’s policy) that the institution will pay the postage.

Another appellate judge member noted that a few institutions have begun to allow inmates to file court papers electronically. Would an inmate in such an institution, he asked, have to comply with Rule 4(c)(1)’s requirements? Judge Colloton responded that Rule 4(c)(1) provides the inmate with an option for showing timely filing of the notice of appeal, but recourse

to Rule 4(c)(1) is not mandatory.

An appellate judge asked whether proposed subdivision (c)(1)(B) concerning later-filed declarations would tempt inmates to omit the declaration from their initial filing. In response, the Reporter undertook to propose revised language for subdivision (c)(1)(B) that would highlight the fact that the court of appeals would have discretion to reject (as well as accept) later-filed declarations.

An attorney participant asked whether there are real problems (with the inmate-filing provisions) that necessitate rule amendments. Judge Colloton responded that the amendments will be worthwhile if they clarify the inmate-filing rule's operation. Mr. Gans stated that the proposed amendments will greatly improve the rule. He stated that in 2013 he had surveyed his fellow circuit clerks. The clerks reported that they have developed ways of handling inmate filings under the current rule. Typically, they look at the filing and if there is evidence of timeliness they accept it but if a filing seems obviously untimely (as, for instance, when the date next to the inmate's signature post-dates the due date), the clerk will flag the timeliness issue. In the Eighth Circuit, Mr. Gans observed, from 35 to 40 percent of the appeals involve pro se litigants.

After the first day of the meeting concluded, the Chair and Reporter prepared a revised draft of the proposed amendments. The revisions reordered the two subparts of Rule 4(c)(1)(A), and revised Rule 4(c)(1)(B) to underscore the court of appeals' discretion concerning whether to permit a later-filed declaration. On the second day of the meeting, copies of the revised drafts were circulated to Committee members. After the Reporter summarized the changes to the drafts, a member moved to approve for publication the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), the proposed amendments to Forms 1 and 5, and the proposed new Form 7, as shown in the revised drafts circulated to the Committee that morning. The motion was seconded and passed by voice vote without dissent.

**B. Item No. 12-AP-E (length limits, including matters now governed by page limits)**

Judge Colloton noted that Item No. 12-AP-E grew out of Professor Katyal's suggestion that the length limit for petitions for rehearing en banc be stated using type-volume limits rather than word limits. The project expanded to encompass other questions relating to length limits. One question is whether the Rules should be amended to ensure uniform treatment (across different types of documents) concerning items to be excluded when computing length. Another question relates to the choice made in connection with the 1998 amendments that produced current Rule 32 to replace the old 50-page brief length limit with a new 14,000-word type-volume limit. While deliberating over the formulae to use when converting existing page limits into type-volume limits, the Committee became aware that the premise of the 1998 amendments namely, that one page was equivalent to 280 words appears to have been mistaken. Based on earlier research by Mr. Letter on behalf of the D.C. Circuit's rules committee, a better estimate

appears to be 250 words per page, which would have translated into a brief length limit of 12,500 words.

The proposed amendments, as restyled by Professor Kimble, were set out in the Reporter's April 22 memorandum to the Committee. Judge Colloton explained that, for briefs prepared using a computer, the proposals would replace existing page limits in Rules 5, 21, 27, 35, and 40 with type-volume limits. For briefs prepared without the use of a computer, the proposals would retain the existing page limits set forth in Rules 5, 21, 27, 35, and 40. A new Rule 32(f) would set forth one globally-applicable list of items to be excluded when computing length. The new type-volume limits in Rules 5, 21, 27, 35, and 40 would reflect an assumption that one page is equivalent to 250 words or to 26 lines of text. The amendments would also shorten the type-volume briefing length limits currently set out in Rules 28.1(e)(2) and 32(a)(7)(B), to reflect the more realistic estimate of 250 words per page. The Reporter mentioned that the draft tentatively included, in Rules 5, 21, 27, 35, and 40, cross-references to new Rule 32(f)'s list of exclusions. Professor Kimble, however, has explained that these cross-references are unnecessary and undesirable.

Judge Colloton invited Professor Katyal to discuss the proposals. Professor Katyal thanked the Committee for its work on this topic. The shift from page limits to type-volume limits, he said, will helpfully remove an opportunity for gamesmanship by lawyers who sought to manipulate page limits. The distinction between briefs produced by computer and briefs produced without a computer is analogous, Professor Katyal suggested, to the distinction made in the U.S. Supreme Court's rules between documents set out on 8 ½ by 11 inch paper and documents printed in booklet format. Professor Katyal suggested deleting, from Rule 32(f)'s list of exclusions, the amicus-brief authorship-and-funding disclosure; omitting that item from the list of exclusions would ensure that the Appellate Rules continue to parallel the Supreme Court's Rules in this regard. Professor Katyal noted that proposed Rule 32(f) carries forward the exclusion (currently set out in Rule 32(a)(7)(B)(iii)) of any "addendum containing statutes, rules, or regulations." In contrast to Supreme Court Rule 33.1(d) which excludes "verbatim quotations required under [Supreme Court] Rule 14.1(f) and Rule 24.1(f)" even when they are set out in the text of the brief rather than in an appendix Rule 32 does not exclude statutory quotations when they are in the body of the brief.

Professor Katyal predicted that, in contrast to the salutary shift to type-volume limits, the proposed reduction in briefing length limits would be much more controversial. In complex cases, lawyers need the full 14,000 words, and a reduction to 12,500 would force lawyers to spend time trying to reduce the length yet further or seeking permission to file an over-length brief. Recently, Professor Katyal reported, he had been involved in briefing some appeals for which it was very difficult to stay within the 14,000-word limit. Another attorney participant, however, suggested that shortening the briefing length limits would be acceptable. Briefs, he stated, seem to have become longer in recent years. This participant suggested adding the cover page to Rule 32(f)'s list of items to be excluded when computing length. He also suggested revising the Committee Note's statement that the page limits in Rules 5, 21, 27, 35, and 40 had

been “subject to manipulation by lawyers.”

An appellate judge member stated that she supported rationalizing the treatment of exclusions. Another appellate judge member stated that he supported shortening the length limits; he reported that briefs seem to be about 60 pages long now, and 50 pages would be preferable. Mr. Letter noted his belief that the choice of 280 words per page as the conversion formula in connection with the 1998 amendments had indeed been a mistake. On the other hand, he said, some cases really are complex. And a number of Assistant United States Attorneys have reported to him that some circuits are unwilling to grant permission to file an over-length brief; accordingly, the prospect of a reduction (of the briefing length limit) to 12,500 words worries those AUSAs. And, Mr. Letter suggested, traditionally the Rules Committees do not amend a rule unless there is a very good reason to do so. The more stringent the length limit, the more likely that a litigant might fail to brief an issue that the court believes should have been addressed.

As for changing the page limits in Rules 5, 21, 27, 35, and 40 to type-volume limits, Mr. Letter noted that he had not heard many complaints about the page limits, and he wondered whether the type-volume limits would be cumbersome for clerks’ offices to administer. Mr. Gans acknowledged that it is easier to check for compliance with a page limit than for compliance with a word limit, but he stated that the type-volume limits are administrable so long as the document includes a certificate of compliance with the limit.

Reflecting on his analysis of a sample of briefs filed in 2008 (i.e., under the current type-volume limits), Mr. Gans noted that he had been surprised to see how many of those briefs would actually have complied with a 12,500-word limit. An appellate judge member reported a different experience; in the Eleventh Circuit, he said, lawyers tend to use all the space that is permitted to them. This judge member noted that the choice of length limit presents a tradeoff: One prefers shorter briefs when possible, but in complex cases one wants the briefs to help work out all the issues. An attorney member stated that he favored reducing the length limits of briefs.

An appellate judge member asked whether a circuit could adopt a local rule setting a more generous length limit than the Appellate Rules. The Reporter stated that Rule 32(e) authorizes local rules that would set longer limits than those in Rule 32(a). Although no similar provision exists in Rule 28.1, the Reporter suggested that a circuit that wished to accept longer briefs could, in practice, make clear that it was willing to do so. The judge member, noting that the proposed amendments distinguish between “handwritten or typewritten” papers and papers “produced using a computer,” asked which of those categories would encompass a typewriter with memory. The Reporter observed that there is a California state court rule that distinguishes between briefs “produced on a computer” and briefs “produced on a typewriter”; it might be useful, she suggested, to investigate whether the relevant California courts have encountered issues with respect to the use of typewriters with memory.

An attorney member stated that he opposed the reduction in briefing length limits. If attorneys use the full permitted length, it is because the case requires it. An appellate judge member responded that things seemed to work well, prior to the 1998 amendments, under the shorter length limit. Another appellate judge member observed that the Eleventh Circuit is willing to permit over-length briefs in complex cases. An attorney member responded that he is generally hesitant to request such permission; another attorney member noted that he shares this reluctance. Mr. Letter noted that the circuits vary in their willingness to permit over-length briefs. An attorney member suggested that, since 1998, circumstances may have changed; perhaps the law is more complex, and perhaps lawyers are more prone to prolixity.

An appellate judge observed that the discussion evidenced a clear divide between the perspectives of judges and the perspectives of attorneys. His court, he observed, often asks the lawyers for further briefing on particular issues. He wondered whether the bar would be shocked by a proposal to reduce length limits to 12,500 words, and he asked whether it would be useful to publish alternative proposals for comment.

An appellate judge member suggested removing the cross-references to new Rule 32(f) in the rules that set specific length limits. The Reporter asked whether the Committee wished to include among the items to be excluded when computing length the Rule 35(b)(1) statement concerning the reasons for en banc hearing or rehearing. An attorney participant suggested that the statement should be excluded from the length limit because such statements tend to be short. An appellate judge member disagreed, explaining that this statement is the heart of the petition for en banc rehearing. Nothing, this judge member said, requires the statement to be formulaic; and excluding the statement from the length limit might tempt lawyers to expand the statement. Mr. Gans agreed with the appellate judge member's prediction. The Reporter, noting that the local-rule equivalent of this statement is excluded from the length limit in the Eleventh Circuit, asked whether lawyers in that circuit abuse that exclusion by expanding the statement. An appellate judge member said that they do not.

A motion was made to adopt the proposed amendments as set out in the Reporter's April 22 memorandum, but with revisions that would (1) delete the cross-references to Rule 32(f); (2) include the Rule 35(b)(1) statement when computing length; (3) add the cover page to Rule 32(f)'s list of excluded items; (4) omit the authorship-and-funding disclosure statement from Rule 32(f)'s list; (5) revise the reference to "rules" in Rule 32(f)'s final bullet point so as to encompass exclusions set out in local circuit rules; and (6) revise the Committee Notes' discussion of the disadvantages of page limits. The motion was seconded, and it passed by a vote of six to four. It was observed that, when the proposed amendments are published for comment, the transmittal memo could point out the possibility that a circuit has authority to expand the length limit if it wishes to do so. On the evening of April 28, the Chair and Reporter compiled a revised draft of the proposed amendments. The Committee reviewed the revised draft when it met the following morning.

### **C. Item No. 13-AP-B (amicus briefs on rehearing)**

Judge Colloton introduced Item No. 13-AP-B, which concerns amicus filings in connection with rehearing petitions. Mr. Roy T. Englert, Jr. has pointed out that the Appellate Rules currently do not provide guidance concerning the length or timing of such filings. Judge Colloton directed the Committee's attention to the proposed draft amendments set out in the Reporter's April 22 memorandum, and noted that the bracketed options in the draft highlighted choices for the Committee if it decided to proceed with the proposals.

The first and most basic choice, Judge Colloton noted, is whether there should be a national rule on this topic. If so, then should the rule provide that all amici need leave of court to file briefs at the rehearing stage, or should the rule take the same approach currently taken (for the merits-briefing stage) by Rule 29(a), which permits certain governmental amici to file without party consent or court leave? Judge Colloton pointed out that the proposed draft would re-number the existing portions of Rule 29 as Rule 29(a), and would add a new Rule 29(b) to address the rehearing stage. Proposed Rule 29(b) would merely set default rules, and would allow circuits to opt out of those default rules by local rule or order in a case.

An appellate judge member reported that the Eleventh Circuit's local rule on this topic works well. An attorney member underscored how important it is for practitioners to know what the rules are. Judge Colloton solicited the Committee's views on proposed Rule 29(b)(2), which would state when court leave is required for amicus filings at the rehearing stage. Mr. Letter stated that the rule should allow the United States to file amicus briefs without court leave or party consent. Such filings, he noted, would occur rarely, and only with the approval of the Solicitor General. Dispensing with the requirement of court leave will save the court's time (by avoiding the need for motions for leave) and would assist the government in situations where the need to file an amicus brief arises suddenly. An attorney member asked whether States would be treated the same as the United States in this respect. Judge Colloton responded that they would. An appellate judge stated that he favored extending to the rehearing stage the Rule 29(a) approach. Another appellate judge member agreed. A third appellate judge member concurred, noting that requiring court leave would not make a difference in practice because the court will always grant the government leave to make an amicus filing.

Judge Colloton next asked the Committee what the default length limit should be for amicus filings at the rehearing stage. An attorney member suggested that half of the party's length limit would be appropriate, and another attorney participant agreed. Half of 15 pages would be 7 ½ pages. Rounding up to 8 pages and multiplying by 250 words per page would yield a limit of 2,000 words. The Reporter asked whether it would be worthwhile to distinguish, in this provision, between typewritten briefs and briefs produced using a computer. The consensus was that it would not be worthwhile: Would-be amici will prepare their briefs using computers, and the access-to-court concerns that weigh in favor of setting page limits (in addition to type-volume limits) for parties' filings would not apply with the same force to amicus filings.

Judge Colloton asked Committee members for their views on the timing of amicus filings in support of a rehearing petition. A deadline of three days after the filing of the rehearing petition, he suggested, might be best because it provides the amicus with a time lag but the time lag is not so long that it will interfere with the processing of the petition. An appellate judge member agreed that a relatively short deadline is desirable; the Third Circuit, this judge observed, processes rehearing petitions expeditiously. Another appellate judge member noted that the practice in the Federal Circuit is somewhat different. A petition for rehearing in the Federal Circuit goes first to the panel that decided the appeal, and only after that to the en banc court. Thus, the Federal Circuit takes somewhat longer to process rehearing petitions. This appellate judge member also noted that amicus filings can serve a particularly important function when the party's rehearing petition is poorly done.

An appellate judge member asked whether amici and parties tend to coordinate with each other at this stage of the litigation. An attorney member responded that coordination is customary. This member observed that, in setting the timing for amicus briefs in support of the petition, it is important not to allow so much time to the amicus that the party opposing the petition will be rushed when preparing the response. Another attorney member agreed that, in a typical instance, the party opposing rehearing is more rushed than the party seeking rehearing. Judge Colloton asked whether, in that case, it would be preferable to require the amicus to file simultaneously with the party seeking rehearing. An attorney member said that simultaneous filing could result in amici needlessly duplicating arguments made in the rehearing petition. Another attorney member suggested that the three-day time lag made the most sense. Mr. Letter asked whether the Committee Note should urge would-be amici to coordinate, when possible, with the party seeking rehearing so as to be able to file the amicus brief simultaneously with the rehearing petition.

An attorney member noted that Supreme Court Rule 37.2 addresses the timing for amici supporting either side, and he asked whether proposed Rule 29(b) should likewise address the timing of an amicus filing in opposition to rehearing. Mr. Letter suggested that such filings should be due on the same date as any response.

By consensus, the Committee resolved to consider a revised draft of the proposed Rule 29 amendments and to vote on the proposal the next day. On the evening of April 28, the Chair and Reporter prepared a revised draft that reflected the Committee's choices concerning the default rules in proposed Rule 29(b). Those choices were to (1) track current Rule 29's approach to the question of when amicus filings are permitted; (2) set a type-volume limit of 2,000 words in proposed Rule 29(b)(4); and (3) revise the timing provision in proposed Rule 29(b)(5).

The Committee reviewed the revised proposal on the morning of April 29. After the Committee made a few style changes to proposed Rule 29(b)(5), a motion was made to approve the proposed amendments (as revised) for publication. The motion was seconded and passed by voice vote without dissent.

**D. Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, and 11-AP-D (possible amendments relating to electronic filing)**

Judge Colloton invited Judge Chagares who chairs the Standing Committee's CM/ECF Subcommittee to introduce the topic of potential changes relating to electronic filing. Judge Chagares reported that the Subcommittee had asked the Reporters to the Advisory Committees to identify rules that might warrant amendment in the light of the shift to electronic filing. The Subcommittee also is moving forward with proposals to amend the "three-day rule" in each set of rules. The three-day rule in Appellate Rule 26(c) adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service. The rules, Judge Chagares explained, should be amended to reflect the fact that the extra three days are no longer needed when service is accomplished electronically.

The Reporter asked the Committee members for their thoughts on the two possible alternatives shown in the agenda materials for amending Rule 26(c) to exclude electronic service from the three-day rule. The first approach would retain the structure of existing Rule 26(c). The current Rule makes the three extra days available "unless the paper is delivered on the date of service stated in the proof of service," and then explains that "a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service." To exclude electronic service from the compass of the three-day rule, one could simply delete "not," so that the Rule would specify that "a paper that is served electronically is treated as delivered on the date of service stated in the proof of service." The second approach would restructure the Rule to track the three-day rules in the other sets of Rules. Under the second approach, the Rule would state that "[w]hen a party may or must act within a specified time after being served and service is made under Rule 25(c)(1)(B) (mail) or (C) (third-party commercial carrier), 3 days are added after the period would otherwise expire under Rule 26(a)." The only downside to this approach, the Reporter suggested, would be the possibility that a party who is served might not always be able to distinguish readily between personal service (which would not trigger the three-day rule) and service by third-party commercial carrier (which would).

An attorney member suggested adopting the second approach; it would be very unlikely, he said, for confusion between personal service and service by a commercial carrier to cause a problem. An appellate judge member, however, expressed support for the first approach. Another attorney member stated that he favored the first approach because it is explicit. An appellate judge observed that the Committee might in future decide to make further changes to Rule 26(c); in the meantime, he suggested, the first approach might be appropriately incremental. A motion was made to approve the proposed amendment to Rule 26(c) as shown in the first approach (i.e., deleting the word "not"). The motion was seconded and passed by voice vote without opposition.

Mr. Letter noted that the DOJ does not oppose the deletion of electronic service from the types of service that trigger the three-day rule. He observed, however, that a problem does exist

when attorneys take unfair advantage of their opponents by serving papers electronically the last thing on a Friday night. An attorney member concurred, and expressed a broader concern that midnight deadlines for electronic filing are very unhealthy for the family life of lawyers and their staffs.

The Reporter observed that the CM/ECF Subcommittee may also consider, in future, whether to recommend eliminating the three-day rule entirely. Such a change, she suggested, might raise concerns with respect to cases involving pro se litigants, who typically serve papers by mail. Mr. Letter noted that the DOJ already experiences a significant time lag in processing papers served on it by mail, due to the need to screen the mail for security reasons.

Judge Chagares reported that the CM/ECF Subcommittee had asked Professor Capra to prepare a template for a rule that would provide two definitions designed to accommodate electronic methods. First, it would define references to writings so as to encompass electronically stored information. Second, it would define references to filing, sending, and similar actions so as to encompass instances when those actions are accomplished electronically.

The Subcommittee also has been considering whether a rule amendment would be warranted on the topic of electronically filed documents that include signatures by someone other than the electronic filer. The question arises in the bankruptcy context with respect to attorney filings containing debtors' signatures, but the issue is not limited to that context. The Bankruptcy Rules Committee, at its spring meeting, considered adopting a rule on electronic signatures but decided not to proceed with the proposal. Mr. Letter noted that problems arise with respect to fraudulent signatures on bankruptcy petitions. The FBI, he reported, requires an original signature for purposes of handwriting analysis.

Judge Chagares noted, as well, Mr. Rabiej's recent proposal that the requirement of proof of service be eliminated for instances when service is accomplished through CM/ECF. The Civil Rules Committee is considering a similar proposal.

Finally, Judge Chagares mentioned Item No. 13-AP-D, which concerns suggestions submitted by Judge S. Martin Teel, Jr., concerning Rules 6(b)(2)(B)(iii) and 3(d)(1). Judge Teel, a United States Bankruptcy Judge, suggests deleting Rule 6(b)(2)(B)(iii)'s reference to "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and inserting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel explains that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Judge Teel also questions why Rule 3(d) requires the lower-court clerk to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically. Judge Chagares suggested that there does not appear to be any current problem arising from these features of Rules 3 and 6. By consensus, the Committee decided to remove Item No. 13-AP-D from its study agenda.

**E. Item No. 07-AP-E (FRAP 4(a)(4) and “timely”)**

Judge Colloton introduced Item No. 07-AP-E, which concerns whether to amend Rule 4(a)(4) to address a circuit split that has developed as to whether a motion filed within a purported extension of a non-extendable deadline under Civil Rules 50, 52, or 59 counts as “timely” under Rule 4(a)(4). A majority of the circuits to address this issue have concluded that such a motion does not count as timely; but the Sixth Circuit has held to the contrary.

Judge Colloton reviewed possible options for amending Rule 4(a)(4) to adopt either the majority or minority approach. To adopt the majority approach, one might simply revise the current rule to refer, not to timely motions, but to motions filed “within the time allowed by” the Federal Rules of Civil Procedure; this could be called the “concise” approach. Or one might retain the word “timely” and add a new subdivision to define what “timely” means (and does not mean); one could call this the “definitional” approach. Judge Colloton solicited the Committee’s views on whether it would be worthwhile to amend Rule 4(a)(4) to clarify this question and, if so, what position the Rule should be amended to take.

An appellate judge member stated that, among the options for implementing the majority view, he preferred the concise approach. The Reporter asked which approach would be most informative for lawyers with less experience in appellate practice. Another appellate judge member observed that it may be natural (though erroneous) for district judges to assume that they can extend the deadlines for motions under Civil Rules 50, 52, and 59. An attorney member agreed, and noted that in such instances it would also be natural for lawyers to assume that they could rely on such an extension. The appellate judge member suggested that a definitional approach would not be out of place in Rule 4(a); that rule already includes subdivision (a)(7), which defines entry of judgment.

It was suggested that the proposed Committee Note set forth on page 288 of the agenda book was too long, and that some of the Note could be replaced by a cite to the relevant Sixth Circuit decision. An appellate judge member suggested that the Committee amend the Rule to adopt the majority approach. The sense of the Committee proving to be in agreement with this suggestion, the Committee next turned to the choice between the “concise” and “definitional” approaches. A straw poll disclosed a vote of 7 to 2 in favor of the “concise” approach. One of the attorney members who voted in favor of the concise approach stated, however, that he wished to ensure that the Committee Note provided some instruction to lawyers about the problem of non-extendable deadlines.

On the evening of April 28, the Chair and Reporter revised the Committee Note to reflect the Committee’s discussion. On the morning of April 29, the Committee reviewed the revised Committee Note. Professor Coquillet confirmed that, in this context, it was permissible for the Committee Note to cite a case (namely, the Sixth Circuit decision that the amendment is designed to reject). The Committee made one further change, to the Committee Note’s characterization of the circuit split. A motion was made to approve the proposed amendment

namely, the “concise” approach adopting the majority view of “timely” and the revised Committee Note. The motion was seconded and passed by voice vote without opposition.

## **V. Discussion Items**

### **A. Item Nos. 08-AP-J, 08-AP-R, and 09-AP-A (disclosure requirements)**

Judge Colloton introduced these agenda items, which relate to disclosure requirements.

Item No. 08-AP-J concerns a 2008 suggestion by the Judicial Conference Committee on Codes of Conduct that the Rules Committees consider possible rule amendments having to do with conflict screening. Two of the three aspects of the Codes of Conduct Committee’s inquiry focused on criminal and bankruptcy practice. Neither the Criminal Rules Committee nor the Bankruptcy Rules Committee proceeded with proposals in response to the Codes of Conduct Committee’s suggestion, and those aspects of Item No. 08-AP-J thus present no issues for the Appellate Rules Committee. However, the Committee’s inquiry also highlighted possible overlaps among Appellate Rule 26.1, local circuit provisions, and prompts in the CM/ECF system. That topic, Judge Colloton suggested, may be worth pursuing. Some circuits require disclosures beyond those mandated by the Appellate Rules. The Appellate Rules Committee, working with the Codes of Conduct Committee, may wish to consider whether any additional disclosures should be required by the Appellate Rules. Judges would like to be apprised of information that is relevant to a possible need to recuse from a case.

An attorney member agreed that this question is worth pursuing. Another attorney member suggested that, conversely, Appellate Rule 26.1’s existing disclosure requirement may be overbroad. Rule 26.1 requires nongovernmental corporate parties to identify any parent corporation and any publicly held corporation that owns 10 percent or more of the party’s stock. The attorney member asked why this requirement should encompass instances when an entity holds the stock in a beneficial capacity as trustee. Stock ownership frequently changes, the member observed, and the Rule could be read to require updates each time such changes put ownership above the 10 percent threshold.

The Reporter mentioned that Item Nos. 08-AP-R and 09-AP-A arise from comments submitted on a proposed amendment to Appellate Rule 29(c). The ABA Council of Appellate Lawyers suggested revisions to the portion of Rule 29(c) that requires corporate would-be amici to submit “a disclosure statement like that required of parties by Rule 26.1.” The Council’s suggestion appeared to proceed from the premise that the current language of Rule 29(c) could be read to permit “some degree of difference” between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But it is difficult to imagine what sort of difference would arise. A corporate amicus should understand that its obligation is to (a) identify any parent corporation and any publicly held corporation that owns 10 % or more of its stock or (b) state there is no such corporation. The Council does not suggest any variations that would be likely to arise under the Rules’ current language. The Reporter suggested that the

Committee consider removing Item 09-AP-A from its agenda.

Item No. 08-AP-R arises from suggestions made by Chief Judge Easterbrook. He points out that the term “corporation” in Rules 26.1 and 29(c) encompasses entities from which a disclosure is unnecessary because they do not have stock – such as the Catholic Bishop of Chicago. But while the Rule requires such entities to disclose that they have no stock and no parents, that is not necessarily a downside; by requiring that explicit statement, the Rule makes it easy to tell whether a corporate filer has complied with the disclosure requirement. The Reporter suggested that the Committee not proceed further with this aspect of Chief Judge Easterbrook’s comments. Chief Judge Easterbrook’s other critique is that the corporate-disclosure requirements in Rules 26.1 and 29(c) fail to elicit all of the information that would be relevant to a judge in considering whether to recuse. This aspect of Item No. 08-AP-R, the Reporter suggested, provides an apt vehicle for pursuing the sorts of inquiries Judge Colloton noted.

By consensus, the Committee removed Item Nos. 08-AP-J and 09-AP-A from, but retained Item No. 08-AP-R on, its agenda.

**B. Item Nos. 09-AP-D & 11-AP-F (response to *Mohawk Industries*)**

Judge Colloton reminded the Committee that Item Nos. 09-AP-D and 11-AP-F arise from the Supreme Court’s decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009). In *Mohawk*, the Court held that a district court’s order to disclose information that the producing party contends is protected by attorney-client privilege does not qualify for an immediate appeal under the collateral order doctrine. The *Mohawk* Court stated that choices concerning the appealability of interlocutory orders ideally should be made through the rulemaking process rather than by judicial decision – a point that echoed the Court’s earlier, similar statement in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995).

The Committee asked Andrea Kuperman to perform some initial research on the doctrinal landscape of the appealability of prejudgment orders. Judge Colloton observed that the agenda materials included a memorandum by Ms. Kuperman that surveys types of interlocutory decisions that are clearly appealable (or not appealable) under current Supreme Court caselaw, as well as types of interlocutory decisions the treatment of which has divided the lower courts. Judge Colloton expressed appreciation for Ms. Kuperman’s hard work and helpful memorandum. The initial question for the Committee, he suggested, is whether a general overhaul of the treatment of interlocutory orders would be a manageable project for the Committee, or whether it would be wiser for the Committee to consider the appealability of particular types of interlocutory orders as and when a suggestion brings that specific type of order to the Committee’s attention.

Judge Sutton recalled that the Committee has, in the past, noted complexities and difficulties in the treatment of decisions concerning qualified immunity. That appealability question, he noted, is presented in a case before the Supreme Court this Term (*Plumhoff v.*

*Rickard* (No. 12-1117)). An attorney member stated that it would be wildly unrealistic to attempt a global project to overhaul the treatment of appealability of interlocutory orders. Even a project focused solely on addressing the appealability of qualified-immunity rulings, he suggested, would take several years to complete.

An appellate judge member proposed removing this item from the Committee's agenda. Mr. Katsas, though, suggested that it would be useful for the Committee to discuss further the appealability of attorney-client privilege rulings. Mr. Letter agreed, noting that the Court in *Mohawk* had highlighted the possibility of rulemaking on the privilege-appeals topic. In response to an invitation by Judge Colloton, Mr. Katsas and Mr. Letter agreed to work with the Reporter on the topic of attorney-client-privilege appeals, with a view to presenting a report to the Committee at its fall 2014 meeting.

### **C. Item No. 12-AP-F (class action objector appeals)**

Judge Colloton introduced this item, which concerns a proposal for addressing appeals by objectors to a class action settlement. He invited the Reporter to summarize briefly the Committee's research thus far. The Reporter noted that district judges may lack full information concerning the fairness of a proposed settlement, and that objectors can be a helpful source of such information. Civil Rule 23(e) is designed to promote careful scrutiny of a proposed class settlement; it requires notice, a hearing, and a finding that the proposed settlement is fair, reasonable, and adequate. Rule 23(e) authorizes objections by any class member, and requires court approval for the withdrawal of such an objection once it has been made.

Concerns have been raised that some objectors lodge objections for the purpose of extracting a side payment from class counsel in exchange for dropping the objection. Rule 23(e)'s requirement of court approval for the withdrawal of objections constrains such pay-offs while the case is in the trial court, but no rule imposes a similar constraint during an objector's appeal from a district court order approving the settlement. If an objector appeals but then drops the appeal in exchange for a side payment, two costs arise: First, the extraction of the side payment functions as a tax on class counsel and could be viewed as unseemly; and second, the discontinuance of an appeal that raised serious issues about the fairness of the class settlement deprives class members of the opportunity to benefit from the resolution of the merits of the appeal.

Various strategies have been proposed for addressing the problem. The objector-appellant's leverage for extracting a side payment arises from the fact that, in practice, such an appeal will often delay implementation of the settlement. Thus, one approach focuses on decreasing the objector-appellant's leverage by speeding the implementation of the settlement despite the pendency of the appeal. Quick-pay provisions (allowing for payment of some or all of class counsel's fees while the appeal is pending) provide an example of this approach.

Another approach would be to set hurdles that an objector must surmount in order to appeal. Some courts have, for example, required sizeable appeal bonds as a condition for taking such an appeal; but there are questions about whether the size of a bond for costs on appeal (under Appellate Rule 7) can be enlarged to take account of anticipated attorney fees and costs associated with delay in implementation of the settlement. At the Committee's spring 2013 meeting, Judge D. Brooks Smith and Professor John E. Lopatka presented their proposal for amendments to Appellate Rules 7 and 39 that would presumptively require objector-appellants to post a bond for costs on appeal that would include costs and attorney fees attributable to the pendency of the appeal (and that would presumptively require imposition of those fees and costs if the court of appeals affirms the order approving the settlement). An appellate judge member suggested that it would be worthwhile for the Committee to consider the appeal-bond possibility further; another appellate judge member noted the need to take care not to deter objector appeals that raise valid questions about a settlement's propriety.

Another way of setting a hurdle for objector appeals would be to impose a "certificate of appealability" ("COA") requirement akin to that imposed on habeas petitioners, who must make "a substantial showing of the denial of a constitutional right" in order to obtain the COA that is a requisite for an appeal of the denial of a habeas petition. The Reporter questioned, however, whether a COA requirement could be imposed by rulemaking without an accompanying statutory change.

Judge Colloton observed that the Committee was indebted to Marie Leary for her painstaking and informative study concerning class-action-objector appeals. He invited Ms. Leary to summarize her findings for the Committee. Ms. Leary explained that she had searched the CM/ECF district court databases for cases (filed in 2008 or later) in the Second, Seventh, and Ninth Circuits in which an appeal was taken from an order approving a class settlement. Objector appeals tend to be relatively rare as a proportion of each circuit's overall appellate caseload; however, they are a significant feature in large multidistrict litigation and nationwide class actions.

Ms. Leary found that the trend concerning disposition of objector appeals in the Second Circuit differs from the trend concerning disposition of such appeals in the Seventh and Ninth Circuits. In the Seventh and Ninth Circuits, objector appeals tend to be voluntarily dismissed (under Appellate Rule 42(b)) within 200 days after the appeal was filed (and before the appellant files its brief). By contrast, in the Second Circuit a majority of terminated appeals were decided on the merits (by unpublished summary orders). Ms. Leary observed that the explanation for this difference is not clear; she wondered whether the Second Circuit puts the appeals on an expedited track for disposition.

Ms. Leary noted a feature of practice in the Ninth Circuit concerning Rule 7 cost bonds. In instances where the district court ordered the objector to post a cost bond but the objector failed to do so, the Ninth Circuit did not dismiss the appeal for failure to post the bond; rather, the court deferred (until the time of argument) its ruling on the consequences of the failure.

Although the Ninth Circuit thus appears not to have responded immediately to the failure to post the bond, that failure did not go unnoticed in the court below; in some cases, it was followed by contempt findings and the imposition of sanctions by the district court.

Judge Colloton reported that he had discussed with Ms. Leary, and with Judge Jeremy Fogel (the Director of the FJC), the possibility of conducting a survey of attorneys who practice in this field. Judge Fogel and others within the FJC had expressed concern about possible obstacles to conducting an effective survey study on the topic of class-action-objector appeals. Instead, Judge Fogel proposed that the Committee consider co-sponsoring (with the Civil Rules Committee) a mini-conference on class action practice. Such a mini-conference could bring together knowledgeable participants to discuss review of class settlements both in the district court and on appeal. Judge Sutton observed that the Civil Rules Committee has already discussed the possibility of planning a mini-conference on class action practice. Judge Colloton noted that the Appellate Rules Committee would be glad to work with Judge Robert Michael Dow, Jr. the Chair of the Civil Rules Committee's Rule 23 Subcommittee on the planning for such a mini-conference.

A member asked whether it would be useful for Ms. Leary to examine how objector appeals fare in other circuits, such as the Fifth Circuit. Judge Colloton invited Ms. Leary to discuss the methodology for her study, which has been, of necessity, very labor-intensive. Ms. Leary explained that there is no quick way to identify the relevant appeals using the CM/ECF databases at the level of the courts of appeals; thus, one must start by searching for class actions at the level of the district court and then identifying, within that pool of cases, the subset of cases that feature an appeal from a judgment approving a class settlement.

An appellate judge member asked whether it would be possible to address inappropriate objector appeals by sanctioning the objector's attorney. The Reporter noted reports that district judges tend not to want to spend time on such sanctions motions. Likewise, Professor Coquillette has observed a reluctance to pursue the possibility of attorney discipline under Model Rules 3.4 and 8.4.

Mr. Letter suggested that the general topic warranted further consideration by the Appellate Rules Committee, in conjunction with the Civil Rules Committee. By consensus, the Committee retained this item on its agenda.

**D. Item No. 13-AP-C (*Chafin v. Chafin* / ICARA appeals)**

Judge Colloton invited the Reporter to introduce Item No. 13-AP-C, which arose from the suggestion by three Justices, in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), that the Committee consider whether to propose rules to expedite appellate proceedings under the Hague Convention on the Civil Aspects of International Child Abduction (the "Convention"). The Convention requires courts in the United States to order a child returned to his or her country of habitual residence if the child has been wrongfully removed to the United States. In *Chafin*, the Court

held that an appeal from such an order did not become moot upon the child's return to the country of habitual residence. In response to concerns that being sent back and forth across national borders would harm the children involved, the *Chafin* Court observed that the goals of the Convention (and the federal legislation that implements it) could be served by a combination of expedited proceedings and (where appropriate) stays. Justice Ginsburg, joined by Justices Scalia and Breyer, concurred in *Chafin* and suggested that the rulemakers consider this topic.

The Civil and Appellate Rules Committees discussed the Justices' suggestion at their spring 2013 meetings, as did the Standing Committee at its June 2013 meeting. In September 2013, Judge Sutton wrote to Justice Ginsburg to thank her for her suggestion and to report the Committees' view that the best course, as an initial matter, would be to address the topic by judicial education rather than rulemaking. Many courts already do expedite child custody matters under the Convention, and Appellate Rule 2 gives courts of appeals the flexibility to do so. Judge Fogel has committed, on behalf of the FJC, to educating judges about the need, and existing tools, for expediting disposition of such matters. Judge Sutton reported that Justice Ginsburg had responded that she viewed this approach as a sound one and that she appreciated the Committees' attention to the matter.

By consensus, the Committee removed this item from its agenda.

## **VI. Additional Old Business and New Business**

### **A. Item No. 13-AP-E (audiorecordings of appellate arguments)**

Judge Colloton invited the Reporter to summarize her research concerning Item No. 13-AP-E, which arose from Mr. Garre's suggestion that the Committee consider adopting a rule concerning the release of audiorecordings of appellate arguments.

The Reporter noted that the circuits take widely differing approaches to the release of such audio, although the trend appears to be toward more and faster access. The Second and Eleventh Circuits provide the least access to audio recordings; they do not post audio online, though they permit attorneys to buy the audio on CDs. The Tenth Circuit posts online what appears to be audio of a few selected arguments; as to other arguments, one must make a motion to obtain the audio. At the other end of the spectrum are circuits that provide quick and full online access to argument audio. The DC Circuit and Eighth Circuits post the audio on the same day as the argument; the Ninth Circuit, on the day after argument; and the Fourth Circuit, two days after argument. The other six circuits make audio available online, but the Reporter had been unable to discern (from online sources) precisely how quick and how comprehensive their postings are.

An attorney member voiced support for a national rule requiring prompt posting of audio; the Second Circuit, he reported, had recently taken three weeks to provide an audio CD of a particular argument. Judge Chagares pointed out that the Third Circuit is currently studying

questions relating to videorecordings of court proceedings, and he expressed interest in hearing any views that participants might have on that topic.

An appellate judge member asked whether problems have arisen, in any cases, concerning references made during an argument to information that is subject to redaction requirements. The Reporter noted her tentative recollection that at least one circuit has a local provision setting out a procedure for seeking to have the audio sealed in such an instance.

Judge Sutton suggested that this matter seems to fall within the primary jurisdiction of the Judicial Conference Committee on Court Administration and Case Management (“CACM”). He observed that Judge Amy J. St. Eve, who now serves as a member of the Standing Committee, used to be a member of CACM.

By consensus, the Committee decided to remove this item from its study agenda, with the understanding that Judge Colloton would communicate to Judge Julie A. Robinson (the Chair of CACM) the interest in this topic that had been expressed by members of the Committee.

**B. Item No. 13-AP-H (*Ryan v. Schad* and *Bell v. Thompson* / FRAP 41)**

Judge Colloton introduced this item, which concerns the operation of Appellate Rule 41 in light of the Supreme Court’s decisions in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005). Rule 41(b) provides that “[t]he court’s mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later,” but also provides that “[t]he court may shorten or extend the time.” Under Rule 41(d)(1), a timely rehearing petition or stay motion presumptively “stays the mandate until disposition of the petition or motion.” A party can seek a stay pending the filing of a certiorari petition; if the court grants such a stay and the party who sought the stay files the certiorari petition, then Rule 41(d)(2)(B) provides that “the stay continues until the Supreme Court’s final disposition.” Rule 41(d)(2)(D) directs that “[t]he court of appeals must issue the mandate immediately when a copy of the Supreme Court order denying the petition for writ of certiorari is filed.”

One question is whether Rule 41 requires the court of appeals to issue the mandate immediately after the filing of the Supreme Court’s order denying a petition for a writ of certiorari. Does Rule 41(b) allow the court of appeals discretion to continue to stay the mandate even after the Supreme Court’s denial of certiorari and rehearing? The Court did not decide this question in either *Bell* or *Schad*; it ruled that even if the court of appeals has authority to stay the mandate following the denial of certiorari, it could only do so if warranted by extraordinary circumstances (which, the Court held, were not present in either *Bell* or *Schad*).

An attorney member asked why a court of appeals would ever extend the stay of the mandate after the Supreme Court has denied certiorari. The Reporter noted that both *Bell* and

*Schad* were death penalty cases. In *Bell*, the court of appeals had affirmed the denial of a death row prisoner's habeas petition, but later (having called for and examined the district court record) vacated and remanded for an evidentiary hearing. The problem was that, months before this vacatur, the Supreme Court had denied the inmate's petition for rehearing with respect to the Court's denial of the inmate's petition for certiorari. In the interim that followed the Supreme Court's final disposition of the petition for certiorari, the court of appeals had failed to notify the parties that it had stayed its mandate, and the state had proceeded in its preparations for the inmate's execution in reliance on its belief that the court of appeals was done with the case.

Judge Colloton noted that this fact pattern presents a second question—namely, whether a court of appeals can stay the issuance of the mandate, under Rule 41(b), merely through inaction, or whether the court must act affirmatively in order to accomplish such a stay. The original Rule 41 had provided that the mandate would issue 21 days after entry of the court of appeals' judgment "unless the time is shortened or enlarged by order." The words "by order" were deleted during the 1998 restyling of Rule 41. An appellate judge participant suggested that there may be a problematic lack of transparency in a case where the court of appeals stays the mandate without telling the parties that it is doing so. Another appellate judge responded that this particular issue could be addressed by "unstyling" Rule 41(b)—i.e., by returning to the Rule the "by order" that had been deleted during the restyling.

When considering whether to amend Rule 41 to remove the court of appeals' discretion to extend the stay of the mandate after the Supreme Court's final disposition of a certiorari petition, Judge Colloton noted, the Committee might also wish to consider the relevance of the caselaw recognizing an inherent authority, in the courts of appeals, to recall their mandates when warranted by extraordinary circumstances. Even if Rule 41 were amended to remove the court of appeals' discretion to *stay* the mandate after the Supreme Court's final disposition of a certiorari petition, presumably the courts of appeals would retain this inherent authority to recall the mandate in extraordinary circumstances. Are there reasons, Judge Colloton asked, to require a court of appeals to first issue and then recall its mandate in such circumstances (rather than permitting the court of appeals simply to stay the mandate)?

An appellate judge participant suggested that it is important for courts of appeals to retain some flexibility in these matters. An attorney member responded that he thought the court of appeals' discretion concerning stays of the mandate should be less after the Supreme Court has finished with the case than it is before the Supreme Court has ruled on the case. Another attorney member, though, wondered why the Court's denial of certiorari should mark a change in the scope of the court of appeals' discretion; this member noted that, as a formal matter, the denial of certiorari leaves the judgment below untouched.

The agenda materials mentioned, in addition, a quirk in the wording of Rule 41(d). Rule 41(d)(2)(B) provides that if the court grants a request for a stay pending the filing of a certiorari petition, the petition is filed, and appropriate notice is given to the circuit clerk, then "the stay continues until the Supreme Court's final disposition." Rule 41(d)(2)(D) directs that "[t]he court

of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed.” When rehearing is sought in the Supreme Court after a denial of certiorari, the “Supreme Court’s final disposition” can occur later than the date when “a copy of a Supreme Court order denying the petition for writ of certiorari is filed.” An appellate judge member stated that the Committee should consider whether to adjust Rule 41(d)(2)(D)’s wording to fit more closely with that in Rule 41(d)(2)(B). This issue, he stated, had raised questions in cases that he had litigated before he became a judge.

An attorney member voiced support for considering ways to clarify Rule 41's operation. Another attorney member agreed, and suggested that the Rule should be revised so as to make clear that the court of appeals cannot stay a mandate through mere inaction.

**C. Item No. 14-AP-A (FRAP 29(e) and timing of amicus briefs)**

Judge Colloton invited the Reporter to introduce Item No. 14-AP-A, which arises from a suggestion by Dean Alan Morrison that Rule 29(e) be revised to set the time period for filing an amicus brief by reference to the due date, rather than the filing date, of the relevant party’s brief and to permit extensions of the amicus-brief due date based on party consent. Rule 29(e)’s due date for amicus filings is “no later than 7 days after the principal brief of the party being supported is filed.” Dean Morrison points out that if the party files its brief before the due date, the would-be amicus might find that its deadline is very short (or even that the deadline has already passed) by the time that the amicus becomes aware of the occasion for filing the brief. It would be better, Dean Morrison suggests, if the amicus could rely on having 7 days after the original due date for the party’s brief, even if the party files its brief early.

The Reporter noted that pegging the amicus-brief deadline to the due date, rather than the filing date, of the party’s brief might pose no problems in a case where the briefing schedule is set by scheduling order. In such a case, the early filing of the appellant’s brief would not move up the due date for the appellee’s brief, and so the appellee would have sufficient time to review any amicus briefs filed in support of the appellant before filing its own brief. However, in instances when no scheduling order sets the briefing schedule, Rule 31(a)(1) provides that the appellee’s brief is due 30 days after service of the appellant’s brief which means that early filing of the appellant’s brief moves up the deadline for the appellee’s brief as well. In such instances, leaving the amicus-brief deadline at 7 days after the appellant’s original filing deadline could leave the appellee with insufficient time to take account of the amicus filing when drafting its own brief.

Thus, the Reporter suggested, the proposal to peg the amicus-brief deadline to the due date for the party’s brief seems unlikely to succeed. If the Committee were to agree with that view, that would leave for consideration the proposal to revise Rule 29(e) to allow the extension of the amicus-brief due date by consent of the parties.

An attorney member asked why a rule amendment on this topic is needed; under the

current Rule, a would-be amicus can ask the court to extend the deadline. It was also noted that a would-be amicus who is interested in a particular appeal can sign up to receive electronic notifications of docket activity in that appeal, and can obtain electronic copies of the parties' briefs.

Another attorney member asked whether there is any reason not to permit extensions of the Rule 29(e) deadline by party consent. The Reporter observed that, if all parties consent to the extension of the amicus-brief deadline, that would seem to address the concern that an extension of the amicus's deadline would disadvantage the appellee. She asked whether judges would object if extensions were available based on party consent without court leave. An appellate judge member responded that judges would have concerns with such an approach, because it is important to keep cases moving. Another appellate judge member expressed agreement with this view. Another appellate judge predicted that such extensions would generate motions by appellees seeking additional time to file their own briefs; Mr. Letter asked, however, whether a consented-to extension would be likely to throw off the parties' briefing schedule. Mr. Gans suggested that there would be complexities associated with changing Rule 29(e)'s timing provision.

By consensus, the Committee decided to remove this item from its agenda.

**D. Item No. 14-AP-B (standard for appellate review of sentencing errors)**

Judge Colloton introduced this item, which arises from a suggestion by Judge Jon O. Newman that the Criminal Rules Committee and the Appellate Rules Committee consider a rule amendment to provide "that a sentencing error to which no objection was made in the district court should be corrected on appeal without regard to the requirements of 'plain error' review, unless the error was harmless." Judge Colloton voiced an expectation that the Criminal Rules Committee would take the lead in addressing this suggestion. Judge Reena Raggi, the Chair of the Criminal Rules Committee, has asked a subcommittee (headed by Judge Raymond M. Kethledge) to examine the proposal.

Mr. Letter agreed that it would make sense for the Appellate Rules Committee to wait and see what the Criminal Rules Committee decided with respect to Judge Newman's proposal. An appellate judge member suggested that the Committee not proceed with the proposal.

By consensus, the Committee decided to remove this item from its agenda. Judge Colloton undertook to write to Judge Newman about the Committee's discussion.

**E. Information item (proposal by Lawyers for Civil Justice, et al., regarding Civil Rule 23(f))**

Judge Colloton invited the Reporter to summarize this information item. The Reporter

explained that Lawyers for Civil Justice, Federation of Defense & Corporate Counsel, DRI The Voice of the Defense Bar, and the International Association of Defense Counsel (collectively, “LCJ”) had submitted a collection of class-action-related proposals to the Civil Rules Committee, and that the excerpt from those proposals that was included in the Appellate Rules Committee’s agenda materials concerned appeals, under Civil Rule 23(f), from orders concerning class certification. LCJ states that the circuits vary widely in both the standards for granting permission to appeal under Civil Rule 23(f) and also the frequency with which they grant such permission. LCJ suggests that Civil Rule 23(f) be amended to authorize appeals as of right from class certification rulings.

The Reporter observed that she is skeptical about the desirability of such an amendment. Professors Cooper and Marcus have noted that a significant body of appellate caselaw concerning class certification has developed since the adoption of Civil Rule 23(f) in 1998. Other topics concerning class certification such as the standards for certification of settlement classes, or the proper role of “issues” classes seem like more productive targets for inquiry.

An appellate judge, however, observed that the low rate at which some circuits grant permission for Rule 23(f) appeals is noteworthy.

#### **F. Information item (*Ray Haluch Gravel Co.*)**

Judge Colloton invited the Reporter to summarize the Court’s recent decision in *Ray Haluch Gravel Co. v. Central Pension Fund of International Union of Operating Engineers and Participating Employers*, 134 S. Ct. 773 (2014). The Reporter reminded the Committee that in *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988), the Court had held that a district court’s decision on the merits of a case is final for purposes of 28 U.S.C. § 1291 even if the court has not yet ruled on a request for attorney’s fees. In *Ray Haluch Gravel*, the Court held that the *Budinich* rule applies even if the basis for the request for attorney fees is contractual rather than statutory.

Responding to the argument that this ruling would result in piecemeal appeals in instances where it would be more desirable for the fee appeal and the merits appeal to be adjudicated together, the *Ray Haluch Gravel* Court reasoned that piecemeal appeals could be avoided, where necessary, by recourse to the Civil Rule 58(e) mechanism that permits a Civil Rule 54(d)(2) motion for attorney fees to be treated the same as a timely Civil Rule 59 motion for purposes of tolling the time to appeal. The Court noted the possibility that some contractual attorney fee requests might not qualify for this mechanism because Rule 54(d)(2) appears not to encompass attorney-fee claims that must, under the relevant substantive law, “be proved at trial as an element of damages.” The Court did not seem concerned by the possibility that the Civil Rule 58(e) mechanism might be unavailable in some cases involving claims for contractual attorney fees. Nor has the Appellate Rules Committee received reports of problems arising from such a gap in Rule 58(e)’s coverage. Accordingly, the Reporter did not suggest that the Committee investigate this issue further, though it may be useful to monitor the caselaw for any

further developments.

**VII. Adjournment**

The Committee adjourned at 10:30 a.m. on April 29, 2014.

Respectfully submitted,

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Catherine T. Struve  
Reporter

**Minutes of Spring 2013 Meeting of  
Advisory Committee on Appellate Rules  
April 22 and 23, 2013  
Washington, D.C.**

**I. Introductions**

Judge Steven M. Colloton called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 22, 2013, at 9:00 a.m. at the Mecham Conference Center in the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Judge Richard G. Taranto, Professor Amy Coney Barrett, Professor Neal K. Katyal, and Mr. Kevin C. Newsom. Mr. Douglas Letter, Director of the Appellate Staff of the Civil Division, U.S. Department of Justice (“DOJ”), and Mr. H. Thomas Byron III, also of the Civil Division, were present representing the Solicitor General. Mr. Gregory G. Garre, liaison from the Standing Committee; Mr. Peter G. McCabe, Administrative Office Assistant Director for Judges Programs; Mr. Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Ms. Julie Wilson, Attorney Advisor in the Administrative Office (“AO”); Mr. Michael Ellis Gans, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center (“FJC”) were also present. Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated by telephone. On the second day of the meeting, Professor John E. Lopatka and Professor Brian T. Fitzpatrick participated in the discussion of one agenda item, and Ms. Holly Sellers, Staff Attorney with the Judicial Conference Committee on Federal-State Jurisdiction, was present for the discussion of another item.

Judge Colloton opened the meeting – his first as the Committee’s Chair – by noting that he looked forward to working with the Committee. He congratulated Judge Taranto on his recent confirmation as a Judge of the U.S. Court of Appeals for the Federal Circuit. He welcomed Mr. Garre, who was replacing Mr. Colson as the liaison from the Standing Committee. Mr. Garre, Judge Colloton noted, served as the forty-fourth Solicitor General of the United States and now is a partner at Latham & Watkins. Judge Colloton also welcomed Mr. Gans, who first joined the Eighth Circuit Clerk’s Office in 1983 and who now replaces Mr. Green as the liaison from the appellate clerks.

At 2:50 p.m. on the first day of the meeting, the Committee joined Professor Coquillette in Boston in observing a moment of silence in honor of the victims of the Boston Marathon bombing.

**II. Approval of Minutes of September 2012 Meeting**

A motion was made and seconded to approve the minutes of the September 2012 meeting. The motion passed by voice vote without dissent.

### **III. Report on January 2013 Meeting of Standing Committee**

Judge Colloton reported that the Standing Committee, at its January meeting, had paid tribute to the memory of Judge Mark R. Kravitz, who died on September 30, 2012. Judge Kravitz is deeply missed.

### **IV. Other Information Items**

Judge Colloton noted that the Supreme Court has approved the proposed amendments to Appellate Rules 28 and 28.1 (concerning the statement of the case), Appellate Rules 13, 14, and 24 (concerning appeals from the United States Tax Court), and Appellate Form 4 (concerning applications to proceed in forma pauperis). Absent contrary action by Congress, those amendments are on track to take effect on December 1, 2013.

### **V. For Final Approval: Item Nos. 08-AP-L and 09-AP-C**

Judge Colloton invited the Reporter to introduce these items, which concern proposed amendments to Appellate Rule 6. The Reporter reminded the Committee that these amendments were designed to dovetail with the Bankruptcy Rules Committee's package of amendments to Part VIII of the Bankruptcy Rules (concerning bankruptcy appellate practice). The amendments would update Rule 6's cross-references to certain Part VIII Rules; amend Rule 6(b)(2)(A)(ii) to remove an ambiguity that resulted from the restyling of the Appellate Rules; and add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2). The amendments also revise Rule 6 to account for the range of possible methods for handling the record on appeal.

A great many comments were submitted on the proposed amendments to the Part VIII Rules; by contrast, only one comment was submitted on the proposal to amend Rule 6. The Reporter noted that the Appellate Rules Committee's agenda materials included a redline showing possible changes that were proposed to the Bankruptcy Rules Committee in light of the public comments. At its spring 2013 meeting, the Bankruptcy Rules Committee had approved many of those changes, had rejected others, and had made a few additional changes. Thus, the proposed Part VIII package, as finally approved by the Bankruptcy Rules Committee, differed in some respects from the version reproduced in Volume II of the Appellate Rules Committee's agenda materials; the Reporter assured the Committee that none of those differences would affect the operation of Rule 6, and she offered to share the as-approved version with any Committee members who wished to review it.

Among the post-publication changes to the Part VIII package, the most interesting change, from the perspective of practice in the courts of appeals, concerns proposed Bankruptcy Rule 8007 (which addresses stays pending appeal). Under proposed Appellate Rule 6(c)(2)(C), Rule 8007 will apply to direct appeals to the courts of appeals

under Section 158(d)(2). Proposed Rule 8007(a), like Appellate Rule 8(a)(1), requires that a litigant seeking a stay must ordinarily move first in the lower court; Rule 8007(a)(2) states that this “motion may be made either before or after the notice of appeal is filed.” As published, Rule 8007(b)(1) provided that “[a] motion for the relief specified in subdivision (a)(1) – or to vacate or modify a bankruptcy court’s order granting such relief – may be made in the court where the appeal is pending or where it will be taken.” However, a commentator questioned the authority of the appellate court to entertain such a motion prior to the filing of a notice of appeal. In response to this comment, the Bankruptcy Rules Committee decided to delete “or where it will be taken” from Rule 8007(b)(1). The Reporter stated that this change seems to bring the proposed Rule into conformity with Section 158(d)(2)(D), which provides: “An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, or the court of appeals in which the appeal is pending, issues a stay of such proceeding pending the appeal.” In sum, the Reporter suggested, this change seems like an improvement, as do the other post-publication changes that the Bankruptcy Rules Committee made to the proposed Part VIII Rules.

The sole comment on the proposed amendments to Appellate Rule 6 was submitted by Judge S. Martin Teel, Jr., a United States Bankruptcy Judge in the District of Columbia. Judge Teel suggested deleting from Rule 6(b)(2)(B)(iii)’s list of the contents of the record on appeal the phrase “a certified copy of the docket entries prepared by the clerk under Rule 3(d)” and substituting “the docket entries maintained by the clerk of the district court or bankruptcy appellate panel.” Judge Teel stated that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Judge Teel also questioned why Appellate Rule 3(d) requires the lower-court clerk to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically. The Reporter suggested that Judge Teel’s comments warrant consideration, but that it would be preferable to add them to the Committee’s agenda as a separate item rather than trying to take account of them in the currently-proposed amendments to Rule 6.

A member moved to approve the Rule 6 proposal as published. The motion was seconded, and it passed by voice vote without dissent.

## **VI. Discussion Items**

### **A. Items Proposed for Removal from Agenda**

Judge Colloton explained that, upon becoming Chair of the Committee, he had decided to take a fresh look at the Committee’s entire docket. He invited the Reporter to present to the Committee six items that appeared to be ripe for removal from the docket.

#### **1. Item No. 07-AP-H (separate document requirement)**

The Reporter reminded the Committee that this item arose from the observation that, where Civil Rule 58(a) requires a judgment to be set out in a separate document, and the district court fails to comply with this requirement, under Civil Rule 58(c)(2) the time limit for making postjudgment motions does not start to run until 150 days after entry of the judgment on the docket. This creates the possibility that a litigant might make a very belated postjudgment motion that – because it was still technically timely – would suspend the effectiveness of any previously-filed notice of appeal pending disposition of the motion.

In 2008, the Committee considered possible ways to address this scenario. Initially, it discussed whether to adopt a time limit within which tolling motions must be filed when a separate document was required but not provided. After consulting with the Civil Rules Committee, however, the Committee decided that it was preferable to raise awareness of Rule 58's requirements in the hopes of improving district court compliance. Since 2008, this item has lain dormant.

By consensus, the Committee decided to remove this item from the docket.

## **2. Item No. 08-AP-N (FRAP 5 / appendix)**

The Reporter noted that this item arose from Peder Batalden's suggestion that the Committee amend Rule 5 to permit litigants to submit an appendix of key record documents along with a petition for permission to appeal (or along with an answer to such a petition). The concern is that courts might count the appendix toward the length limit set by Rule 5(c). (Rule 5(c) excludes the items required by Rule 5(b)(1)(E), but that list of items does not include an appendix.)

When the Committee discussed this proposal in 2009, members observed that when the filings in the district court are electronic, the court of appeals can usually access those documents via the CM/ECF system. Admittedly, as the Committee noted, pro se litigants continue to make paper filings, and some sealed filings are not available in CM/ECF. But, the Reporter suggested, now that all of the courts of appeals have completed the shift to electronic filing, the rationale for this proposal seems weaker than it was in 2009.

Mr. Gans reported that each district court sets its own parameters concerning the access of court of appeals personnel to filings in the district court; some districts, for example, do not permit electronic access to sealed documents.

An appellate judge member asked whether anyone had reported instances in which a court of appeals forbade the filing of an appendix to a petition or an answer. If not, he suggested, it would be a good idea to remove this item from the agenda.

By consensus, the Committee removed this item from the agenda.

### **3. Item No. 08-AP-P (FRAP 32 / line spacing)**

The Reporter stated that this item arose from Mr. Batalden's proposal that the Committee amend the Rules to permit the use of 1.5-spaced, rather than double-spaced, briefs. When the Committee discussed this proposal, members also considered the possibility of amending the Rules to permit double-sided briefs. There was some support for each of these proposals during the Committee's discussion. However, other participants had predicted that judges would oppose such changes. Moreover, it was suggested that the shift to electronic filing would eventually render the question of double-sided printing moot.

An appellate judge member stated that the judges of the Eleventh Circuit prefer double-spaced, single-sided briefs. Another appellate judge member asked whether some units within the DOJ had, in the past, filed double-sided briefs. Mr. Letter responded that the DOJ had periodically raised the possibility of submitting double-sided briefs but that the courts had never acceded to that suggestion. Another appellate judge recalled that Iowa lawyers were known in the Eighth Circuit for attempting to file double-sided briefs – and the explanation was that the Iowa Supreme Court required double-sided briefs.

Mr. Letter said that, in his view, the key question is what judges prefer. However, he also noted that moving to double-sided printing would save a lot of paper and a lot of storage space. Commercially printed briefs, he observed, are printed double-sided, as are books and newspapers. He urged the Committee to consider permitting double-sided printing.

Another appellate judge stated that he preferred the Rules' current approach; he reported that he writes on the blank side of the pages. An attorney participant stated that he had become accustomed to printing documents double-sided for his own use, and that this practice does consume a lot less paper. Mr. Letter added that double-sided briefs are lighter.

An appellate judge asked Mr. Gans whether his office stores appellate briefs. Mr. Gans responded that his office keeps the briefs for a period of time and then recycles them. He observed that sometimes there are copies of briefs that were never used; on the other hand, in other instances his office runs out of copies and has to print more. A member asked whether the Committee could encourage circuits to lower the number of required copies of briefs.

An appellate judge predicted that judges would resist the adoption of double-sided printing. A motion was made to remove this item from the agenda. The motion was seconded and passed by voice vote without dissent.

### **4. Item No. 08-AP-Q (use of audiorecordings in lieu of transcript)**

Judge Colloton introduced this item, which arose from a suggestion by Judge Michael M. Baylson that the Committee consider amending the Appellate Rules to permit the use of audiorecordings in lieu of a transcript for purposes of the record on appeal.

Professor Coquillette observed that any proposal that would affect court reporters would become highly political. An appellate judge member suggested that searching an audio file would be more difficult and time consuming than looking through a written transcript. A motion was made and seconded to remove this item from the agenda. The motion passed by voice vote without dissent.

An attorney participant asked whether the Committee had ever considered drafting a rule concerning the release of audiorecordings of appellate arguments. Some courts, he reported, are very slow to release them – in contrast with recent Supreme Court practice. Mr. Letter stated that he did not recall such a proposal. Professor Coquillette stressed that it would be important for the Committee to confer with the Judicial Conference Committee on Court Administration and Case Management (“CACM”) before commencing such a project. Mr. McCabe noted that CACM is in charge of pilot programs concerning audiorecordings and videorecordings of trial-court proceedings. A member stated that he favored approaching CACM to discuss practices concerning the release of appellate argument audiorecordings. He noted that there is a strong public interest in open access, and also that the recordings are very useful to advocates who are preparing for their own arguments. Mr. Gans asked whether the FJC has studied this issue. By consensus, the Committee resolved to investigate this matter further.

**5. Item No. 10-AP-D (FRAP 39 / *Snyder v. Phelps*)**

Judge Colloton introduced this item, which related to a bill – the “Fair Payment of Court Fees Act of 2010” – which would have amended Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011). At the Committee’s request, Ms. Leary prepared a study concerning the circuits’ practices with respect to appellate costs. Judge Sutton, as chair of this committee, sent Ms. Leary’s report to the Chief Judges of each circuit, and the Fourth Circuit subsequently reduced the ceiling on the permissible reimbursement per page of copies. The bill has not been reintroduced since then.

A motion was made to remove this item from the Committee’s agenda. The motion was seconded, and passed by voice vote without dissent.

**6. Item No. 10-AP-H (appellate review of remand orders)**

The Reporter reminded the Committee that this item relates to an inquiry the Committee received in 2010 from Karen Kremer, an attorney at the AO who works with the Judicial Conference’s Committee on Federal-State Jurisdiction. Ms. Kremer had asked whether the Appellate Rules Committee was considering questions relating to appellate review of remand orders. The Committee discussed this inquiry at its fall 2010 meeting and noted that this topic falls within the primary jurisdiction of the Federal-State

Jurisdiction Committee. Committee members expressed willingness to assist with a project in this area if the Federal-State Jurisdiction Committee decided to undertake one. The Committee did not hear anything further on the matter from the Federal-State Jurisdiction Committee.

A motion was made, and seconded, to remove this item from the Committee's agenda. The motion passed by voice vote without dissent.

**B. Items for Further Discussion**

**1. Item No. 05-01 (FRAP 21 & 27(c) / Justice for All Act of 2004)**

Judge Colloton and the Reporter introduced this item, which concerned the possibility of amending the Appellate Rules to account for the mandamus procedures set by the Crime Victims' Rights Act ("CVRA") (which was part of the Justice for All Act of 2004). If a district court denies relief sought by a crime victim under the CVRA, the CVRA authorizes the victim to seek a writ of mandamus from the court of appeals. The statute authorizes the issuance of the mandamus writ "on the order of a single judge" and sets a 72-hour deadline for the court of appeals to reach a decision on the application. Then-Professor Schiltz, the Committee's Reporter at the time, identified three problems arising from the CVRA. One is that Rule 27(c) (which provides that a circuit judge acting alone "may not dismiss or otherwise determine an appeal or other proceeding") prevents individual judges from issuing mandamus writs and Rule 47(a)(1) forecloses local rules that are inconsistent with the Appellate Rules. A second is that the 72-hour deadline would be extremely hard to meet. A third was that, as of 2005, the Rules provided no method for computing time periods set in hours. The third of these problems was removed by the adoption, in 2009, of Rule 26(a)(2)'s provision for counting time periods stated in hours. When the committee last considered this matter, it was left that the Department of Justice would monitor practice under the Act and notify the committee of any difficulties. Judge Colloton asked Mr. Letter whether he could report on how the first and second problems identified by Professor Schiltz have played out in practice.

Mr. Letter reported that he had consulted the Solicitor General, the Criminal Appellate Office at DOJ, and various United States Attorney's Offices. Those consultations produced no sense that a rule change is warranted. Mr. Letter surveyed judicial opinions that deal with the CVRA. There are, he reported, some procedural issues that are being litigated in the circuits, but those issues are likely to be resolved through judicial decisionmaking more quickly than they could be resolved by means of a rule change. There has been litigation over whether review of a district court ruling is available via an appeal, or whether mandamus is the only avenue; most courts say the latter. Mr. Letter suggested that this question is probably not appropriate for treatment through rulemaking.

Mr. Letter noted that the 72-hour deadline is not typically observed by courts. Some courts view the issue in terms of waiver; there is some question whether the deadline is waivable by the litigants. In any event, no court has ruled that a failure to

meet this deadline deprives the court of the power to act. Mr. Letter also observed that courts do not all apply the same standard of review when deciding CVRA petitions. However, Mr. Letter's office was unable to identify a case in which the choice (among the different standards of review that are in use in different courts) would have produced a difference in outcome. An appellate judge stated his impression that none of the courts of appeals directs CVRA petitions to a single judge for resolution; rather, all of the circuits use three-judge panels. Mr. Letter agreed.

Judge Colloton asked whether there is any sense that delays in resolving CVRA appeals are causing harm to victims. Mr. Letter responded that he is not aware of any such instances. Mr. Letter noted that although a rule adopted under the Rules Enabling Act will supersede any existing statutory provisions that conflict with it, it would be odd to try to supersede the CVRA's 72-hour deadline through rulemaking. Judge Colloton noted that, during the Committee's prior discussions of this topic, then-Professor Schiltz had raised the possibility of amending the Appellate Rules to permit a single judge to act on CVRA petitions (as a way of expediting them and to conform to the statute's contemplated procedure).

Mr. McCabe pointed out that the statute requires the AO to report to Congress every year on any instances in which a court denied a victim's request for relief under the CVRA. There are, he said, very few such instances per year. Mr. Letter noted that there is a developing circuit split concerning restitution awards against downloaders of child pornography, but that is unrelated to the issues raised by this docket item.

By consensus, the Committee decided to remove this item from its agenda.

## **2. Item No. 07-AP-E (*Bowles v. Russell*)**

Judge Colloton invited the Reporter to introduce this item, which arose from a suggestion that the Committee consider possible responses to the Supreme Court's holding, in *Bowles v. Russell*, 551 U.S. 205 (2007), that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional.

Starting in 2007, the Committee discussed a number of possible approaches. It considered the idea of altering the law to specify which appeal-related deadlines were or were not jurisdictional, and the idea of reinstating the "unique circumstances" doctrine (which had provided an avenue for excusing noncompliance with a deadline). After discussing questions of the scope of rulemaking authority, the Committee turned to the possibility of developing proposed legislation that would set a method for determining whether statutory deadlines were jurisdictional. However, after considering the potential scope of that project, the Committee decided to reassess how big a problem *Bowles*-related issues really were in practice. This question proved difficult to assess; the caselaw showed that some litigants were losing the opportunity for appellate review because an appeal deadline was deemed jurisdictional under *Bowles*, but it was hard to tell how frequently this was happening. In addition, some doctrines were available to

mitigate the effect of *Bowles* – for example, the possibility of treating, as the notice of appeal, another document that was the substantial equivalent of such a notice.

After years of comprehensive consideration, it seemed that this item might be ripe for removal from the Committee’s agenda. However, there were a couple of loose ends that merited the Committee’s attention. Since *Bowles*, the lower courts are treating statutory deadlines for taking an appeal from the district court to the court of appeals as jurisdictional, but they are treating non-statutory appeal deadlines as non-jurisdictional claim-processing rules. This dichotomy gives rise to a difficulty in instances where a basic appeal deadline is set by statute but the Rules fill in statutory gaps; should such a gap-filling rule be viewed as jurisdictional?

In particular, two questions have arisen concerning the treatment under Rule 4(a)(4) of motions that toll the time to take a civil appeal. 28 U.S.C. § 2107 does not mention such motions, but the tolling effect of certain postjudgment motions was recognized even prior to that statute’s enactment. Rule 4(a)(4) refers to the tolling effect of specified “timely” motions. A number of circuits have concluded that the Civil Rules’ non-extendable deadlines for post-judgment motions are claim-processing rather than jurisdictional rules. In this view, if the district court purports to extend such a deadline, and no party objects, the district court has authority to decide the late-filed motion on its merits. But is such a motion “timely” under Rule 4(a)(4), such that it tolls the time to take an appeal? The majority view in the circuits is that such a motion does not qualify for tolling effect – but the Sixth Circuit has taken the opposite view.

Another question concerns the nature of Rule 4(a)(4)’s requirements themselves: is Rule 4(a)(4)’s requirement of a “timely” motion itself a jurisdictional requirement, or merely a claim-processing rule? Drafting a rule change to address this second question, the Reporter suggested, could be more challenging. An appellate judge member suggested looking at other Rules, if any, that refer to the waivability of a requirement set by Rule. This member wondered whether addressing the waivability of one requirement would give rise to any negative implications for the treatment of other such requirements. The Reporter made a note to look at other rules that refer to timeliness, and also to consider the possible implications (of any proposed change concerning Rule 4(a)(4)) for Rule 4(b)(3)’s tolling provision. The appellate judge member also noted the possible relevance of Rule 4(a)(7)(B) (which states that failure to comply with Civil Rule 58(a)’s separate document requirement “does not affect the validity of an appeal”).

Judge Colloton asked Committee members for their views on whether the Committee should propose an amendment to clarify the meaning of “timely” in Rule 4(a)(4). An appellate judge member said that it would be worthwhile to clarify the Rule. Another appellate judge member agreed.

A district judge member noted that it might be useful to gather data on how frequently district courts mistakenly grant a litigant’s request to extend one of the non-extendable deadlines for post-judgment motions. He observed that, in criminal cases, the

deadlines for some postjudgment motions *are* extendable and requests for extensions are routinely granted.

By consensus, the Committee decided to keep this item on its agenda. The Reporter undertook to work with Judge Dow, Mr. Letter, and Mr. Byron to draft illustrative alternatives for an amendment to Rule 4(a)(4) – one draft that would implement the majority view concerning the meaning of “timely,” and another that would implement the Sixth Circuit’s view.

### **3. Item No. 07-AP-I (FRAP 4(c) / inmate filing)**

Judge Colloton invited the Reporter to introduce this item, which concerns the operation of Rule 4(c)(1)’s inmate-filing provision. The first sentence of Rule 4(c)(1) applies the prison-mailbox rule to notices of appeal. The second sentence states that the inmate, to receive the benefit of this rule, must use the “system designed for legal mail” if the institution has one. The third sentence states that timeliness “may be shown” by a declaration or notarized statement setting out the date of deposit and attesting that first-class postage was prepaid. Judge Diane Wood asked the Committee to consider clarifying whether this Rule requires prepayment of postage as a condition of timeliness. Research revealed that there also may be confusion in the law about whether the declaration discussed in the third sentence is required in all instances and, if so, when it must be furnished.

The doctrinal backdrop for this inquiry includes prisoners’ constitutional right of access to court under *Bounds v. Smith*, 430 U.S. 817 (1977). The Court has ruled that *Bounds* requires that inmates be provided with the “tools ... to attack their sentences, directly or collaterally, and ... to challenge the conditions of their confinement.” *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Although courts have recognized (or assumed) that there is a federal constitutional right to some amount of free postage for an indigent inmate’s legal mail, the constitutionally required amount may be relatively small. The Reporter noted that the Sixth Circuit, in a 2010 decision, found a *Bounds* violation where a defendant’s attempt to file a direct appeal of his state-court judgment of conviction was thwarted by prison officials’ delay in mailing his appeal papers and by the absence of a prison-mailbox rule under state law.

The Committee’s agenda materials set forth some possible drafting alternatives for amendments to Rule 4(c)(1). The Rule could be amended to extend clearly the postage-prepayment requirement to all prison-mailbox filings. An argument in favor of such a change is that it could speed the processing of appeals by preventing delays in the transit of the notice of appeal; counter-arguments would stem from the facts that inmates have fewer opportunities to earn money than non-inmates and that inmates lack the alternative of delivering the notice of appeal to the court by hand. The latter concerns would suggest that if the Committee were to propose an amendment cementing a postage-prepayment requirement, it should also consider including a provision for excusing compliance in appropriate circumstances. The materials also sketched a possible amendment that would restrict the postage-prepayment requirement to instances

when the inmate does not use a legal mail system, but it is unclear why such a choice would be desirable. Another possible type of amendment would make clear whether the declaration or notarized statement is always required, and, if so, whether it must be included with the notice of appeal or whether it can be provided later. Another question is whether it would be possible to clarify what is meant by a “system designed for legal mail”; but a clearer alternative seems difficult to formulate. Finally, another possible type of amendment would clarify whether Rule 4(c)(1) applies to filings by an inmate who has a lawyer.

Judge Colloton observed that the 1993 Committee Note to Rule 4(c) stated that this inmate-filing provision was “similar to that in Supreme Court Rule 29.2.” There may have been some ambiguity in the original Rule, he suggested, with respect to the requirement of a declaration. In 1998 the second sentence of Rule 4(c)(1) – referring a “system designed for legal mail” – was added. The 1998 Committee Note to Rule 4(c) explained: “Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc.” Judge Colloton pointed out that “often” is different from “always.” He asked whether it is always the case that a piece of mail processed through an institution’s legal mail system will have a date stamp, such that it would be unnecessary to have a declaration by the inmate concerning the date of deposit.

Mr. Gans stated that simplicity is key for rules concerning inmate filings. He reported that inmates tend to assume that all of their filings are governed by *Houston v. Lack*, 487 U.S. 266 (1988). Judge Colloton asked whether the Clerk’s Office checks inmate mailings for a date stamp. Mr. Gans responded that his office does typically look at the envelope, which is usually scanned in as a PDF file by the District Clerk’s Office. The Federal Bureau of Prisons, he noted, does mark the envelopes containing inmate mailings. He reported that his office typically does not see a declaration by the inmate concerning the date of deposit of the mailing; usually the issue does not arise unless the appellee moves to dismiss the appeal. Sometimes the court of appeals remands the case to the district court for the district court to make a finding concerning when the notice of appeal was filed.

An appellate judge member suggested that the provision concerning legal mail systems adds complexity. Another member questioned why the Rule should require payment of postage, and why the institution should not be required to cover the cost of postage for a notice of appeal. Covering the cost of postage, this member suggested, would be cheaper than litigating the question of whether there was good cause to excuse the inmate from paying the postage. Mr. Letter summarized the Federal Bureau of Prisons policy. Under this policy, inmates are generally responsible for paying their own postage costs, but the institution will provide stamps for legal mail (subject to possible limitation by the warden). Mr. Gans noted that, before inmates arrive in a Federal Bureau of Prisons facility, they may be held temporarily in a facility (such as a county jail) where different mail practices apply. An appellate judge agreed that it would be very rare for an inmate to arrive in an institution run by the Federal Bureau of Prisons within the 14-day period for filing a notice of appeal. Mr. Letter observed that federal public defenders file

notices of appeal on behalf of their clients as a matter of course. Mr. Gans responded, though, that retained or appointed counsel might not follow this practice.

An appellate judge member observed that the Committee is not in a position to require an institution to pay the cost of postage for inmates filing a notice of appeal. Another member responded that the Rule could be amended to address the question that does fall within the Committee's purview – namely, whether a notice of appeal that was timely deposited in the institution's mail system is considered timely filed despite subsequent delays caused by nonpayment of postage. If the Rule were amended to provide that such a notice is timely, this member conceded, the effect would likely be that the institution would decide to pay the postage costs itself. This member expressed concern at the possibility that a defendant's appeal might fall through the cracks, and he questioned why the system requires criminal defendants to file a notice of appeal rather than assuming that they will wish to take an appeal. Another participant noted that Rule 4(c)(1) applies to both civil and criminal cases.

An attorney participant stated that he favored making the rules clearer and easier to apply. However, he asked whether the Supreme Court has encountered difficulties in applying its Rule 29.2. A member responded that the filing of certiorari petitions presents different issues because a certiorari petition (unlike a notice of appeal) is not a one-page document.

Mr. Letter questioned whether a Rule could require the government to pay inmates' postage costs; such a requirement, he suggested, could raise questions of sovereign immunity. An appellate judge member responded that a Rule could address the issue by stating that a notice of appeal could be timely even if the lack of postage delayed its arrival at the courthouse. Another appellate judge asked why such a filing should be timely if the inmate had the money to pay for postage and failed to do so. The other appellate judge responded that a bright-line rule providing for timeliness would allow courts to avoid expending judicial efforts on the question of whether the inmate had the resources to pay for postage. Another member added that, under such an approach, the inmate would still need to deposit the notice of appeal in the institution's mail system within the filing deadline.

A district judge member observed that, in civil cases, inmates who lose in the district court are typically litigating pro se. Another member suggested holding this item on the Committee's agenda and conducting research on the origins of the postage-prepayment requirement. An appellate judge suggested that it would also be useful to research whether any similar issues have arisen under the Supreme Court's Rule 29.2. Another appellate judge noted that while the second sentence in Supreme Court Rule 29.2 refers to the statement or declaration noting the date the document was deposited in the mail system and stating that postage has been prepaid, the third sentence provides further steps for the Clerk to take if "[i]f the postmark is missing or not legible." An attorney participant stated that inmates do not have a constitutional right to require the government to pay for postage; he suggested that it would be useful to see whether other Rules discuss prepayment of postage. An appellate judge asked whether there is

information on the frequency with which inmates lose their appeal rights because of the wording of the current Rule 4(c)(1). The Reporter responded that the caselaw provides some examples; for instance, in *United States v. Ceballos-Martinez*, 371 F.3d 713 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

An appellate judge member suggested that it would be useful to revise the Rule to clarify the idea that the declaration *suffices*, but is not required, to show compliance with the Rule. The Reporter suggested that Rule 32(a)(7)(C)(ii) might provide a useful model.

An appellate judge member asked whether amending the Rule to make clear that there is no postage-prepayment requirement would touch off conflicts between inmates and prison authorities. An attorney participant suggested that it would be odd to eliminate the postage-prepayment requirement for notices of appeal but not for briefs. The Reporter noted that the deadline for filing a notice of appeal is jurisdictional in civil cases. Mr. Gans observed, however, that if a litigant fails to meet an appellate briefing deadline, the litigant only receives one opportunity to show cause why the appeal should not be dismissed.

With respect to the effects of amending the Rule to clarify that there is no postage-prepayment requirement, the Reporter suggested that it might be useful to study how practice has developed in the Seventh and Tenth Circuits, where the caselaw provides that prepayment of postage is not required if the inmate uses the legal mail system. An appellate judge member asked why the Rule should *require* an inmate to use an institution's legal mail system in order to get the benefit of the inmate-filing rule. Another appellate judge agreed that this is a good question.

Judge Colloton observed that several possibilities may be on the table. First, the discussion touched upon the possibility of amending Rule 4(c)(1) to eliminate any requirement that postage be prepaid. Second, the discussion raised the question whether the second sentence of Rule 4(c)(1) (requiring use of an institution's legal mail system) makes sense. There was also the question of the declaration referred to in the third sentence of Rule 4(c)(1); participants in the discussion did not seem to think that the declaration should be required if there was another way to tell that the notice was timely deposited in the mail system. Another approach might focus on bringing Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

A district judge member suggested that one approach could be to provide that the notice of appeal is timely whether or not postage is paid by the inmate, and that if institution pays the postage on the inmate's behalf, the institution can debit the postage cost from the inmate's institutional account. To get the benefit of such a provision, this member suggested, the inmate could be required to certify that he or she is indigent. Almost all such litigants, the member stated, are proceeding *in forma pauperis*.

Judge Colloton asked whether any Committee members would be willing to work with the Reporter to draft alternatives in advance of the next meeting. Justice Eid, Professor Barrett, and Mr. Letter volunteered to assist with this task.

**4. Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, 11-AP-D (possible amendments relating to electronic filing)**

Judge Colloton reported that the Standing Committee was in the process of convening a subcommittee to consider possible amendments to each set of national Rules to take further account of electronic filing issues. Professor Coquillette stated that he would be coordinating the subcommittee's efforts, and that Professor Capra would serve as the subcommittee's reporter. Most of the other Advisory Committees, he noted, were appointing a representative to serve on the subcommittee.

Judge Colloton invited the Reporter to introduce the collection of existing agenda items that relate to electronic filing. The Reporter reminded the Committee that all of the circuits had completed their transition to the CM/ECF system. She observed that the project to revise Part VIII of the Bankruptcy Rules (which the Committee had discussed earlier in the day) provided a model for ways in which the Rules could be amended to take account of electronic filing. With input from the other Circuit Clerks, Mr. Green (who was Mr. Gans's predecessor as the Circuit Clerks' representative on the Committee) had prepared a list of Appellate Rules that could be considered in this connection. Relevant topics included requirements for service by the clerk; filing or service by parties; the treatment of the record; the treatment of the appendix; the format of briefs and other papers; and the number of required copies. One issue that had been raised by a number of commentators concerned the "three-day rule" in Appellate Rule 26(c), which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service.

Judge Colloton invited the Committee members to suggest topics that might be ripe for study. The three-day rule might be one such topic. With respect to the appendix, there may be varying views; some judges may prefer an electronic appendix while others will continue to prefer paper.

As to the three-day rule, Mr. Letter pointed out that eliminating this provision in instances where the paper is served electronically could cause problems for lawyers whose opponents electronically serve them at 11:59 p.m. Perhaps, he suggested, the rule could be amended to eliminate the three-day rule for electronically served papers but to provide one extra day for responding to a paper that is electronically served after noon. Mr. Gans responded that such a rule would be difficult for clerks to enforce; moreover, if late-night electronic service causes a problem in a given case the court could grant a one-day extension. In the Eighth Circuit, he noted, the Clerk's Office serves some documents electronically on behalf of inmate litigants; but this practice is not universal among other circuits. Pro se prisoner litigation, Mr. Gans reported, constitutes roughly a third of the Eighth Circuit's docket. Mr. Gans suggested that the three-day rule is no longer

necessary but that if the Rule were amended the change would result in some transition costs.

A member stated that, although lawyers have an ingrained habit of relying on the three-day rule, it does not make sense in the case of electronically served papers. An appellate judge asked how often service is accomplished by U.S. Mail. Mr. Gans reported that, in the Eighth Circuit, over a period of years, only a handful of lawyers had been exempted from using the CM/ECF system. Mr. Letter pointed out that in a number of circuits there will continue to be papers served in paper form by pro se litigants. Those papers are typically delayed in reaching federal-government lawyers because all mail that comes to the DOJ is screened on its way in for security reasons.

An appellate judge member noted two possible ways of amending Rule 26(c) to address the question of electronic service. One option would be to delete the last sentence of the Rule, which currently states that “[f]or purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.” An alternative would be to revise that sentence by deleting the “not.” Mr. Gans stated that he preferred the latter approach.

The Reporter observed that, although the application of the three-day rule to electronically-served papers has garnered the most criticism, Chief Judge Easterbrook also has voiced a more general objection to the three-day rule – namely, that it interferes with the Rules’ general preference for setting time periods in multiples of seven days. Mr. Gans stated that the continuing prevalence of paper filings by pro se litigants provides a valid argument in favor of maintaining the three-day rule for documents served by mail. An appellate judge asked whether such pro se papers typically require an extensive response by opposing counsel. Mr. Letter predicted that if the three-day rule is eliminated altogether, the change will require the government to file more motions for extension of time.

Mr. Byron pointed out that the Standing Committee’s electronic-filing subcommittee would no doubt consider the question of what to do about the three-day rules in the Appellate, Bankruptcy, Civil, and Criminal Rules. Mr. Gans noted that it is important for the three-day rule to function the same way in all of these sets of Rules.

Judge Colloton asked Committee members for their views concerning the treatment of the appendix. The Reporter observed that circuits vary widely in their practices, with some requiring appendices and some requiring “record excerpts” instead. There is a question whether it is possible for the Rules to nudge circuits toward the use of electronic appendices. Mr. Gans observed that court employees do not want to be the ones to print the appendix.

Judge Colloton encouraged Committee members to share any additional thoughts on this topic, and to let him know if they were interested in serving on the newly-formed subcommittee.

## 5. Item No. 08-AP-H (manufactured finality)

Judge Colloton introduced this topic, which concerns the efforts of a would-be appellant to “manufacture” appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. Judge Colloton reminded the Committee that, as of fall 2012, it had appeared possible that the Court would shed light on this topic when deciding *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). As it turned out, however, the Court’s decision in *Gabelli* did not speak to the manufactured-finality issue.

Judge Colloton had chaired the Civil / Appellate Subcommittee, which previously considered this topic. He noted that a majority of the Subcommittee members had agreed that it would be desirable to bring clarity to this question of appellate jurisdiction, and had felt that this was an appropriate topic for rulemaking. However, the Subcommittee had failed to reach consensus on how to clarify the law in this area. A majority of the circuits have ruled that a dismissal of the remaining claims without prejudice does not suffice to render the judgment final. And a majority of circuits to consider the question have ruled that a dismissal of the remaining claims with conditional prejudice (i.e., a dismissal that is final as to the remaining claims unless the appellant wins on appeal as to the central claim) does not suffice to render the judgment final. Some circuits look at whether the appellant dismissed the remaining claims with the intent to manipulate appellate jurisdiction – a standard that presents problems of administrability.

Judge Colloton pointed out that the agenda materials included some sketches that Professor Cooper had prepared for the Civil / Appellate Subcommittee’s consideration. As a basis for discussion, Judge Colloton suggested considering the possibility of an amendment that would adopt the strict view that a dismissal without prejudice does not achieve finality. Such an approach would help to avoid piecemeal litigation; and avenues for taking an immediate appeal are already provided by Civil Rule 54(b) and by 28 U.S.C. § 1292(b). Judge Colloton drew the Committee’s attention to one of Professor Cooper’s sketches: “A party asserting a claim for relief can establish a final judgment by voluntary dismissal only by dismissing with prejudice all claims and parties remaining in the action.” He asked the Committee members to comment on this possibility.

An appellate judge member stated that he liked the idea of having a clear rule. An attorney member expressed agreement, and stated that some of the existing approaches to manufactured finality felt like methods for gaming the system; an attorney participant concurred in this view. Another member, however, questioned how big a problem the current caselaw is posing in practice; are there many abuses, or are lawyers using existing caselaw to serve the legitimate needs of their clients? Mr. Letter noted that the issue comes up frequently and has generated plenty of caselaw. An appellate judge stated that he did not know how often appellants use the vehicle of manufactured finality in order to take an appeal; he observed that the Second Circuit first recognized conditional prejudice as an avenue for creating finality a decade ago, in *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003).

Mr. Letter pointed out that some district judges may be unwilling to direct entry of judgment as to fewer than all claims or parties under Civil Rule 54(b). An appellate judge member suggested that it would be worthwhile to understand the reasons why circuits that take a relatively permissive approach to manufactured finality have decided to do so. In complex patent cases, this member noted, there may be an interest in clearing the way for appellate review on the main issue in the case. A district judge member noted that he has directed entry of judgment under Civil Rule 54(b) in cases where the appeal would be taken to the Federal Circuit.

An appellate judge member stated that he favored the sketch pointed out by Judge Colloton. The district judge member agreed.

It was determined that the Chair and the Reporter would contact Judge Campbell and Professor Cooper and ask if the Civil Rules Committee would give consideration to the possibility of adopting a rule amendment along the lines of the sketch.

Later in the meeting, the discussion returned to the topic of manufactured finality. Mr. Letter pointed out that in False Claims Act cases, the government frequently files both a False Claims Act claim (which carries treble damages) and a common-law claim (which does not). If the False Claims Act claim is dismissed, the case may or may not be worth trying on the common-law claim by itself. If an appeal is taken and the court of appeals upholds the dismissal of the False Claims Act claim, sometimes the government might wish to pursue the common-law claim (though in many cases it would instead simply dismiss that claim). Mr. Letter reported that some district judges may be unwilling to direct entry of final judgment as to the False Claims Act claim under Civil Rule 54(b), because they do not wish to try the common-law claim. Mr. Letter stated that he would need to verify the DOJ's position concerning the manufactured-finality issue, but that he suspected that the DOJ would not support a rule change modeled on the sketch.

An appellate judge member expressed skepticism about the value of permitting appeals in the type of scenario described by Mr. Letter. Another appellate judge member asked whether any court has explored an approach that would permit a dismissal without prejudice to result in finality so long as it is clear that the statute of limitations continues to run while the appeal is litigated. The statute of limitations on the voluntarily-dismissed claims, he suggested, could provide some discipline for parties who seek to use manufactured finality to take an appeal.

## **6. Item No. 12-AP-E (length limits)**

Judge Colloton turned the Committee's attention to this item, which concerns the question of how to formulate length limits in the Appellate Rules. Most of the Appellate Rules that set length limits, Judge Colloton observed, set those limits in terms of pages rather than type/volume limits. The Reporter pointed out that the Committee's agenda materials included a chart showing possible ways to reformulate the length limits that are currently set in pages. One column showed a type/volume limit designed to roughly

approximate the current page limit, coupled with the alternative of a shorter page limit. The next column showed a type/volume limit that would provide greater length than the current page limit, coupled with the alternative of the current page limit. And the final column showed a type/volume limit – for papers produced using a computer – that was designed to approximate the current page limit; for papers produced without the aid of a computer, the final column showed the current page limit.

Judge Colloton expressed doubt about the viability of the approaches sketched in the first two columns. Professor Katyal stated that the Supreme Court’s switch (in 2007) to using word counts was a great move. Setting length limits in pages invites litigants to game the system and also wastes lawyers’ time. Professor Katyal suggested that the approach illustrated in the third column – setting length limits in pages only for typewritten briefs – was an elegant solution. An attorney participant stated a preference for page limits and expressed nostalgia for the prior version of the Supreme Court Rules. Judge Colloton noted that Professor Katyal, in raising this issue, had focused on rehearing petitions; he asked Professor Katyal whether he felt that other page limits, such as those for motion papers, were also problematic. Professor Katyal responded that in his experience it is the rehearing petition page limits that have posed problems, but that it would be best to express all the Rules’ length limits in the same units.

Mr. Byron noted that although it is impracticable for a litigant to count the words in a typewritten paper, it is possible to use the alternative type/volume method by counting the number of lines of text in the paper. Mr. Byron queried whether courts would want to treat motions the same way as rehearing petitions for purposes of the length limits. The Supreme Court’s rules, he suggested, treat motions differently from rehearing petitions. Professor Katyal responded that the Supreme Court’s Rules do not set page limits for motions or applications. There are page limits, he reported, for certiorari-stage pleadings that are prepared on letter-size paper pursuant to Supreme Court Rule 33.2(b); that is because most of those documents are in *in forma pauperis* cases and many are prepared by prisoners who may hand-write their petitions.

The discussion turned to the basis for developing the numbers shown in the columns in the chart. The Reporter explained that, for illustrative purposes, she had assumed the correctness of the statement in the 1998 Committee Note to Rule 32(a)(7) that the type/volume limits in Rule 32(a)(7)(B) “approximate the current 50-page limit,” and had divided those limits by 50 to obtain the word and line equivalents of a single page. Mr. Letter stated, however, that the Committee Note was incorrect in suggesting that a length of 14,000 words was equivalent to a length of 50 pages. As he recalled, 50 pages was the equivalent of some 12,500 words. An appellate judge member suggested that perhaps the difference reflected the fact that additional lines might be included (when length limits are set in pages) by placing material in a footnote instead of in the text.

Mr. Letter suggested that, while litigants are tempted to manipulate the length of briefs, the temptation is less with respect to rehearing petitions and motions because those documents are shorter. He also suggested that clerks may prefer page limits because they are easier to administer. He reported that he had seen lawyers manipulate the length

limits for rehearing petitions, but that this occurred less frequently with such petitions than it had with briefs. Professor Katyal responded that, especially when a litigant is seeking rehearing en banc, the brevity of the page limit generates an incentive to manipulate the limit. Mr. Letter asked Professor Katyal whether he advocated a word limit, for rehearing petitions, that would yield petitions longer than the current 15 pages. Professor Katyal responded that the limit should be equivalent to 15 pages.

A member asked Mr. Gans whether the burden – for the Clerk’s Office – of verifying compliance with type/volume limits would be less for papers filed electronically. Mr. Gans responded that electronic word counts work differently for PDF documents than for Word or WordPerfect documents. To count the words in a PDF, it becomes necessary to convert the file to another format; rather than do so, the Clerk’s Office asks the attorney to submit a version in either Word or WordPerfect. Participants discussed the possibility that a filer could manipulate the performance of the word-counting software. Mr. Letter suggested that word limits, too, could lead lawyers to waste time cutting words in order to fit within a given limit. Professor Katyal responded, however, that at least the activity of cutting words to comply with a word limit affects the substance of the filing, whereas the activity of fitting more words on a page to comply with a page limit bears no relation to the substance of the filing.

Mr. Garre noted a question that has arisen concerning the operation of the length limit for petitions for rehearing en banc: Does the statement required by Rule 35(b)(1) count for purposes of the 15-page limit set by Rule 35(b)(2)? He reported that the circuits take varying approaches to this question; the Federal Circuit requires the statement to count. Mr. Garre agreed to survey circuit practices on this issue in preparation for the Committee’s next meeting. The Chair wondered what is the basis for excluding the statement from the length limit, since the “petition” must not exceed fifteen pages and the “petition must *begin with*” the statement.

Mr. Letter suggested that frequent Rule amendments are undesirable, and he noted that Rule 32(a)(7)’s provisions are still relatively new. An appellate judge member expressed agreement with this view. Justice Eid noted that the Colorado Supreme Court uses word limits and periodically checks briefs for compliance with those limits. She undertook to provide a comparison with the Colorado Supreme Court’s rules for the next meeting.

An appellate judge asked whether setting length limits in words creates more work for the Clerk’s Office. Mr. Gans predicted that attorneys would in some instances fail to file the required certification. He asked whether the proposal on the table related only to petitions for rehearing or to all of the documents for which length limits are currently set in pages. Professor Katyal responded that it would make sense for all the length limits to take a consistent approach. Although the rule change would give rise to some transition problems, he suggested, the switch to type/volume limits is inevitable. An attorney member agreed that consistency is desirable.

Judge Colloton noted that, if the frequency of rule changes is a concern, proposed amendments can be held for bundling with other proposals. Turning to the option of switching to a type/volume limit, he asked Committee members whether they favored the model used in Rule 32(a)(7), where in effect the length limits for handwritten briefs were shortened, or whether they instead favored the approach shown in the rightmost column of the chart, that is, a model that seeks equivalence between documents prepared on computers and documents prepared on typewriters or by hand. One participant expressed support for the approach shown in the final column of the chart, which would set limits using different methods for typewritten papers than for papers prepared on a computer. An attorney participant asked how one would operationalize that approach; would the litigant have to certify that a computer had not been used in preparing the paper? He suggested that one could avoid making a distinction between papers that were or were not prepared on a computer by instead requiring those submitting typewritten papers to comply with the line-counting option in a type/volume limit. An appellate judge noted, however, that the latter expedient would not address the issue of handwritten briefs; he asked whether concerns over handwritten briefs had been discussed during the development of the 1998 amendments. Mr. Byron stated that rules concerning CM/ECF typically require litigants to obtain a waiver in order to avoid using the CM/ECF system, and he asked whether the Rules concerning length limits could distinguish among filers based on whether they were CM/ECF users or not.

Judge Colloton suggested that it would be useful to prepare alternative drafts of amendments – one set that would impose length limits modeled on Rule 32(a)(7)'s approach (as shown in the leftmost of the three columns) and another set that would track the approach illustrated in the rightmost column. He also asked whether, if the approach in the rightmost column were adopted for the provisions that currently employ page limits, that approach should be considered for Rule 32(a)(7) as well. An appellate judge member responded that it is important to avoid undue length in briefs, and that it would not bother him if the length limits for briefs were set using a different method than the length limits for other papers.

A district judge member observed that the approach shown in the rightmost column would treat pro se filings more similarly to filings by counsel in terms of length; under Rule 32(a)(7)'s approach, by contrast, a pro se filer who uses the page limits option gets less space. On the other hand, this member said, many pro se filers may not need the extra length. An appellate judge member noted that attorneys tend to use the entire permitted length even when a shorter paper would suffice. An attorney participant questioned why short length limits would unduly burden pro se litigants. Mr. Letter observed that pro se briefs tend to be less complicated than briefs prepared by counsel, and suggested that this might render Rule 32(a)(7)'s 30-page limit less of a hardship than it might otherwise appear.

The attorney participant suggested that it might be useful to research whether briefs filed under Rule 32(a)(7)'s 14,000-word length limit are longer than they were before. An appellate judge member recalled that the way that lawyers fit additional words into the old page limits was by moving portions of the brief from the text into the

footnotes. Mr. Gans stated that the CM/ECF system includes a field for word counts, which he could search in order to produce figures from which to derive an average length. An appellate judge member suggested that the attorney members might be able to survey documents in their firms' archives. Another appellate judge member suggested looking on Westlaw at petitions for rehearing. Judge Colloton asked Mr. Letter whether he recalled this question being studied during the late 1990s by any local rules committees. Mr. Letter responded that word-counting software was at a relatively early stage then.

The Reporter raised one additional issue concerning length limits. Unlike Rule 32(a)(7)(B), Rule 28.1(e) – which sets length limits for briefs in connection with cross-appeals – does not include a list of items that can be excluded for purposes of calculating length. Rule 28.1(a) excludes Rule 32(a)(7)(B) from applying to cross-appeals. Judge Colloton asked the Committee members whether it would be useful to clarify the Rule. Two attorney members stated that they have assumed the same exclusions apply to briefs on cross-appeals. Judge Colloton suggested that the question concerning Rule 28.1(e) be kept on the Committee's docket for future consideration as a housekeeping amendment.

#### **7. Item No. 12-AP-F (class action objector appeals)**

Judge Colloton reminded the Committee that he had invited Professor John E. Lopatka, who is the A. Robert Noll Distinguished Professor of Law at Pennsylvania State University Law School, and Professor Brian T. Fitzpatrick, who is a Professor of Law at Vanderbilt Law School, to speak with the Committee about the topic of appeals by class action objectors. Judge Colloton invited the Reporter to briefly introduce this topic.

The Reporter observed that the basics of the problem are well known. In reviewing class action settlements, judges need good information concerning the quality of the settlement. Discussions over the last decade or so have focused on various ways of producing that information, whether through the opt-out mechanism or through encouraging objectors. During the discussions that led to the 2003 amendments to Civil Rule 23, participants noted the difficulty of crafting rules that distinguish between good objectors – who improve the quality of the settlement – and undesirable objectors – who seek merely to extract payments for themselves. There are reports that objectors routinely take appeals from orders approving class settlements. The Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002) – which allowed a class member to take an appeal even if the member had not intervened below – has facilitated the practice of objector appeals. As a practical matter, such an appeal has the effect of staying the implementation of the settlement. Class counsel may end up offering the objector a payment in order to drop the appeal – a practice that some class action lawyers characterize as a tax on their activities.

The 2003 amendments to Civil Rule 23 included some measures designed to address the behavior of objectors in the district court. Civil Rule 23(e)(5) permits a class member to object to a proposed settlement, and provides that the objection may be withdrawn only with the court's approval. (Interestingly, Civil Rule 23(h)(2), which

permits a class member to object to a request for attorney fees, does not include a requirement of court approval for the withdrawal of such an objection.) The 2003 Committee Note to Civil Rule 23(e) included a passage that seemed apposite to the Committee's current inquiry:

Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.

Approval ... may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.

Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

This Committee Note, thus, discussed in general terms the topic of objector appeals. The Reporter noted that the Civil Rules Committee – during the discussions that led up to the 2003 amendments – had considered the possibility of addressing the question of objector appeals in the rule text, but had decided not to do so. The Reporter suggested that the dynamics that had been present at the district court level, and which may now be held in check by Rule 23(e)(5)'s requirement of court review for the withdrawal of objections, may be replicating themselves during the appeal.

Judge Colloton noted that he had asked Ms. Leary to conduct some research on the frequency of objector appeals and their disposition, and he invited Ms. Leary to summarize her preliminary findings. Ms. Leary explained that she had decided to focus on appeals from class settlements in districts within the Seventh Circuit because the district courts in that circuit have an average representative level of class action filings. Ms. Leary used an electronic search of the CM/ECF system in the relevant districts in

order to identify all class action cases in which final approval of a Rule 23-certified class action settlement was granted between January 1, 2008, and March 19, 2013, and after which one or more appeals were taken. Through further analysis, Ms. Leary identified those settled class actions from which an appeal was taken by one or more class members who had objected to the settlement in the district court prior to final approval. Ms. Leary identified 27 appeals by objectors in eight class actions. The appeals were concentrated in a few districts. All 27 of the appeals were voluntarily dismissed on motion under Rule 42(b). Among 21 of those appeals, the average time from inception to dismissal was less than three months. In many of those appeals, the appeals were dismissed before the appellant filed a brief. In many of the appeals, the class representatives asked the district court to require the objector to post a cost bond. In one case, the court ordered the objectors to post cost bonds of \$4,500 each; in another case, the court refused to require a bond; and in other cases, the objectors dismissed their appeals before a ruling was made on the bond request.

Judge Colloton expressed the Committee's appreciation for Ms. Leary's research. An appellate judge asked if the data reflected the number of class settlements that were approved in the district court and from which no appeal was taken. Ms. Leary stated that she had not gathered those data, but stated her impression that objections to settlements are relatively rare, and appeals from settlements are likewise relatively rare.

Judge Colloton reminded the Committee that Professor Fitzpatrick, along with Professor Brian Wolfman and Dean Alan Morrison, had submitted a proposal concerning Rule 42 to the Committee in 2012. Professor Lopatka and Judge Brooks Smith, he noted, had coauthored an article in the Florida State University Law Review that proposed amendments to the Rules concerning costs and cost bonds. Judge Colloton had invited Professor Fitzpatrick and Professor Lopatka to present their ideas to the Committee. He turned first to Professor Fitzpatrick, as the proponent of the proposal that was formally pending before the Committee.

Professor Fitzpatrick began by commenting on the empirical data concerning class action objector appeals. Professor Fitzpatrick, in researching his article, *The End of Objector Blackmail?*, 62 Vanderbilt Law Review 1623 (2009), reviewed every class settlement that was approved by a federal district court in 2006. Roughly 10 percent of those settlements were appealed. He suggested that the reason why the other settlements are not appealed is that it is not worthwhile for an objector to seek to hold up a settlement unless the settlement carries the prospect of substantial attorney fees. It is the class counsel, he noted, who would pay the objector to abandon the objection. Accordingly, objections are typically made to the big settlements, where the attorney fees will be large.

Professor Fitzpatrick advocated the adoption of a rule that would entirely bar an objector from dropping an appeal in exchange for anything of value. He argued that Rule 23(e)(5) – which does not bar the dropping of objections but does require court approval for their withdrawal – does not go far enough. Responding to the argument that sometimes objectors might raise an objection that is specific to them rather than generally applicable to the members of the class, Professor Fitzpatrick stated that he has never seen

such an objection. If an objector has an objection that is unique to him, then why is he legitimately a member of the class? Dropping an objector appeal, he asserted, affects all of the class members, by depriving them of positive changes that might have been made to the settlement in response to the objection. In addition, he noted, requiring court approval for dropping an appeal would create a lot of work for the court. Professor Fitzpatrick noted that when class counsel pay objectors to drop their appeals, the effect is equivalent to a tax on class action plaintiffs' lawyers. There are no good data on how big that tax is. But he has heard informal reports from class action lawyers of numbers that range from \$ 50,000 to \$ 1 million per objector. Addressing possible concerns about his proposal, Professor Fitzpatrick stated that the biggest concern is what would happen if an objector filed an appeal but then reached an agreement with class counsel and simply failed to prosecute the appeal.

Professor Fitzpatrick observed that Professor Lopatka and Judge Smith criticize the idea of banning the dismissal of objectors' appeals on the ground that such a ban would merely alter the timing of objectors' demands, by leading them to bargain with class counsel during the 30-day window between the entry of judgment and the deadline for the notice of appeal. But, Professor Fitzpatrick argued, a ban on the withdrawal of appeals would remove the objector's leverage because the threat to file the appeal would no longer be credible.

Responding to the appeal-bond proposal by Professor Lopatka and Judge Smith, Professor Fitzpatrick asserted that requiring an appeal bond would not prevent meritorious objector appeals from being settled in exchange for a payoff to the objector. He stated that appeal bonds are currently an available tool under Rule 7 and yet they have not curtailed objector blackmail. Moreover, he said, even if the district court imposes an appeal bond, it is possible to appeal the imposition of the bond. An approach that would bar the objector from appealing the bond without first posting the bond would, Professor Fitzpatrick argued, likely violate Due Process. In addition, if would-be appellants lack an effective avenue for securing review of the imposition of a bond requirement, then district judges may become too ready to require such bonds. A bond requirement could prevent a good objector, such as Public Citizen Litigation Group, from taking a meritorious appeal.

Judge Colloton thanked Professor Fitzpatrick, and turned next to Professor Lopatka. Professor Lopatka observed that everyone is in agreement about the nature of the problem concerning objector appeals. As to the scope of the problem, he agreed with Professor Fitzpatrick that data are hard to obtain. Looking only at the number of appeals taken may undercount the problem, because such a count would omit appeals that are threatened but then foregone. In addition, while it would be helpful to know more about the scope of the problem, the fact that such extortionate behavior occurs at all offends the purposes of the justice system.

The interaction between objector and class counsel, he stated, is a bargaining game. Taking an appeal is not costly because the appellate briefs typically do not require

much work. There is a need to change the framework so that objectors' threats to take an appeal become less credible.

Professor Lopatka stated that the cost and appeal bond measures that he and Judge Smith advocated would not eliminate the possibility of extortionate behavior by objectors, but that those measures would change the terms of the bargaining. Responding to Professor Fitzpatrick's point that the current appeal bond requirement has not stemmed objector appeals, Professor Lopatka observed that the circuits currently disagree about the items that can be taken into account when a court sets the amount of a Rule 7 bond. Professor Lopatka and Judge Smith propose amending the Rules to make clear the district court's authority to require a bond in the full amount of all projected costs of delay attributable to the appeal, and to bar the objector from appealing the bond order without first posting the bond. Otherwise, Professor Lopatka argued, an appeal from the bond order would give the objector the same bargaining advantage as an appeal from the underlying settlement approval. But the district court would have discretion, under the proposal, to reduce the amount of the bond if the grounds for appeal seemed legitimate and if a bond in the full amount would effectively bar the appeal.

Professor Lopatka argued that Professor Fitzpatrick's proposal, though ingenious, would likely fail to deprive objectors of their leverage. Professor Lopatka offered a hypothetical: Suppose that an objector files an objection in the district court. The district court rejects the objection. The objector uses the thirty days after entry of judgment to put class counsel to a choice: Either the class counsel can pay the objector, in which event the objector will forgo filing a notice of appeal, or class counsel can refuse, in which event the objector will file the notice of appeal. True, once the objector files the notice of appeal, Professor Fitzpatrick's proposal would prevent the objector from dismissing it in exchange for money. But the appeal would not be very costly for the objector to litigate, and it would impose substantial delay costs on class counsel.

Judge Colloton thanked Professor Lopatka for his comments, and invited the Reporter to summarize some feedback that she had informally obtained from members of the Civil Rules Committee's Rule 23 Subcommittee. The Reporter stated that the Subcommittee took the view that this is a serious issue that is worth attention, and one on which it is important for the two Committees to coordinate their efforts. Subcommittee members believed that the bond mechanism proposed by Professor Lopatka and Judge Smith was too blunt a tool. The Subcommittee also expressed a preference for court review of the withdrawal of an objector appeal, rather than an outright ban on dismissals; but the Subcommittee noted that court review carried the possibility of delay. Individual subcommittee members had provided further feedback, some of which the Reporter highlighted without attempting to provide attribution. One question, she noted, concerned instances in which an objector's appeal is dismissed in return for *both* a payment to the individual objector *and* modification of the settlement that results in better terms for the class. Another question concerned the possibility that banning the withdrawal of an appeal in exchange for payment might shift the time for such withdrawals to the certiorari-petition stage. At least one participant did, though, suggest that Professor Fitzpatrick's proposal was appealing because it took a structural,

incentives-based approach rather than relying on ad hoc decisionmaking by a district judge.

Professor Fitzpatrick responded that, if class counsel and the defendant believe that there are grounds for improving the settlement, they can ask the court of appeals to remand the case so that the district court can review and approve the settlement modification. In such an event, the district court could, if appropriate, award fees to the objector for having produced the improvement in the settlement. Turning to the specter of “zombie appeals” (i.e., appeals that the appellant refuses to pursue but that the court is barred from dismissing), Professor Fitzpatrick stated that the problem would only arise if someone actually accedes to an objector’s demands. So long as class counsel has refused to pay anything to the objector, then if the objector fails to prosecute the appeal, the appellees can move for dismissal of the appeal and can provide the required certification that they have paid nothing of value to the objector. As for the possibility that a ban on dismissal of appeals to the court of appeals would simply move the bargaining process to the certiorari-petition stage, Professor Fitzpatrick stated that his impression was that the Supreme Court acts fairly quickly on petitions for certiorari.

Professor Lopatka conceded that raising the cap on the permissible size of appeal bonds might create an obstacle to some legitimate appeals. However, he expressed optimism that district judges would not overuse a more robust appeal-bond tool. As evidence that judges do not seek to insulate their rulings from review, Professor Lopatka noted that district judges sometimes certify interlocutory rulings for immediate appellate review under 28 U.S.C. § 1292(b).

An appellate judge asked Professor Lopatka how he would suggest handling appeals from an order imposing a cost bond. Professor Lopatka suggested that allowing the objector to appeal the cost bond order would be tantamount to allowing the objector to appeal the settlement itself, in the sense that it would permit the objector to hold the settlement hostage. On the other hand, he conceded, perhaps the appeal from the cost bond order could be disposed of more quickly.

An appellate judge member asked whether there are other means to control the conduct of objectors, such as suspending membership in the court’s bar for an objector’s attorney who behaves unethically. Professor Lopatka responded that district judges have sometimes employed such measures, but that they tend not to want to spend judicial time on it. In addition, he stated, class counsel have sometimes sought sanctions against objectors’ attorneys; but that, too, has failed to solve the problem. Professor Coquillette observed that disciplinary proceedings are a blunt instrument for addressing a problem of this nature. ABA Model Rules 3.4 and 8.4 provide a basis for discipline, but people are reluctant to pursue it.

A member stated that he agreed that objector conduct can become salient by affecting the big class action settlements, even if those settlements are a small percentage of the total number of class settlements. But he suggested that, even though the amounts mentioned by Professor Fitzpatrick were large numbers, they were very small in

comparison to the typical amount of attorney fees received by class counsel in connection with a large class action settlement. Professor Fitzpatrick noted that the figures he had cited (\$ 50,000 to \$ 1 million) were settlements with *single objectors*; in connection with any large class action settlement, there are typically multiple objectors.

A member asked whether an objector might find a way around the proposed ban on appeal dismissals by arguing that, when and if class counsel pay the objector a satisfactory settlement, the objector's appeal becomes moot. Professor Fitzpatrick noted Supreme Court precedents holding that when a district court certifies a class action (or erroneously denies such certification), the class gains its own legal status such that subsequent events mooting the individual plaintiff's claim do not thereby moot the class action.<sup>1</sup> The member observed, however, that the Court had recently refused to apply those precedents in the context of a collective action brought by an employee under the Fair Labor Standards Act on behalf of similarly situated employees.<sup>2</sup>

A district judge member observed that by the time a class settlement is on appeal, the district judge has reviewed and addressed the objections in detail. In the habeas context, this member pointed out, the district judge must grant or deny a certificate of appealability ("COA") at the time that he or she enters a final judgment denying the habeas petition. The member stated that he is forthright in giving an accurate view of the merits of the petitioner's claims when he drafts the ruling on the COA. Perhaps, he suggested, it would be useful to require class action objectors to obtain a COA in order to appeal a class settlement. Such a requirement would leverage the district judge's expertise. Professor Lopatka responded that, when he and Judge Smith first started work on their proposal, they considered advocating a COA requirement. However, they turned to a bond requirement instead because a COA is binary (it does or does not issue) while a bond is more nuanced (because the amount can be adjusted). Also, he suggested, if the district court's denial of the COA is reviewable in the court of appeals, then that too could provide an objector with an opportunity to hold up the settlement. An appellate judge asked why appealing the denial of a COA would differ from appealing the imposition of an appeal bond requirement. Professor Lopatka responded that, in either of those instances, it would make a difference whether the appeal of the preliminary matter could be quickly disposed of. Professor Fitzpatrick suggested that the rule could impose a time limit for the disposition of such appeals; but participants noted the Judicial Conference policy against imposing such time limits by rule.

Mr. Letter stated that the discussion thus far suggested to him that the reason objector appeals can cause problems is that the appeal stays the implementation of the settlement. He asked whether one could address this problem by providing that the implementation will proceed, despite the pending appeal, unless the would-be appellant posts a bond. Professor Fitzpatrick responded that if the order approving the settlement is reversed on appeal, it will be hard to unwind an already-implemented settlement if the payments have already gone to the class members. One measure that partly fills this

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<sup>1</sup> See *Sosna v. Iowa*, 419 U.S. 393 (1975), and *United States Parole Comm'n v. Geraghty*, 445 U.S. 388 (1980).

<sup>2</sup> See *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013).

function, Professor Fitzpatrick noted, is the use of “quick-pay provisions” – i.e., a provision in the settlement that entitles class counsel to receive their fees upon settlement approval despite the pendency of an appeal (but subject to the return of the fees if the order is reversed on appeal). Quick-pay provisions can provide a fairly good solution, he reported, but defendants are reluctant to agree to such provisions unless they receive security that assures the repayment of the fees if the judgment is reversed on appeal. Mr. Letter observed that the difficulty of recouping amounts paid pursuant to a judgment that is ultimately reversed on appeal is not unique to class suits. Professor Fitzpatrick responded that in a large class suit, the costs of administering the settlement can themselves run into the millions of dollars.

Mr. Letter also suggested that this topic seems to present questions of policy that seem more suitable for treatment by Congress than by the rulemaking process. Congress, he observed, would have the power to subpoena repeat objectors and to question them about their practices. Mr. Letter also noted that one could view this topic as a subset of the broader category of instances in which litigants settle nuisance suits because it makes more sense to settle them than to litigate them. Professor Lopatka responded that, even if addressing objector appeals would leave other nuisance litigation unaddressed, that should not be a reason to reject measures that could address objector appeals. As to quick pay provisions, Professor Lopatka stated that it is not yet clear whether they will catch on; some defendants are unwilling to front money to the class counsel before it is clear whether the settlement will be upheld in the event of an appeal. Mr. Letter asked whether a “partial quick pay” mechanism would provide a useful compromise – i.e., whether objectors would lose their leverage if the defendant paid class counsel a portion of their fee pending disposition of the appeal. Professor Lopatka responded that such a measure would reduce the size of the “tax” objectors can impose on class counsel, but would not eliminate it.

An attorney participant asked whether there exist any other rules that prohibit a party from settling a claim in exchange for money. Professor Fitzpatrick stated that he did not know of any. The attorney participant asked Professor Fitzpatrick to clarify whether the court of appeals would have to approve the settlement as well as the dismissal. If the parties can settle something without needing the court to review the settlement, the settlement could then have possible mootness consequences that would affect the question of dismissal.

Professor Fitzpatrick argued that the proposed Rule 42 amendment would yield a framework that the Clerk’s Office could readily administer: If the movant filed the required certification, the appeal would be dismissed, and if the certification were not provided, the appeal would not be dismissed. An attorney participant suggested that an alternative approach could require court approval for the dismissal of an appeal and could direct the court, in reviewing a request for approval, to consider whether the appellant received anything of value in exchange for seeking to dismiss the appeal. Professor Fitzpatrick responded that the courts of appeals would likely be unwilling to scrutinize the arrangements that lead an objector to seek dismissal of an appeal. An appellate judge asked whether the task of reviewing the request to dismiss an appeal could be assigned to

the district judge. An attorney participant asked whether it would be useful to require an objector to certify that the appeal was taken in good faith. Professor Fitzpatrick expressed doubt that such a requirement would be effective in addressing abuses.

The Reporter noted that while Rule 23(e)(5) requires court approval for the withdrawal of an objection to a class action settlement, Rule 23(h)(2) does not include a similar provision requiring court approval for the withdrawal of an objection to an award of attorney fees. She asked whether any difference had arisen in practice between objections focused on settlements and objections focused on attorney fees. Professor Fitzpatrick responded that he had not perceived a difference. Ms. Leary pointed out that objectors typically object to both the settlement and the fee award.

An appellate judge member stated that he was concerned by the potential sweep of proposed solutions that had been discussed. He stated that it was important to avoid chilling appeals by good objectors. Professor Lopatka agreed that this is a key concern. The question, he suggested, is whether the district court can distinguish appeals that have merit from those that do not. He reported that district judges tend to think that they can spot professional objectors.

Judge Colloton thanked Professor Fitzpatrick and Professor Lopatka for their contributions to a very helpful discussion. He invited them to share any suggestions for the direction of future empirical research. Professor Fitzpatrick suggested that it could be useful to perform a confidential survey of class action lawyers and ask them about the size of any side payments they have made to objectors; one could perform a similar survey of the objectors' attorneys as well. The Reporter noted the Committee's debt to Ms. Leary for her research, which had been very labor-intensive due to the lack of ready methods for locating the relevant appeals.

#### **8. Item Nos. 09-AP-D & 11-AP-F (response to Mohawk Industries)**

Judge Colloton introduced these items, which arise from proposals concerning the possibility of amending the Rules – in the wake of *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) – to provide for appellate review of attorney-client privilege rulings.

Judge Colloton observed that the Supreme Court had indicated, both in *Mohawk Industries* and in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the preferred method for determining whether interlocutory orders should be immediately appealable is the Rules Committee process, not further caselaw expansion of the collateral order doctrine. In 1990, Congress amended the Rules Enabling Act to add 28 U.S.C. § 2072(c), which authorizes the rulemakers to “define when a ruling of a district court is final for the purposes of appeal under section 1291.” In 1992, Congress amended 28 U.S.C. § 1292 by adding Section 1292(e), which authorizes the rulemakers “to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).”

Judge Colloton asked the Committee members for their views on whether it would make sense to tackle this general area. Should a project focus on appeals from attorney-client privilege rulings? On other areas where there are conflicts in the caselaw? Judge Colloton suggested that it would be useful to perform research concerning the status of the caselaw; a member agreed with this view. An appellate judge member asked about the Committee's prior discussions of this topic. The Reporter stated that the Committee had considered whether there were areas in addition to attorney-client privilege – for example, qualified immunity – where the law concerning interlocutory review might warrant clarification. But the Committee had decided to start by focusing on attorney-client privilege appeals and to consult the other Advisory Committees for their views. The project had not developed momentum in the other Advisory Committees, but the Evidence Rules Committee had stressed the need for consultation if the Appellate Rules Committee were to proceed in this area.

Professor Coquillette expressed concern about the possible scope of a research project on the law of interlocutory appeals, and suggested the importance of prioritizing the Reporter's tasks. An appellate judge member noted that changes in this area could alter the landscape of appeals. Another appellate judge member suggested consulting academics who have already been writing on this topic.

By consensus, the Committee retained this item on its agenda.

## **VII. New Business**

### **A. Item No. 13-AP-A (FRAP 29(a) / government amici)**

Judge Colloton invited the Reporter to introduce this item, which arises from a suggestion by Dr. Roger I. Roots that Rule 29(a) be amended “to require that *any* party seeking to file an *amicus curiae* brief must obtain leave of court or state that all parties have consented to the filing.” Dr. Roots asserts that Rule 29(a)'s current exemptions for certain government amici improperly favor those government entities.

The Reporter noted that governmental amici have always been treated specially under Rule 29. The only change in Rule 29's list of exempt governmental filers came in 1998, with the addition of the District of Columbia. The 1968 Committee Note to Rule 29 does not explain why the Rule exempted governmental filers from the requirement of party consent or court leave. The Committee Note cited five local circuit rules and then stated that Rule 29 “follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42.” Perhaps, the Reporter suggested, the exemption for governmental amici can be explained by considerations of separation of powers and federalism.

Mr. Letter observed that the federal Rules treat the government specially in a number of ways. The federal government makes more filings in federal court than any other litigant. It would be undesirable, he suggested, for the Rules to require the

government to move for leave to file. Not only do comity considerations apply, but also the quality of the government's briefing is high. In fact, the courts of appeals often request briefing from the United States. The DOJ, he noted, litigates on behalf of the people of the United States, and its filings in the courts of appeals require authorization from the Solicitor General.

A member moved to remove this item from the Committee's agenda. The United States, this member agreed, is different from non-governmental litigants both substantively and procedurally. It represents the people, and comity considerations support the exemption. An attorney participant agreed, stating that courts have good reasons to wish to hear from sovereigns as amici and that those sovereigns are not abusing the privilege afforded them by Rule 29(a). The motion was seconded and passed by voice vote without dissent.

**B. Item No. 13-AP-B (amicus briefs on rehearing)**

Judge Colloton invited Judge Chagares to introduce this item, which arises from a proposal by Roy T. Englert, Jr., that the Committee consider amending the Appellate Rules to address amicus filings with respect to petitions for rehearing and/or rehearing en banc. Judge Chagares stressed that the proposal would not require a court of appeals to permit such amicus filings, but rather it would govern procedural questions (such as length and deadlines) in a circuit chooses to permit them. The circuits, he noted, vary in their treatment of such questions. Adopting a rule that addresses the timing and length of amicus filings with respect to rehearing would foster predictability and uniformity. The courts of appeals review rehearing petitions relatively quickly; thus, Judge Chagares suggested, it is important that amicus filings not lengthen the schedule for filing papers. The amicus should coordinate with the petitioner. If a rule concerning these amicus filings were to follow the model set by Rule 29(d), then one would give the amicus half as much length as the petitioner – which would yield a length of seven and a half pages for the amicus filing.

An appellate judge member stated that it would be useful to provide clear rules on length and timing. Another appellate judge noted that, during past discussions, some had suggested that adopting rules on these topics (even rules that merely addressed timing and length) would encourage amicus filings at the rehearing stage. Another appellate judge member reported that, in the Federal Circuit, there is a slightly greater expectation that a rehearing petition might be granted, given the Federal Circuit's unique role in shaping patent law. The judges are interested, he said, in knowing whether the questions at issue in the appeal have broad importance. Amicus filings can be informative on this point, both because the identity of the amicus can shed light on the perceived importance of the issue and because amici can make points that the petitioner may be unable to include in the petition (due to space constraints and the need to cover technical points). A seven-and-a-half page limit for amicus filings, this member suggested, would often be too short. But, he noted, that does not necessarily mean that the issue must be addressed in the Appellate Rules.

Judge Chagares asked Mr. Gans what the Eighth Circuit's practice is. Mr. Gans responded that his office frequently receives questions on these issues and is unable to provide clear guidance. He observed that if a rule allowed a time lag between the petition and the amicus filing, this might be inefficient from the judges' perspective because it might require them to take two looks at the briefing. An appellate judge noted that such a time lag could also interfere with the timing of a response to the petition (if the court orders a response). An attorney member reported that the Fifth Circuit lacks a local rule on point; this produces uncertainty on the lawyers' part and leads them to take the most conservative approach with respect to length and timing. An appellate judge asked whether members would favor requiring the amicus to file at the same time as the party whose position the amicus supports. The attorney member responded that such an approach would not be ideal from the amicus's perspective but that he would not oppose it. Mr. Gans observed that the court can extend the time to file a petition for rehearing or rehearing en banc. Another member stated that amicus filings with respect to rehearing can add value; thus, he suggested, it would be beneficial to adopt rules on this topic, and such rules would be unlikely to cause a flood of amicus filings. This member agreed that seven and a half pages would be too short a limit; 15 pages would be preferable.

Mr. Letter agreed that certainty on these questions would be valuable. But, he suggested, circuit practices may vary widely, such that local rules would make more sense than a national rule. Some circuits, he noted, grant rehearing en banc much more frequently than others. The United States sometimes files amicus briefs with respect to rehearing. To avoid redundancy between the party's filing and the amicus filing, he suggested, it would be better to have a time lag of two to three days rather than requiring the amicus to file on the same day as the party it supports. Amici, he observed, do not always coordinate their filings with the party whose position they support. Mr. Letter suggested a length limit of eight or ten pages rather than fifteen, on the ground that judges might find longer filings burdensome.

An attorney participant stated that, in recent years, amici have become more likely to coordinate their efforts with those of the party whom they support – especially in briefing before the Supreme Court. Thus, he suggested, it should not be problematic to require amici to meet the same deadline as the party whom they support. He stated that seven pages seemed like an adequate length for amicus filings.

An appellate judge noted that the Ninth Circuit has a local rule providing that the amicus must file its brief no later than ten days after the petition. There are at least a couple of circuits, he suggested, that would not like such a rule. The Reporter recalled that – during the Committee's prior discussions of this general topic – Judge Sutton had informally consulted with judges in several circuits, focusing on circuits that did not have local rules on point. Customarily, Judge Colloton observed, the Rules Committees are wary of encouraging the adoption of local rules. Professor Coquillette agreed that the rulemakers have a policy against doing so. A member pointed out that amicus filings with respect to rehearing may be particularly key where no one anticipated the panel's ruling.

Mr. Gans noted that the Eleventh Circuit has a local rule that sets a length limit of fifteen pages and a time limit of ten days after the filing of the petition. An appellate judge member observed that when amici are briefing issues in the Supreme Court, it is already evident what the questions presented are; by contrast, at the stage of rehearing in the court of appeals, amici may be unsure of the precise nature of the questions and it may not be easy for them to coordinate with the party whose position they are supporting. Mr. Letter noted that, in criminal appeals, Rule 40 sets a presumptive 14-day deadline for rehearing petitions. It may be difficult, he suggested, for amici to prepare their filings within that short time period.

Professor Coquillette reminded the Committee that an Appellate Rule will abrogate inconsistent local rules. The Judicial Conference has delegated to the Standing Committee the task of reviewing local rules for consistency with the national Rules. On the occasions when the Standing Committee points out local rules that are inconsistent with a national Rule, controversy results. Mr. Letter asked whether it would be useful for Judge Colloton to poll the Chief Judges of each Circuit to ask whether they favor adoption of a national Rule. Judge Chagares added that it might be useful to poll the Circuit Clerks concerning their local practices.

Judge Colloton proposed that further information be gathered in advance of the Committee's next meeting.

### **C. Item No. 13-AP-C (*Chafin v. Chafin* / ICARA appeals)**

Judge Colloton invited the Reporter to introduce this item, which arises from the suggestion by Justice Ginsburg (joined by Justices Scalia and Breyer), in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), that the Civil and Appellate Rules Committees consider adopting uniform rules to expedite proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ("Convention").<sup>3</sup> Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA"). The Convention requires U.S. courts to order the return of children to their country of habitual residence under specified circumstances. In *Chafin*, the Court held that a child's return to her country of habitual residence did not render moot an appeal from the order directing that return. The Court in *Chafin* stressed the need for speedy disposition of ICARA proceedings, and cited an FJC study which noted that courts have already followed a practice of expediting such proceedings. The cases highlighted in the FJC study were cases in which the court expedited the disposition of a particular appeal; none of those opinions cited a local circuit rule requiring speedy processing of this particular category of appeal, and a quick search by the Reporter did not disclose any such provisions. Rule 2 authorizes a court of appeals to "suspend any provision of [the Appellate Rules] in a particular case and order proceedings as it directs," in order, inter alia, "to expedite its decision." Thus, the courts of appeals currently possess authority to expedite ICARA appeals. The question, the Reporter suggested, is whether to mandate deadlines for such appeals or to leave the matter to the courts' discretion.

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<sup>3</sup> See *Chafin v. Chafin*, 133 S. Ct. 1017, 1029 n.3 (2013) (Ginsburg, J., joined by Scalia & Breyer, JJ., concurring).

Professor Coquillette expressed appreciation for the Justices' willingness to refer matters to the Rules Committees. However, he suggested that there are reasons for the Rules Committees to hesitate before attempting to implement specific pieces of legislation. Judge Sutton had discussed this matter with the Civil Rules Advisory Committee, which had decided to take no action. Judge Sutton was contemplating an informal communication with members of the Supreme Court about the matter, but would welcome the Appellate Rules Committee's views on it.

Mr. Letter reported that the United States has filed amicus briefs in a fair number of ICARA cases. To his surprise, the parties in those cases often failed to move to expedite the proceedings. Perhaps, he suggested, the decision in *Chafin* will produce an improvement in the processing of such cases by encouraging the parties to make more motions to expedite. Article 11 of the Convention, he noted, sets a goal of six weeks for the court to reach a decision. Mr. Letter also stated that it is important to make a distinction between the need to expedite the proceedings and the standards for obtaining a stay; the usual standards should govern the question of the stay. A district judge member reported that, in his experience, the parties usually move quickly to commence the proceeding, but that once the proceeding has commenced, there is often an informal stay in order to give the judge time to rule. Mr. Letter noted that Article 12 of the Convention directs the relevant authority, under specified circumstances, to "order the return of the child forthwith."

A member asked whether there are any Rules that set time limits for judicial action. Mr. Robinson said that he was not aware of any; Professor Coquillette agreed. Judge Colloton asked whether there are any data on how long ICARA appeals take. Mr. Letter stated that his impression is that sometimes they can take a surprisingly long time. Ms. Leary observed that it was unlikely that there would be any code that would enable researchers to readily identify ICARA appeals.

An appellate judge reported that, in his circuit, the clerk alerts the judges if an ICARA appeal is filed, and the court then hears that appeal at the next argument panel. Mr. Gans reported that ICARA cases tend to move very quickly in the district court. Ms. Sellers stated that the Judicial Conference Committee on Federal-State Jurisdiction was monitoring the Rules Committees' discussions of ICARA matters so as to be able to update the Committee's state-court representatives concerning the federal courts' approach. Mr. Robinson reported that Judge Fogel (the Director of the FJC) is aware of the issue raised by the *Chafin* Court. Mr. Robinson suggested the possibility of asking the FJC to raise judicial awareness of the need to expedite ICARA proceedings. Judge Colloton suggested that this was an issue on which judicial education would be useful.

An attorney participant asked whether the Committees ever produce commentary without amending a Rule. The closest example that the Reporter could think of was a 2000 pamphlet by Professor Capra, the Reporter for the Evidence Rules Committee, concerning caselaw that had diverged from the text of the Evidence Rules. Professor

Coquilletto noted that in that instance, Professor Capra authored the pamphlet and the FJC published it.

A motion was made to remove this item from the Committee's agenda and to notify the Chair of the Standing Committee that the advisory committee concurs in the idea of coordinating through the Standing Committee a response to Members of the Court. The motion was seconded and passed by voice vote without dissent.

### **VIII. Adjournment**

The Appellate Rules Committee adjourned at noon on April 23, 2013.

Respectfully submitted,

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Catherine T. Struve  
Reporter

**Minutes of Fall 2012 Meeting of  
Advisory Committee on Appellate Rules  
September 27, 2012  
Philadelphia, Pennsylvania**

**I. Introductions**

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, September 27, 2012, at 10:10 a.m. at the University of Pennsylvania Law School in Philadelphia, Pennsylvania. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Professor Neal K. Katyal, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. H. Thomas Byron III, Civil Division, U.S. Department of Justice (“DOJ”), was present representing the Solicitor General. Also present were Judge Steven M. Colloton, the incoming Chair of the Committee; Judge Adalberto Jordan, liaison from the Bankruptcy Rules Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office (“AO”); Mr. Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Mr. Leonard Green, liaison from the appellate clerks; Ms. Marie Leary from the Federal Judicial Center (“FJC”). Dean Michael A. Fitts attended briefly to welcome the committee; Professor Stephen B. Burbank and Professor Tobias Barrington Wolff attended the first portion of the meeting to give a presentation. A number of students from the Law School attended portions of the meeting. Professor Catherine T. Struve, the Reporter, took the minutes.

Dean Fitts welcomed the Committee and noted that how pleased and honored the Law School was to have the Committee meet at the Law School. He observed that Penn Law School is very proud of its civil procedure faculty, including Professors Burbank and Wolff (who would be addressing the Committee). And he thanked the Committee members for their important work in improving the Rules. Judge Sutton thanked Dean Fitts for hosting the Committee’s meeting. Judge Sutton noted that Judge Jordan is joining the Committee as a liaison member from the Bankruptcy Rules Committee in order to facilitate communications between the two Committees on matters that pertain to both the Appellate Rules and the Bankruptcy Rules. Judge Jordan served as an Assistant United States Attorney and then as a federal district judge in Miami, and in early 2012 he was confirmed to a seat on the U.S. Court of Appeals for the Eleventh Circuit. Judge Sutton also welcomed Judge Colloton, whose term as the Chair of the Appellate Rules Committee would commence on October 1, 2012.

Professor Coquillette brought greetings from Judge Mark R. Kravitz, the Chair of the Standing Committee. Professor Coquillette also reported that Judge Kravitz had just received a major honor: The Connecticut Bar Foundation has instituted a symposium in Judge Kravitz's name.

During the meeting, Judge Sutton thanked Mr. Rose, Mr. Robinson, and the AO staff for their preparations for and participation in the meeting. Judge Sutton also thanked Mr. Green for his excellent and important contributions during his service on the Committee. He congratulated Mr. Green on his retirement, and observed that Mr. Green was the longest-serving Clerk of the Sixth Circuit.

## **II. Presentations by Professor Burbank and Professor Wolff**

The Reporter introduced Professors Burbank and Wolff. She noted how fortunate she is to serve on a faculty with colleagues who are stronger scholars of procedure than she is. Professor Burbank, she noted, is the nation's leading authority on the history of the Rules Enabling Act and has long been a close observer of the rulemaking process. The Reporter noted her personal debt of gratitude to Professor Burbank for his generous and thoughtful guidance during the twelve years that they had been colleagues. More recently, Penn was fortunate to induce Professor Wolff to join the faculty. Even before getting to know Professor Wolff, the Reporter recalled, she had already realized that he is the most creative, thoughtful, innovative scholar of her generation on topics such as such as the preclusive effect of judgments in class actions. At Judge Sutton's invitation, Professor Burbank had agreed to address the Committee on the topic of the rulemaking process, and Professor Wolff had agreed to comment on this presentation.

Professor Burbank observed that the Federal Rules of Civil Procedure are nearing their seventy-fifth anniversary, and thus he took as his topic "Rulemaking at 75" (with a focus on the Civil Rules). He noted that Professor Barrett is an expert on the topic of courts' inherent rulemaking power. Congress, he observed, has almost plenary power with respect to federal court procedure limited only in those areas where true inherent court power operates. The U.S. Supreme Court has been very modest in its claims of inherent power that can trump a contrary directive from Congress.

Nonetheless, Congress has given the federal courts rulemaking power, both local and supervisory, since almost the beginning. In the eighteenth and nineteenth century, the Supreme Court refrained from exercising its supervisory rulemaking power for actions at law. By means of the 1872 Conformity Act, Congress effectively withdrew that power. Meanwhile, experience in states such as New York which went from the relative simplicity of the Field Code to complexity of the Throop Code and the concerns of lawyers with multistate practices contributed to a movement supporting adoption of a uniform system of federal procedure. The American Bar Association took up that idea and advocated in favor of it for two decades. The concept was opposed by Senator Thomas Walsh, but after Walsh's death the concept of uniform federal procedure came to fruition in the 1934 passage of the Rules Enabling Act.

When the first Advisory Committee began meeting in the 1930s, questions arose with respect to the scope and limits of the rulemaking power. The major question at the time concerned the meaning of “general rules.” Ultimately, the Advisory Committee almost backed into the idea that their task was to create trans-substantive rules.

As for the scope limitation set by the Enabling Act that the Rules “shall neither abridge, enlarge, nor modify the substantive rights of any litigant” the original Advisory Committee had no coherent and consistent understanding of that limitation. In a 1937 letter, William D. Mitchell (the Chair of the original Advisory Committee) stated that “the twilight zone around the dividing line between substance and procedure is a very broad one. If it were not for the fact that the court which makes these rules will decide whether they were within the authority, we would have very serious difficulties in dealing with this problem. The general policy I have acted on is that where a difficult question arose as to whether a matter was substance or procedure and I thought the proposed provision was a good one, I have voted to put it in, on the theory that if the Court adopted it, the Court would be likely to hold, if the question ever arises in litigation, that the matter is a procedural one.” And Mitchell’s prediction proved accurate; the Supreme Court has never invalidated a Civil Rule.

*Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), cast the Enabling Act’s scope limitation in terms of federalism concerns, but the notion that the Enabling Act’s scope limitation arose from federalism concerns is a myth; the real motivation for that limit was a concern over separation of powers. *Hanna v. Plumer*, 380 U.S. 460 (1965), clarified that it makes a difference, for purposes of the *Erie* analysis, what *type* of federal law is operating, but *Hanna* did not improve the law respecting the nature of the Enabling Act’s scope limitation. The concerns expressed by Justice Harlan in his separate opinion in *Hanna* have been vindicated; it seems almost impossible to invalidate a duly adopted Rule. Citing as examples *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), and *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), Professor Burbank stated that the Supreme Court’s jurisprudence on the Enabling Act’s scope limitation is incoherent.

During the early 1980s, Professor Burbank recalled, the Civil Rules Committee took a broad view of its powers, as evidenced by the 1983 amendments to Civil Rule 11. As a contrast, Professor Burbank cited the conference that the Civil Rules Committee convened in 2001 to discuss the topic of federal courts’ power to enjoin overlapping class actions. Academics who participated in that conference expressed the view that the rulemakers would exceed their powers under the Enabling Act if they were to propose the adoption of a rule empowering federal courts to enjoin the certification of a state-court class action where certification of a substantially similar class had been denied in federal court; and the Committee decided not to proceed with such a proposal. Similar concerns about the scope of rulemaking authority led some to support the enactment by Congress of the Class Action Fairness Act.

Professor Burbank next highlighted the politics of rulemaking during different time periods. Initially, there was a long honeymoon (punctuated occasionally by dissents by Justices Black and Douglas from the Court’s orders promulgating a proposed rule). In the 1980s, Representative

Kastenmeier began engaging in oversight of issues relating to the Civil Rules such as offers of judgment under Civil Rule 68. Congress itself has acknowledged the power of procedure; for instance, in the Private Securities Litigation Reform Act it ratcheted up the pleading standard. As the power of procedure to affect the operation of the substantive law became more widely recognized, the topic attracted interest, and also interest groups. Meanwhile, during the 1980s the rulemaking process became more transparent. Chief Justice Burger oversaw the creation of a legislative affairs office within the AO.

The composition of the Advisory Committee changed over time. The original Advisory Committee was made up of lawyers and academics; it included no sitting judges. That changed during the 1970s, perhaps because people no longer perceived (as they formerly had) a unity of interests between the bench and bar. Calls arose for judicial management of litigation. Now, Professor Burbank observed, judges have come to dominate the rulemaking process. This raises the question, he suggested, how judges should function as part of a political process for that, he stated, is what the rulemaking process is.

The rulemaking process has made progress with respect to the use of empirical data. Charles Clark and Edson Sunderland were legal realists who valued empirical research. One barrier to such research on matters touching the rulemaking process, Professor Burbank argued, has been the appeal of the image of trans-substantive rules. But when one compares the rulemakers' attitude toward empirical research in the 1980s and today, the change is admirable. Professor Burbank adduced, as an example of this shift, the Civil Rules Committee's decision not to incorporate into the recent Civil Rule 56 amendments the point-counterpoint mechanism that some districts mandate by local rule. But, Professor Burbank suggested, it would be even better if the AO would systematically collect, and make available to researchers outside the FJC, data concerning the litigation system.

Professor Wolff opened his remarks by noting that much of his scholarship focuses on the relationship between procedural rules and the underlying substantive law. He suggested that the rulemakers should take a modest view of the role that rules should play in relation to the substantive law. Judges and lawyers have become accustomed, Professor Wolff observed, to thinking about procedure trans-substantively. Similarly, he noted, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), the plurality asserted that Civil Rule 23 is merely another joinder rule. That assertion, Professor Wolff suggested, avoids the tough question that would otherwise arise: If you acknowledge the transformative nature of Rule 23, how could Rule 23 be a valid exercise of rulemaking power? Professor Wolff posited that one can answer that question by viewing the permissibility of class certification as tied to, and dependent on, the policies that underlie the relevant substantive law. In this view, the rules provide courts with an *occasion* for asking difficult liability questions. But, he suggested, it is not for the rulemakers to decide how liability policy will respond to the Rules; that task lies with legislators or with common-law courts. The Court recognized this principle, Professor Wolff commented, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Wal-Mart*, one of the Court's holdings was that the proposed employment discrimination class could not be certified under Civil Rule 23(b)(2) because that would conflict with certain requirements that the Court viewed as non-defeasible features of Title VII's statutory scheme.

Judge Sutton thanked Professor Burbank and Professor Wolff for their remarks. It is very helpful, he noted, for the Committee to obtain big-picture perspectives on the rulemaking process. He recalled that, in fall 2011, the Committee had heard from Professor Richard D. Freer on the issue of the frequency of rule amendments. (Later in the meeting, Judge Sutton noted that Professor Freer had recently drafted an article setting out his critiques of the rulemaking process.) Judge Sutton asked Professors Burbank and Wolff if they had advice to share with the Committee about the rulemaking process.

Professor Wolff noted that rule changes impose costs on the legal profession. Bold changes in the Rules, he suggested, should be undertaken only when supported by empirical data. Professor Burbank mentioned his 1993 article, "Ignorance and Procedural Law Reform: Time for a Moratorium," in which he criticized the 1993 amendments to Civil Rule 26 concerning initial disclosures. Professor Burbank agreed about the importance of empirical data. He also noted that trans-substantive procedure has costs. When rules are made with complex cases in mind, the rules become more elaborate and this raises the expense of litigation. As an example, Professor Burbank cited the point-counterpoint procedure for summary judgment, which, he observed, allows a litigant to impose huge costs on an opponent. Professor Wolff questioned whether the recent amendments to Civil Rule 56 were helpful to litigants in low-stakes cases. It is important, he suggested, to think about the broad array of litigants who may use the federal courts, and to ensure access to justice.

Professor Coquillette recalled that, in the 1990s, the Standing Committee considered the possibility of drafting a set of uniform Federal Rules of Attorney Conduct. In the end, the Standing Committee decided not to proceed with that project, which some regarded as being at or outside the limits of the rulemaking power. Senator Leahy, however, regarded the project as a good one and drafted a bill that would have empowered the rulemakers to undertake it. Professor Coquillette asked whether it is valuable when Congress looks to the Rules Committees for ideas on law reform. Professor Burbank responded that good law reform can require thinking beyond the boundaries of the Rules Enabling Act. (He pointed out that when sending forward the 1993 amendments to Civil Rule 4, the rulemakers included a special note flagging the question whether new Rule 4(k)(2) complied with the Rules Enabling Act's limits.) Professor Burbank suggested that multi-tiered lawmaking in which the rulemakers provide input to Congress can be useful.

Professor Wolff suggested that it can also be useful for the rulemakers to flag for the judicial branch issues that may arise from a change in the Rules. As an example, he cited the 1966 Committee Note to Civil Rule 23, which directed judges' attention to the connection between the procedures articulated in amended Rule 23 and the binding effect of a resulting judgment.

Mr. Rose stated that a classmate of his who is a district judge has commented on the difference between managerial judges who seek to avert trial through case management and summary judgment, and others who are more traditionalist about the idea that scheduling trials itself constitutes effective case management. He asked the presenters if they had suggestions for changing the way that the AO collects statistics. Professor Burbank noted that he had been involved in the ABA's project on the "vanishing trial" and, in connection with that, he wrote two articles about

summary judgment. He found that the AO's data did not distinguish summary judgment motions from other pretrial motions. The AO, Professor Burbank said, keeps statistics for the judiciary's purposes, and not for researchers' purposes. The Rules Committees have turned to the FJC for targeted research, but the FJC's resources are limited. He noted that he and Professor Judith Resnik participate in the activities of the American Bar Association's Standing Committee on Federal Judicial Improvements, and they have proposed a project on the collection of court data. Mr. Rose asked whether Professor Burbank has a view on the question of managerial judging. Professor Burbank responded that it is sad that people have come to regard trial as a failure. Modern procedure, he said, has made trial impossible, even for those who want it and deserve it. Summary judgments now account for from four to six times as many terminations as trials do. It would be better, he suggested, if federal judges spent more time in court trying cases and less time in their chambers managing cases.

Returning to the topic of the amendments to Civil Rule 56, an appellate judge recalled that the proposal to include a point-counterpoint mechanism in Rule 56 first arose because many federal districts have instituted such a mechanism in their local rules. Those districts felt that the mechanism worked very well. There was a concern that the rules for summary judgment procedure should be uniform nationwide. Opposition to the point-counterpoint proposal did come from judges in some districts who had employed the point-counterpoint mechanism and found that it did not work well. But there were also those who did not want a new mechanism imposed on their districts. So the failure of the point-counterpoint proposal was not solely due to conclusions drawn from empirical data. There were concerns about whether the proposal could ultimately receive approval. And there was a balancing of the value of uniformity against the value of local control. Professor Burbank responded that if the Committee had reached a contrary conclusion, that would have been surprising in light of the FJC study's findings concerning the length of time to motion disposition: When the point-counterpoint procedure was used, summary judgment motions took longer to decide. Also, the FJC study found a statistically significant difference in dismissal rates in employment discrimination cases: When the point-counterpoint mechanism was used, those cases were dismissed at a higher rate. The appellate judge participant responded that in evaluating the higher dismissal rate, one must consider why cases are being dismissed at a higher rate. The purpose of the point-counterpoint rule, he noted, is to clarify the issues.

Professor Wolff recalled that, at the 2010 Duke Civil Litigation Conference, he had argued during one of the sessions that *Twombly* and *Iqbal* confer a type of discretion on district judges to employ their "judicial experience and common sense" that the judges themselves should not wish to have. In a one-on-one conversation after that discussion, a judge had said to him that the *Twombly* / *Iqbal* pleading standard is a useful tool for disposing of *pro se* prisoner complaints. Professor Wolff suggested that good empirical data can help make visible to judges aspects of the practice in their own courthouses that the judges, acting in all good faith, may not otherwise perceive.

Judge Sutton asked Professors Burbank and Wolff for their views on whether it is better for procedural reforms to come about through judicial decisions or by means of a Rule amendment. Professor Burbank noted that the idea of "uniform rules" is appealing, but that a facially uniform rule

can be interpreted differently in different places around the country. Many Rules, he observed, confer discretion; such discretion-conferring Rules should not be viewed the same way as Rules that explicitly make policy choices. Professor Wolff suggested that so long as judges think carefully about the interplay between procedural rules and the substantive law, open-textured Rules can be a virtue. As an example, he cited litigation in which many “Doe” defendants are joined in a single copyright-infringement suit concerning file-sharing; in such suits, Civil Rules 20 and 26 give the district judge considerable discretion whether to allow early discovery prior to resolving the propriety of joinder.

Judge Sutton thanked Professors Burbank and Wolff for their presentations.

### **III. Approval of Minutes of April 2012 Meeting**

During the meeting, a motion was made and seconded to approve the minutes of the Committee’s April 2012 meeting. The motion passed by voice vote without dissent.

### **IV. Report on June 2012 Meeting of Standing Committee and Other Information Items**

Judge Sutton described relevant aspects of the Standing Committee’s June 2012 meeting. He noted that the Standing Committee gave final approval to proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1 and to Form 4, and that those amendments were recently approved by the Judicial Conference for submission to the Supreme Court. The Standing Committee approved for publication proposed amendments to Appellate Rule 6, concerning appeals in bankruptcy cases; so far, he reported, no comments had been submitted.

Judge Sutton noted that, after the Appellate Rules Committee’s spring 2012 meeting, he had written to the Chief Judge of each circuit to thank them for their input on the question of amicus filings by Indian tribes and to let them know that the Committee plans to revisit the question in five years. At the Judicial Conference, Judge Sutton reported, he spoke with Chief Judge Kozinski, who stated that the Ninth Circuit will consider the possibility of adopting a local rule concerning such filings. He encouraged those present to suggest to the Chief Judge of their home circuit that the circuit consider adopting a local rule on that issue.

Judge Sutton noted that, at the Standing Committee’s January 2012 meeting, Judge Kravitz had appointed Judge Gorsuch as the chair of a subcommittee to discuss terms, in the sets of national Rules, that may be affected by the shift from paper to electronic filing, storage, and transmission. Research performed for the subcommittee by Andrea Kuperman disclosed that the Rules currently use many different terms that could be affected by the shift to electronic filing. The subcommittee held discussions during spring 2012 and determined that, going forward, each Advisory Committee should attend carefully to the choice of words, in proposed Rule amendments, to denote the filing, storage, and transmission of documents.

## **V. Discussion Items**

### **A. Item No. 10-AP-I (redactions in briefs)**

Judge Sutton invited Judge Dow to introduce this item, concerning sealing and redaction of appellate briefs. Judge Dow noted that the item arose from an observation by Paul Alan Levy of Public Citizen Litigation Group, who stated that redactions in appellate briefs make it difficult for a potential amicus to gain the information necessary for effective amicus participation. That observation led the Committee to a more general discussion of sealing on appeal.

The Committee's inquiries identified three primary approaches to sealing and redaction on appeal. The D.C. Circuit and Federal Circuit require the litigants to review the record and to try to determine jointly whether any sealed portions can be unsealed; the litigants are to present that agreement to the court below. Some other circuits apply a presumption that materials sealed below should remain sealed on appeal. By contrast, the Seventh Circuit applies a contrary presumption; after a brief grace period, any sealed portions of the record on appeal are unsealed unless a motion is made to maintain the seal or unless the parties ask the court to excise the materials in question from the record on appeal.

Judge Dow reported that he, Mr. Letter, and Mr. Green had spoken informally with people in selected Circuit Clerks' offices to gain a better understanding of local circuit practices. In Mr. Letter's absence, the Reporter summarized the results of his research; she reported that the officials with whom Mr. Letter had conferred did not identify any practical problems with their circuits' approaches to sealing. The clerks' responses did provide some reason to think, the Reporter suggested, that a shift to an approach like the Seventh Circuit's approach might raise concerns in some circuits about possible resource constraints and delays. Mr. Green noted that, in the Sixth Circuit, items in the record that were sealed below remain sealed on appeal. The Sixth Circuit's approach, he said, seems to work well; motions seeking either to seal or to unseal matters in the record are rare, and counsel tend to have no complaints.

Judge Dow explained that the premise underlying the Seventh Circuit's approach is that the judiciary's activities are open to the public. There is a concern that district courts may seal items in the record without adequate justification if both parties agree to sealing. Judge Dow noted that the Seventh Circuit's approach requires more work both from the district court and from the parties. On appeal in the Seventh Circuit, the following procedure applies: If the record on appeal includes sealed items and the sealing is not required by statute or rule, the Clerk's Office notifies the parties that after two weeks the sealed documents will be unsealed unless a party moves to maintain the documents under seal or unless a party asks the Court to return the sealed documents to the district court (on the ground that those documents were not germane to the lower court's decision). Participants in this process characterize it as a well-oiled machine.

In sum, Judge Dow concluded, each circuit that was canvassed seems happy with its own procedures for dealing with sealed appellate filings. To achieve nationwide adoption of an approach

similar to the Seventh Circuit's might take a Supreme Court decision or legislation. Failing that, the best course may be to try to generate dialogue among the circuits concerning best practices. The CM/ECF system, Judge Dow noted, has the capacity to handle sealed filings.

An appellate judge agreed that it may be difficult to induce other circuits to change their approaches, and that this fact makes him somewhat skeptical about the prospects for a national rule on the subject. On the other hand, he suggested, the Seventh Circuit's approach makes sense. He agreed that it could be productive to circulate to each circuit information concerning the other circuits' practices.

An attorney member asked how sealed filings affect the resulting court opinions. The Reporter responded that her research had not focused on the treatment, in judicial opinions, of information from sealed filings. Participants in the discussion noted the importance of explaining the reasons for a judicial decision and also the possibility of asking the parties to address in letter briefs whether previously sealed information should be disclosed in the opinion. An appellate judge asked how sealed materials in criminal cases are handled on appeal in the Seventh Circuit. The Reporter mentioned that the Seventh Circuit's procedures take into account statutory sealing requirements; if materials are sealed pursuant to statute or rule, then the Seventh Circuit's presumption in favor of unsealing on appeal does not apply. Judge Dow reported that there sometimes are motions by third parties to unseal materials that the court has placed under seal; such motions might be made, for example, by a media entity. An appellate judge noted that judicial opinions might disclose some information from a sealed document; for example, an opinion addressing a sentencing issue might discuss information from a pre-sentence investigation report.

An appellate judge member suggested that, if each circuit is satisfied with its own approach, there is no need for rulemaking on this topic. Judge Dow, noting the earlier proposal to circulate information to each circuit's Chief Judge, asked what sort of information might be included. Judge Sutton responded that the letter could describe the genesis of this item and also describe the varied approaches that the circuits take to sealed materials. The Committee has found that information useful, he noted, so it could be helpful to share it with each circuit.

A member expressed support for the idea but asked whether it is likely that the circuits would give attention to this question. The Reporter observed that after the Committee had circulated to the Chief Judges of each circuit Ms. Leary's 2011 report on the taxation of appellate costs under Rule 39, at least one circuit had changed its practices concerning costs. A participant suggested that any letter on sealing practices should be sent to the Circuit Clerks as well as the Chief Judges. A member asked how frequently the Committee decides to send letters to the Chief Judges. The Reporter noted that in fall 2006 Judge Stewart, as the Chair of the Committee, had written to the Chief Judge of each circuit to urge the circuits to consider whether their local briefing requirements were truly necessary and to stress the need to make those requirements accessible to lawyers.

Professor Coquillette observed that it is important not to encourage the proliferation of local circuit rules. In some instances, though, committees have identified specific areas where local variation may be justified, and have merely circulated information about such local variations.

An appellate judge member asked whether the letter should take a policy position on which approach is best. Another participant asked whether such a letter might cause readers to wonder why the Committee is not moving forward with a rulemaking proposal. An appellate judge observed that, even if a provision were to be adopted that imposed a nationally uniform presumption in favor of unsealing on appeal (i.e., an approach similar to the Seventh Circuit's), this would not ensure that the resulting *decisions* on motions to seal achieved uniform results. The Reporter observed that if the Committee were to decide to take a strong policy position, consultation with other interested Judicial Conference committees (such as the Judicial Conference Committee on Court Administration and Case Management ("CACM")) might be advisable. Mr. Rose said that advance coordination would not be necessary if the Committee's letter were informational.

An appellate judge member expressed support for the idea of a letter. Judge Sutton asked whether the Committee preferred that the letter take an agnostic position on the relative merits of the circuits' approaches. Professor Coquillette stated that it would be necessary to consult CACM before taking the step of endorsing the Seventh Circuit's approach. An appellate judge member suggested that the letter could usefully identify the concerns that arise from sealed and redacted appellate filings. A district judge member added that the letter could also note the Seventh Circuit's rationale for its approach.

A motion was made that the Committee not proceed with a proposed rule amendment on the subject of sealed or redacted appellate filings. The motion was seconded and passed by voice vote without dissent.

Judge Sutton undertook to write to the Chief Judge of each circuit to advise them of Mr. Levy's suggestion, the reasons for it, the Committee's findings concerning the circuits' approaches, and the rationale for the Seventh Circuit's approach. Copies of the letter would be sent to the Circuit Clerks. A motion was made to approve this approach. The motion was seconded and passed by voice vote without dissent.

#### **B. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)**

Judge Sutton invited Judge Fay to present this item, which arises from a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to lengthen the deadline for a criminal defendant to take an appeal. Judge Fay reviewed the suggestion and observed that the Committee had discussed a similar proposal roughly a decade earlier. At that time, after a very broad discussion, the Committee had voted to remove the proposal from its agenda. More recently, the Committee at its Spring 2012 meeting discussed Dr. Roots' proposal. Much of the discussion focused on whether the current 14-day deadline poses a hardship for defendants. Participants in that discussion observed that it is typically easier for a criminal defendant to decide whether to appeal than it is for the

government to decide whether to appeal. And there is ordinarily a time lapse between conviction and sentencing, so that (except as to sentencing issues) defendants tend to have more than 14 days within which to consider possible bases for appeal.

Judge Fay noted that the agenda materials for the current meeting included some figures concerning the rate at which federal criminal defendants appeal; he stated that he was surprised by the low proportion of such defendants who appeal. The agenda materials also indicated that the choice of deadlines for criminal defendants' appeals is not likely to have major implications for speedy trial requirements. It appears, Judge Fay noted, that relatively few appeals are dismissed on untimeliness grounds. District courts are likely to grant extensions where warranted. After *Bowles v. Russell*, 551 U.S. 205 (2007), courts are unlikely to regard a criminal defendant's appeal deadline as jurisdictional. The DOJ has opposed altering criminal defendants' appeal time limit, and has pointed out that there are big differences between the government and criminal defendants in terms of the time needed to decide whether to appeal. In sum, Judge Fay suggested, the current Rule works well and there is no reason to change it.

The Reporter thanked Ms. Leary for her very helpful research on criminal defendants' appeals. Ms. Leary noted that she had done a preliminary search, looking only at criminal appeals terminated in the Third Circuit since January 1, 2011. Among those appeals, nine were dismissed because the pro se defendant failed to meet Appellate Rule 4(b)'s 14-day deadline. But, she noted, in all but one of those cases, the defendant's delay was lengthy and would have rendered the appeal untimely even if the relevant deadline had been 30 days rather than 14 days. A member asked whether Ms. Leary had looked at all relevant appeals in the Third Circuit during the stated time period; she responded that the search was comprehensive.

A district judge member observed that very few cases go to trial. There is typically a long delay between conviction and sentencing. And where a criminal defendant needs more time to file a notice of appeal, caselaw in the Seventh Circuit supports the view that the district court should grant an extension under Rule 4(b)(4). Mr. Byron reiterated the DOJ's view that no amendment is needed.

A motion was made and seconded to remove this item from the Committee's agenda. The motion passed by voice vote without dissent.

**C. Item Nos. 08-AP-A, 11-AP-C, and 11-AP-D (possible changes in light of electronic filing and service)**

Judge Sutton invited the Reporter to introduce these items, which concern the possibility of amending the Appellate Rules to account for the shift to electronic filing, service, and transmission. The Committee last discussed this set of issues at its fall 2011 meeting. At this point, the Advisory Committees may not be ready to take joint action to further adjust the Rules in light of electronic filing. Given that fact, the Committee may wish to consider whether it wishes to proceed with such updates to the Appellate Rules outside the context of a joint project. There have been some relevant

developments since the fall 2011 meeting. In the interim, the Eleventh and Federal Circuits have instituted electronic filing. The Bankruptcy Rules Committee has published for comment proposed amendments to Part VIII of the Bankruptcy Rules, which deal with appellate practice and which reflect the early adoption, in bankruptcy practice, of electronic filing and service. There are a variety of adjustments that might eventually be made to the Appellate Rules in light of the shift to electronic filing; one of the questions before the Committee is how to time those adjustments. One approach would be to propose such revisions only when the Committee is proposing to amend a particular Rule for other reasons. But, the Reporter suggested, it makes sense for the Committee to consider whether there are any such revisions that are worth proposing earlier than that, as stand-alone amendments.

Mr. Green reported that the Circuit Clerks do not see an urgent need for revisions to the Appellate Rules at this time. Admittedly, he noted, Rule 26(c)'s "three-day rule" is odd and anachronistic. It would be difficult to achieve nationally uniform procedures for the treatment of the record and appendix; practices currently vary widely among the circuits. Judge Sutton asked whether the "three-day rule" is causing problems. Mr. Green responded that he did not think it causes logistical problems; rather, it is an oddity and it is hard to explain why it exists.

Mr. Byron asked about the effects, if any, of the adoption of the next generation of software for the CM/ECF system. The Reporter noted that the new software is slated to be rolled out gradually over a period of years. Mr. Green stated that the next generation software will make refinements, rather than big changes, in the electronic filing system.

Judge Sutton suggested that it might make sense for the Advisory Committees to address jointly the question of whether to revise the Rules to account for changes related to electronic filing. By consensus, the Committee retained Items 08-AP-A, 11-AP-C, and 11-AP-D on its study agenda.

#### **D. Item No. 08-AP-H (manufactured finality)**

Judge Sutton invited the Reporter to introduce this item, which concerns the possibility of amending the Rules to address situations in which parties attempt to "manufacture" a final appealable judgment (so as to obtain review of a ruling on one claim in a suit (the "central claim")) by dismissing all other pending claims (the "peripheral claims"). The Reporter noted that the Civil / Appellate Subcommittee, chaired by Judge Colloton, had considered this item in depth but had not reached consensus on it.

The Reporter noted that there are a variety of ways in which one might try to secure review of the central claim. First, a straightforward way is to dismiss the peripheral claims with prejudice; there is consensus that such action produces a final, appealable judgment. Second, at the other end of the spectrum, if the peripheral claims are dismissed without prejudice, roughly half the circuits have made clear that this does not produce an appealable judgment; but there are some decisions in a few circuits taking a different view. The Ninth Circuit has a test that examines whether the would-be appellant tried to manipulate appellate jurisdiction. Third, when the dismissal of the peripheral

claims was nominally without prejudice but those claims can no longer be asserted due to some practical impediment, there is a growing consensus that such a dismissal does create an appealable judgment. Fourth, in the Eighth and Ninth Circuits an appealable judgment results when the dismissal of the peripheral claims without prejudice completely removes a defendant from the suit. Fifth, the Second Circuit takes the view that an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice i.e., commits not to re-assert the peripheral claims unless the appeal results in the reinstatement of the central claim. However, some four circuits disagree with this view. Most recently, in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011), the Second Circuit applied the conditional-prejudice doctrine to permit an appeal, but refused to extend the doctrine to the attempted cross-appeal in the same case.

An attorney member noted that, two days earlier, the Supreme Court had granted certiorari in *Gabelli*.

Judge Colloton summarized the Civil Rules Committee's discussions of the topic of manufactured finality; some members of that Committee had reacted negatively to the idea of the conditional-prejudice doctrine. The Civil / Appellate Subcommittee considered the idea of proposing a rule that would eliminate avenues for manufacturing jurisdiction (such as dismissal without prejudice or with conditional prejudice), and alternatively considered the idea of not proposing a rule amendment. Ultimately, through lack of strong support for the first option, the Subcommittee defaulted to the second option. Some participants in the discussion were of the opinion that any problems that arise can be handled under Civil Rule 54(b).

A member asked whether the topic of appellate jurisdiction is appropriate for rulemaking. Judge Colloton responded that Congress has authorized rulemaking to define when a district-court ruling is final for purposes of appeal. An attorney member stated that this area of law meets his criterion for rulemaking action: It is an area in which litigants ought to be able to find a clear answer.

A participant asked for examples of scenarios that could not be adequately dealt with under Civil Rule 54(b). It was noted that the use of Civil Rule 54(b) is within the district court's discretion, and that Civil Rule 54(b) certification can apply only when there is a particular claim that is ripe for the certification. Judge Colloton noted that Professor Cooper had pointed out that Civil Rule 54(b) does not address instances where a ruling severely affects a claim but does not completely dispose of it as when a court has excluded a party's most persuasive evidence in support of its claim, but has ruled admissible just enough evidence "to survive summary judgment and limp through trial."

It was suggested that it would be wise to await the Supreme Court's decision in *Gabelli*. By consensus, the Committee retained this item on its study agenda.

## **VI. Additional Old Business and New Business**

**A. Item No. 12-AP-B (Form 4's directive regarding institutional-account statements)**

Judge Sutton invited the Reporter to introduce this item, which arises from a comment that the National Association of Criminal Defense Lawyers (“NACDL”) submitted on the pending amendment to Form 4 (concerning applications to proceed *in forma pauperis* (“IFP”)). The pending amendments which are on track to take effect on December 1, 2013 if the Supreme Court approves them and Congress takes no contrary action make certain technical changes to the Form and revise the current Form’s detailed questions about the applicant’s payments for legal and other services.

The pending technical changes include a revision to the Form’s directive that prisoners must attach an institutional account statement. The pending revision would limit that directive to prisoners “seeking to appeal a judgment in a civil action or proceeding.” That revised language more closely tracks the language in 28 U.S.C. § 1915(a)(2) (a statutory provision added by the Prison Litigation Reform Act (“PLRA”)). Commenting on this proposed change, NACDL suggested that this provision be further revised by adding the following parenthetical: “(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255).”

The Reporter stated that NACDL’s legal analysis accords with the overall state of the law. All circuits have cases stating that the PLRA’s IFP provisions do not apply to habeas petitions under Section 2254. A majority of circuits have cases stating the same view with respect to Section 2255 motions. However, the Reporter noted that courts might well apply the PLRA’s IFP requirements if a prisoner (erroneously or not) styled a challenge to prison conditions as a habeas petition, or if a prisoner included a prison-conditions challenge in a habeas petition.

The Reporter suggested that, in evaluating NACDL’s proposal, it may be useful to consider the effect of Form 4's wording on the risk of error by an IFP applicant. Form 4, as revised by the pending amendment, might risk inconveniencing some IFP applicants in habeas cases who erroneously think that they must include an institutional-account statement with their IFP application. This risk may be relatively widespread, but would likely pose no more than an inconvenience in any given case. If NACDL’s proposed change is made, there would be a risk that some (relatively small) number of IFP applicants would erroneously believe they need not include an institutional-account statement. That risk would not likely be widespread, but it might have more significant implications for the appeal. Those implications would depend on how courts would treat the absence of an institutional-account statement when one is required. The caselaw gives reason to hope that such an error would not render the filing untimely, and that the appeal would be permitted to proceed so long as the applicant supplied the required statement promptly once alerted to the error. That would be the likely outcome, but there remains the possibility that a court might disagree.

An appellate judge member suggested that the worst-case scenario under the Form (as revised by the pending amendment) does not seem a matter for grave concern: The prison will simply supply an institutional-account statement unnecessarily. An attorney member asked what would happen if an inmate is moved from one institution to another – would he or she need to supply more than one institutional-account statement? Mr. Green stated that if a litigant omitted an institutional-account statement when one was required, his office would simply direct the litigant to remedy the omission. A district judge member reported that this requirement does not cause problems at the district court level; within his district, each prison has a designated person whose job it is to process the institutional-account statements.

Judge Colloton noted the broader issue of the role of rulemaking concerning forms; the Civil Rules Committee, he observed, is considering whether to cease promulgating forms. Professor Coquillette noted that the Advisory Committees vary in their approaches to forms.

An attorney member suggested that any change in response to NACDL’s comment should be held for disposition along with other small changes that might be addressed once every five years or so. Judge Sutton agreed that it is worth thinking about the frequency of rule amendments. More generally, though, bundling amendments might not always work for all of the Advisory Committees. Mr. Byron recalled that in the late 1990s and early 2000s the Appellate Rules Committee did follow the practice of bundling rule amendments.

Concerning the present proposal about Form 4, Mr. Byron stated that the DOJ defers to the views of the judges and clerks. An appellate judge member suggested that it would make sense to wait and see how the pending amendments to Form 4 function in practice before considering further changes.

By consensus, the Committee retained this item on its agenda.

**B. Item No. 12-AP-C (FRAP 28 – pinpoint citations)**

Judge Sutton invited Judge Chagares to present this item, which arises from a suggestion submitted by the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association’s Judicial Division (the “Council”) as part of that group’s comments on the pending amendments to Rules 28 and 28.1 (concerning the statement of the case). The Council proposes “amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief,” rather than “only in the statement of facts.”

Judge Chagares noted that it is very frustrating to read briefs that lack citations to the record. The amendment proposed by the Council, he suggested, might raise awareness (among less experienced lawyers) about the requirement of citations to the record. However, an attorney member asked what the Council’s proposed amendment would change. Another attorney member observed that Appellate Rule 28(a)(9)(A) already requires “citations to the authorities and parts of the record

on which the appellant relies.” Professor Coquillette argued that one should not propose a rule amendment for the purpose of educating lawyers. A member suggested that lawyers should not need further instruction concerning the requirement of citations to the record. Judge Jordan observed that the Bankruptcy Rules Committee has had a similar discussion about whether to amend the Rules in order to address lawyers’ failure to comply with existing requirements; some rules, he noted, are disobeyed frequently. Good lawyers will comply with the rules and bad lawyers will not.

A motion was made and seconded to remove this item from the Committee’s study agenda. The motion passed by voice vote without dissent.

**C. Item No. 12-AP-D (Civil Rule 62 and FRAP 8 – appeal bonds)**

Judge Sutton invited Mr. Newsom to introduce this item, which arises from Mr. Newsom’s suggestion that the Committee consider the topic of appeal bonds. Mr. Newsom explained that he finds the bonding process mystifying every time that it arises in a complex civil case. Though he does not advocate amending the Rules to educate lawyers about the bonding process, he suggested that amendments might usefully address gaps in the Rules’ treatment of the topic. This topic centrally concerns Civil Rule 62, but most lawyers who deal with these issues are appellate lawyers.

Mr. Newsom pointed out that Civil Rule 62 currently addresses separately two time periods for which a bond will typically be needed: Civil Rule 62(b) addresses stays of a judgment pending disposition of a postjudgment motion, while Civil Rule 62(d) addresses stays of the judgment pending appeal. Issues that might be addressed by a Rule amendment include the timing, form, and amount of a bond. Current Rule 62 may produce something of a gap, because under Rule 62(d) the stay takes effect only when the court approves the bond, and the bond can be given “upon or after filing the notice of appeal.” So technically the Rule 62(b) stay would have expired upon the disposition of the postjudgment motion, and the Rule 62(d) stay would not take effect until the appellant has filed the notice of appeal and the bond, and the court has approved the bond.

The question of procedure, Mr. Newsom suggested, is more interesting than the question of the amount of the bond. Questions include the following: (1) Should Civil Rule 62(b) be amended to *require* the issuance of a stay upon the posting of sufficient security? (2) Should the Rule be amended to reflect the reality that most complex cases involve both postjudgment motions and an appeal, and to treat those two periods under the same framework? (3) Should the Rule be amended to address the timing gap between disposition of the postjudgment motion and the approval of the supersedeas bond? In practice, Mr. Newsom said, lawyers take a “belt and suspenders” approach by obtaining for purposes of the postjudgment motion period a bond that will also meet the requirements for a supersedeas bond under Civil Rule 62(d); one pays a single annual premium and can get a refund for the unused period.

An attorney member observed that this topic seems to fall largely within the jurisdiction of the Civil Rules Committee. Judge Sutton asked for Judge Dow’s views. Judge Dow responded that

the appeal-bond requirement can be a big problem when things go wrong. He suggested that the Reporter discuss the matter with Professor Cooper.

By consensus, the Committee retained this item on its study agenda.

**D. Item No. 12-AP-E (FRAP 35 – length limits for petitions for rehearing en banc)**

Judge Sutton invited Professor Katyal to introduce this item, which arises from Professor Katyal’s observation that Appellate Rule 35(b)(2) sets a 15-page limit for rehearing petitions.

Professor Katyal observed that he has seen a lot of manipulation of length limits that are set in pages. People waste time altering fonts and line spacing. The 1998 amendments to the Appellate Rules set type-volume length limits for merits briefs, but limits denoted in pages remain in Rules 5, 21, 27, and 35. The time may have come to reconsider that choice. Technological developments have made it much easier to count words. The type-volume limit is harder to manipulate. On the other hand, the type-volume limit does entail an added item – a certificate of compliance. And some pro se litigants continue to file handwritten briefs. But on balance, Professor Katyal suggested, it would be worthwhile to denote length limits in a consistent fashion. An attorney member agreed with this view.

A district judge member pointed out that Rule 28(j) sets a 350-word limit for letters concerning supplemental authorities, and he expressed support for that approach. Mr. Byron noted that one might view the type-volume approach as the exception and the page-limit approach as the general rule. He asked whether the page limits create problems for judges and clerks. Mr. Green said that they do not. Professor Katyal observed that when one’s opponent manipulates a page limit, it can be awkward to call the opponent on it. The district judge member observed that when length limits are set in pages, the resulting briefs can be harder to read.

The Reporter noted that the type-volume limits include a safe harbor denoted in pages, and she asked how those safe-harbor page limits compare to the type-volume limits. Mr. Byron responded that the safe-harbor page limits are significantly shorter than the type-volume limits. An attorney member observed that the Supreme Court switched from page limits to word limits in 2007. A participant asked how length limits are applied to pro se briefs. An appellate judge participant responded that the court would likely just deal with the pro se brief on its merits rather than worrying about its compliance with length limits.

An attorney member expressed support for pursuing this topic further. By consensus, the Committee retained this item on its study agenda.

**E. Item No. 12-AP-F (FRAP 42 and class action appeals)**

Judge Sutton invited the Reporter to introduce this item, which arises from a suggestion by Professors Brian T. Fitzpatrick, Brian Wolfman, and Alan B. Morrison that Appellate Rule 42 be

amended to require approval from the court of appeals for any dismissal of an appeal from a judgment approving a class action settlement or fee award, and to bar such dismissals absent a certification that no person will give or receive anything of value in exchange for dismissing the appeal.

The Reporter observed that the backdrop for this proposal is the debate over the role of objectors in class actions. That debate played a part in the Civil Rules Committee's discussions, during the early 2000s, of the proposals that ultimately gave rise to the 2003 amendments to Civil Rule 23. The 2003 amendments, among other things, revised Rule 23(e) in order to intensify judicial scrutiny of proposed class settlements. In considering ways to better inform the district judge about the merits of such a proposed settlement, the Civil Rules Committee had discussed possible ways to facilitate a role for objectors in generating information about a proposed settlement. Participants discussed but the Committee ultimately rejected the possibility of amending Rule 23 to, for example, provide for discovery conducted by objectors, or provide ways to remunerate objectors and their counsel. Participants noted that objectors may have varying motives and that it could be problematic to give all such objectors undue sway. Ultimately the Committee moved in a different direction; the 2003 amendments to Rule 23 use other means to try to improve the settlement approval process such as providing the possibility of a second round of opting out.

The question, in dealing with objectors, has always been how best to promote useful objections while minimizing the problems caused by objectors (and their counsel) whose objections do not improve the result for the class and who are motivated by the prospect of personal gain. When determining how to treat the withdrawal of an objection, one might also seek to distinguish between objections with grounds that apply to the class as a whole and objections founded upon circumstances unique to the objector in question.

Civil Rule 23(e)(5) addresses the question of dropping an objection. It provides that “[a]ny class member may object” to a proposed class settlement, and that “the objection may be withdrawn only with the court’s approval.” To that extent, Civil Rule 23(e)’s treatment of objectors departs from the usual principle that the court will not force a litigant to keep litigating when the litigant no longer wishes to do so. (Of course, the requirement of court approval for class settlements is itself a departure from that principle.)

The proponents of the current proposal point out that Civil Rule 23(e)(5) will not prevent objectors from making objections in order to extract monetary compensation. Those objectors might simply wait until they have a pending appeal and then offer to drop the appeal if they are paid off at that point. Currently there is no provision in the Rules that explicitly addresses that possibility. Professor Cooper has pointed out that during the discussions that led to the 2003 amendments, there was a proposal to draft the provision in Civil Rule 23(e) broadly enough to encompass the withdrawal of objector appeals. That proposal did not make it into the 2003 amendments to Civil Rule 23. Some participants had questioned whether a district court would have authority to address the propriety of an objector’s dismissal of a pending appeal.

Compared with current Civil Rule 23(e)(5), the proposed amendment to Appellate Rule 42 is broader in scope and more stringent in its criteria. Unlike Civil Rule 23(e)(5), the proposed amendment would encompass objections to fee awards. Civil Rule 23(h)(2) does contemplate objections to fee awards, but does not constrain the dropping of such objections in the way that the proposed Appellate Rule 42 amendment would. In addition, Civil Rule 23(e)(5) gives the district court discretion whether to approve the withdrawal of an objection, whereas the proposed amendment to Appellate Rule 42 would remove the court of appeals' discretion to approve the withdrawal of the appeal if there is a payment in exchange for that withdrawal.

The Reporter suggested that the proposal is an elegant one in the sense that its goal is to craft a Rule that would cause undesirable objectors to self-select out of the appellate process. If they anticipate that they can get no personal benefit from the appeal, then they will not appeal. But the Reporter noted a few questions about the proposal. One concerns the possibility that the Rule's existence might not deter all such objectors from appealing. If an objector did in fact take an appeal, and then receive something of value in exchange for dropping the appeal, the court would be in the unusual position of forcing a now-unwilling appellant to maintain an appeal. There are not very many cases that interpret and apply Appellate Rule 42, but among those scattered cases are at least some that remark upon the awkwardness of denying an appellant permission to drop an appeal. Perhaps it would be less awkward in the case of a class action objector's appeal, to the extent that one could view the objector as having a duty to act in the interests of the class when objecting. One question is whether the proposal could be modified to provide the court of appeals with discretion whether to permit the dropping of an appeal along the lines of the discretion that Civil Rule 23(e)(5) accords to the district court. The decision whether to permit the withdrawal of the appeal would fall to the court of appeals, unless that court decided to remand to the district court for a resolution of that question. Court of appeals judges may not be as well situated as the district court to assess the validity of the objector's reasons for seeking to withdraw the appeal.

Judge Sutton suggested that this proposal might best be considered within the larger context of the Civil Rules Committee's consideration of possible changes to Civil Rule 23. If so, perhaps it would be useful for a member of the Appellate Rules Committee to participate in the discussions of the relevant subcommittee of the Civil Rules Committee. Professor Coquillette agreed that it will be important to work closely with the Civil Rules Committee.

An attorney member stated that the current proposal concerning Appellate Rule 42 would go beyond the provisions of Civil Rule 23(e)(5). It is not intuitively obvious, this member suggested, that all payments to class action objectors are nefarious. District judges are in a better position than court of appeals judges to assess an objector's reasons for withdrawing an objection. If the Committee moves forward with a proposal on this topic, the proposal should assign the decision to the district court rather than the court of appeals.

An appellate judge member described her experience with parties' motions seeking permission to withdraw from an appeal. Resolving such motions, she reported, can be very time-intensive for the appellate court.

By consensus, the Committee retained this item on its study agenda.

**VII. Adjournment**

The Committee adjourned at 3:45 p.m. on September 27, 2012.

Respectfully submitted,

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Catherine T. Struve  
Reporter



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# UNACCEPTABLE

FEBRUARY 27, 2012

The Obama administration has offered what it has styled as an “accommodation” for religious institutions in the dispute over the HHS mandate for coverage (without cost sharing) of abortion-inducing drugs, sterilization, and contraception. The administration will now require that all insurance plans cover (“cost free”) these same products and services. Once a religiously-affiliated (or believing individual) employer purchases insurance (as it must, by law), the insurance company will then contact the insured employees to advise them that the terms of the policy include coverage for these objectionable things.

This so-called “accommodation” changes nothing of moral substance and fails to remove the assault on religious liberty and the rights of conscience which gave rise to the controversy. It is certainly no compromise. The reason for the original bipartisan uproar was the administration’s insistence that religious employers, be they institutions or individuals, provide insurance that covered services they regard as gravely immoral and unjust. Under the new rule, the government still coerces religious institutions and individuals to purchase insurance policies that include the very same services.

It is no answer to respond that the religious employers are not “paying” for this aspect of the insurance coverage. For one thing, it is unrealistic to suggest that insurance companies will not pass the costs of these additional services on to the purchasers. More importantly, abortion-drugs, sterilizations, and contraceptives are a necessary feature of the policy purchased by the religious institution or believing individual. They will only be made available to those who are insured under such policy, *by virtue of the terms of the policy*.

It is morally obtuse for the administration to suggest (as it does) that this is a meaningful accommodation of religious liberty because the insurance company will be the one to inform the employee that she is entitled to the embryo-destroying “five day after pill” pursuant to the insurance contract purchased by the religious employer. It does not matter *who* explains the terms of the policy purchased by the religiously affiliated or observant employer. What matters is what services the policy covers.

The simple fact is that the Obama administration is compelling religious people and institutions who are employers to purchase a health insurance contract that provides abortion-inducing drugs, contraception, and sterilization. This is a grave violation of religious freedom and cannot stand. It is an insult to the intelligence of Catholics, Protestants, Eastern Orthodox Christians, Jews, Muslims, and other people of faith and conscience to imagine that they will accept an assault on their religious liberty if only it is covered up by a cheap accounting trick.

Finally, it bears noting that by sustaining the original narrow exemptions for churches, auxiliaries, and religious orders, the administration has effectively admitted that the new policy

(like the old one) amounts to a grave infringement on religious liberty. The administration still fails to understand that institutions that employ and serve others of different or no faith are still engaged in a religious mission and, as such, enjoy the protections of the First Amendment.

Signed:

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**Minutes of Fall 2011 Meeting of  
Advisory Committee on Appellate Rules  
October 13 and 14, 2011  
Atlanta, Georgia**

**I. Introductions**

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 13, 2011, at 8:30 a.m. at the Ritz-Carlton Hotel in Atlanta, Georgia. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice (“DOJ”), was present representing the Solicitor General. Also present were former Committee members Judge Kermit E. Bye, Mr. James F. Bennett, and Ms. Maureen E. Mahoney; Mr. Dean C. Colson, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office (“AO”); Benjamin Robinson, deputy in the Rules Committee Support Office; Mr. Leonard Green, liaison from the appellate clerks; and Ms. Marie Leary from the Federal Judicial Center (“FJC”). Also attending the meeting’s opening session were Dean Robert Schapiro and Professor Richard D. Freer of Emory Law School.

Judge Sutton welcomed the meeting participants. He introduced two of the Committee’s new members, Judge Chagares and Mr. Newsom. He observed that Judge Chagares was replacing Judge Bye, and that Judge Chagares’s chambers were formerly those of another Appellate Rules Committee Chair, Justice Alito. Judge Sutton noted that Mr. Newsom had clerked for Judge O’Scannlain and for Justice Souter, that he had served as Alabama’s Solicitor General, and that he chairs the appellate litigation group at Bradley Arant Boult Cummings in Birmingham, Alabama. Judge Sutton reported that the third new member of the Committee – Neal Katyal, former Acting Solicitor General of the United States – was unable to attend the meeting. Judge Sutton also welcomed Mr. Rose and Mr. Robinson and noted that they both came to the AO from Jones Day, where Mr. Rose was a partner and Mr. Robinson an associate. Professor Coquillette observed that Mr. Rose and Mr. Robinson are doing a wonderful job in their new positions. Judge Sutton thanked the three departing Committee members – Judge Bye, Mr. Bennett, and Ms. Mahoney – for their superb service to the Committee. Judge Bye stated what a pleasure it had been to work with the Committee. During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rose, Mr. Robinson, and the AO staff for their preparations for and participation in the meeting.

Dean Schapiro welcomed the Committee to Atlanta and introduced Professor Freer, whom Judge Sutton had invited to address the Committee on the topic of rulemaking. Professor Freer presented an assessment and critique of the rulemaking process, with a focus on the Civil Rules. Professor Freer asserted that there have been two big problems with the rulemaking process over the past 15 to 20 years: first, that the rulemakers have been too active, and second, that some of the rules amendments were directed toward nonexistent problems. During the roughly three-quarters of a century of federal rulemaking under the Rules Enabling Act there have been more than 30 sets of amendments – 14 of which took effect within the last 15 years. The increased frequency of rule amendments creates fatigue among judges, practitioners, and academics, with the result that people no longer pay attention to pending rule amendments and when amendments take effect there is no “buy-in” among those who must read and apply the Rules.

Professor Freer gave two examples of the public’s lack of engagement with the rulemaking process. One was a case in which the court was unaware that the 2000 amendment to Civil Rule 26(b)(1) had changed the presumptive scope of discovery from nonprivileged matter relevant to “the subject matter” of the action to nonprivileged matter relevant to any party’s “claim or defense.” In fact, Professor Freer stated, a recent study has suggested that this change in Rule 26(b)(1) has had no actual impact. Another example was the 2007 restyling of the Civil Rules; Professor Freer reported that when he had mentioned the upcoming restyling to practitioners, none of them knew about it. The Civil Rules, Professor Freer asserted, are not read by lay people; they are read by lawyers who are familiar with the pre-restyling language. Professor Freer pointed out that changes in well-established terminology impose costs. For instance, changing the term “directed verdict” in Civil Rule 50 to “judgment as a matter of law” means that Civil Rule 50’s language now differs from the language in many cognate state procedure rules. The restyling of the Civil Rules has required law firms to revise many standard forms, and has required new editions of many treatises and casebooks.

Professor Freer suggested that the rulemaking process is dominated by a small group of people who set the rulemaking agenda. One cannot, he suggested, impose changes from the top; rather, buy-in is needed from those who use the Rules. Rule amendments, Professor Freer concluded, should be like faculty meetings: rare and purposeful. A participant asked Professor Freer for his thoughts on the reasons for the increase in rulemaking activity. He responded that he does not have an explanation for the increase, but he suggested that perhaps members of the Rules Committees feel that they should work on rules changes every year. Professor Freer argued that the rulemakers’ activities used to be more focused; for example, in the 1966 amendments to the Civil Rules the rulemakers overhauled party joinder.

An attorney member noted that it is expensive for firms to buy the new editions of treatises and rule books; this member also agreed that there are a lot of differences between federal and state procedural rules that do not make much sense. Professor Freer observed that states are less likely to have the resources to engage in continual updates to their rules. He posited that the Rules Committees’ focus on issues such as restyling had distracted the

committees from focusing on larger issues. He stated that the Rules Committees had done a good job with the Civil Rules amendments relating to electronic discovery but he argued that they had not done as well in responding to concerns about pleading.

Professor Coquillette observed that Professor Freer is a valued coauthor of the Moore's Federal Practice treatise. Professor Coquillette pointed out that from the perspective of the Rules Committees, three factors have contributed to the frequency of rule amendments. First, the Committees often must respond to legislative initiatives to change the Rules. Second, the Supreme Court has taken an active role, in recent decisions, in interpreting the Rules. Third, changes in technology have required changes in the Rules – for example, with respect to electronic filing and electronic discovery.

Judge Sutton asked Professor Freer whether he would prefer a system in which each set of Rules were revised only every five years. Professor Freer responded that such a system would be beneficial; whether the interval were five years or three years, such a system would provide users of the Rules with some predictability. An appellate judge member asked Professor Freer for his views on local rules. Professor Freer observed that local rules are very important in everyday practice; commentators often discuss the issue of disuniformity arising from local rules, but he stated that he does not have a sense of whether that is a serious problem. Another appellate judge member voiced the view that there should be no local rules, and that federal practice should be entirely uniform throughout the country. An attorney member asked whether the time lag between a rule amendment's initial introduction and its effective date risks rendering rule amendments obsolete before they even take effect. Professor Freer added that part of the time lag is due to the layers of public participation built into the rulemaking process, and he argued that this is ironic given that many interested parties do not participate in that process. An attorney participant voiced doubt that reducing the frequency of rule amendments would increase participation by lawyers.

An attorney member asked whether the restyling of the Rules had made the Rules more accessible to new lawyers. Professor Freer conceded that it had, but argued that older lawyers had invested a lot of effort in becoming familiar with the pre-restyling version of the Rules. A member noted that law students may find the restyled Rules more accessible, but they will still need to contend with the pre-restyling version of the Rules when they research older cases. Professor Coquillette noted that the Bankruptcy Rules have not yet been restyled, and that many litigants in bankruptcy court are pro se.

Judge Sutton asked Professor Freer whether he feels that it would be useful to amend a Rule where the Rule's text does not currently reflect actual practice. For example, Appellate Rule 4(a)(2)'s text provides little guidance as to the circumstances when a premature notice of appeal will relate forward. Is it helpful to the bench and bar for the Rules to codify what the courts are doing in caselaw? Professor Freer responded that it would be useful to amend the Rule to reflect current practice, particularly if a majority view can be identified.

Judge Sutton thanked Professor Freer for his thought-provoking presentation. It is always important, he noted, to keep in mind the costs as well as the benefits of amending the Rules.

## **II. Approval of Minutes of April 2011 Meeting**

A motion was made and seconded to approve the minutes of the Committee's April 2011 meeting. The motion passed by voice vote without dissent.

## **III. Report on June 2011 Meeting of Standing Committee**

Judge Sutton summarized relevant events at the Standing Committee's June 2011 meeting. The Standing Committee approved for publication proposed amendments to Rules 28 and 28.1 concerning the statement of the case, and proposed amendments to Form 4 concerning applications to appeal in forma pauperis. Those proposals, along with previously-approved proposals to amend Rules 13, 14, and 24, are currently out for public comment. Judge Sutton noted that the Standing Committee has created a Forms Subcommittee to coordinate the efforts of the Advisory Committees to review their forms and the process for amending them.

Judge Sutton reported that the proposed amendments to Appellate Rules 4 and 40 (which will clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party) are currently on track to take effect on December 1, 2011 (absent contrary action by Congress). Because the time to appeal in a civil case is set not only by Appellate Rule 4 but also by 28 U.S.C. § 2107, legislation has been introduced that will make the same clarifying change to Section 2107. Such a change is very important in order to avoid creating a trap for unsophisticated litigants. The goal is for the amendment to Section 2107 to take effect simultaneously with the amendments to Rules 4 and 40.

## **IV. Action Items**

### **A. For publication**

#### **1. Item No. 09-AP-C (FRAP 6 / direct bankruptcy appeals) and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)**

Judge Sutton invited Professor Barrett to introduce these items, which relate to proposals to amend the Appellate Rules' treatment of appeals in bankruptcy matters. Professor Barrett observed that the context for these items is the Bankruptcy Rules Committee's project to amend Part VIII of the Bankruptcy Rules (dealing with appellate procedure in bankruptcy). She reminded members that the two Committees had held a joint meeting in spring 2011 to discuss the Part VIII project and related proposals concerning Appellate Rule 6. During summer 2011, Professor Barrett attended (and the Reporter participated telephonically in) a meeting to further discuss these issues.

Professor Barrett provided an overview of the proposals to amend Appellate Rule 6. Rule 6(a) addresses appeals from a district court exercising original jurisdiction in a bankruptcy case. Rule 6(b) governs appeals from a district court or a bankruptcy appellate panel (BAP) exercising appellate jurisdiction in a bankruptcy case. Rule 6 does not currently address the procedure for taking a permissive appeal directly from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Since Section 158(d)(2)'s enactment in 2005, direct appeals under that provision have been governed by interim statutory provisions that referenced Appellate Rule 5. The proposed amendments would add a new subdivision (c) to Rule 6 that would govern such direct appeals. The proposals would also make several amendments to Rule 6(b)'s treatment of appeals from district courts or BAPs exercising appellate jurisdiction.

The Reporter observed that Rule 6's title would be amended to reflect an expanded breadth of application. Various portions of the Rule's text would be restyled. Cross-references to statutory and rules provisions would be updated. Under Rules 6(b) and 6(c), Rule 12.1's indicative-ruling procedure would apply to appeals in bankruptcy cases, with references to the "district court" read to include a bankruptcy court or BAP.

Rule 6(b)(2) would be revised to remove an ambiguity that had resulted from the 1998 restyling: Instead of referring to challenges to "an altered or amended judgment, order, or decree," the Rule would refer to challenges to "the alteration or amendment of a judgment, order, or decree." (The 2009 amendments to Rule 4(a)(4) removed a similar ambiguity from that Rule.) The amended provision would read: "If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion." In the second of these sentences, Professor Kimble has suggested replacing "The notice or amended notice" with "It." The Reporter stated that she disagrees with this suggestion; the longer option is clearer, and given the importance of this filing requirement, clarity is key. Mr. Letter stated that "The notice or amended notice" is clearer; two appellate judge members and an attorney participant expressed agreement with this view.

The Reporter pointed out that a number of the proposed changes to Rule 6(b)(2)(C) and (D) – and a number of aspects of proposed Rule 6(c) – are designed to reflect the ongoing shift to electronic filing. This shift is changing the way in which the record is assembled and transmitted to the court of appeals. The proposed amendments use the term "transmit" to denote both transmission of a paper record and transmission of an electronic record; they use the term "send" to denote transmission of a paper record. An appellate judge suggested that the proposals' use of the term "transmit" is clear when read in context. Professor Barrett pointed out that the Part VIII proposals also use the term "transmit." Mr. McCabe reported that the Bankruptcy Rules Committee had discussed this term at length during its fall 2011 meeting, and had decided to include a definition of "transmit" for the purposes of the Part VIII rules. An appellate judge member asked how the Civil Rules and the other Appellate Rules treat the topic of electronic

filing and transmission; this member also asked whether the proposed Part VIII rules will define “transmit.”

An attorney member asked whether the language proposed for Rule 6 would encompass all the possible modes of furnishing the record; for example, he noted that a record could be sent in paper form, or could be transmitted as an electronic document, or could be made available in the form of a set of links to portions of the electronic record. Mr. Green observed that when the record is transmitted electronically this is usually accomplished by transmitting a list of the record’s components, which can then be accessed by document number. In the Sixth Circuit, he reported, the court directly accesses any desired portions of the record. Mr. Green concluded that there are a variety of ways in which the record can be furnished to the court of appeals and that the various methods are changing over time. The attorney member suggested that the term “transmit” does not seem to encompass instances where the court below sends a list or index as opposed to the documents themselves; he proposed that better terms might be “furnish” or “provide.” He noted that such a change in terminology could also affect any cross-references to the transmission of the record. A district judge member agreed that a broader term like “furnish” or “provide” seems preferable. Mr. Robinson observed that the Committee Note to the original adoption of Appellate Rule 11 uses the term “transmit.” An attorney participant pointed out that the term “send” could be read to encompass electronic transmission, and that using “send” specifically to denote paper transmission would not be clear.

Judge Sutton noted that it will be important to discuss this issue with the Bankruptcy Rules Committee and to coordinate with that Committee in preparing proposals for consideration at the Committees’ spring meetings. Professor Coquillette predicted that the Standing Committee will have a heavy agenda at the June 2012 meeting, and he suggested that it would be advisable to discuss the Appellate Rule 6 proposal at the Standing Committee’s January 2012 meeting. Judge Sutton proposed that the Committee should try to settle on appropriate terminology for the Rule 6 draft in advance of the January 2012 Standing Committee meeting.

Mr. Green noted that these questions about electronic transmission relate to more general issues about the need to consider updating the Appellate Rules to address electronic filing. (The Committee discussed those broader issues later in the meeting.) The Committee briefly discussed other features of the Rule 6 proposal, including the treatment of stay requests and the treatment of materials that had been sealed in the lower court. Professor Barrett suggested that it would promote clarity to state in Rule 6(c)(2)(C) that Rule 8(b) (in addition to Bankruptcy Rule 8007) applies to requests for stays pending appeal.

The Committee determined by consensus to work further on the drafting of the Rule 6 proposal in advance of the January 2012 Standing Committee meeting.

## **V. Discussion Items**

### **A. Item No. 08-AP-D (FRAP 4(a)(4))**

Judge Sutton invited Mr. Taranto to introduce Item No. 08-AP-D, which concerns Peder Batalden's suggestion that the Committee amend Appellate Rule 4(a)(4) to address potential problems arising from the possibility of a time lag between entry of the order disposing of a tolling motion and entry of any resulting amended judgment. Mr. Taranto began by suggesting that this is an issue that started small; then it got bigger; and now it seems that perhaps the balloon has burst. He noted that sometimes it is not clear whether an order has "disposed of" a postjudgment motion. Moreover, he noted, in some instances the time lag between entry of such an order and entry of a resulting amended judgment might be longer than the 30-day time limit for taking an appeal. The Committee considered various ways to address this issue, but found that each possibility carried a risk of creating other problems. Mr. Taranto recalled that he had suggested that the Committee consider proposing to the Civil Rules Committee that it broaden Civil Rule 58(a)'s separate document requirement. Mr. Taranto observed that a number of participants had expressed concern about such a proposal – notably the participants in the Appellate Rules Committee's joint discussion with the Bankruptcy Rules Committee, and also Professor Cooper. A central concern, Mr. Taranto noted, is that district courts already neglect to comply with the existing separate document requirement. Mr. Taranto closed his introductory remarks by wondering whether this item presented an example of the occasions that Professor Freer had posited, when rulemaking changes are not warranted.

Judge Sutton thanked Mr. Taranto for his work on this item, and noted that Ms. Mahoney had also participated in the efforts to find a solution. Judge Sutton observed that Mr. Batalden had identified a potential problem. It is not clear, however, how frequently this problem arises in practice. Any changes in the mechanics of Rule 4(a) are delicate in light of the fact that statutory appeal deadlines (such as those set in 28 U.S.C. § 2107) are jurisdictional. Improving the clarity of Rule 4 is an important goal, and the Committee tried diligently to find a way to address Mr. Batalden's concerns, but each possibility that the Committee discussed raised potential problems. Judge Sutton suggested that it was time for the Committee to determine what to do with this item.

An appellate judge participant stated that it would be worthwhile to explore the question further. An attorney participant suggested that, if this issue comes up in practice, courts are likely to interpret the term "disposing of" in Rule 4(a)(4) in a way that preserves appeal rights; it might be better, this participant posited, to leave the issue to the courts. An attorney member stated that, although he had not recently reviewed the prior options considered by the Committee, he recalled that each presented difficult issues; one should not, this member suggested, amend the Rule absent a real need to do so. A participant asked the Reporter what she thought; she responded that the concerns about district-court noncompliance with the separate document requirement seem well-founded, and she wondered whether the costs of amending Rule 4(a)(4) might outweigh the benefits.

A member moved that the Committee remove this item from its agenda until a case raising this problem is brought to the Committee's attention. The motion was seconded and

passed by voice vote without dissent. Judge Sutton undertook to write to Mr. Batalden and thank him for his helpful suggestion.

**B. Item No. 09-AP-B (definition of “state” and Indian tribes)**

Judge Sutton invited Justice Eid to introduce this item, which concerns Daniel Rey-Bear’s proposal that federally recognized Native American tribes be treated the same as states for purposes of amicus filings. Justice Eid described Mr. Rey-Bear’s proposal and noted that the Committee had received resolutions in support of the proposal from the National Congress of American Indians and the Coalition of Bar Associations of Color. She reminded the Committee that it had asked Ms. Leary and the FJC to research the treatment of tribal amicus filings in the courts of appeals. Ms. Leary found that motions to make such filings are ordinarily granted, and that the filings are largely concentrated in the Eighth, Ninth, and Tenth Circuits. At the Committee’s request, Judge Sutton wrote to the Chief Judges of those three circuits to ask for their circuits’ views on the proposal to amend Appellate Rule 29 to treat tribes the same as states and also for their views on the possibility of adopting a local rule on the subject. Chief Judge Riley subsequently reported that he had circulated the inquiry to three relevant Eighth Circuit committees and had received only three responses, of which two favored either a national or a local rule amendment and one favored only a local rule amendment if appropriate. Circuit Clerk Molly Dwyer reported that the Ninth Circuit supported the proposal to amend Rule 29 and offered some drafting suggestions for such an amendment. The Reporter added that, since receiving those responses, the Committee had also received a response from Chief Judge Briscoe, who reported that the Tenth Circuit judges had considered Judge Sutton’s inquiry and that a majority of the judges saw no need to amend Rule 29. Chief Judge Briscoe reported that the discussion was lively but that the majority view was clear that Native American tribes should not be treated differently from other litigants.

Justice Eid summarized the Committee’s prior discussions, noting that those discussions had focused on the value of treating Native American tribes with dignity and also on the question of whether municipalities should also be accorded the right to file amicus briefs without party consent or court leave. Judge Sutton observed that there are strong arguments both for and against amending Rule 29. As to the dignity issue, he noted that tribes share qualities with both states and the federal government. He observed that, if anything, Supreme Court Rule 37.4 is harder to explain, from this perspective, because Rule 37.4 permits municipal governments, but not Native American tribes, to file amicus briefs without party consent or court leave. Often, he noted, when the Appellate Rules are amended the Supreme Court also amends its own rules in a similar fashion. One possible course of action would be to amend Rule 29 to treat both tribes and municipalities the same as states. Although one Committee member had earlier asked why those types of entities should be treated better – for purposes of amicus filings – than foreign governments are, one could argue that it is possible to draw the line at the United States’ border. On the other side of the argument, Judge Sutton noted that the Eighth, Ninth, and Tenth Circuits have voiced a spectrum of views on this proposal – as have the members of the Standing Committee. There are no local rules in any circuit that currently take the approach that is

proposed for Rule 29.

Judge Sutton suggested that one possible course of action would be to write to the Chief Judges of all the circuits to share with them the Committee's discussions and research, and to state that although the Committee is not moving ahead with a national rule change at this point, it is open to each circuit to adopt a local rule authorizing Native American tribes to file amicus briefs without party consent or court leave. The letter could report that a number of Committee members favor such a rule but that the Committee is not prepared at this point to adopt it as an amendment to Rule 29. The responses to such a letter, he suggested, could help the Committee discern whether it makes sense to amend Rule 29. On the other hand, though a circuit could adopt a local rule permitting amicus filings as of right by Native American tribes, it does not appear that a circuit would have authority to adopt a local rule exempting Native American tribes from Rule 29(c)(5)'s authorship-and-funding disclosure requirement. Professor Coquillette cautioned against sending a letter that would encourage the proliferation of local rules.

Alternatively, Judge Sutton suggested, he could write to the Chief Judges of all the circuits to solicit their views concerning the proposal to amend Rule 29. A district judge member stated that it would be useful to do so. This member stated that he finds the dignity argument compelling, but that if there were resistance from the courts of appeals, that would give him pause. One participant suggested that although the dignity argument is appealing, not everyone is persuaded by it and the issue is one with political overtones. An attorney participant argued that it would be preferable for the Committee to follow the Supreme Court's lead concerning the question of tribal amicus filings. Mr. Letter stated that he supported the idea of soliciting the views of the rest of the circuits; he also reiterated the DOJ's position that Native American tribes should be consulted and he offered the DOJ's help in arranging that consultation. It was suggested that it would be helpful if the DOJ could explain in writing its views concerning consultation.

An attorney member asked whether anyone had asserted that Native American tribes have been deterred from proffering amicus briefs due to the requirement of seeking court leave to file them. Judge Sutton responded that such a concern does not seem to be the motivating factor in Mr. Rey-Bear's proposal. The attorney member also observed that the overall issue of tribal amicus filings includes not only Rule 29(a)'s provision concerning filing without court leave or party consent but also Rule 29(c)(5)'s requirement of the authorship-and-funding disclosure.

A committee member asked whether soliciting the views of the other circuits would provide the Committee with useful information; this member noted that the Committee is already aware that the Tenth Circuit strongly opposes amending Rule 29. Judge Sutton responded that if it turns out that there is a lopsided division in views among the circuits – for example, if no circuits other than the Tenth Circuit oppose amending Rule 29 – then some members might find that information to be relevant. A district judge member agreed and suggested that if that were to turn out to be the case, that information might even persuade the Tenth Circuit to reconsider its own view of the matter.

An appellate judge member offered a differing view, arguing that the Committee has the information it needs and that it should decide whether to amend Rule 29. This member argued in support of treating tribes the same as states for purposes of amicus filings; the member stated that such an approach would have no downside and that the rule amendment could also encompass municipalities and could be justified on the grounds that all large, important, sovereign entities should be treated similarly under Rule 29. The Reporter stated that although the extent of tribal government authority is much debated and has been altered in Supreme Court decisions since 1978, the doctrine is still clear that Native American tribes retain their sovereignty except to the extent that it has been removed by a federal treaty, by a federal statute, or by implication of the tribes' status as "domestic dependent nations." An attorney member observed that the term "state" is now defined by Appellate Rule 1(b) to include United States territories, which are not sovereign entities; under Rules 1(b) and 29(a), those non-sovereign entities are permitted to file amicus briefs without party consent or court leave. This member asked whether amending Rule 29(a) to treat tribes the same as states would be perceived as having broader implications for legal doctrines concerning tribal authority. A participant responded that the answer to that question is unclear. In any event, this participant observed, those who oppose treating tribes the same as states for purposes of Rule 29(a) may do so for reasons unrelated to their views of tribal sovereignty; such opponents may have a general aversion to amicus filings and may view the requirement of a motion for leave to file an amicus brief as a useful hurdle.

An attorney member asked whether the Committee knows how frequently municipalities seek leave to file amicus briefs in the courts of appeals. A district judge member noted that a letter soliciting the views of the circuits concerning tribal amicus filings could also solicit their views concerning municipal amicus filings. Mr. Letter argued that, given the range of views expressed by the three circuits the Committee consulted to date, the Committee should not move forward without consulting the remaining circuits. The attorney member expressed support for asking the circuits about both tribal amicus filings and municipal amicus filings, in order to get a sense of how a rule change would affect the courts' functioning. An appellate judge member observed that such information would not change the assessment of the dignity argument. But the attorney member responded that this information would illuminate the likely impact of a rule change. Another attorney participant stated that it would be useful to learn the views of the other circuits. An appellate judge member stated that the inquiry to the circuits should ask about both tribal and municipal amicus filers.

An attorney member – turning to the question of the disclosure requirement – observed that as one moves along the spectrum from the federal government to other government entities the likelihood of ghostwritten briefs increases (though it is still low). States with well-developed appellate operations write their own amicus briefs, but that might not always be true of states with less-developed appellate litigation functions. When a brief is circulated among the members of the National Association of Attorneys General, those reviewing the brief want to know who wrote it. An appellate judge member agreed that states' practices vary. Another attorney member asked whether one could amend Rule 29(c)(5) to apply the authorship-and-

funding disclosure requirement to all amici, including government amici. Such an approach would differ from that taken in Supreme Court Rule 37.6, but, he argued, the practicalities of amicus briefs differ as between filings in the courts of appeals and filings in the Supreme Court. Mr. Letter noted that if the disclosure requirement extended to the United States' amicus filings, the United States' answers to all the questions would always be "No." A participant asked whether extending the disclosure requirement to the United States would raise separation of powers issues. An attorney participant asked whether such an amendment to Rule 29(c)(5) would run counter to the presumption that one should not amend a rule that is functioning well.

By consensus, the Committee resolved to return to this item at its spring 2012 meeting.

### **C. Item No. 10-AP-A (premature notices of appeal)**

Judge Sutton introduced this item, which concerns the possibility of amending Appellate Rule 4(a)(2) to reflect the treatment of premature notices of appeal. He noted that it would be hard to guess, from the current language of Rule 4(a)(2), the way that the caselaw treats the various situations in which a premature notice of appeal might be filed. The caselaw itself appears to be developing in a way that shows a convergence of approaches among the circuits. The exception is the treatment of instances when an order disposing of fewer than all claims or parties is followed by disposition as to all remaining claims or parties; the majority view allows relation forward in that circumstance but the Eighth Circuit takes the opposite view.

Judge Sutton noted three possible approaches that the Committee could take. It could amend Rule 4(a)(2) to codify the majority approach to common scenarios; this would provide information that the average litigant could not infer from current Rule 4(a)(2). Or the Committee could choose not to amend the rule and to allow the caselaw to continue to develop. Or the Committee could amend Rule 4(a)(2) to narrow the range of circumstances in which relation forward is permitted; although such an amendment could provide a bright line rule, it would overrule a good deal of precedent and could lead to the loss of appeal rights. Judge Sutton asked whether Committee members would support the latter approach; no members indicated support for it. He then asked whether the Committee was interested in amending the Rule to codify existing practices.

Mr. Letter suggested that it would be useful to provide clarity and to diminish the need to research the law. A district judge member asked whether it would be possible to amend the Committee Note to provide this clarification. Mr. McCabe explained that it is not an option to amend the Notes without amending the Rule text. Professor Coquillette recalled that Professor Capra had published (through the FJC) a pamphlet discussing aspects of the original Committee Notes to the Federal Rules of Evidence that warranted clarification (in some instances, because the rule discussed in the relevant Note was later altered by Congress). Professor Coquillette pointed out that there is a preference for not citing caselaw in Committee Notes because the cases might later be overruled.

Judge Sutton asked how often rules have been amended in order to codify existing practices. The Reporter noted the example of Civil Rule 62.1 and Appellate Rule 12.1, concerning indicative rulings. However, Professor Coquillette observed that such codification is not the norm. An attorney participant suggested that making the law more accessible provides a good reason for rulemaking. But an appellate judge member noted that, on the other hand, it might be argued that specifying in the rule the instances in which a premature notice of appeal relates forward might encourage imprecise practice concerning notices of appeal.

An attorney member asked whether it would be possible to amend Rule 4(a)(2) merely by substituting “an appealable” for “the,” so that the Rule would read: “A notice of appeal filed after the court announces a decision or order – but before the entry of an appealable judgment or order – is treated as filed on the date of and after the entry.” That amendment could be accompanied by an explanatory Committee Note. However, one problem with that language might be its potential breadth; it could be read to cover, for example, a notice of appeal filed after entry of a clearly interlocutory order and well before entry of final judgment.

An attorney participant turned the Committee’s attention to another possible amendment illustrated in the materials. This proposal would leave the existing language of Rule 4(a)(2) as it stands and then add: “Instances in which a notice of appeal relates forward under the first sentence of this provision include, but are not limited to, those in which a notice is filed” (followed by a list of instances in which relation forward is permitted under current law). The attorney pointed out that this proposal was incoherent because the examples in which current law permits relation forward do not actually fit within the language of Rule 4(a)(2)’s current text. An attorney member pointed out that this inconsistency would not arise if “an appealable” were substituted for “the” in the current text of Rule 4(a)(2). But the attorney participant responded that such a change could broaden the application of relation forward beyond that permitted by current doctrine.

An appellate judge member agreed with the concern – voiced earlier in the discussion – that such an amendment to Rule 4(a)(2) could unduly encourage parties to file notices of appeal early. This member suggested that it might be better not to amend the rule. He moved to remove this item from the Committee’s agenda. The motion was seconded and passed by voice vote without opposition.

**D. Item No. 10-AP-I (consider issues raised by redactions in appellate briefs)**

Judge Sutton invited Judge Dow to introduce Item No. 10-AP-I, which concerns questions raised by sealing or redaction of appellate filings. Judge Dow observed that this item arose from a suggestion by Paul Alan Levy – an attorney at Public Citizen Litigation Group – that redaction of appellate briefs creates problems for would-be filers of amicus briefs. Sealing on appeal, Judge Dow noted, raises questions beyond those that concern amici. He noted a number of related but distinct issues, such as issues raised by protective orders in the district court that seal discovery materials, and issues concerning redactions pursuant to the recently-

adopted privacy rules. In contrast to questions relating to protective orders governing discovery, the question of sealing on appeal solely concerns materials filed with the court.

Judge Dow observed that there are a number of different possible approaches to sealing on appeal. One approach is that taken by the D.C. Circuit and Federal Circuit; these circuits require the litigants – at the outset of the appeal – to review the record, mutually agree on whether some or all sealed portions can be unsealed, and present that agreement to the court or agency below. Some other circuits appear to operate on the assumption that materials that were sealed in the district court presumptively remain sealed on appeal. A third approach is that taken by the Seventh Circuit (and in some instances by the Third Circuit); this approach provides a grace period during which matters sealed below remain sealed on appeal, but mandates that those matters are unsealed (to the extent they appear in the record on appeal) if no motion is made within the grace period to maintain the seal on appeal.

Judge Dow suggested several questions for the Committee to consider. An initial question is whether there should be a national rule governing sealing on appeal. A national rule, he observed, would create a uniform approach. He noted the underlying principle that court business should be public. An appeal, he pointed out, comes later in the court process and the original reason for sealing an item in the court below may have dissipated by the time of the appeal. Another question is who should review the question of sealing at the time of the appeal. One possibility is to put the onus on the parties to review the continued appropriateness of any sealing orders. Another possibility would be to place this burden on the lower court. One advantage of that approach is that the district judge is familiar with the record. But requiring the district judge to review sealing orders at the conclusion of every case would be overbroad, because not all judgments are appealed; a narrower approach would provide that the judge's duty to review any sealing orders would be triggered by the filing of a notice of appeal. A third possibility would be to adopt the Seventh Circuit approach and require the parties to an appeal to make a motion if they desire the sealing to continue on appeal.

Judge Dow pointed out that this set of issues is complex, and that a number of areas require further study – for instance, concerning the question of sealing in criminal appeals. He observed that it will be important to consider how the CM/ECF systems are working. For example, in the Seventh Circuit, the CM/ECF system has sealed functionality (so that the district judge assigned to the case can view sealed filings through CM/ECF). Courts are in different places on these questions.

The Reporter posited that the question of sealing on appeal is distinct from the question of protective orders concerning discovery materials under Civil Rule 26(c). In the latter context, many or all of the sealed materials may never be filed with the court; by contrast, sealing on appeal by definition concerns materials filed by a party in support of or in opposition to a request for action by the court. Judge Sutton, noting the variation among the circuits' approaches to sealing on appeal, suggested that the Committee discuss the significance of that variation. Professor Coquillette responded that one approach would be to wait for the Supreme Court to

resolve these questions; another approach would be to pursue uniformity through the promulgation of a national rule. Mr. McCabe pointed out the salience of the Judicial Conference Committee on Court Administration and Case Management (“CACM”). CACM’s jurisdiction, he noted, encompasses questions of privacy and sealing. He observed that those planning the Next Generation of CM/ECF have approved two requirements for the next iteration of the CM/ECF system: First, the system must accommodate a sealed as well as a non-sealed level of filing; and second, there should be a system for “lodging” submissions with the court without actually filing them. An attorney participant asked how frequently non-parties make motions to unseal a sealed filing.

Judge Sutton suggested that it might be useful to form a working group to consider these issues further; the group could consider not only the possibility of a rule change but also alternatives to rulemaking. Mr. Letter agreed to work with Judge Dow and the Reporter on this topic. Judge Sutton invited any other member who is interested to participate in this effort. By consensus, the Committee retained this item on its study agenda.

## **VI. Additional Old Business and New Business**

### **A. Item No. 11-AP-B (FRAP 28 / introductions in briefs)**

Judge Sutton invited the Reporter to introduce Item No. 11-AP-B, which concerns the possibility of amending Rule 28 to discuss the inclusion of introductions in briefs. The Reporter stated that this topic grows out of Committee discussions concerning the proposal – currently out for comment – that would amend Rule 28 to combine the statement of the case and of the facts. Some participants in those discussions had suggested that it would be useful for Rule 28 to alert lawyers to the possibility of including an introduction in their brief. Participants had also discussed a related idea of moving the statement of issues (currently provided for in Rule 28(a)(5)) so that it would follow rather than precede the statement of the case. Rather than attempt to address these issues in the context of the proposal concerning the statement of the case, the Committee had added these questions to its agenda as a separate item.

Few rules currently address the question of introductions in briefs, though experienced appellate litigators often include them. Eighth Circuit Rule 28A(i)(1) requires appellants to include an up-to-one-page statement that includes a summary of the case and a statement of whether oral argument should be heard; appellees may include a responsive statement. Mr. Letter has mentioned to the Committee that the Ninth Circuit is considering adopting a local rule on introductions in briefs. Apart from that, there do not appear to be local circuit rules on point. The Supreme Court rules do not address introductions; the first item in a Supreme Court brief is the Questions Presented (in which experienced litigators may include a few sentences that serve the role of an introduction). Thanks to helpful research by Holly Sellers, the Committee is aware that three states have relevant provisions. Kentucky requires a very brief introduction (one or two sentences concerning the nature of the case). New Jersey permits a “preliminary statement” of up to three pages. Washington permits the inclusion of an introduction.

Amending Rule 28 to discuss introductions would codify current practice and might simplify the lawyer's task by making clear that an introduction is permissible. Promoting the inclusion of introductions would be helpful to the extent that those introductions are well-written. But such an amendment might also have costs. Not all introductions would be skilfully drafted. Some might include factual assertions that are not tied to the record. Some might try to present too many ideas "up front." Given those possible costs, perhaps this is something that should be dealt with, if at all, by local rule. If a national rule were to be drafted, it presumably would permit but not require an introduction. Other things that the rule might address could include the introduction's length (presumably the introduction would count toward the overall length limit for the brief); guidance concerning the introduction's contents; the introduction's placement in the brief (a necessary topic given that Rule 28(a) directs that the listed items appear in the order stated in the rule); and the respective roles of the introduction and the summary of argument.

Judge Sutton suggested that a central question is whether Rule 28 should be amended to reflect current practice concerning introductions. An attorney participant suggested that such an amendment is unnecessary because the proposed amendments to Rules 28 and 28.1 that are currently out for comment give lawyers flexibility to include an introduction as part of the statement of the case. An attorney member agreed that this item is "a solution in search of a problem"; he currently includes introductions in his briefs. Mr. Letter disagreed, arguing that although experienced appellate lawyers include introductions, the rest of the bar may not be aware that they can do so under the current Rule. He noted that when he advises young lawyers to add an introduction in a brief, they often come back to him, after reading Rule 28, to ask whether it is permissible to do so.

Judge Sutton observed that if the currently published proposals are adopted, Rule 28(a)(6) would require "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." The attorney participant suggested that it would be possible to amend this provision to mention "an optional introduction." But even without such a modification, she argued, the published language would permit the inclusion of an introduction as part of the statement of the case.

An attorney member asked how one would describe the appropriate contents of an introduction. Mr. Letter stated that an introduction can usefully state what the case is about and identify the basic arguments. The attorney member responded that it seems difficult to formulate just what an introduction should contain. An attorney participant suggested that it would be counter-productive to specify the contents of the introduction because flexibility is important; the best approach if one is mentioning an introduction, she argued, would be a simple reference to "an optional introduction." An appellate judge member asked whether mentioning an "optional introduction" would suggest by implication that no other optional components can be included in the brief. By way of comparison, it was noted that Rule 28(a)(10) currently requires "a short conclusion stating the precise relief sought." The attorney participant stated her understanding that this provision requires the brief to state what the appellant is asking the court of appeals to

do with the judgment below (reverse, vacate, or the like).

A member, noting that the proposal concerning the statement of the case is currently out for comment, asked whether it would be wise to amend Rule 28 twice in a row. Judge Sutton responded that if the Committee were to decide that the rule should discuss introductions, it would be possible to hold the currently published amendment and bundle it with the proposal concerning introductions. Mr. McCabe observed that the Committee Note of the currently published proposal could be revised after the comment period.

A member suggested that it did not make sense to amend Rule 28 to discuss introductions. Two attorney members agreed with this view, as did two other participants. A district judge member suggested that it could be useful to provide guidance concerning introductions in the Committee Note. Two appellate judge members agreed with this idea, as did two other participants (one of those participants reiterated her alternative suggestion that the rule text could be revised to refer to an “optional introduction”). Mr. Letter advocated adding a discussion of introductions either to the rule text or to the Committee Note in order to raise awareness concerning the possibility of including introductions; he argued that it would be better to address this topic in the rule text than in the Note. Professor Coquillette advised against including in the Committee Note something that should be addressed in the rule text. An appellate judge member stated that junior lawyers need guidance, and advocated addressing introductions either in the rule text or in the Note.

Judge Sutton suggested that – because it was time for the Committee to break for the day – Mr. Letter could formulate proposed language for a rule amendment that the Committee could then consider the next day. The following morning (after discussing the other matters noted below) the Committee resumed its discussion of this topic.

Mr. Letter offered some possible language to describe what should be included in the introduction. An appellate judge member asked whether an introduction differs from the summary of argument. Mr. Letter answered in the affirmative: An introduction says what the case is about and summarizes one or two key arguments. The Reporter asked whether one would ever omit the summary of argument because an introduction took its place. Mr. Letter suggested that judges’ views on this point would differ. Another appellate judge member predicted that adding a new section to the brief would tend to make briefs longer (because, currently, not all briefs are as long as they could be under the length limits). And in the case of unsophisticated litigants, this member suggested, authorizing the inclusion of an introduction could dilute the usefulness of the summary of the argument. Mr. Letter predicted that, without a rule that mentions introductions, experienced litigators will continue to include them and inexperienced lawyers will continue not including them. An appellate judge member predicted that most judges would not wish to encourage the inclusion of another section in briefs, and that judges certainly would not wish to render the summary of argument optional. This member stated that it seems difficult to draft rule language that would explain the difference between the introduction and the summary of argument. The difference, he observed, is that the summary of argument is legalistic

and the introduction is not, but it is hard to know how to say that in a rule without confusing the reader. Mr. Letter observed that circuits could address the matter by local rule. He asked whether Assistant United States Attorneys in the Third Circuit include introductions. An appellate judge member stated that they usually do not.

By consensus, the Committee decided to keep this item on its agenda and discuss it again at the Spring 2012 meeting.

**B. Item Nos. 11-AP-D (changes to FRAP in light of CM/ECF), 08-AP-A (changes to FRAP 3(d) in light of CM/ECF), and 11-AP-C (same)**

Judge Sutton introduced this topic, which concerns a couple of specific proposals for amending Appellate Rule 3(d), as well as a broader proposal for reviewing all of the Appellate Rules' functioning, in the light of electronic filing and service. He observed that there will always be some litigants who submit paper filings; the question is when and how to amend the rules to address the growing prevalence of electronic filings. He invited Mr. Green to provide a further introduction to this topic.

Mr. Green noted that all but two circuits have moved to the electronic world. (The Eleventh Circuit will come online within a year or so; the Federal Circuit has yet to come online.) The systems in a number of circuits are mature. Local practices have developed side by side with the Appellate Rules. A key question concerns the treatment of the record and appendix. An attorney member asked whether the Sixth Circuit's CM/ECF system is coordinated with those of the district courts within the Sixth Circuit. Mr. Green reported that the systems are coordinated. The bankruptcy courts were the first to come online, then the district courts, and now the court of appeals. The courts are now at the stage of developing the Next Generation of CM/ECF. There are some areas where the Appellate Rules are silent concerning electronic filings. There is no urgent need to revise the Rules, but over the next couple of years it would make sense to consider amending them.

Judge Sutton asked whether any meeting participants were aware of Appellate Rules that urgently need revision in light of the shift to electronic filing. An appellate judge said that he was not aware of any such rules; the big advantage of the advent of electronic filing, he noted, is that the court is always open to receive such filings. Mr. Letter stated that although there is no urgent need for a rule amendment, it would make sense to consider whether to change Appellate Rule 26(c)'s "three-day rule" (which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service). Mr. Letter reported that lawyers constantly ask why the three-day rule encompasses electronic service. The problems with electronic service, he noted, are decreasing. Mr. Green agreed that including electronic service within the three-day rule seems like an anachronism.

Mr. Letter noted the possibility that a judge who receives an electronic brief might print it

in a format that yields page numbers that differ from those referred to in the briefs. Mr. Green observed that electronic briefs are always required to be filed in PDF format. Mr. Letter responded that PDF briefs can be manipulated to yield different fonts. An appellate judge member stated that he does not change the appearance of briefs in this manner. Mr. Letter asked whether it would make sense for cross-references in briefs to refer to something other than page numbers. An attorney member responded that numbering the paragraphs in a brief would be an unappealing prospect. Another member suggested that even if a judge prints a brief in another format, he or she could return to the originally-filed version when determining what to refer to in the course of an oral argument. Another appellate judge observed that he had not heard of this phenomenon causing problems.

Judge Sutton suggested that changes relating to electronic filing and service might be addressed over the next few years through a joint project with the other Advisory Committees. Professor Coquillette stated that he would raise this possibility with Judge Kravitz (the Chair of the Standing Committee). Mr. McCabe observed that questions like the proper definition of “transmit” present global issues. A member noted that on that particular question, the Committee’s choice of wording for Appellate Rule 6 (in the context of the project to revise that Rule and Part VIII of the Bankruptcy Rules) could end up affecting the overall approach to terminology throughout the Appellate Rules. An appellate judge member asked whether those working on a joint project on electronic filing and service should include court employees who work with the relevant technology. Judge Sutton responded that if the Appellate Rules Committee forms a working group on this topic it could include not only Mr. Green but perhaps also another court employee with technical knowledge. Mr. McCabe noted that such a project would also involve CACM, and that the Next Generation of CM/ECF would presume the use of an all-electronic system. An attorney member agreed that it would be important to involve people with technical knowledge; he observed that in this fast-changing area the time lag between consideration and adoption of rule amendments would pose particular challenges.

## **VII. Other Information Items**

### **A. Item No. 10-AP-D (taxing costs under FRAP 39)**

Judge Sutton invited the Reporter to update the Committee concerning Item No. 10-AP-D. This item relates to the proposed “Fair Payment of Court Fees Act of 2011,” which would have amended Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff’d*, 131 S. Ct. 1207 (2011). The bill would have added a new subdivision (f) to Rule 39; that provision would require the court to order a waiver of appellate costs if the court determined that the interest of justice so required, and would define the “interest of justice” to include the establishment of constitutional or other precedent.

As the Committee has previously discussed, current Rule 39 already provides the courts of appeals with discretion to deny costs in a case such as *Snyder*. On the other hand, the circuits

have varied in their application of Rule 39's cost provisions. Pursuant to a request from the Committee, Ms. Leary and the FJC completed a very informative study of circuit practices concerning appellate costs. Ms. Leary found that the circuit practices vary due to differences with respect to factors such as the ceilings on the reimbursable cost per page of copying and the number of copies. In *Snyder*, the great bulk of the cost award was due to the cost of copying the briefs and extensive appendices.

At the Committee's request, Judge Sutton sent Ms. Leary's report to the Chief Judges of each circuit; and the circuits are responding to the study. Thus, for example, the Fourth Circuit has amended Fourth Circuit Rule 39(a) to lower the ceiling on reimbursable costs from \$ 4.00 per page to 15 cents per page. Chief Judge Easterbrook has commented that there seems to be no need to amend the Seventh Circuit's local rules, but that the Appellate Rules should be amended to set the maximum reimbursement per page, to provide that only actual costs are reimbursable, and to clarify that reimbursement can be claimed only for the number of copies that are required by local rule. Chief Judge Lynch has disseminated the FJC study to the judges in the First Circuit for their review. In July 2011, the Rules Committees submitted a memo to argue that the proposed bill to amend Civil Rule 68 and Appellate Rule 39 would be unnecessary in light of, inter alia, the circuits' responses to the FJC study and the growing prevalence of electronic filing (which will decrease copying costs). The bill has not been reintroduced in the 112th Congress.

Judge Sutton thanked Ms. Leary for her informative and timely research, which was key to these positive developments.

## **B. FRAP-related circuit splits and certiorari petitions**

Judge Sutton observed that the ongoing projects to review circuit splits and certiorari petitions relating to the Appellate Rules are designed to help the Committee investigate proactively how the Appellate Rules are functioning. He invited members to comment on these projects, and he invited the Reporter to highlight aspects of the memos concerning them.

The Reporter noted that the certiorari petitions had raised a number of interesting issues concerning appellate practice. For example, the petition in *In re Text Messaging Antitrust Litigation* (No. 10-1172), had challenged the practice of simultaneously granting permission to take a discretionary appeal and deciding the merits of that appeal. The petition for certiorari in *United States v. Irey*, 612 F.3d 1160 (11th Cir. 2010) (en banc), *cert. denied*, 131 S. Ct. 1813 (2011), presented a case in which the court of appeals' judgment was entered at the end of March; there was no petition for rehearing, but the mandate did not issue; and the court of appeals in mid-August granted rehearing en banc and vacated the panel opinion. The Eleventh Circuit has now adopted an internal operating procedure under which – if no rehearing petition has been filed by the time the mandate would otherwise issue – the clerk will make a docket entry to advise the parties when a judge has notified the clerk to withhold the mandate.

Judge Sutton asked whether Committee members wished to discuss any of the other cases addressed in the memos. An appellate judge member noted that he had been struck by the procedure employed by the court of appeals in *Karls v. Goldman Sachs Group, Inc.*, 131 S. Ct. 180 (2010). The practice followed in the Ninth Circuit appears to be that if an appeal meets the test for summary affirmance (in the Ninth Circuit, “appeals obviously controlled by precedent and cases in which the insubstantiality is manifest from the face of appellant's brief”), then the panel that summarily affirmed can, if it chooses, reject any petition for rehearing en banc without circulating it to the other active judges. The member noted that when an appeal is controlled by circuit precedent, rehearing en banc would be a particularly important avenue for the litigant seeking to overturn that precedent. A member suggested that the Ninth Circuit’s use of this procedure may stem from the docket pressures in that circuit. Another member observed that this procedure ceded authority (over whether to vote to rehear a case en banc) to the judges on the panel.

### **VIII. Date and Location of Spring 2012 Meeting**

Judge Sutton noted that the Committee’s Spring 2012 meeting is scheduled for April 12 and 13 in Washington, D.C.

### **IX. Adjournment**

The Committee adjourned at 9:40 a.m. on October 14, 2011.

Respectfully submitted,

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Catherine T. Struve  
Reporter

**Minutes of Spring 2011 Meeting of  
Advisory Committee on Appellate Rules  
April 6 and 7, 2011  
San Francisco, California**

**I. Introductions**

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Wednesday, April 6, 2011, at 8:35 a.m. at the Fairmont Hotel in San Francisco, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Robert Michael Dow, Jr., Justice Allison Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Mr. James F. Bennett, Ms. Maureen E. Mahoney, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice (“DOJ”), was present representing the Solicitor General. Also present were Judge Lee H. Rosenthal, Chair of the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office (“AO”); Ms. Holly Sellers, a Supreme Court Fellow assigned to the AO; and Ms. Marie Leary from the Federal Judicial Center (“FJC”). Peder K. Batalden, Esq., attended the meeting on April 6. Prof. Catherine T. Struve, the Reporter, took the minutes. (On the second day of the meeting, the Appellate Rules Committee met jointly with the Bankruptcy Rules Committee. The attendees of the joint meeting are noted in Part VIII below.)

Judge Sutton welcomed the meeting participants and introduced the Committee’s newest member, Professor Amy Coney Barrett. He noted that Professor Barrett attended Rhodes College and Notre Dame Law School, clerked for Judge Silberman and then for Justice Scalia, and now teaches Civil Procedure (among other subjects) at Notre Dame. Judge Bye introduced Mr. Batalden, who clerked for Judge Bye and who now, as an appellate practitioner, has submitted thoughtful suggestions and comments to the Appellate Rules Committee. Judge Sutton welcomed Mr. Batalden.

During the meeting, Judge Sutton thanked Mr. McCabe, Ms. Kuperman, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting.

**II. Approval of Minutes of October 2010 Meeting**

A motion was made and seconded to approve the minutes of the Committee’s October 2010 meeting. The motion passed by voice vote without dissent.

### **III. Report on January 2011 Meeting of Standing Committee**

Judge Sutton summarized relevant events at the Standing Committee's January 2011 meeting. The Standing Committee approved for publication proposed amendments to Rules 13, 14, and 24; these amendments would address permissive interlocutory appeals from the United States Tax Court and also would revise Rule 24(b)'s reference to the Tax Court to remove a possible source of confusion concerning the Tax Court's legal status.

Judge Sutton noted that he also discussed with the Standing Committee the pending proposal to treat federally recognized Native American tribes the same as states for the purpose of amicus filings. Members of the Standing Committee expressed varying views concerning this proposal, with a couple of members expressing support and two or three others taking a contrary view. Judge Rosenthal observed that members from western states tend to be more familiar with the issue. Judge Sutton noted that the Appellate Rules Committee has consulted the Chief Judges of the Eighth, Ninth, and Tenth Circuits (where relatively many tribal amicus filings occur) for their views; so far, the Committee has received formal responses from the Eighth and Ninth Circuits and informal feedback from the Tenth Circuit. With that input, the Committee will be in a position to revisit this item in the fall.

### **IV. Other Information Items**

Judge Sutton reported that the Supreme Court has approved the proposed amendments to Appellate Rules 4 and 40 that will clarify the treatment of the time to appeal or to seek rehearing in civil cases to which a United States officer or employee is a party. Because the time to appeal in a civil case is set not only by Appellate Rule 4 but also by 28 U.S.C. § 2107, the Judicial Conference is seeking legislation to make the same clarifying change to Section 2107. Senate Judiciary staff have conveyed an inquiry by the Office of Senate Legal Counsel (SLC), who have questioned whether the "safe harbors" in the proposed rule and statute amendments<sup>1</sup> apply in cases in which a House or Senate Member, officer, or employee is sued in an individual capacity and is represented by SLC or by the House Office of General Counsel rather than by the DOJ. Judge Sutton noted that the language of the proposals, as drafted, covers such cases, but he observed that the Senate Judiciary staff have expressed an inclination to add language underscoring that point in the legislative history of the proposed amendment to Section 2107. It has also been suggested that similar language should be added to the Committee Notes to Rules 4 and 40; but changing the Notes at this stage would be unusual and complicated, given that the Supreme Court has already approved the proposed amendments. Mr. Letter noted that he has spoken with House staffers to underscore the DOJ's support for the proposed amendments.

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<sup>1</sup> The "safe harbors" provide the longer appeal or rehearing periods when the United States represents the officer or employee at the time the relevant judgment is entered or when the United States files the appeal or petition for the officer or employee.

Judge Sutton recalled that the Committee, at its fall 2010 meeting, had discussed Chief Judge Rader's proposal, on behalf of the judges of the Federal Circuit, that 28 U.S.C. § 46(c) be amended to include in an en banc court any senior circuit judge "who participated on the original panel, regardless of whether an opinion of the panel has formally issued."<sup>2</sup> It turns out that the Judicial Conference Committee on Court Administration and Case Management (CACM) simultaneously considered this proposal and decided to recommend it favorably to the Judicial Conference. The CACM proposal was on the agenda for the Judicial Conference's March 2011 meeting, but was taken off the agenda in order to permit time for coordinated consideration of the proposal by CACM and the Appellate Rules Committee. The two committees will form a joint subcommittee to consider this question over the summer.

## **V. Action Items**

### **A. For publication**

#### **1. Item No. 08-AP-G (substantive and style changes to Form 4)**

Judge Sutton invited the Reporter to introduce this item, which concerns proposed revisions to Form 4 (the form that is used in connection with applications to proceed in forma pauperis ("IFP") on appeal). Effective December 1, 2010, Form 4 was revised to accord with the recently-adopted privacy rules. During the discussions that led to the 2010 amendments, the Committee also discussed possible substantive changes to the Form. In particular, it was suggested that Questions 10 and 11 request unnecessary information. Question 10 requests the name of any attorney whom the litigant has paid (or will pay) for services in connection with the case, as well as the amount of such payments; Question 11 inquires about payments for non-attorney services in connection with the case. In the past, the National Association of Criminal Defense Lawyers ("NACDL") has suggested that questions like Question 10 intrude upon the attorney-client privilege. More recently, comments received from attorneys in the Pro Se Staff Attorneys Office for the District of Massachusetts have suggested that requiring IFP applicants to disclose information concerning legal representation could impose a strategic disadvantage on those applicants.

The Reporter stated that, at least in most instances, the information requested by Questions 10 and 11 would not seem to be covered by attorney-client privilege. However, to the extent that Question 11 is read to encompass payments to investigators or to experts (especially non-testifying experts), it might elicit information that reveals litigation theories and strategy and that therefore qualifies as opinion work product. In addition, as the comments mentioned above suggest, the disclosures required by Questions 10 and 11 would enable an IFP applicant's opponent to learn the details of a represented applicant's fee arrangement with the applicant's

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<sup>2</sup> The statute currently provides that a senior judge may participate in an en banc court that is "reviewing a decision of a panel of which such judge was a member."

lawyer, and could reveal the fact that an IFP applicant who is proceeding pro se has obtained legal advice from a lawyer who has not appeared in the case.

During the Committee's previous discussions of Form 4, members did not identify any reason to think that the details currently sought by Questions 10 and 11 are necessary to the disposition of IFP applications. Because Form 4 is also used in connection with applications to proceed IFP in the Supreme Court, members suggested seeking the Court's views on the question. Judge Sutton spoke informally to the Supreme Court Clerk's Office, which could not think of any reason why the information was necessary. In light of these discussions, the Reporter suggested, it would make sense to amend Form 4 by combining Questions 10 and 11 into a single, simpler question: "Have you spent – or will you be spending – any money for expenses or attorney fees in connection with this lawsuit? If yes, how much?"

The Reporter also suggested that the Committee make certain technical amendments to Form 4, to bring the official Form into conformity with changes that were approved by the Judicial Conference in fall 1997 but were not subsequently transmitted to Congress. The proposed technical amendments would add columns in Question 1 to permit the applicant to list the applicant's spouse's income; would limit the requests for employment history in Questions 2 and 3 to the past two years; and would specify that the requirement for inmate account statements applies to civil appeals.

A district judge member stated if the purpose of Form 4 is to enable the court to determine whether the applicant's finances qualify him or her to proceed IFP, then the simpler the form is, the better. He noted that information showing that a litigant has obtained legal advice might affect a judge's determination of how to construe the litigant's pleadings, but that the question of the amount of latitude to give a pro se litigant is separate from the question of whether a litigant should be permitted to proceed IFP. Professor Coquillette observed that the proposed amendment would address the complaints that NACDL has raised in the past.

Apart from the merits of the proposed amendments, Professor Coquillette suggested, the Committee should give attention to the process by which they are to be adopted. He reported that the Civil Rules Committee has begun to reconsider the procedures for adopting and amending forms. Participants have queried whether the forms should go through the standard rulemaking process. Judge Rosenthal observed that, at present, Civil Rule 84 addresses the forms that accompany the Civil Rules. The time may be opportune to reconsider the relationship of the forms and the rulemaking process. In 1938, the forms had a key function: to instruct the bench and bar concerning the new approach taken by the Civil Rules. But in 2011, the forms are no longer necessary for that purpose. Rather, in the case of the Civil Rules, it may be preferable for the Forms to focus on ministerial topics. Moreover, it is no longer practicable for the Rules Committees to monitor and maintain the forms on an ongoing basis in the way that they monitor and maintain the Rules themselves. It seems worthwhile for the rules committees jointly to consider how to handle the revision and maintenance of the forms. Mr. McCabe stated that the Bankruptcy Forms raise special issues. Under Bankruptcy Rule 9009, the Official Bankruptcy

Forms go to the Judicial Conference for approval, but the Director of the AO is authorized to issue additional forms as well. Depending how quickly this inter-committee project proceeds, the fruits of this project may yield a new process that can be used to implement the proposed Form 4 amendments. However, it was noted that the project was likely to take at least three years.

An attorney member asked how a litigant responding to the proposed new Question 10 should answer the question if the litigant has a contingent fee arrangement with a lawyer. The Reporter responded that this excellent question also arises with respect to current Question 10. She suggested that such a litigant should check the “Yes” box in response to the amended Question 10, but that it would be unclear how to respond to the question’s inquiry concerning “how much” money would be spent. The attorney member, though, predicted that an applicant who has a contingent fee arrangement might well check the “No” box in response to proposed Question 10 as drafted. He suggested revising proposed Question 10 to ask whether the litigant has agreed to share part of any recovery. Another attorney member, though, questioned whether that additional query is worthwhile; most of those applying to proceed IFP on appeal, she noted, will have lost in the court below.

Professor Coquillette mentioned the significant changes that are occurring concerning litigation financing. Mr. Letter noted that if a litigant’s answers on Form 4 left the Clerk’s Office unsatisfied, the office could inquire further of the litigant; given this possibility, he suggested, there is no need to further complicate the form. Mr. Green agreed that if the information provided on Form 4 proved inadequate, his office would request more information from the litigant; he reported that such situations are very rare.

A judge member suggested that even if the proposed amended Question 10 might not elicit full information in all cases, it strikes a reasonable balance. He noted that one might, in fact, argue for striking Questions 10 and 11 altogether, as unnecessary to the assessment of the litigant’s finances. But he has seen some cases in which a litigant who was represented during part of a lawsuit later applies for IFP status. Gathering some information about the money spent on the litigation could be useful in assessing such requests.

A district judge member suggested that proposed Question 10 might be revised to read, in part, “or might you be spending” (rather than “or will you be spending”) in order to more clearly encompass contingent fees arrangements. An attorney member responded that the key question is whether the Committee feels that it is necessary for Form 4 to elicit information that will reveal whether the applicant has a contingent-fee arrangement with a lawyer who may be advancing some of the litigation costs. If that is not a pressing concern, then it would be less important to draft Form 4 with a view to eliciting detailed information on this question. The Reporter observed that IFP status also relieves the litigant from any otherwise-applicable obligation to post security for costs.

Professor Coquillette expressed strong support for revising Questions 10 and 11. These

questions, he suggested, should not be posed without a good reason. If the only goal of Form 4 is to elicit information concerning a litigant's poverty, Questions 10 and 11 are not germane. An appellate judge member asked whether it would be useful to seek the views of some practitioners' organizations such as the Litigation Section of the American Bar Association; another appellate judge predicted that such groups would be happy with the proposed revisions to Questions 10 and 11. An attorney member expressed support for adopting the proposed revisions to Form 4 as shown in the agenda book. The main issue that usually rides on IFP status, this member stated, is whether a litigant will be required to pay the \$450 docket fee.

A motion was made and seconded to approve for publication all of the proposed revisions to Form 4 as shown in the agenda book. The motion passed by voice vote without dissent.

## **2. Item No. 10-AP-B (statement of the case)**

Judge Sutton presented this item, which concerns Rule 28(a)(6)'s requirement that the brief contain "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." The statement required by Rule 28(a)(6) must precede the "statement of facts" required by Rule 28(a)(7); and these requirements have confused practitioners and produced redundancy in briefs. Judge Sutton observed that the Committee has obtained input on this item from two groups – the ABA Council of Appellate Lawyers and the American Academy of Appellate Lawyers. Nearly everyone whom the Committee has heard from agrees that there is a problem with the current Rule. To focus the discussion, the agenda materials presented three possible options for revising Rule 28(a). The first option would revise Rule 28(a) to emulate the Supreme Court's approach of combining the statement of the case and of the facts. The second option would retain the separate subdivisions of Rule 28(a) requiring statements of the case and the facts, but would reverse their order and revise the reference to the "course of proceedings." The third option would relocate the "course of proceedings" requirement from Rule 28(a)(6) to Rule 28(a)(7) so as to permit the description of the course of proceedings in chronological order (after the facts). Mr. Batalden, in a recent letter, suggested another possible variation. Ms. Sellers, meanwhile, provided the Committee with illuminating research on similar requirements in state-court briefing rules. Judge Sutton invited Ms. Sellers to present the results of her research.

Ms. Sellers noted that characterizing the various state approaches had presented a challenge. It is possible to sort states into two rough categories – those with rules similar to Rule 28 and those with rules that diverge from Rule 28. Some states appear to model their rules on a former version of the U.S. Supreme Court rules. Three states have rules that provide explicitly for an introduction. Depending on what approach the Committee decides to take, the state-court rules may provide models. Judge Sutton thanked Ms. Sellers for her thorough and informative research, and noted that it was useful to know that the states have reached no consensus on the best means of approaching the question. He observed that the question of providing for an introduction in briefs warrants consideration as a distinct agenda item.

Judge Sutton next invited Mr. Batalden to comment. Mr. Batalden stated that the most important question, for attorneys, is the ordering of the statements: Was it necessary, he asked, that the statement of the course of proceedings precede the statement of the facts? Mr. Letter noted that he is part of a group of lawyers whom Chief Judge Kozinski has appointed to advise the Ninth Circuit on various matters; Mr. Letter reported that the group has discussed this question, and that judges who were present observed that when lawyers comply with the current Rule's ordering the result is unhelpful.<sup>3</sup> Judges, Mr. Letter emphasized, are the audience for briefs, so the question is what judges find most useful. Judge Sutton reported that he spoke with one appellate judge who does not read the statement of the case in view of the redundancy caused by it. Mr. Letter agreed that judges' perspectives on this question are likely to vary; but most judges, he suggested, would favor a change in the order of the requirements.

An attorney member stated that she has always struggled with Rule 28(a)'s requirements, and she stressed that there is a need for more flexibility in the Rule. This member stated that she liked the first option set forth in the agenda materials, but suggested a change to that option. The first option, as shown in the agenda materials, proposed that the later references in Rules 28 and 28.1 to the "statement of the case" and "statement of the facts" be replaced by references to "the statement of the case and the facts." The member proposed deleting "and the facts," so as to refer simply to the "statement of the case." (Later in the discussion the Committee determined by consensus that conforming revisions should be made to the proposed amendments to Rules 28(b) and 28.1 – so that those Rules, as amended, would refer simply to "the statement of the case" rather than to "the statement of the case and the facts.") Also, the member proposed deleting from the Committee Note to the proposed amendment to Rule 28(a) a statement that the amendment "permits the lawyer to present the factual and procedural history in one place chronologically." The member stated that she did not favor the second of the options shown in the agenda materials because that option did not provide attorneys with flexibility in drafting their briefs. Nor did she favor the third option; that option, she suggested, could confuse attorneys who might wonder what the revised Rule 28(a)(6) meant by referring (without more) to "a statement of the case briefly indicating the nature of the case." Responding to the suggestion that flexibility is better than an approach that simply reverses the order of the statement-of-the-case and statement-of-the-facts requirements, Mr. Letter observed that in some instances a lawyer may wish to provide context for the brief and an introductory statement can be useful in that regard.

An attorney member stated that he also favored the first option set forth in the agenda materials, but he suggested inserting a reference to the "rulings presented for review" into the proposed new Rule 28(a)(6) so that the amended Rule would require "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review with appropriate references to the record (see Rule 28(e))." Mr. Batalden agreed that the inclusion of that language would be helpful, but wondered whether it could

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<sup>3</sup> Later in the discussion, Mr. Letter noted that the Ninth Circuit is currently considering moving the table of authorities to the back of the brief.

instead be added to Rule 28(a)(5), which currently directs the inclusion of “a statement of the issues presented for review.” The attorney member responded that inserting the “rulings presented for review” requirement into subdivision (a)(5) might make the statement of the issues unduly long. An appellate judge noted that briefs filed in the Eleventh Circuit have a separate page for the issues and a separate page for the standard of review; this system, he observed, is very helpful. The attorney member suggested that it would also be useful to revise the Committee Note to Rule 28(a) to state that the amended Rule 28(a)(6) “permits but does not require the lawyer to present the factual and procedural history chronologically.”

A motion was made and seconded to approve for publication the proposed amendments to Rules 28 and 28.1, with the changes noted above. The motion passed by voice vote without dissent.

Prior to the vote, an attorney member had stated that she read the proposed amended Rule 28(a)(6) to permit brief writers to include an introduction at the beginning of the “statement of the case” section of the brief. This member suggested that it might be useful to mention that fact in the Committee Note – perhaps by saying something like “Briefs may, but are not required to, include an introduction in the statement of the case.” Judge Sutton responded, however, that it would be better to keep the issue of introductions to briefs separate from the proposed amendment to the statement of the case. Accordingly, after the Committee completed its consideration of Item No. 10-AP-B, Judge Sutton invited further discussion of the topic of introductions to briefs.

Mr. Letter reported that the United States Attorneys’ Offices in the Southern District of New York and in districts within the Ninth Circuit customarily include introductions in their briefs. The U.S. Attorney’s Office in the Southern District of New York usually keeps the introduction to a single page. But Mr. Letter reported occasions when a very complex case had occasioned a four-page introduction in a brief. He noted that there are no local rules provisions in the Second or Ninth Circuits that explicitly provide for introductions in briefs but that courts do not reject briefs that include such introductions. Mr. Letter noted the possibility that the Ninth Circuit might consider revising the Ninth Circuit’s local rules to permit (though not require) an introduction. Judges, he reported, consider introductions very useful. Mr. Letter also observed that he has read briefs by public interest groups such as Public Citizen and the ACLU that make very effective use of introductions. Mr. Letter noted that one question that might arise is whether the inclusion of an introduction diminishes the need for a summary of the argument.

An appellate judge noted that introductions can be provided for by local rule; given that fact, he wondered, was it necessary for the national rules to address introductions? Mr. Letter responded that the key is what judges prefer; if judges would prefer to have an introduction, then the rules should require it. Mr. Batalden observed that lawyers include introductions in their briefs despite the fact that Rule 28 does not mention them. Thus, any rule amendment would be a matter of accommodating existing practice. He pointed out that if Rule 28(a) is amended to refer explicitly to introductions, then such an amendment could alter existing practice by

mandating a particular placement for the introduction (because Rule 28(a) states that the listed items must be included “in the order indicated”).

An attorney member reiterated her view that the new statement of the case provision that the Committee had approved for publication would permit the inclusion of an introduction in the statement of the case, and she advocated revising the Committee Note to mention that. The introduction, she suggested, could be placed either at the start of the statement of the case or directly before it. Somewhat later in the discussion, another attorney member returned to this suggestion. He wondered whether it might be useful to consider moving the statement of issues (currently required by Rule 28(a)(5)) so that it comes after rather than before the statement of the case. The jurisdictional statement required by Rule 28(a)(4) is short, but the statement of issues can be longer. If the statement of issues followed rather than preceded the statement of the case, then an introduction contained in the statement of the case would be the first item of substance in the brief. An appellate judge member noted that under the Supreme Court’s rules, the questions presented are the first item in petitions for certiorari and in merits briefs. The attorney member suggested, however, that the questions presented section in a Supreme Court brief differs from the statement of issues section in a court of appeals brief. Mr. Letter noted that Supreme Court briefs tend to include, in the questions presented section, a couple of sentences that serve, in effect, as an introduction.

An attorney member noted that if the Rule were revised to mandate (rather than merely permit) an introduction, then the Committee would have to determine what the introduction should contain. An appellate judge responded to this observation by asking what an introduction would contain that is not already set forth somewhere in the existing parts of the brief. Mr. Letter noted that while introductions can be designed to provide information concerning the posture of the case and the relevant issues, introductions can also serve a persuasive function. He observed that the proposal currently being considered by the Ninth Circuit contemplates that if the brief is to have an introduction, the introduction should be the first substantive item in the brief.

A member asked whether a provision concerning introductions would be better placed in the national rules or in local rules. Addressing the topic through local rules, she suggested, might provide more flexibility. A district judge member stated that he saw appeal in the idea of including the introduction in the statement of the case; that option, he suggested, would provide flexibility. He noted that the lawyers know more about the case than the judges do. On the other hand, he observed, the inclusion of an introduction in the statement of the case might occasion tension to the extent that the introduction is argumentative. This member noted that in the Seventh Circuit, lawyers must anchor in the record any citations to the facts. An appellate judge member asked Mr. Letter whether the proposed Ninth Circuit rule concerning introductions would provide for citations to the record in the introduction. Mr. Letter responded that the rule would not provide for record citations in the introduction, but that factual assertions elsewhere in the brief would be accompanied by citations to the record. The judge member noted that the quality of briefs filed in the Eleventh Circuit is very high. Mr. Letter suggested that judges in the Ninth Circuit may be less satisfied with the briefs filed in their circuit.

Judge Sutton summed up the range of issues that might arise with respect to introductions in briefs: Should introductions be permitted? Should they be mandatory? What should an introduction contain? Where should it be placed? He stated that it would make sense to solicit input on these questions. He suggested, however, that it would be difficult to take up these questions simultaneously with the proposed amendment to Rule 28(a)(6). Instead, he proposed, the Committee should make the introduction question a separate agenda item and discuss it in the fall. This new agenda item would include both the topic of introductions and also the possibility, noted above, of moving the statement of issues so that it follows rather than precedes the statement of the case.

## **VI. Discussion Items**

### **A. Item No. 07-AP-E (issues relating to *Bowles v. Russell*)**

Judge Sutton invited the Reporter to update the Committee on this item, which concerns issues related to the Supreme Court’s decision in *Bowles v. Russell*, 551 U.S. 205 (2007). The Reporter noted that in *Dolan v. United States*, 130 S. Ct. 2533 (2010), the Court had provided a typology of deadlines. The *Dolan* Court noted (citing *Bowles*) that some deadlines are jurisdictional; some other deadlines are claim-processing rules; and still other deadlines “seek[] speed by creating a time-related directive that is legally enforceable but do[] not deprive a judge ... of the power to take the action to which the deadline applies if the deadline is missed.”

More recently still, in *Henderson ex rel. Henderson v. Shinseki*, 2011 WL 691592 (U.S. March 1, 2011), the Court held that the 120-day deadline set by 38 U.S.C. § 7266(a) for seeking review in the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals is not jurisdictional. The Court of Appeals for Veterans Claims had dismissed Mr. Henderson’s appeal because he had filed it 15 days late. A divided en banc Federal Circuit affirmed, holding (in reliance on *Bowles*) that the deadline is jurisdictional. The dissenters pointed out that the very veterans who most deserve service-related benefits may be the litigants least likely to be able to comply with the filing deadline. The sympathetic facts of the case spurred legislative action, and four bills were introduced in Congress in response to the Federal Circuit’s decision. This spring, the Supreme Court (with all eight participating Justices voting unanimously) reversed. The Court held that *Bowles* was inapplicable because *Bowles* involved a deadline for taking an appeal from one court to another; by contrast, Section 7266(a) sets a deadline for taking an appeal from an agency to an Article I court in connection with a “unique administrative scheme.” Instead of applying *Bowles*, the Court applied the clear statement rule from *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006). The Court found no clear indication that Congress intended Section 7266(a)’s deadline to be jurisdictional. This holding, the Reporter observed, does not directly affect any deadlines that affect practice in the courts of appeals. But the *Henderson* Court’s method of distinguishing *Bowles* – as a case that concerned court/court review – might leave the door open in future cases for the argument that *Bowles* does not govern

the nature of deadlines for seeking court of appeals review of an administrative agency decision. Such an argument, though, would have to confront the precedent set by *Stone v. INS*, 514 U.S. 386 (1995), in which the Court held that the then-applicable statutory provision delineating the procedure for petitioning for court of appeals review of a final deportation order by the Board of Immigration Appeals was jurisdictional. The Reporter suggested that it will be interesting to see how this branch of the doctrine continues to develop. She also suggested that the Court's decision in *Henderson* appears likely to remove the impetus for the legislative proposals that grew out of the Federal Circuit's decision.

The Reporter also briefly noted a certiorari petition pending before the Court in *United States ex rel. O'Connell v. Chapman University* (No. 10-810), in which the petitioner seeks to narrow *Bowles* through the application of 28 U.S.C. § 2106. With respect to the development of *Bowles*-related caselaw in the courts of appeals, the Reporter observed that the most interesting questions continue to arise with respect to hybrid deadlines – namely, appeal deadlines set partly by statute and partly by rule.

#### **B. Item No. 08-AP-D (FRAP 4(a)(4))**

Judge Sutton invited Ms. Mahoney to introduce this item. Ms. Mahoney observed that this item arose from Mr. Batalden's observation that under Appellate Rule 4(a)(4)(B) the time to appeal from an amended judgment runs from the entry of the order disposing of the last remaining tolling motion. In some scenarios, Mr. Batalden had suggested, the judgment might not be issued and entered until well after the entry of the order. Ms. Mahoney noted that the Committee has been considering how to clarify the Rule. The Committee has discussed a possible solution that would peg the re-starting of appeal time to the "later of" the entry of the order disposing of the last remaining tolling motion or the entry of any resulting judgment.

Ms. Mahoney reported that Mr. Taranto had recently suggested another possible approach – one that would require the entry of a new judgment on a separate document after the disposition of all tolling motions. If the court were to deny all of the tolling motions, it would re-enter the same judgment that it had originally entered. Such an approach, Ms. Mahoney suggested, could be by far the most sensible solution. Judge Sutton observed that Mr. Taranto has presented the Committee with a new way of thinking about the issue, and he suggested that it would be worthwhile to consider this new proposal over the summer.

Mr. Taranto noted that the proposal will require joint discussion with the Civil Rules Committee. He explained that his proposal uses the term "resetting motion," rather than "tolling motion," to indicate that the relevant motions, when timely filed, reset the appeal-time clock to 0. He stated that the objective of extending the separate-document requirement is to provide the benefit of formality in all cases, even when the end of a case follows from the disposition of a resetting motion. Extending the separate-document requirement, Mr. Taranto noted, might eliminate the need to define the term "disposing of" (a question that had occupied the Committee

at the fall 2010 meeting). The extension of the separate-document requirement could also, he argued, provide an opportunity to simplify Civil Rule 58 and Appellate Rule 4(a), because there would be no need to address separately the situations in which no separate document is currently required. Mr. Taranto explained that the proposal would make use of the statutory authorization, in 28 U.S.C. § 2072(c), to define when a district court's ruling is final for purposes of appeal under 28 U.S.C. § 1291. Under the proposal, the judgment in a case where timely resetting motions have been made would not be final for appeal purposes until the entry of the required separate document after the disposition of all resetting motions. But an appellant could waive the separate-document requirement and appeal an otherwise-final judgment after disposition of all resetting motions but prior to the provision of the separate document.

Judge Sutton expressed the Committee's gratitude for Mr. Taranto's work on this item, and he suggested that Mr. Taranto's proposal be forwarded to the Civil / Appellate Subcommittee for its consideration. Judge Sutton noted he had previously heard some misgivings about the separate document requirement. Judge Rosenthal observed that it would be optimistic to assume that the separate document requirement is widely known or understood. Judge Sutton asked Mr. Green how the circuit clerks would react to an expansion of the separate document requirement. Mr. Green responded that the change should be straightforward from the clerks' perspective. A district judge member observed that district judges within the Seventh Circuit do not question the separate document requirement. If a separate document were always (rather than sometimes) required, this member suggested, that could make compliance simpler for the district judges. Mr. Batalden expressed support for Mr. Taranto's proposal; he suggested that an additional benefit of requiring a new judgment on a separate document would be that enforcement of the judgment would be easier.

Judge Sutton thanked Mr. Taranto, Ms. Mahoney, Mr. Letter, and Mr. Batalden for their efforts with respect to this item.

### **C. Item No. 08-AP-H (manufactured finality)**

Judge Sutton invited Mr. Letter to introduce this item, which concerns the doctrines that govern a litigant's attempt to "manufacture" a final judgment in order to take an appeal. Mr. Letter offered the following example: Suppose that a plaintiff includes five claims in a complaint and the court dismisses two of the five. Without obtaining a certification under Civil Rule 54(b), the plaintiff cannot appeal the dismissal of the two claims until the other three claims have been finally disposed of. Some lawyers have suggested that the option of seeking a Civil Rule 54(b) certification does not satisfactorily address this scenario because Rule 54(b) certification lies within the district judge's discretion. It is generally accepted that if the plaintiff dismisses the remaining three claims with prejudice, that dismissal results in a final judgment so that the plaintiff can appeal the dismissal of the two claims. If the plaintiff dismisses the three remaining claims without prejudice, some would argue this produces finality for appeal purposes but most take the contrary view. More difficult questions arise if the plaintiff dismisses the remaining

three claims with conditional prejudice (that is to say, stating that the dismissal is without prejudice to the reinstatement of the remaining three claims if the two previously-dismissed claims are reinstated on appeal).

Mr. Letter reported that the Civil / Appellate Subcommittee, which has been considering this item, has recently discussed suggestions by Ms. Mahoney and by Mr. Keisler. Judge Rosenthal observed that the Civil Rules Committee – at its spring meeting – discussed this item and concluded that it would welcome guidance from the Appellate Rules Committee.

Mr. Letter noted that lawyers in his office regularly ask him questions relating to the manufactured-finality doctrine. During the Subcommittee's prior discussions, questions were raised concerning the experience within the Second Circuit (which is the only Circuit so far to issue a decision approving the use of a conditional-prejudice dismissal to create an appealable judgment). Mr. Letter informally canvassed Assistant United States Attorneys in the Second Circuit – and especially in the Southern District of New York – to ask their experience; they told him that the issue of conditional-prejudice dismissals does not come up frequently.

Ms. Mahoney noted that there is consensus on the Subcommittee that a dismissal of the remaining claims with prejudice should produce finality. As to dismissals without prejudice, there is a circuit split, but the Subcommittee members believe that such dismissals should not produce finality. The question on which the Subcommittee has not reached consensus is how to treat conditional-prejudice dismissals. An attorney member of the Subcommittee from the Civil Rules Committee has expressed support for permitting conditional-prejudice dismissals to produce finality, and has expressed opposition to amending the rules to bar such dismissals from producing finality. Ms. Mahoney argued that the rules should be amended to provide for a nationally uniform approach to the question of manufactured finality. She noted that she finds the conditional-prejudice idea appealing but that it is proving complicated to devise a rule that would implement the idea in multi-party cases. In such cases, she observed, there is a possibility that unrestrained use of the conditional-prejudice dismissal mechanism could result in unfairness to parties other than the would-be appellant. Ms. Mahoney suggested that one possible approach would be to amend Civil Rule 54(b) to provide that the district court shall certify a separate Rule 54(b) judgment when the would-be appellant has dismissed all other claims with conditional prejudice, unless another party shows that such a certification would be unfair.

Mr. Taranto observed that the question of manufactured finality also arises in the context of criminal cases, and he asked Mr. Letter whether the DOJ has a view concerning potential amendments that would address this topic. Mr. Letter responded that the DOJ would definitely wish to express its views on the matter. Judge Rosenthal observed that many districts will not allow a criminal defendant to plead guilty unless the defendant waives appeal (including with respect to constitutional issues). Thus, in the criminal context, these issues could implicate the dynamic of plea bargaining. She noted that it would be wise to seek the views of the Criminal Rules Committee in order to gain a sense of how such changes would be viewed on the criminal side.

An appellate judge member observed that it is useful to ask whether a question of this nature is better resolved by rule or by caselaw; in this instance, he noted, the fact that the question concerns appellate jurisdiction might weigh against leaving the issue to development in the caselaw. Concerning Ms. Mahoney's suggestion that it would be useful for a rules amendment to address the circuit split concerning the effect of dismissals without prejudice, the member noted that such an amendment would seek to achieve uniformity by adopting the more stringent side of the circuit split. Ms. Mahoney acknowledged this point but argued that the circumstances under which an appeal is available should be uniform from one circuit to another. She suggested that it would be useful to know whether the Appellate Rules Committee feels that the circuit split should be addressed.

An appellate judge member of the Civil / Appellate Subcommittee expressed a preference for not amending the rules to address the manufactured-finality issue. Amending the rules, he suggested, might interfere with the flexibility that is currently available to district judges. Another appellate judge member of the Committee expressed agreement with this view. An attorney member argued, in response, that in the circuits where the manufactured-finality doctrine currently permits the appellant an alternative way to appeal without obtaining a Civil Rule 54(b) certification, the existing doctrine can be seen as removing control from the district judges. The appellate judge member responded that such a result would only occur in a circuit in which the court of appeals has chosen to move the doctrine in that direction. This judge member stated that if the Rules Committees were to do anything with respect to this item, he would lean toward putting control in the hands of the district judge.

An appellate judge member wondered whether it would be beneficial for the Committee to ask the Subcommittee whether the Subcommittee's members could reach consensus on a concrete proposal. Mr. Letter suggested that it would be a mistake not to take action to address the question of manufactured finality. The appellate judge member responded that it would be helpful for the Subcommittee to craft a concrete proposal, at least concerning the treatment of dismissals without prejudice. An attorney member of the Subcommittee suggested that it would be useful to encourage the Subcommittee to address both dismissals without prejudice and conditional-prejudice dismissals. An appellate judge member of the Subcommittee reiterated his view that the rulemakers should not proceed at this time to propose an amendment; rather, he suggested, the Committee could re-consider the question later if someone in the future formulates a proposal on the subject.

It was decided that the Committee would request that the Subcommittee attempt to reach consensus on a specific proposal. Consultation with the Criminal Rules Committee will become necessary in the event that the Civil and Appellate Rules Committees decide to move forward with a proposal.

**D. Item No. 08-AP-K (alien registration numbers)**

Judge Sutton invited the Reporter to introduce this item, which arose from concerns voiced in 2008 by Public.Resource.Org about the presence of social security numbers and alien registration numbers in federal appellate opinions. The Appellate Rules Committee discussed the issue in fall 2008 and referred it to the Standing Committee's Privacy Subcommittee, which was considering various privacy-related questions relating to the national Rules. The Privacy Subcommittee reviewed the materials submitted by Public.Resource.Org; it commissioned the FJC to conduct a survey of court filings; it reviewed local rules concerning redaction; with the assistance of the FJC, it surveyed judges, clerks and attorneys about privacy-related issues; and it held a day-long conference at Fordham Law School in April 2010. One of the panels at the Fordham Conference focused specifically on immigration cases.

In its recent report to the Standing Committee, the Privacy Subcommittee concluded that alien registration numbers should not be added to the list of items for which the national Rules require redaction. The Subcommittee found that disclosure of alien registration numbers does not pose a substantial risk of identity theft. In addition, the Subcommittee noted that both the DOJ and circuit clerks had emphasized that alien numbers provide an essential means of distinguishing among litigants and preventing confusion.

The Reporter suggested that in the light of the Privacy Subcommittee's determination, the Committee might wish to consider removing Item No. 08-AP-K from the Committee's study agenda. A motion to remove that item from the study agenda was made and seconded and passed by voice vote without opposition.

#### **E. Item No. 10-AP-A (premature notices of appeal)**

Judge Sutton introduced this item, which concerns the possibility of amending Appellate Rule 4(a)(2) to address the question of the relation forward of a premature notice of appeal. Judge Sutton noted that the Committee's previous review of the caselaw applying the relation-forward doctrine to a range of fact patterns had found a number of lopsided circuit splits concerning the availability of relation forward in particular sorts of circumstances. He observed that, since the time that the Committee commenced its consideration of this issue, developments in the caselaw appear to have lessened or removed some of the circuit splits. He suggested that the Committee should consider whether it would prefer to consider amending Rule 4(a)(2); or hold the item on the agenda while monitoring the developing caselaw; or remove the item altogether.

Judge Sutton pointed out that if the Committee decides to consider amending Rule 4(a), the agenda materials included four sketches designed to illustrate different possible approaches. Judge Sutton stated that among those four sketches, he slightly favored the fourth, which would amend Rule 4(a)(2) to provide a (non-exhaustive) list of scenarios in which relation forward occurs. He asked participants for their views on whether pursuit of a Rules amendment would be worthwhile.

A district judge member asked whether the relation-forward ruling in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), *overruled on other grounds by Otis v. City of Chicago*, 29 F.3d 1159 (7th Cir. 1994), was still good law. He suggested that the Seventh Circuit’s caselaw may be moving away from the *Strasburg* approach for cases where a decision is announced contingent on a future event and the notice of appeal is filed between the announcement and the occurrence of the contingency. He wondered whether there is any problem that needs to be addressed through a Rules amendment.

Judge Sutton responded that Rule 4(a)(2) does not set out the approaches that courts have developed through the caselaw, and he wondered whether the Rule could usefully codify existing practice. The question, he suggested, is whether the existence of inter-circuit consensus on a given approach provides a reason to codify that approach in the Rule. Judge Rosenthal observed that one could view the recent adoption of Civil Rule 62.1 and Appellate Rule 12.1 as an example of such codification. There was general consensus (subject to variation on some details) among the circuits concerning the practice of indicative rulings, but many practitioners were unfamiliar with the indicative-ruling mechanism. There is a role, she suggested, for Rule amendments that codify and/or clarify existing practice. Such rules can be especially helpful in providing guidance to pro se litigants.

An attorney member expressed support for retaining this item on the agenda and continuing to work on it while also monitoring the caselaw developments. This member pointed out that the Eighth Circuit has rejected the majority approach to scenarios that involve a judgment as to fewer than all claims or parties, with later disposition of all remaining claims with respect to all parties. There is no reason to think, the member suggested, that the Eighth Circuit will reverse itself on this point. Turning to the four possibilities sketched in the agenda materials, this member expressed skepticism concerning the second and third sketches because those approaches would not resolve all of the existing circuit splits. The member stated that the first sketch<sup>4</sup> provides an approach that seems harsh but would be clear. As to the fourth sketch, the member suggested that the list of scenarios in which relation forward can occur should be introduced by the phrase “including but not limited to” in order to avoid creating the impression that the listed scenarios are the only ones in which relation forward can occur. There are, the member observed, many possible permutations.

By consensus, the Committee resolved to continue its work on this item.

**F. Item No. 10-AP-D (taxing costs under FRAP 39)**

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<sup>4</sup> In that sketch, Rule 4(a)(2) would be amended to read: “A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry, if and only if the decision or order, as announced, would otherwise be appealable.”

Judge Sutton thanked Ms. Leary for her excellent research concerning the award of costs under Appellate Rule 39, and he invited her to present that research to the Committee. Ms. Leary observed that the Committee had asked the FJC to provide data in response to concerns raised about the taxation of costs by the Fourth Circuit in the case of *Snyder v. Phelps*. Ms. Leary explained that the FJC had researched each circuit's local rules and procedures for determining cost awards, and that the FJC had used the courts of appeals' CM/ECF databases to identify cases in which cost awards had been made.

Ms. Leary reported that there is no simple answer to the question what constitutes a typical award of appellate costs under Rule 39. Multiple variables determine the amount of a Rule 39 cost award, and each circuit has adopted its own combination of those variables. The variables include the range of documents and fees that are recoverable, the amount recoverable for copying each page of a document, and the number of copies for which costs are recoverable.

Turning to the results of the FJC's database search, Ms. Leary cautioned that the search was limited by the fact that the FJC had not obtained data from the Federal Circuit because that Circuit was not yet live on CM/ECF. In addition, the data from the Second and Eleventh Circuits were limited because those Circuits only recently went live on CM/ECF. Some limitations also applied to the data from the Fifth, Seventh, and Ninth Circuits. The data show that most cost awards go to appellees upon affirmance of the judgment below. But when appellants received cost awards upon reversal, partial reversal, modification, or vacatur of the judgment below, their average cost award was higher than the average cost award to appellees. Using the range in size of a majority of the awards in a given circuit as a benchmark, the FJC assessed whether any awards in that circuit could be seen as "outliers" in relation to that circuit's normal range. Such outliers were found in nine circuits; the award in *Snyder* was one such outlier. The very large award in *Snyder* resulted from the length of the appendix and the fact that the Fourth Circuit permits recovery of printing costs up to \$4.00 per page (which in *Snyder* meant recovery of 50 cents per page for each of eight copies of the appendix).

Judge Sutton noted that in the *Snyder* case, the existing rules gave the court of appeals the discretion not to impose costs on the appellant. Professor Coquillette agreed that Rule 39 gives the court of appeals discretion. Mr. Letter noted that it would not be a good idea for Rule 39 to be amended to distinguish among particular types of cases with respect to the permissibility of cost awards.

Judge Sutton asked how costs would be computed in a case where the briefs are filed electronically. Mr. Green responded that if the briefs were filed only in electronic form, then no printing costs would be awarded. However, he noted that – with the exception of the Sixth Circuit – the circuits that have transitioned to electronic filing nonetheless require paper copies as well.

Judge Sutton stated that he would send a copy of Ms. Leary's report to the Chief Judge and Circuit Clerk for each Circuit. By consensus, the Committee retained this item on its study

agenda.

**G. Item No. 10-AP-E (effect of withdrawal of a timely-filed post-judgment motion on the time to appeal in a civil case)**

Judge Sutton invited the Reporter to introduce this item, which arose from Howard Bashman's suggestion that the Committee consider issues raised by *Vanderwerf v. SmithKline Beecham Corp.*, 603 F.3d 842 (10th Cir. 2010). The Reporter reminded the Committee that in *Vanderwerf*, the majority held that the withdrawal of a Civil Rule 59(e) motion deprived that motion of tolling effect and rendered the movant's appeal untimely. No consensus emerged, at the fall 2010 meeting, in favor of a rulemaking response to *Vanderwerf*. Members did express interest in considering further the situation faced by a non-movant who has relied on the tolling effect of a post-judgment motion that is subsequently withdrawn. One might question whether the *Vanderwerf* holding extends to cases in which the movant and the appellant are different parties. It would not seem to make sense to extend the *Vanderwerf* holding to situations in which the tolling motion is made (and then withdrawn) by a litigant other than the would-be appellant. Admittedly, no textual basis is readily apparent in Appellate Rule 4(a)(4) for distinguishing between appeals by the litigant that made the withdrawn motion and appeals by other litigants. However, there has as yet been no decision that applies *Vanderwerf* to an appeal by a non-movant. The Reporter suggested that the Committee consider whether, in the absence of such a decision, it is worthwhile to maintain this item on the study agenda.

A motion was made and seconded to remove Item No. 10-AP-E from the study agenda. The motion passed by voice vote without dissent.

**H. Item No. 10-AP-G (intervention on appeal)**

Judge Sutton invited discussion of this item, which arose from Mr. Letter's observation that Civil Rule 24 sets standards for intervention in the district courts, but that no comparable provision covers the general question of intervention in the courts of appeals. Mr. Letter noted that the United States has been successful in moving to intervene in a number of appeals. He observed that unless a statute provides a right to intervene, the decision whether to allow intervention rests in the court's discretion. An attorney member expressed concern with the idea of formalizing a procedure for seeking to intervene in the court of appeals (instead of in the district court); such a measure, this member suggested, might have unintended consequences.

A motion was made and seconded to remove Item No. 10-AP-G from the study agenda. The motion passed by voice vote without dissent.

**VII. Additional Old Business and New Business**

**A. Item No. 10-AP-I (consider issues raised by redactions in appellate briefs)**

Judge Sutton invited the Reporter to present this item, which arises from concerns expressed by Paul Alan Levy, an attorney at Public Citizen Litigation Group, concerning redactions in appellate briefs. Mr. Levy explains that in some cases, broadly worded district court orders permitting the parties to designate discovery materials as confidential may be followed by the filing, on appeal, of briefs that are heavily redacted to obscure references to those materials. Mr. Levy reports that the filers of such redacted briefs often provide no justification for the redactions. In some cases, no one files a motion to unseal the unredacted copies of the briefs; and even if such a motion is filed, by the time that the unredacted copies of the briefs are filed it is too late for would-be amici to have a meaningful chance to draft their briefs in the light of the unredacted record.

The Reporter noted that she had shared Mr. Levy's suggestion with the Chairs and Reporters of the Privacy and Sealing Subcommittees, and that Judge Hartz had provided thoughtful comments. Judge Hartz observed that the questions raised by Mr. Levy fall outside the scope of the Sealing Subcommittee's inquiries, because that Subcommittee considered only the sealing of entire cases. But some of the Subcommittee's suggestions – such as requiring judicial oversight of sealing decisions and sealing as little as necessary – could be relevant to Mr. Levy's concerns. Judge Hartz noted that the appellate context poses challenges because judges are not usually assigned to a case until after the answering brief is filed, and even then judges may feel uncomfortable resolving a sealing question before having had a chance to fully consider the merits of the appeal. The challenge, he suggested, is to provide for judicial involvement without creating too great a burden. One possibility might be an approach that provides that matters are unsealed when submitted to the court of appeals absent a showing of good cause.

The Reporter noted that all circuits have one or more local provisions dealing with sealed materials. Not all circuits specify whether materials sealed below presumptively remain sealed on appeal. Seven circuits have provisions that state or imply (with varying degrees of explicitness) that materials sealed below presumptively remain sealed on appeal. But two of those seven circuits – the First and the Sixth – also provide that a party wishing to file a sealed brief must move for leave to do so. Two circuits take a different approach: When records have been sealed below, these circuits maintain the seal only for a limited period to afford an opportunity for a party to move in the court of appeals to seal the materials. The Seventh Circuit applies this approach to all cases, except where a statute or procedural rule provides otherwise. The Third Circuit follows this approach in appeals in civil cases, and also provides that a litigant must move for leave to file a sealed brief.

Mr. Taranto drew the Committee's attention to the Federal Circuit's recent decision in *In re Violation of Rule 28(d)*, 2011 WL 1137296 (Fed. Cir. Mar. 29, 2011), in which the court of appeals sanctioned counsel for improperly marking portions of briefs confidential in violation of Federal Circuit Rule 28(d). Judge Rosenthal noted the Civil Rules Committee's extensive

consideration of protective orders issued under Civil Rule 26. She observed that the law is quite clear that good cause is required in order for the court to seal discovery items. And a more stringent showing is required in order to seal materials filed with the court in support of a request for judicial action. Despite the clarity of the law, however, practitioners persist in asserting that materials subject to a protective order are for that reason subject to sealing even when submitted as part of a court filing. There is a divide between law and practice. A district judge member agreed, and noted that in the Seventh Circuit matters are presumptively unsealed if the litigant fails to show within 14 days why they should remain sealed. Judge Sutton asked whether the concerns about sealing in the court of appeals would dissipate if questions of sealing were properly addressed at the district court level. A district judge participant said that they would.

A district judge member suggested that practices would improve if the Appellate Rules embodied the approach taken by the Seventh Circuit; the presence of such a provision in the Appellate Rules would help to focus district judges on the need to require a stringent showing to seal materials filed in support of a request for judicial action. An attorney member stated that the standards for sealing in the district court and the court of appeals should be the same. Another attorney member agreed, but noted that the application of those standards in the court of appeals might differ from that in the district court if the reason for protecting the materials at issue has dissipated by the time of the appeal. Mr. Letter pointed out that D.C. Circuit Rule 47.1(b) requires the parties to an appeal to review the record to make sure that continued sealing is appropriate.

Judge Sutton suggested that the Committee coordinate its consideration of these questions with the Civil Rules Committee. Mr. Letter observed that this topic also has implications for criminal matters. He suggested that one approach to the issue might be to impose a requirement that the district court review any sealing orders before closing a case. An alternative approach would be to adopt the D.C. Circuit's requirement of continuing review. Judge Rosenthal observed that the question of Rule 26 and protective orders has been on the agenda of the Civil Rules Committee for a very long time. The Civil Rules Committee has not, to date, found it necessary to update Rule 26 as it relates to protective orders and confidentiality, because the caselaw dealing with this issue is on the right track. However, a conclusion by the Civil Rules Committee that there is no need to amend Civil Rule 26 does not necessarily answer the question raised by Mr. Levy. The Appellate Rules Committee could consider requiring re-justification of any sealing decisions in the context of an appeal; it might be the case that a separate set of arguments becomes relevant in the appeal context. Professor Coquillette expressed agreement.

A district judge member observed that in the Seventh Circuit, lawyers know that the court of appeals will unseal matters that should not have been sealed, and this provides accountability. An attorney member asked whether the Appellate Rules Committee should consider adopting in the national rules an approach like the Seventh Circuit's. An appellate judge member asked whether the Supreme Court has a rule governing sealed documents. Mr. Letter stated that he did not think that the Supreme Court has a rule. Sealed filings are rare in the Supreme Court, he observed, but the DOJ has made such filings on occasion.

By consensus, the Committee retained this item on its study agenda. Judge Dow agreed to work with the Reporter to develop a proposal for presentation to the Committee in the fall.

**B. Item No. 11-AP-A (exempt amicus statement of interest from length limit)**

Judge Sutton invited the Reporter to introduce this item, which concerns a proposal by R. Shawn Gunnarson and Alexander Dushku that Appellate Rule 32(a)(7)(B)(iii) be amended to “provide that the statement of interest by an amicus curiae, required by Rule 29(c)(4), is not included in the word count for purposes of the type-volume limitation of Rule 32(a)(7)(B).” The proponents argue that amici’s statements of interest are more similar to items already excluded from Rule 32(a)(7)(B)’s limits than to other items that must be counted under those limits. They report that counting the statement of interest for purposes of Rule 32(a)(7)(B)’s limits is burdensome when a brief is filed by a large consortium of amici. And they state that the interpretations of the current Rule by clerk’s offices vary from circuit to circuit.

The Reporter stated that Messrs. Gunnarson and Dushku make good arguments for exempting the statement of interest from the length limit. On the other hand, it is worth considering the possible downside of such an exemption: It might tempt amici to skirt the length limits by smuggling argument into the statement of interest. To get a sense of length of statements of interest, the Reporter had performed a small and rough search on Westlaw. The search – described in the agenda materials – found a wide variation in length, both in absolute terms and when measured in number of words per amicus. Many statements in the sample were concise, but not all were. And the three briefs, within the sample, that had the greatest number of words per amicus contained argumentation.

The Reporter noted that most circuits do not appear to address by local rule whether the statement of interest is included in the length limit; the Third Circuit, though, does have a local rule that appears intended to exclude the statement. A member asked whether the three longest statements in the sample came from briefs filed in a circuit that excluded the statement of interest from the length limit. The Reporter stated that she would check.<sup>5</sup> An attorney member observed that the Rules should attempt to encourage multiple amici to file a single brief when possible. This member wondered whether a rule could be drafted that would exclude the statement of interest from the word count, but only up to a specific number of words per amicus. Another attorney member responded that any rule that depended on the number of amici could be manipulated – for example, by listing as amici not only an association but also its members. This member suggested, as an alternative, a rule that would exclude the statement of interest up to a uniform ceiling (such as 250 words). A third attorney member stated that he did not think it was worthwhile to address this matter in the national Rules.

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<sup>5</sup> Subsequent to the meeting, the Reporter determined that one of the three briefs in question was filed in the Third Circuit.

An attorney member noted that in Supreme Court briefs, it has become customary to place in a separate addendum or appendix a paragraph describing each amicus; that addendum or appendix does not count toward the length limit. A district judge member observed that some court of appeals judges prefer not to encourage amicus filings, and he suggested that such judges would fail to see a reason to address this question in the national Rules; he noted that an amicus can make a motion for permission to serve an over-length brief. Judge Sutton asked the meeting participants whether any of them had found the current Rule to be problematic. An attorney member responded that she could envision cases in which it could be a problem, but that in such instances the amicus could file a motion.

The Reporter had noted earlier that an argument might be made for excluding new Rule 29(c)(5)'s authorship-and-funding disclosure requirement from the length limits. Judge Sutton recommended that the Committee defer considering that possibility until such time as it is considering other amendments to the relevant Rule.

A motion was made and seconded to remove Item No. 11-AP-A from the study agenda. The motion based by voice vote without dissent.

### **VIII. Joint Discussion with Advisory Committee on Bankruptcy Rules concerning Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules), and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)**

At 8:35 a.m. on April 7, Judge Sutton and Judge Eugene R. Wedoff called to order the joint meeting of the Bankruptcy Rules Committee and the Appellate Rules Committee. Present from the Bankruptcy Rules Committee were Judge Wedoff (the Chair of the Committee); Judge Karen K. Caldwell; Judge Arthur I. Harris; Judge Sandra Segal Ikuta; Judge Robert James Jonker; Judge Adalberto Jordan; Judge William H. Pauley III; Judge Elizabeth L. Perris; Chief Judge Judith H. Wizmur; J. Michael Lamberth, Esq.; David A. Lander, Esq.; and John Rao, Esq. J. Christopher Kohn, Esq., Director of the Commercial Litigation Branch of the Civil Division of the DOJ, was present as an ex officio member of the Bankruptcy Rules Committee. Judge Laura Taylor Swain attended as the past Chair of the Bankruptcy Rules Committee. Judge James A. Teilborg attended as liaison from the Standing Committee and Judge Joan Humphrey Lefkowitz attended as liaison from the Committee on the Administration of the Bankruptcy System. Present as Advisors or Consultants to the Bankruptcy Rules Committee were Patricia S. Ketchum, Esq.; Mark A. Redmiles (Deputy Director, Executive Office for U.S. Trustees); and James J. Waldron (Clerk of the United States Bankruptcy Court for the District of New Jersey). Also present were Judge Dennis Montali, Molly T. Johnson from the FJC, and James H. Wannamaker III and Scott Myers from the AO. Professor S. Elizabeth Gibson and Professor Troy A. McKenzie were present as the Reporter and Assistant Reporter for the Bankruptcy Rules Committee. Also in attendance were Philip S. Corwin, Esq. of Butera & Andrews; David Melcer, Esq. of Bass & Associates P.C.; and Lisa A. Tracy of the Executive Office for U.S. Trustees.

Judge Sutton commenced by observing that the joint meeting would be interesting and helpful. He noted that the Appellate Rules Committee members were eager to benefit from discussions with the Bankruptcy Rules Committee, including with respect to the experience with electronic filing in bankruptcy. Judge Wedoff thanked the Appellate Rules Committee for agreeing to meet jointly with the Bankruptcy Rules Committee. He noted that one of the goals of the Bankruptcy Rules Committee's Part VIII revision project is to achieve consistency with the Appellate Rules. Judge Wedoff introduced three new members of the Bankruptcy Rules Committee. Judge Robert James Jonker is a district judge in the Western District of Michigan who has had a longstanding interest in bankruptcy law. Judge Adalberto Jordan, who clerked for Justice O'Connor, will be joining the subcommittee on appeals and will bring a great deal of appellate experience to that subcommittee. Professor Troy A. McKenzie joins the Committee as its Assistant Reporter; Professor McKenzie, who teaches at N.Y.U. Law School, has a rare combination of expertise in both bankruptcy and civil procedure.

Judge Pauley observed that the Part VIII revision project arose from the efforts of Eric Brunstad, who produced an initial draft of the proposed revision. The Bankruptcy Rules Committee's Subcommittee on Privacy, Public Access, and Appeals has held two mini-conferences on the subject. The process has been iterative and thoughtful.

Professor Gibson proposed that the joint meeting focus on issues of common interest to the two Committees. Those include issues relating to electronic filing and transmission, as well as issues concerning the intersection of the Bankruptcy and Appellate Rules (especially with respect to appeals directly from the bankruptcy court to the court of appeals). Professor Gibson noted that bankruptcy appeals are relatively rare, and that it is thus a challenge to find practitioners who specialize in appellate bankruptcy practice. She reported that there have been two perspectives voiced during the deliberations thus far – that of practitioners who handle bankruptcy appeals only occasionally and who view the Part VIII Rules as difficult, and that of appellate specialists who would like the Part VIII Rules to more closely resemble the Appellate Rules.

Professor Gibson observed that the Bankruptcy Rules elsewhere incorporate by reference a number of Civil Rules. Thus, a question that arose early on was whether the Part VIII Rules should simply incorporate the Appellate Rules by reference. At the Standing Committee's January 2011 meeting, it became clear that the Standing Committee does not favor such an approach for the Part VIII Rules.

Professor Gibson suggested that it might be useful for the joint meeting to commence by discussing the possibility of incorporating into the national Rules a presumption of electronic filing and transmission. For example, how would such a change affect the rules concerning the submission of briefs, the form of briefs, and how the record is assembled? Professor Gibson noted that it would be particularly useful to learn about the experience in the Sixth Circuit; she observed that other courts, such as the Ninth Circuit Bankruptcy Appellate Panel ("BAP"), have also moved toward electronic filing. She pointed out that a key question is how to manage the

transition to electronic filing while also retaining paper filing where necessary. Judge Sutton responded that in the courts of appeals, there is a presumption that there will continue to be paper filings; the courts must accommodate filings by inmates, who will ordinarily file in paper form rather than electronically. Professor Gibson noted that in bankruptcy a similar accommodation must be made for paper filings by pro se debtors. A member of the Bankruptcy Rules Committee noted that the rates of paper filings vary by district but can be as high as 25 or 30 percent; this member noted that the court will scan paper filings into PDF format. Judge Wedoff noted that the requirement that attorneys file electronically has worked well. Mr. Green observed that while circuits other than the Sixth Circuit will accept electronic filings, those circuits also require paper copies. In courts within the Sixth Circuit, he reported, some 40 to 45 percent of the filings are paper filings by inmates; the court converts those filings to PDF format. The Sixth Circuit generally will not accept paper filings from attorneys and does not accept the appendix or record excerpts in paper form. Instead, the judges access the electronic record themselves. But the Sixth Circuit, he noted, is an outlier in this respect. Judge Wedoff asked whether the Sixth Circuit's system has worked well. Judge Sutton responded that it is the right approach, but that it took years for judges' chambers to adjust; the Sixth Circuit's system transfers the burden of printing to chambers. During the first year of electronic filing, Judge Sutton printed paper copies of briefs; now, he reads them on an iPad. Professor Gibson asked how the record is handled in the Sixth Circuit. Mr. Green responded that the electronic case filing architecture differs in the court of appeals, so the Clerk's Office must reach out and bring the electronic record from the court below into the court of appeals' system. The Clerk's Office is able to use that method to provide the court of appeals judges with electronic links to the record. Counsel identify for the court of appeals what the relevant portions of the record are. Judge Sutton noted that the Sixth Circuit used to include in the case schedule time to assemble the appendix; things move faster now because there is no need to allow time for putting the appendix together.

A participant asked whether bankruptcy judges like the system of electronic filing. Judge Wedoff responded that the system works well because the Clerk's Office provides whatever support the judges need. A key benefit is that a judge can work on the latest filings from anywhere, whether at home or during travel. And litigants, similarly, can file wherever and whenever they prefer. A bankruptcy judge from the Ninth Circuit agreed. In his district, each judge posts his or her policy concerning chambers copies. Another advantage of electronic filing is that emergency matters can be filed and accessed at any time. Electronic filing is particularly useful for the BAP because the Ninth Circuit spans such a large area. Judge Sutton asked what provisions the bankruptcy courts have made for situations in which the computer system crashes. Judge Wedoff responded that the courts have backup centers at other locations; backing up court files, he observed, is easier when those files are in electronic format.

Professor Gibson turned the Committees' attention to proposed Bankruptcy Rule 8006, which concerns the certification of a direct appeal to the court of appeals. Professor Gibson explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA") put in place for bankruptcy appeals a framework – in 28 U.S.C. § 158(d)(2) – for direct appeals by permission that is in some ways similar to, but in other ways quite distinct

from, the interlocutory-appeal framework set by 28 U.S.C. § 1292(b). Under Section 158(d)(2), a direct appeal from the bankruptcy court to the court of appeals requires a certification from a lower court and also requires permission from the court of appeals. Section 158(d)(2)'s criteria for the certification differ from those set by Section 1292(b) for interlocutory appeals from the district court to the court of appeals. Moreover, Section 158(d)(2) sets out a variety of means for certification. The certification may be made by the court on its own motion; by the court on a party's motion; by the court on request by a majority of the appellants and a majority of the appellees; or jointly by all the appellants and appellees. Three different courts can make the required certification in appropriate circumstances – the bankruptcy court, the BAP, or the district court. Proposed Rule 8006(d) provides that the certification is to be made by the court in which the matter is pending, and proposed Rule 8006(b) sets for the rule for determining in which court the matter is pending at a given time. Proposed Rule 8006(g) then sets a 30-day time limit for filing in the court of appeals a request for permission to take a direct appeal to the court of appeals.

Professor Gibson invited Professor Struve to discuss proposed new Appellate Rule 6(c), which would address the procedure for permissive direct appeals under Section 158(d)(2) subsequent to the filing in the court of appeals of the petition for leave to appeal. Proposed Rule 6(c)(1) provides that the Appellate Rules, with specified exceptions, govern such an appeal. Proposed Rule 6(c)(2) provides that Bankruptcy Rule 8009 and 8010 govern the designation and transmission of the record on appeal.

Professor Struve noted that it would be useful to obtain participants' views on whether proposed Appellate Rule 6(c), as drafted, appropriately addresses the procedure for direct appeals under Section 158(d)(2). As an example, she noted the question of stays pending appeal. The proposal as drafted would provide that Appellate Rule 8 would apply to direct appeals. That Rule's treatment of stays is basically similar to proposed Bankruptcy Rule 8007 (which addresses stays in the context of appeals from the bankruptcy court to the district court or BAP), but there is a question about Rule 8's provision for proceeding directly against a surety. Rule 8 provides that a surety's liability can be enforced on motion in the district court without the need for an independent action. If Rule 8 applies to bankruptcy direct appeals, then it would contemplate such a direct proceeding in the bankruptcy court. One question is whether such a proceeding would fall naturally within the existing jurisdiction of the bankruptcy court. Professor Gibson noted that Bankruptcy Rule 9025 currently provides that sureties submit to the jurisdiction of the bankruptcy court. Rule 9025, though, provides for the determination of the surety's liability in an adversary proceeding. This raises a question as to whether any provision for proceedings against the surety in the bankruptcy court should contemplate an adversary proceeding; perhaps proposed Appellate Rule 6(c) could be revised to incorporate by reference the terms of Bankruptcy Rule 9025. Professor Gibson asked whether any of the bankruptcy judges on the Committee wished to comment on their experiences with proceedings against sureties, but no members volunteered a response.

Professor Gibson asked whether participants in the meeting had experience with direct

appeals under Section 158(d)(2). Mr. Green reported that there have been few such direct appeals in the Sixth Circuit, and that there have been no problems with their processing. A bankruptcy judge observed that *Blausey v. United States Trustee*, 552 F.3d 1124 (9th Cir. 2009), illustrates the confusion that can arise concerning the appropriate procedure in connection with direct appeals under Section 158(d)(2). This judge observed that it would be salutary for the Rules to settle the question of the proper procedures on such appeals.

An attorney member of the Appellate Rules Committee observed that proposed Bankruptcy Rule 8006's certification provisions seem odd. Professor Gibson explained that those provisions are drawn from Section 158(d)(2). A participant questioned why Section 158(d)(2) provides for the four different means of certification noted previously. A bankruptcy judge member of the Bankruptcy Rules Committee observed that a Section 158(d)(2) certification can read in various ways; the bankruptcy judge can draft the certification with varying degrees of forcefulness. For example, if the judge is issuing the certification only because he or she is required to do so in response to a request by a majority of the appellants and a majority of the appellees, the judge may draft a certification that sounds equivocal.

Professor Struve noted that the joint Part VIII project also provides an occasion to address possible revisions to Appellate Rule 6(b), which concerns appeals from a district court or BAP exercising appellate jurisdiction in a bankruptcy case. One proposed amendment to Rule 6(b) would update a cross-reference to Appellate Rule 12. Another proposed amendment would revise Rule 6(b)(2)(A) to eliminate an ambiguity; a similar ambiguity in Appellate Rule 4(a)(4) was eliminated by a 2009 amendment.

Professor Struve observed that the Appellate Rules Committee is currently considering other possible changes to Appellate Rule 4(a)(4), stemming from the fact that the time to appeal after disposition of a tolling motion runs from entry of the order disposing of the last remaining tolling motion rather than from entry of any resulting altered or amended judgment. In some instances, there can be a time lag between the two events – as when the court grants a motion for remittitur and the plaintiff has a period of time within which to decide whether to accept the remitted amount. At the Appellate Rules Committee's meeting the previous day, the Committee's consensus was that the possibilities it had previously considered for addressing this issue were not worth proceeding with. Instead, the Committee has decided to consider a new suggestion by Mr. Taranto that takes a different approach. Mr. Taranto's proposal addresses the timing question by extending Civil Rule 58's separate document requirement to the disposition of tolling motions. Such an extension would provide clarity concerning the point at which the appeal time resets under Appellate Rule 4(a)(4). The Committee has not yet had an opportunity to seek the views of the Civil Rules Committee or the Civil / Appellate Subcommittee. Professor Struve noted that this project, as it develops, may be of interest to the Bankruptcy Rules Committee for several reasons. First, Bankruptcy Rule 7058 incorporates by reference the terms of Civil Rule 58. Second, it would be useful for participants to consider whether the issue that gave rise to the Appellate Rule 4(a)(4) project is salient in the bankruptcy context. Is a similar time lag (between entry of an order disposing of the last remaining tolling motion under current

Bankruptcy Rule 8015 and entry of any resulting altered or amended judgment) a problem in bankruptcy practice? Professor Gibson noted an additional reason for coordination on this issue: Proposed Bankruptcy Rule 8002 includes a subdivision modeled on Appellate Rule 4(a)(4). As to Appellate Rule 6(b)(2)(A), Professor Gibson observed that this Rule may present fewer current problems than Appellate Rule 4(a)(4) because Appellate Rule 6(b)(2)(A) treats only one type of tolling motion (namely, rehearing motions). Professor Gibson observed that current Bankruptcy Rule 8015 might provide a useful model for resolving any timing issue that arises from the disposition of such motions.

Judge Sutton asked the meeting participants for their thoughts on Civil Rule 58's separate document requirement. A participant responded that in bankruptcy, the separate document requirement becomes a trap for the unwary. To impose the separate document requirement, this participant suggested, could in effect be to extend appeal time in the name of clarity. Professor Struve asked whether compliance with the separate document requirement might increase if the requirement applied across the board (in contrast to the present system, which exempts dispositions of tolling motions). A participant predicted that such a change would not result in greater compliance. This participant observed that there used to be a brighter line for the separate document requirement in bankruptcy, but now the rules only impose the separate document requirement in adversary proceedings and not in contested matters. Another participant observed that adversary proceedings are very like civil actions; contested matters, however, can be a hodgepodge, and the operation of the separate document requirement in that context could be confusing. A bankruptcy judge member expressed gratitude for the fact that the separate document requirement no longer applies in contested matters.

Professor Gibson noted that another point of intersection between the Bankruptcy Rules and the Appellate Rules concerns indicative rulings. Proposed Bankruptcy Rule 8008 is intended to serve two functions. With respect to appeals pending in the court of appeals, it is the equivalent of Civil Rule 62.1 – namely, it tells the trial court what to do if someone seeks relief that the trial court lacks authority to grant due to a pending appeal. Proposed Bankruptcy Rule 8008 is also designed to address the indicative-ruling procedure for the appellate court when the appellate court in question is a district court or a BAP. Professor Gibson noted a further issue: Should the procedures set out in proposed Bankruptcy Rule 8008 apply when an indicative ruling is sought in the bankruptcy court while a non-direct appeal is pending in the court of appeals under Section 158(d)(1)? A participant responded that she thought the Rule should apply in that context as well.

Professor Gibson raised a question concerning the source of the authority to promulgate local rules for BAPs. She noted that it would be useful to determine whether that authority resides in the court of appeals, in the circuit judicial council, or in the BAP. Perhaps, she suggested, it would make sense that the body that creates the BAP also has the authority to promulgate rules for the BAP. Mr. Green reported that the Sixth Circuit BAP relies on the circuit council for promulgation of its local rules; the proposed rules are sent out for comment during the development of the proposals, and are ultimately sent to the circuit judicial council for

approval. Another participant observed that in the Ninth Circuit, the Circuit's standing rules committee handles the task of obtaining public comment on proposed BAP rules; this participant noted the importance of public comment.

Professor Gibson noted that the Appellate Rules contain a high level of detail concerning briefs, and she stated that it would be useful to get a sense whether participants favor a similar approach for the Part VIII Rules. An attorney member of the Appellate Rules Committee noted that detailed rules are useful to practitioners because such rules provide guidance. On the other hand, this member questioned whether district judges really want to receive briefs that conform to the Appellate Rules. A participant responded that the district court cares less about formalities than about simplicity and speed; the goal is to get the briefs in and resolve the case quickly. A court of appeals judge stated that it would be useful for the rules to evolve so that they do not specify the colors of brief covers. Another participant noted that Mr. Brunstad had proposed setting a default rule for the color of brief covers when the briefs are filed in paper form.

Professor Gibson also noted the potential importance of maintaining similar length limits for briefs at both stages of the appellate process (in the district court or BAP, and in the court of appeals). A bankruptcy judge agreed, and observed that Mr. Brunstad had expressed concern with the "dumbbell problem" – namely, that if the district court's length limit is tighter than the one that applies in the court of appeals, a party may find it difficult to preserve adequately all the points that it wishes to argue on appeal. A bankruptcy judge member stated that he likes the idea of specific requirements because they provide attorneys with structure; and he favors ensuring that the length limits are consistent at the two levels of appeal. An attorney participant agreed that he favors consistency between the two levels of appeal.

A district judge member of the Appellate Rules Committee expressed agreement with the idea that detailed briefing rules make things fairer for the lawyers. He noted that his district has a local rule that imposes a low page limit. Another district judge observed that bankruptcy cases are sufficiently challenging to begin with, and that it would be helpful for the briefs to be consistent from case to case.

Professor Gibson drew the Committees' attention to proposed Bankruptcy Rule 8009(f), concerning the treatment of sealed documents on appeal. The Appellate Rules do not currently address that issue. Professor Struve noted that the local rules in some circuits do address some issues relating to sealed documents. She also observed that another question might be whether all the circuits are ready to handle sealed documents electronically. Mr. Green responded that some circuits are prepared but that others are not. Another participant observed that it would be a good idea to look into the way in which the CM/ECF system handles sealed documents; she noted that the relevant technology is changing. A bankruptcy judge suggested that the Rule be drafted so as to incorporate by reference whatever the current CM/ECF technology and practice are.

In closing, Professor Gibson predicted that the Bankruptcy Rules Committee would

discuss a portion of the project at its fall 2011 meeting and another portion at the spring 2012 meeting. In the meantime, the Bankruptcy Rules Committee's working group will further refine the proposals. She expressed the Bankruptcy Rules Committee's desire to continue coordinating efforts with the Appellate Rules Committee. Judge Sutton promised to appoint one or two members of the Appellate Rules Committee to the working group, and expressed commitment to coordinating the two Committees' work going forward.

Judge Sutton thanked Judge Wedoff and the Bankruptcy Rules Committee for inviting the Appellate Rules Committee to join them. Judge Sutton noted that this was Judge Rosenthal's last meeting with the Appellate Rules Committee. He thanked her for her prodigious efforts and superb work as Chair of the Standing Committee. He observed that during her time as Chair she has attended the meetings of the Advisory Committees and the Standing Committee and the Judicial Conference. Judge Rosenthal thanked the Advisory Committees for their thorough, thoughtful, and innovative work. Judge Wedoff thanked the Appellate Rules Committee for their participation in the joint meeting.

## **IX. Adjournment**

The Appellate Rules Committee adjourned at 10:25 a.m. on April 7, 2011.

Respectfully submitted,

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Catherine T. Struve  
Reporter

years. It is addressed to the leadership of the Judiciary Committee. It says:

The undersigned are all members of the Bar of the District of Columbia and we are writing in support of the nomination of John G. Roberts, Jr., to serve as a federal court of appeals judge. . . .

It is extraordinary. It is Democrats on one side, Republicans on the right, and a mixture in the center. I cannot recall in my years here ever seeing a document of such import as this in the context of a judicial nomination.

I ask unanimous consent that this letter be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

DECEMBER 18, 2002.

Re Judicial nomination of John G. Roberts, Jr., to the United States Court of Appeals for the District of Columbia Circuit

Hon. TOM DASCHLE,  
Hon. ORRIN HATCH,  
Hon. PATRICK LEAHY,  
Hon. TRENT LOTT,  
*U.S. Senate,*  
*Washington, DC.*

DEAR SENATORS DASCHLE, HATCH, LEAHY, AND LOTT: The undersigned are all members of the Bar of the District of Columbia and are writing in support of the nomination of John G. Roberts, Jr., to serve as a federal court of appeals judge on the United States Court of Appeals for the District of Columbia Circuit. Although, as individuals, we reflect a wide spectrum of political party affiliation and ideology, we are united in our belief that John Roberts will be an outstanding federal court of appeals judge and should be confirmed by the United States Senate. He is one of the very best and most highly respected appellate lawyers in the nation, with a deserved reputation as a brilliant writer and oral advocate. He is also a wonderful professional colleague both because of his enormous skills and because of his unquestioned integrity and fair-mindedness. In short, John Roberts represents the best of the bar and, we have no doubt, would be a superb federal court of appeals judge.

Thank you.

Sincerely,

Donald B. Ayer, Jones, Day, Reavis & Pogue, Louis R. Cohen, Wilmer, Cutler & Pickering, Lloyd N. Cutler, Wilmer, Cutler & Pickering, C. Boyden Gray, Wilmer, Cutler & Pickering, Maureen Mahoney, Latham & Watkins, Carter Phillips, Sidley, Austin, Brown & Wood, E. Barrett Prettyman, Jr., Hogan & Hartson, George J. Terwilliger III, White and Case, E. Edward Bruce, Covington & Burling, William Coleman, O'Melveny & Myers, Kenneth Geller, Mayer, Brown, Rowe & Maw, Mark Levy, Howrey, Simon, Arnold & White, John E. Nolan, Steptoe & Johnson, John H. Pickering, Wilmer, Cutler & Pickering, Allen R. Snyder, Hogan & Hartson, Seth Waxman, Wilmer, Cutler & Pickering,

Jeanne S. Archibald, Hogan & Hartson; Jeannette L. Austin, Mayer, Brown, Rowe & Maw; James C. Bailey, Steptoe & Johnson; Stewart Baker, Steptoe & Johnson; James T. Banks, Hogan & Hartson; Amy Coney Barrett, Notre Dame Law School; Michael J. Barta, Baker, Botts; Kenneth C. Bass III, Sterne, Kessler, Goldstein & Fox; Richard K. A. Becker, Hogan & Hartson; Joseph C. Bell, Hogan & Hartson; Brigida Benitez, Wilmer, Cutler & Pickering; Douglas L. Beresford,

Hogan & Hartson; Edward Berlin, Swidler, Bertin, Shereff, Friedman; Elizabeth Beske (Member, Bar of the State of California); Patricia A. Brannan, Hogan & Hartson; Don O. Burley, Finnegan, Henderson, Farabow, Garrett & Dunner; Raymond S. Calamaro, Hogan & Hartson; George U. Carneal, Hogan & Hartson; Michael Carvin, Jones, Day, Reavis & Pogue; Richard W. Cass, Wilmer, Cutler & Pickering.

Gregory A. Castanias, Jones, Day, Reavis & Pogue; Ty Cobb, Hogan & Hartson; Charles G. Cole, Steptoe & Johnson; Robert Corn-Revere, Hogan & Hartson; Charles Davidow, Wilmer, Cutler & Pickering; Grant Dixon, Kirkland & Ellis; Edward C. DuMont, Wilmer, Cutler & Pickering; Donald R. Dunner, Finnegan, Henderson, Farabow, Garrett & Dunner; Thomas J. Eastment, Baker Botts; Claude S. Eley, Hogan & Hartson; E. Tazewell Ellett, Hogan & Hartson; Roy T. Englert, Jr., Robbins, Rullell, Englert, Orseck & Untereiner; Mark L. Evans, Kellogg, Huber, Hansen, Todd & Evans; Frank Fahrenkopf, Hogan & Hartson; Michele C. Farquhar, Hogan & Hartson; H. Bartow Farr, Farr & Taranto; Jonathan J. Frankel, Wilmer, Cutler & Pickering; Jonathan S. Franklin, Hogan & Hartson; David Frederick, Kellogg, Huber, Hansen, Todd & Evans; Richard W. Garnett, Notre Dame Law School.

H.P. Goldfield, Vice Chairman, Stonebridge International; Tom Goldstein, Goldstein & Howe; Griffith L. Green, Sidley, Austin, Brown & Wood; Jonathan Hacker, O'Melveny & Myers; Martin J. Hahn, Hogan & Hartson; Joseph M. Hasset, Hogan & Hartson; Kenneth Hautman, Hogan & Hartson; David J. Hensler, Hogan & Hartson; Patrick F. Hofer, Hogan & Hartson; William Michael House, Hogan & Hartson; Janet Holt, Hogan & Hartson; Robert Hoyt, Wilmer, Cutler & Pickering; A. Stephen Hut, Jr., Wilmer, Cutler & Pickering; Lester S. Hyman, Swidler & Berlin; Sten A. Jensen, Hogan & Hartson; Erika Z. Jones, Mayer, Brown, Rowe & Maw; Jay T. Jorgensen, Sidley, Austin, Brown & Wood; John C. Keeney, Jr., Hogan & Hartson; Michael K. Kellogg, Kellogg, Huber, Hansen, Todd & Evans; Nevin J. Kelly, Hogan & Hartson; J. Hovey Kemp, Hogan & Hartson; David A. Kikel, Hogan & Hartson; R. Scott Kilgore, Wilmer, Cutler & Pickering; Michael L. Kidney, Hogan & Hartson; Duncan S. Klinedinst, Hogan & Hartson; Robert Klonoff, Jones, Day, Reavis & Pogue; Jody Manier Kris, Wilmer, Cutler & Pickering; Chris Landau, Kirkland & Ellis; Philip C. Larson, Hogan & Hartson; Richard J. Lazarus, Georgetown University Law Center; Thomas B. Leary, Commissioner, Federal Trade Commission; Darryl S. Lew, White & Case; Lewis E. Leibowitz, Hogan & Hartson; Kevin J. Lipson, Hogan & Hartson; Robert A. Long, Covington & Burling; C. Kevin Marshall, Sidley, Austin, Brown & Wood; Stephanie A. Martz, Mayer, Brown, Rowe & Maw; Warren Maruyama, Hogan & Hartson; George W. Mayo, Jr., Hogan & Hartson; Mark E. Maze, Hogan & Hartson; Mark S. McConnell, Hogan & Hartson; Janet L. McDavid, Hogan & Hartson.

Thomas L. McGovern III, Hogan & Hartson; A. Douglas Melamed, Wilmer, Cutler & Pickering; Martin Michaelson, Hogan & Hartson; Evan

Miller, Hogan & Hartson; George W. Miller, Hogan & Hartson; William L. Monts III, Hogan & Hartson; Stanley J. Brown, Hogan & Hartson; Jeff Munk, Hogan & Hartson; Glen D. Nager, Jones Day Reavis & Pogue; William L. Neff, Hogan & Hartson; J. Patrick Nevins, Hogan & Hartson; David Newmann, Hogan & Hartson; Karol Lyn Newman, Hogan & Hartson; Keith A. Noreika, Covington & Burling; William D. Nussbaum, Hogan & Hartson; Bob Glen Odle, Hogan & Hartson; Jeffrey Pariser, Hogan & Hartson; Bruce Parmly, Hogan & Hartson; George T. Patton, Jr., Bose, McKinney & Evans; Robert B. Pender, Hogan & Hartson.

John Edward Porter, Hogan & Hartson (former Member of Congress); Philip D. Porter, Hogan & Hartson; Patrick M. Rahe, Hogan & Hartson; Laurence Robbins, Robbins, Russell, Englert, Orseck & Untereiner; Peter A. Rohrbach, Hogan & Hartson; James J. Rosenhauer, Hogan & Hartson; Richard T. Rossier, McLeod, Watkinson & Miller; Charles Rothfeld, Mayer, Brown, Rowe & Maw; David J. Saylor, Hogan & Hartson; Patrick J. Schiltz, Associate Dean and St. Thomas More Chair in Law University of St. Thomas School of Law; Jay Alan Sekulow, Chief Counsel, American Center for Law & Justice; Kannon K. Shanmugam, Kirkland & Ellis; Jeffrey K. Shapiro, Hogan & Hartson; Richard S. Shiverman, Hogan & Hartson; Samuel M. Sipe, Jr., Steptoe & Johnson; Luke Sobota, Wilmer, Cutler & Pickering; Peler Spivak, Hogan & Hartson; Jolanta Sterbenz, Hogan & Hartson; Kara F. Stoll, Finnegan, Henderson, Farabow, Garren & Dunner; Silvija A. Strikis, Kellogg, Huber, Hansen, Todd & Evans; Clifford D. Stromberg, Hogan & Hartson.

Mary Anne Sullivan, Hogan & Hartson; Richard G. Taranto, Farr & Taranto; John Thorne, Deputy General Council, Verizon Communications Inc., & Lecturer, Columbia Law School; Helen Trilling, Hogan & Hartson; Rebecca K. Troth, Washington College of Law, American University; Eric Von Salzen, Hogan & Hartson; Christine Varney, Hogan & Hartson; Ann Morgan Vickery, Hogan & Hartson; Donald B. Verrilli, Jr., Jenner & Block; J. Warren Gorrell, Jr., Chairman, Hogan & Hartson; John B. Watkins, Wilmer, Cutler & Pickering; Robert N. Weiner, Arnold & Porter; Robert A. Welp, Hogan & Hartson; Douglas P. Wheeler, Duke University School of Law; Christopher J. Wright; Harris, Wiltshire & Grannis; Clayton Yeutter, Hogan & Hartson (former Secretary of Agriculture); and Paul J. Zidlicky, Sidley Austin Brown & Wood.

Mr. WARNER. I yield the floor.

The PRESIDING OFFICER. The Senator from Connecticut.

Mr. DODD. Mr. President, I ask unanimous consent that the pending amendment be laid aside.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 1305

Mr. DODD. Mr. President, I send an amendment to the desk on behalf of myself, Senator NELSON of Florida, and Senator REED of Rhode Island.

The PRESIDING OFFICER. The clerk will report the amendment.

The assistant legislative clerk read as follows: