ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, DC
October 20, 2014

TABLE OF CONTENTS

Agenda for Fall 2014 Meeting of
Advisory Committee on Appellate Rules
October 20, 2014
Washington, DC

I. Introductions

II. Approval of Minutes of April 2014 Meeting

III. Report on May 2014 Meeting of Standing Committee

IV. Other Information Items

V. Discussion Items

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

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

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

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

VI. New Business

VII. Adjournment

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON APPELLATE RULES

Chair, Advisory Committee on Appellate Rules	**Honorable Steven M. Colloton** United States Court of Appeals U.S. Courthouse Annex, Suite 461 110 East Court Avenue Des Moines, IA 50309-2044
Reporter, Advisory Committee on Appellate Rules	**Professor Catherine T. Struve** University of Pennsylvania Law School 3501 Sansom Street Philadelphia, PA 19104
Members, Advisory Committee on Appellate Rules	**Professor Amy Coney Barrett** University of Notre Dame Law School 3165 Eck Hall of Law Notre Dame, IN 46556 **Honorable Michael A. Chagares** United States Court of Appeals United States Post Office and Courthouse Two Federal Square, Room 357 Newark, NJ 07102-3513 **Honorable Allison H. Eid** Colorado Supreme Court 2 East 14th Avenue Denver, CO 80203 **Honorable Peter T. Fay** United States Court of Appeals James Lawrence King Federal Justice Building 99 Northeast Fourth Street, Room 1255 Miami, FL 33132 **Gregory G. Katsas** Jones Day 51 Louisiana Avenue, N.W. Washington, D.C. 20001-2113 **Neal Katyal, Esq.** Hogan Lovells US LLP Columbia Square 555 Thirteenth Street, N.W. Washington, DC 20004

Members, Advisory Committee on Appellate Rules *(cont'd.)*	**Kevin C. Newsom, Esq.** Bradley Arant Boult Cummings LLP One Federal Place 1819 Fifth Avenue North Birmingham, AL 35203 **Honorable Richard G. Taranto** United States Court of Appeals Howard T. Markey National Courts Building 717 Madison Place, N.W., Suite 802 Washington, DC 20439 **Honorable Donald Verrilli** Solicitor General (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. Washington, DC 20530
Clerk of Court Representative, Advisory Committee on Appellate Rules	**Michael Ellis Gans** United States Court of Appeals Thomas F. Eagleton United States Courthouse 111 South Tenth Street, Room 24.329 St. Louis, MO 6312-1116
Liaison Member, Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.** ***(Standing)*** Latham & Watkins LLP 555 Eleventh Street, N.W. Washington, DC 20004-1304 **Honorable Adalberto Jordan** ***(Bankruptcy)*** Eleventh Circuit Court of Appeals Wilkie D. Ferguson, Jr. U.S. Courthouse 400 North Miami Avenue, Room 10-4 Miami, FL 33128
Secretary, Standing Committee and Rules Committee Officer	**Jonathan C. Rose** Secretary, Committee on Rules of Practice & Procedure and Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov

Chief Counsel	**Andrea L. Kuperman** Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Ave. Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 Andrea_Kuperman@txs.uscourts.gov

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Gregory G. Garre, Esq.**	***(Standing)***
Liaison for the Advisory Committee on Appellate Rules	**Judge Adalberto Jordan**	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Roy T. Englert, Jr., Esq.**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Neil M. Gorsuch**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Amy J. St. Eve**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules		***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules		***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Jonathan C. Rose
Secretary, Committee on Rules of Practice &
Procedure and Rules Committee Officer
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755
Jonathan_Rose@ao.uscourts.gov

Julie Wilson
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3678
Fax 202-502-1766
Julie_Wilson@ao.uscourts.gov

Scott Myers
Attorney Advisor (Bankruptcy)
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-250
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Scott_Myers@ao.uscourts.gov

Bridget M. Healy
Attorney Advisor (Bankruptcy)
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-273
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Bridget_Healy@ao.uscourts.gov

Toni A. Loftin
Administrative Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1682
Fax 202-502-1755
Toni_Loftin@ao.uscourts.gov

Frances F. Skillman
Paralegal Specialist
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-3945
Fax 202-502-1755
Frances_Skillman@ao.uscourts.gov

FEDERAL JUDICIAL CENTER

Tim Reagan *(Rules of Practice & Procedure)* Senior Research Associate Federal Judicial Center Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 6-436 Washington, DC 20002 Phone 202-502-4097 Fax 202-502-4199	**Marie Leary** *(Appellate Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov
Molly T. Johnson *(Bankruptcy Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov	**Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov
Laural L. Hooper *(Criminal Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov	**Catherine Borden** *(Evidence Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4090 Fax 202-502-4199 cborden@fjc.gov

THIS PAGE INTENTIONALLY BLANK

TAB 1

THIS PAGE INTENTIONALLY BLANK

TAB 1A

THIS PAGE INTENTIONALLY BLANK

Advisory Committee on Appellate Rules
Table of Agenda Items — October 2014

FRAP Item	Proposal	Source	Current Status
07-AP-E	Consider possible FRAP amendments in response to Bowles v. Russell (2007).	Mark Levy, Esq.	Discussed and retained on agenda 11/07 Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
07-AP-I	Consider amending FRAP 4(c)(1) to clarify the effect of failure to prepay first-class postage.	Hon. Diane Wood	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
08-AP-A	Amend FRAP 3(d) concerning service of notices of appeal.	Hon. Mark R. Kravitz	Discussed and retained on agenda 11/08
08-AP-C	Abolish FRAP 26(c)'s three-day rule.	Hon. Frank H. Easterbrook	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
08-AP-H	Consider issues of "manufactured finality" and appealability	Mark Levy, Esq.	Discussed and retained on agenda 11/08 Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

FRAP Item	Proposal	Source	Current Status
08-AP-L	Amend FRAP 6(b)(2)(A)(ii) to remove ambiguity	Reporter	Discussed and retained on agenda 11/08 Discussed and retained on agenda 11/09 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13 Approved by Supreme Court 04/14
08-AP-R	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	Hon. Frank H. Easterbrook	Discussed and retained on agenda 04/09 Discussed and retained on agenda 04/14
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13 Approved by Judicial Conference 09/13 Approved by Supreme Court 04/14

FRAP Item	Proposal	Source	Current Status
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
12-AP-B	Consider amending FRAP Form 4's directive concerning institutional-account statements for IFP applicants	Peter Goldberger, Esq., on behalf of the National Association of Criminal Defense Lawyers (NACDL)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits, including matters now governed by page limits	Professor Neal K. Katyal	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13 Discussed and retained on agenda 04/14
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13 Draft approved 04/14 for submission to Standing Committee Approved for publication by Standing Committee 06/14 Published for comment 08/14

FRAP Item	Proposal	Source	Current Status
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Discussed and retained on agenda 04/14
14-AP-C	Address issues of appellate procedure identified in the certiorari petition in Morris v. Atchity (No. 13-1266)	Margaret Morris	Awaiting initial discussion

TAB 1B

THIS PAGE INTENTIONALLY BLANK

DRAFT

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,[1] 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.

---

[1] 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 Coquillette 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 cirumstances (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,

Catherine T. Struve
Reporter

TAB 1C

THIS PAGE INTENTIONALLY BLANK

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of May 29–30, 2014
Washington, D.C.
Draft Minutes as of September 22, 2014

TABLE OF CONTENTS

ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Thursday and Friday, May 29 and 30, 2014. The following members participated in the meeting:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Susan P. Graber
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge Amy J. St. Eve
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Jack Zouhary

Deputy Attorney General James M. Cole was unable to attend. Stuart Delery, Esq., Assistant Attorney General for the Civil Division, Elizabeth J. Shapiro, Esq., Theodore Hirt, Esq., Allison Stanton, Esq., Rachel Hines, Esq., and J. Christopher Kohn, Esq., represented the Department of Justice at various times throughout the meeting.

Professor R. Joseph Kimble, the committee's style consultant, participated. Judge Jeremy D. Fogel, Director of the Federal Judicial Center, also participated. Judge Michael A. Chagares, member of the Appellate Rules Committee and chair of the CM/ECF Subcommittee, also participated. Judge John G. Koeltl, member of the Civil Rules Committee and chair of that committee's Duke Subcommittee, participated in part of the meeting by telephone.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Jonathan C. Rose	The committee's secretary and Rules Committee Officer
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman	Chief Counsel to the Rules Committees
Tim Reagan	Senior Research Associate, Federal Judicial Center
Emery G. Lee, III	Senior Research Associate, Federal Judicial Center
Catherine Borden	Research Associate, Federal Judicial Center
Scott Myers	Attorney in the Bankruptcy Judges Division
Bridget M. Healy	Attorney in the Bankruptcy Judges Division
Frances F. Skillman	Rules Office Paralegal Specialist
Toni Loftin	Rules Office Administrative Specialist

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter

Professor Nancy J. King, Associate Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair

Professor Daniel J. Capra, Reporter to the Evidence Rules Committee, was unable to attend.

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by welcoming everyone and thanking the Rules Office staff for arranging the logistics of the meeting and the committee dinner. Judge Sutton reported that all of the rules proposals that were before the Supreme Court were approved in April, including the proposed amendment to Criminal Rule 12, which had been modified as agreed at the January Standing Committee meeting. The proposals to amend the Bankruptcy Rules to respond to *Stern v. Marshall* were withdrawn for the time being, while the committee waits to see what the Supreme Court does in *Executive Benefits Insurance Agency v. Arkison*, which may address an issue involved in the *Stern* proposals.

Judge Sutton also noted that the term of Chief Justice Wallace Jefferson, the committee's state court representative, was coming to a close. He said that Chief Justice Brent Dickson, of the Indiana Supreme Court, would succeed Chief Justice Jefferson as the state court representative. Judge Sutton thanked Chief Justice Jefferson for his wonderful service to the committee, described some of Justice Jefferson's outstanding contributions to the committee's work and some of his accomplishments outside the committee, and presented him with a plaque signed by Judge John Bates, Director of the Administrative Office, and by Chief Justice John G. Roberts. Chief Justice Jefferson expressed his thanks to the committee for a terrific experience and for doing such good work for the nation.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee unanimously approved the minutes of the last meeting, held on January 9–10, 2014.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set out in Judge Campbell's memorandum and attachments of May 2, 2014 (Agenda Item 2).

Amendments for Final Approval

DUKE RULES PACKAGE
(FED. R. CIV. P. 1, 4, 16, 26, 30, 31, 33, 34, AND 37)

Judge Campbell reported that the Civil Rules Committee had a final proposed package of amendments to implement the ideas from the Civil Litigation Conference held at Duke Law School in May 2010 ("Duke Conference"). He noted that the Duke Conference was intended to look at the Civil Rules generally and whether they are working and what needs to be improved. The conclusion from that Conference, he said, was that the rules generally work well, but that improvement was needed in three areas: (1) proportionality; (2) cooperation among counsel; and (3) early, active judicial case management. The advisory committee had eventually narrowed the list of possible amendments to address these areas and had published its proposals for public comment in August 2013. Judge Campbell reported that there was great public interest in the proposals, with the public comment period generating over 2,300 comments and over 40 witnesses at each of three public hearings. Judge Campbell believed that the response of the bar and the public demonstrated the continuing vitality of the Rules Enabling Act process, and he stated that the comments the committee received were very helpful in refining the proposals. He also expressed gratitude to the reporters for their excellent work in reviewing and summarizing all of the testimony and comments.

Judge Campbell next explained that the advisory committee had made a number of changes to the published proposals to address issues raised during the public comment period. In addition, the advisory committee had decided not to recommend for final adoption the published proposals to place presumptive limits on certain types of discovery devices.

Judge Campbell and Professor Cooper reported that the advisory committee proposed a few changes to some committee note language that appeared in the Standing Committee agenda materials. First, the advisory committee proposed to take out some language in the committee note for Rule 26. The proposed revised committee note would remove the language in the committee note appearing in the agenda book at page 85, lines 277 to 289. The deleted matter provided additional background on the 2000 amendment to Rule 26 that had moved subject-matter discovery from party-controlled discovery to court-managed discovery. Professor Cooper explained that the deleted language was unnecessary. Second, a paragraph was added after line 262 on page 84 of the agenda materials, to encourage courts and parties to consider computer-assisted searches as a means of reducing the cost of producing electronically stored information, thereby addressing possible proportionality concerns that might arise in ESI-intensive cases.[1] Third, Judge Campbell reported

[1] The added language stated:

> The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored

that the proposal to amend Rule 1, which will emphasize that the court and the parties bear responsibility for securing the just, speedy, and inexpensive resolution of the case, now includes some added committee note language that was not in the agenda materials. The added language would make it clear that the change was not intended to create a new source for sanctions motions. The proposed added language would state: "This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules."

A member commented that the Duke package is "awesome" and that the advisory committee had done a marvelous job. He added that the problems being addressed are intractable, difficult problems, complicated by the commitment to transsubstantivity. He said that the advisory committee had invited as much participation as possible and he believed the proposals could make a real difference in meeting the goals of Rule 1. He added that the committee would need to continue to evaluate the rules to make sure the system is working well. He congratulated Judge Koeltl (the chair of the Duke Subcommittee), Judge Campbell, Judge Sutton, and the reporters for putting together a great package. Other members added their gratitude and commended the good work and extraordinary effort.

A member asked whether a portion of the proposal to amend Rule 34(b)(2)(B)—that "The production must then be completed no later than the time for inspection stated in the request or another reasonable time stated in the response"—would allow a responding party to simply state that it would produce documents at a reasonable time without providing a specific date. Another member suggested a friendly amendment that would revise the proposal to state: "If production is not to be completed by the time for inspection stated in the request, then the response must identify another date by which production will occur." After conferring with the reporters, Judge Campbell reported that the idea was to make the provision in Rule 34(b)(2)(B) parallel Rule 34(b)(1)(B), which states that a request "must specify a reasonable *time* . . . for the inspection . . ." (emphasis added). For that reason, it was necessary to retain "time" in the proposed revision to Rule 34(b)(2)(B), instead of substituting "date." However, the advisory committee changed its proposal to refer to "specified" instead of "stated," to emphasize that it would not be sufficient to generally state that the production would occur at a reasonable time. He noted that the proposed advisory committee note already stated that "[w]hen it is necessary to make the production in stages the response should specify the beginning and end dates of the production." A motion was made to change "stated" to "specified" in the proposal, so that it would read: "The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response." The motion passed unanimously.

The Duke package of proposed amendments passed by a unanimous vote. Judge Sutton thanked Judge Koeltl for his tireless work on the Duke Conference and on this very promising set of proposed amendments, as well as Judge Campbell and the rest of his team.

The committee unanimously approved the Duke package of proposed amendments to

---

information become available.

the Civil Rules, revised as stated above, to be submitted for final approval by the Judicial Conference.

FED. R. CIV. P. 37(e)

Judge Campbell reported on the proposed amendment to Rule 37(e), which is intended to give better guidance to courts and litigants on the consequences of failing to preserve information for use in litigation. He said that comments on the version that was published for public comment were extensive, and the advisory committee had substantially revised the rule to address issues raised by the comments. The subcommittee and the advisory committee decided that the following guiding principles should be implemented in the revised proposal: (1) It should resolve the circuit split on the culpability standard for imposing certain severe sanctions; (2) It should preserve ample trial court discretion to deal with the loss of information; (3) It should be limited to electronically stored information; and (4) It should not be a strict liability rule that would automatically impose serious sanctions if information is lost. Judge Campbell explained that the rule text and committee note had been revised after publication in line with these principles.[2]

---

[2] Judge Campbell also noted that the advisory committee's final proposal revised the committee note that was included in the agenda materials for the Standing Committee's meeting. Specifically, the paragraphs on pages 322–23, lines 170–91 were revised as follows:

> Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.
>
> Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.
>
> Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.
>
> ~~Subdivision (e)(2) does not include an express requirement that the court find prejudice to the party deprived of the information. The adverse inference permitted under this subdivision can itself satisfy the prejudice requirement: if a court or jury infers the lost information was unfavorable to the party that lost it, the same inference suggests that the opposing party was prejudiced by the loss.~~

The committee engaged in discussion on the proposal. After considering some suggestions and discussing them with the reporters, the advisory committee agreed to make a suggested change to delete "may" in line 9 on page 318 of the agenda materials, and to add "may" on line 10 before "order," and on line 13 after "litigation." Judge Campbell stated that he and the reporters agreed that this change adds more emphasis to the word "only" on line 12, underscoring the intent that (e)(2) measures are not available under (e)(1).

A member commented that, in looking at this proposal from multiple perspectives, it is going to be very helpful and is clearly needed. He added his congratulations to the advisory committee for their terrific work.

The committee unanimously approved the proposed amendment to Rule 37(e), revised as stated above, to be submitted for final approval by the Judicial Conference.

FORMS
(FED. R. CIV. P. 84 AND 4 AND APPENDIX OF FORMS)

Judge Campbell reported on the proposal to abrogate Rule 84 and the Appendix of Forms. He said that there were relatively few comments on this proposal and that the advisory committee remained persuaded after reading the comments that the forms are rarely used and that the best course is abrogation. Professor Cooper added that Forms 5 and 6 on waiver of service would be incorporated into Rule 4.

A member suggested that he thought the sense of the committee was that forms can be and are extremely important in helping lawyers and pro se litigants, but that the advisory committee should no longer bear responsibility for them. He added that he favored abrogation, but the advisory committee should continue to have a role in shaping the forms, perhaps by participating in a group at the Administrative Office (AO) that can handle the forms, helping to draft model forms, and/or having a right of first refusal on forms drafted by the AO. Judge Sutton agreed that forms are very useful and that this proposal is simply about getting them out of the Rules Enabling Act process. He added that there are many options in terms of how civil forms are handled if the abrogation goes into effect and suggested that the advisory committee consider what it thinks its role should be in shaping the forms going forward. He suggested that the advisory committee present its suggestion in that regard for discussion at the next Standing Committee meeting in January.

The committee unanimously approved the proposed amendments to abrogate Rule 84 and the Appendix of Forms, and to amend Rule 4 to incorporate Forms 5 and 6, to be submitted for final approval by the Judicial Conference.

~~In addition, there may be rare cases where a court concludes that a party's conduct is so reprehensible that serious measures should be imposed even in the absence of prejudice. In such rare cases, however, the court must still find the intent specified in subdivision (e)(2).~~

Judge Sutton congratulated and praised Judge Campbell, the reporters, and the subcommittee chairs for all their hard work and terrific leadership and insight in bringing the Duke proposals, the Rule 37(e) amendments, and the Rule 84 amendment to the Standing Committee. He added that all three sets of proposals were done through consensus, which is a credit to the chairs of the subcommittees and the chair of the advisory committee. He also said that many of these proposals started with former Civil Rules Committee and Standing Committee chairs Judge Lee H. Rosenthal and Judge Mark R. Kravitz. This package of amendments, he said, was a wonderful tribute to Judge Kravitz's memory. Judge Sutton added that the way to thank the chairs and reporters for all of their work on these proposals is to make sure they make a difference in practice. He said that in the near future, the Standing Committee should discuss these amendments in terms of broader reform, including pilot projects and judicial education efforts, to make sure that they are making a difference on the ground. Judge Campbell expressed his thanks to Judge Grimm, for his tireless efforts on Rule 37, and to Judge Sutton for all of his insight and time in overseeing the work on these proposals.

FED. R. CIV. P. 6(d)

Professor Cooper reported that the advisory committee had also published an amendment to Rule 6(d) that would revise the rule to provide that the three added days provided for actions taken after certain types of service apply only after being served, not after "service" more generally. Few comments were received and no changes were made after publication. Judge Campbell said that the advisory committee recommended approving this proposal, but not sending it on to the Judicial Conference yet, so that it can be presented together with another proposed amendment to Rule 6(d), which would remove the three added days for electronic service and which was being proposed for publication.

The committee unanimously approved the proposed amendment to Rule 6(d), to be submitted for final approval by the Judicial Conference at the appropriate time.

FED. R. CIV. P. 55(c)

Professor Cooper reported that the final proposal that was published for public comment in 2013 was a proposal to amend Rule 55(c) to make explicit that only a final default judgment could be set aside under Rule 60(b).

The committee unanimously approved the proposed amendment to Rule 55(c) to be submitted for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CIV. P. 82

Professor Cooper reported that at its January 2014 meeting, the Standing Committee had approved for publication at a suitable time an amendment to Rule 82 to reflect enactment of a new

venue statute for civil actions in admiralty. Since January, further reflection had led the advisory committee to believe that a cross-reference in the rule to 28 U.S.C. § 1391 should be deleted and that the text should be further revised to reflect the language of new § 1390. The advisory committee renewed its recommendation to publish the proposal, as revised.

The committee unanimously approved publication of the proposed amendment to Rule 82.

FED. R. CIV. P. 4(m)

Professor Cooper reported on the recommendation to publish a clarifying amendment to Rule 4(m) to ensure that service abroad on a corporation is excluded from the time for service set by Rule 4(m).

The committee unanimously approved publication of the proposed amendment to Rule 4(m).

REPORT OF THE INTER-COMMITTEE CM/ECF SUBCOMMITTEE

Judge Chagares presented the report of the CM/ECF Subcommittee, as set out in his memorandum of May 5, 2014 (Agenda Item 3).

Amendments for Publication

FED. R. APP. P. 26(c), FED. R. BANKR. P. 9006, FED. R. CIV. P. 6, FED. R. CRIM. P. 45

Judge Chagares reported that the subcommittee had been working with the advisory committees for the Appellate, Bankruptcy, Civil, and Criminal Rules on proposals to remove the provisions in each set of rules that currently provide three extra days for acting after electronic service. Each advisory committee recommended an amendment to its set of rules for publication. The subcommittee had unanimously supported the recommendation of the advisory committees to publish these amendments for public comment. The amendments to eliminate the "three-day rule" as applied to electronic service would be to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45.

Judge Sutton noted that a Standing Committee member had asked at the last Standing Committee meeting whether other types of service should be removed from the three-day rule. Judge Chagares said that question would take some study and for the time being the only recommendation of the subcommittee was to take electronic service out of the three-day rule. Judge Sutton added that the advisory committees would each study that question separately.

A member suggested removing "in" before "widespread skill" in the last sentence of the second paragraph of each of the draft committee notes. The reporters all agreed to make that change.

The committee unanimously approved publication of the proposed amendments to Appellate Rule 26(c), Bankruptcy Rule 9006, Civil Rule 6, and Criminal Rule 45, with the change to the committee notes described above.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professors Beale and King presented the report of the advisory committee, as set out in Judge Raggi's memorandum and attachments of May 5, 2014 (Agenda Item 4).

Amendments for Publication

FED. R. CRIM. P. 4

Judge Raggi reported that the advisory committee recommended publication of an amendment to Rule 4 to address service of summons on organizational defendants who are abroad. The proposed amendment would: (1) specify that the court may take any action authorized by law if an organizational defendant fails to appear in response to a summons, filling a gap in the current rule; (2) for service of a summons on an organization within the United States, eliminate the requirement of a separate mailing to an organizational defendant when delivery has been made to an officer or to a managing or general agent, but require mailing when delivery has been made on an agent authorized by statute, if the statute requires mailing to the organization; and (3) authorize service on an organization at a place not within a judicial district of the United States, prescribing a non-exclusive list of methods for service.

A member suggested making it clearer in the proposed additional sentence in Rule 4(c)(2) that the reference to the summons under Rule 41(c)(3)(D) is to summons to an organization. Judge Raggi agreed to change the sentence to: "A summons to an organization under Rule 41(c)(3)(D) may also be served at a place not within a judicial district of the United States."

Another member asked about the phrase "authorized by law" in the proposed amendment to Rule 4(a), asking whether it clarifies what actions a judge can take if an organizational defendant fails to appear in response to a summons. The committee discussed whether to add "United States" before "law," and decided to include that addition in the version published for public comment, noting that including it would be more likely to elicit comments on whether it was helpful.

Another member suggested that, in the illustrative list of means of giving notice in proposed Rule 4(c)(3)(D)(ii), "stipulated by the parties" be changed to "agreement of the organization" or that the list add "agreed to by the party." Judge Raggi explained that a stipulation implied a certain level of formality and that the list was merely illustrative. She said she could not agree to this change without going back to the advisory committee. The member stated that his suggestion could just be considered the first comment of the public comment period.

The member also suggested that on page 492, line 58, in proposed Rule 4(c)(3)(D)(i),

"another agent" be changed to "an agent" to avoid implying that foreign law always authorizes officers and managing or general agents to receive notice. Judge Raggi agreed to accept that suggestion, noting that it reflected the advisory committee's intent.

The committee unanimously approved publication of the proposed amendment to Rule 4, revised as noted above.

FED. R. CRIM. P. 41

Judge Raggi reported that the advisory committee recommended publishing an amendment to Rule 41, to provide that in two specific circumstances a magistrate judge in a district where activities related to a crime may have occurred has authority to issue a warrant to use remote access to search electronic storage media and seize or copy electronically stored information even when the media or information is or may be located outside of the district. Judge Raggi explained that this proposal came about because the Department of Justice had encountered special difficulties with Rule 41's territorial venue provisions—which generally limit searches to locations within a district—as applied to investigating crimes involving electronic information.

The current limits on where a warrant application must be made make it difficult to secure a search warrant in two specific situations: First, when the location of the storage media or electronic information to be searched, copied, or seized is not known because the location has been disguised through the use of anonymizing software, and second, when a criminal scheme involves multiple computers located in many different districts, such as a "botnet" in which perpetrators obtain control over numerous computers of unsuspecting victims. Judge Raggi explained that proposed new subparagraph (b)(6)(A) addresses the first scenario. It would provide authority to issue a warrant to use remote electronic access to search electronic storage media and to seize or copy electronically stored information within or outside the district when the district in which the media or information is located has been concealed through technological means. Proposed (b)(6)(B) addresses the second scenario. It would eliminate the burden of attempting to secure multiple warrants in numerous districts and allow a single judge to issue a warrant to search, seize, or copy electronically stored information by remotely accessing multiple affected computers within or outside a district, but only in investigations of violations of 18 U.S.C. § 1030(a)(5), where the media to be searched are "protected computers" that have been "damaged without authorization" (terms defined in 18 U.S.C. § 1030(e)(2) & (8)) and are located in at least five different districts. Judge Raggi added that the proposed amendments affect only the district in which a warrant may be obtained and would not alter the requirements of the Fourth Amendment for obtaining warrants, including particularity and probable cause showings.

She noted that the proposal also includes a change to Rule 41(f)(1)(C), to ensure that notice that a search has been conducted will be provided for searches by remote access as well as physical searches. The rule now requires that notice of a physical search be provided "to the person from whom, or from whose premises, the property was taken" or left "at the place where the officer took the property." The proposed addition to the rule would require that when the search is by remote

access, reasonable efforts must be made to provide notice to the person whose information was seized or whose property was searched.

The committee unanimously approved publication of the proposed amendment to Rule 41.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set out in Judge Colloton's memorandum and attachments of May 8, 2014 (Agenda Item 5).

Amendments for Publication

Judge Colloton reported that the advisory committee had five proposals it recommended for publication. The first, the proposed amendment to Rule 26(c) to eliminate the three-day rule for electronic service, was already addressed during the CM/ECF Subcommittee's report.

INMATE FILING RULES
(FED. R. APP. P. 4(c)(1) AND 25(a)(2)(C), FORMS 1 AND 5, AND NEW FORM 7)

Judge Colloton reported that the advisory committee recommended publishing a set of amendments designed to clarify and improve the inmate-filing rules. The amendments to Rules (4)(c)(1) and 25(a)(2)(C) 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 clarify that a document is timely filed if it is accompanied by evidence—a declaration, notarized statement, or other evidence such as a postmark and date stamp—showing that the document was deposited on or before the due date and that postage was prepaid. New Form 7 is a suggested form of declaration that would satisfy the rule. Forms 1 and 5 (suggested forms of notices of appeal) are revised to include a reference alerting filers to the existence of Form 7.

Professor Struve noted that a few stylistic changes had been made to the proposals in the Standing Committee's agenda materials. First, in Rule 4(c)(1)(B), on page 560, lines 3–4, "meets the requirements of" was changed to "satisfies." A similar change was made to Rule 25(a)(2)(C)(ii), on page 562, lines 9–10. In Rule 25(a)(2)(C)(i), subdivisions (a) and (b), on pages 561 and 562, would become bullet points. As a result, in Rule 25(a)(2)(C)(ii), the cross-reference to Rule 25(a)(2)(C)(i)(a) would refer only to Rule 25(a)(2)(C)(i).

A member noted that in Rule 4(c)(1)(A)(ii), the "it" on page 559, line 20, referred to the "notice" referenced quite a bit earlier in the rule. Judge Colloton agreed to make revisions to clarify the reference. In Rule 4(c)(1)(A)(ii), "it" was changed to "the notice." A corresponding change was made to Rule 25(a)(2)(C)(i), changing "it" to "the paper" on page 562, line 5. Finally, the advisory committee agreed to change "and" to "or" in Rule 25(a)(2)(C)(i), on page 562, line 4, and in Rule 4(c)(1)(A)(ii), page 559, line 20, so that evidence such as a postmark or a date stamp would suffice.

Professor Struve said that, at the suggestion of a committee member, the advisory committee would consider whether to change the references in Rule 4(c)(1)(B) and Rule 25(a)(2)(C)(ii) from "exercises its discretion to permit" to simply "permits." She said that the committee would also consider a member's suggestion that the rules need not suggest the option of getting a notarized statement when a declaration would suffice. She said these suggestions would be brought to the advisory committee for consideration as it works through the comments on the published draft.

The committee unanimously approved publication of the proposed amendments to Rules 4(c)(1) and 25(a)(2)(C), revised as noted above, and to Appellate Forms 1 and 5, and proposed new Form 7.

FED. R. APP. P. 4(a)(4)

Judge Colloton reported that the advisory committee recommended publishing a proposed amendment to Rule 4(a)(4) to address a circuit split on whether a motion filed outside a non-extendable deadline under Civil Rules 50, 52, or 59 counts as "timely" under Rule 4(a)(4) if a court has mistakenly ordered an "extension" of the deadline for filing the motion. The proposal is to adopt the majority approach, which is that postjudgment motions made outside the deadlines set by the Civil Rules are not "timely" under Rule 4(a)(4).

The committee unanimously approved publication of the proposed amendment to Rule 4(a)(4).

LENGTH LIMITS
(FED. R. APP. P. 5, 21, 27, 28.1, 32, 35, AND 40, AND FORM 6)

Judge Colloton reported that the advisory committee recommended publishing a set of proposals to address length limits. The proposed amendments to Rules 5, 21, 27, 35, and 40 would impose type-volume limits for documents prepared using a computer, and would maintain the page limits currently set out in the rules for documents prepared without the aid of a computer. They would also employ a conversion ratio of 250 words per page for these rules. The proposed amendments also shorten Rule 32's word limits for briefs to reflect the pre-1998 page limits multiplied by 250 words. The word limits set by Rule 28.1 for cross-appeals are correspondingly shortened. Finally, the proposals add a new Rule 32(f), setting out a list of items that can be excluded when computing a document's length.

A member asked why it was necessary to have line limits in addition to word limits. Judge Colloton agreed that the advisory committee would examine that question in the future, but he said that it would require careful consideration and the advisory committee recommended publishing the current proposals for now.

The committee unanimously approved publication of the proposed amendments to

Appellate Rules 5, 21, 27, 28.1, 32, 35, and 40, and to Form 6.

FED. R. APP. P. 29

Judge Colloton reported that the advisory committee recommended publishing an amendment to Rule 29, addressing amicus filings in connection with rehearing. The amendment would re-number the existing rule as Rule 29(a) and would add Rule 29(b) to set default rules for the treatment of amicus filings in connection with petitions for rehearing.

Judge Colloton noted that two stylistic changes were made to the version that appeared in the Standing Committee's agenda materials. First, on page 584, line 14, in proposed Rule 29(b)(2), "Rule 29(a)(2) applies" was changed to "Rule 29(a)(2) governs the need to seek leave." Second, on page 584, line 16, in proposed Rule 29(b)(3), "the" was changed to "a."

The committee discussed whether Rule 29(b)(2) should incorporate any of the language of Rule 29(a)(2). Some members noted that some appellate courts do not allow the filing of amicus briefs without leave of court, because a practice had developed of filing amicus briefs in order to force recusals. Judge Colloton agreed, on behalf of the advisory committee, to borrow some of the language from Rule 29(a)(2) for use in Rule 29(b)(2). The proposed amendment to Rule 29(b)(2) would read: "The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court." Judge Sutton noted that Rule 29(a), which allows filing amicus briefs by consent during initial consideration of a case on the merits, may be in tension with some circuits' practice, and suggested that the advisory committee consider whether it should be changed in the future. Judge Colloton agreed that the advisory committee would add Rule 29(a) to its agenda.

The committee unanimously approved publication of the proposed amendment to Rule 29, revised as stated above.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater presented the report of the advisory committee, as set out in his memorandum and attachment of April 10, 2014 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Informational Items

Judge Fitzwater reported that, in connection with its spring meeting, the advisory committee had worked with the University of Maine School of Law to host a symposium on the challenges of electronic evidence. He said that no concrete rules proposals came out of the symposium, but that it set the stage for issues that the advisory committee will need to monitor going forward.

Judge Fitzwater said that the advisory committee is examining a possible amendment to Rule

803(16), the hearsay exception for "ancient documents," and that it will discuss the matter further at its fall meeting.

The Standing Committee's liaison to the Evidence Rules Committee commented that Judge Fitzwater's term as chair was drawing to a close and that he had greatly admired Judge Fitzwater's leadership. He expressed his personal gratitude for Judge Fitzwater's exceptional leadership and reported that Judge Bill Sessions would serve as the next chair. Judge Sutton echoed the praise and gratitude.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set out in Judge Wedoff's memorandum and attachments of May 6, 2014 (Agenda Item 7).

Amendments for Final Approval

OFFICIAL FORMS 17A, 17B, AND 17C

Professor Gibson reported that an amendment to Form 17A and new Forms 17B and 17C had been published for comment in connection with the revision of the bankruptcy appellate rules. Form 17A and new Form 17B would implement the provisions of 28 U.S.C. § 158(c)(1) that permit an appellant and an appellee to elect to have an appeal heard by the district court in districts for which appeals to a bankruptcy appellate panel have been authorized. New Form 17C would be used by a party to certify compliance with the provisions of the bankruptcy appellate rules that prescribe limitations on brief length based on number of words or lines of text. Professor Gibson reported that no comments had been received, that the advisory committee had unanimously approved the proposals, and that the advisory committee recommended them to be approved and take effect in December of this year. Professor Gibson noted that there was a typographical error on page 702 of the agenda materials, and that the reference to "U.S.C. § 158(c)(1)" should say "28 U.S.C. § 158(c)(1)."

The committee unanimously approved the proposed amendments to Form 17A and new Forms 17B and 17C, with the revision stated above, for submission to the Judicial Conference for final approval.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff reported that the advisory committee recommended amending Forms 3A and 3B to eliminate references to filing fees, because those amounts are subject to periodic changes by the Judicial Conference that can render the forms inaccurate. Judge Wedoff said that since the amendments were technical in nature, publication was not needed.

The committee unanimously approved the proposed amendments to Forms 3A and 3B for submission to the Judicial Conference for final approval without publication.

OFFICIAL FORMS 22A-1, 22A-1 SUPP, 22A-2, 22B, 22C-1, AND 22C-2

Judge Wedoff reported that the advisory committee recommended approval of the amendments to the modernized "means test" forms that were originally published in 2012 and then republished in 2013. Judge Wedoff said that the comments on the republished drafts were generally favorable, but that the advisory committee had made several changes after publication to take account of some of the suggestions made during the public comment period.

The committee unanimously approved the proposed amendments to Forms 22A-1, 22A-1 Supp, 22A-2, 22B, 22C-1, and 22C-2 for submission to the Judicial Conference for final approval.

MODERNIZED INDIVIDUAL FORMS
(OFFICIAL FORMS 101, 101A, 101B, 104, 105, 106SUM, 106A/B,
106C, 106D, 106E/F, 106G, 106H, 106DEC, 107, 112, 119, 121, 318, 423, AND 427)

Professor Gibson reported that the advisory committee recommended approving the modernized forms for individual-debtor cases that were published in 2013. She explained the process used by the subcommittee and the advisory committee to carefully review the comments and make changes as needed. She added that some of the comments had made suggestions outside the scope of the modernization project, and that the advisory committee had noted those for consideration at a later date. Professor Gibson said that the advisory committee recommended approving the forms, but making their effective date correspond with the non-individual modernized forms recommended for publication this summer, making the earliest possible effective date December 1, 2015.

The committee unanimously approved the proposed amendments to the modernized forms for individual-debtor cases for submission to the Judicial Conference for final approval at the appropriate time, likely in 2015.

Amendments for Publication

MODERNIZED FORMS FOR NON-INDIVIDUALS
(OFFICIAL FORMS 11A, 11B, 106J, 106J-2, 201, 202, 204, 205,
206SUM, 206A/B, 206D, 206E/F, 206G, 206H, 207, 309A, 309B, 309C, 309D, 309E)

Professor Gibson reported that the nearly final installment of the Forms Modernization Project consisted primarily of case-opening forms for non-individual cases, chapter 11-related forms, the proof of claim form and supplements, and orders and court notices for use in all types of cases. The advisory committee also sought to publish two revised individual debtor forms and the

abrogation of two official forms.

At the suggestion of a committee member, Judge Wedoff agreed to revise the instructions at the top of Form 106J-2 to make it clear that the form requests only expenses personally incurred, not those that overlap with the expenses reported on Form 106J.

The committee unanimously approved publication of the modernized forms for non-individuals, described above and with the revision described above.

CHAPTER 13 PLAN FORM AND RELATED AMENDMENTS
(OFFICIAL FORM 113 AND FED. R. BANKR. P. 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, AND 9009)

Judge Wedoff reported that the chapter 13 plan form had been published for comment in August 2013, that the advisory committee had revised the form in response to public comments, and that it now recommended republication in August 2014. Judge Wedoff noted that one improvement in the revised form is that it adds an instruction that clarifies that the form sets out options that may be appropriate in some cases, but the presence of an option on the form does not indicate that the option is appropriate in all circumstances or that it is permissible in all judicial districts. A member asked whether that should be done on all of the forms to avoid needing to tweak forms every time a decision changes the applicability of some aspect of a form. Judge Wedoff said that the advisory committee would consider whether it might be appropriate to amend Rule 9009 to state that the presence of an option on a form does not mean that it is always applicable. But he said that such an amendment should be pursued separately from the current proposal to amend the chapter 13 plan form.

Judge Wedoff explained that because of the significant changes to the proposed form, the advisory committee recommended republication. As to the related rule amendments that were published in 2013, Judge Wedoff said that republication was probably not necessary, but that the advisory committee recommended republication of the rule amendments so that they could remain part of the same package as the plan form. He said that republication of the rules would delay the package by a year because, under the Rules Enabling Act, the rules would not go into effect until at least 2016 if they are republished this year. But, he said, the advisory committee did not think it wise to put the rule amendments into effect without the related form that was the driving force behind the amendments. Professor McKenzie described the proposed rule amendments and the changes made after publication, most of which were minor. He said the request for comment would seek input as to whether the rule amendments should go into effect even if the advisory committee were to decide not to proceed with the plan form.

The committee unanimously approved publication of the revised chapter 13 plan form and related amendments to Rules 2002, 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009.

FED. R. BANKR. P. 3002.1

Judge Wedoff reported that the advisory committee recommended proposed amendments to Rule 3002.1, which applies in chapter 13 cases and requires creditors whose claims are secured by a security interest in the debtor's principal residence to provide the debtor and trustee certain information about the mortgage while the bankruptcy case is pending. The proposed amendments would clarify when the rule applies and when its requirements cease.

The committee unanimously approved publication of the proposed amendment to Rule 3002.1.

OFFICIAL FORM 410A

Judge Wedoff reported that the advisory committee recommended publication of amendments to Official Form 410A (currently Form 10A), the Mortgage Proof of Claim Attachment that is required to be filed in an individual debtor case with the proof of claim of a creditor that asserts a security interest in the debtor's principal residence. The advisory committee recommended publication of a revised form that would replace the existing form with one that requires a mortgage claimant to provide a loan payment history and other information about the mortgage claim, including calculations of the claim and the arrearage amounts. Judge Wedoff noted that there was one typographical error in the draft in the Standing Committee's agenda materials. On page 1103, the reference to Rule 3001(c)(2)(A) should be to the Federal Rules of Bankruptcy Procedure, not the Federal Rules of Civil Procedure.

The committee unanimously approved publication of the proposed amendments to Official Form 410A, with the revision noted above.

CHAPTER 15 FORM AND RULES AMENDMENTS
(OFFICIAL FORM 401 AND FED. R. BANK. P. 1010, 1011, 1012, AND 2002)

Professor McKenzie reported that the advisory committee recommended publication of an official form for petitions under chapter 15, which covers cross-border insolvencies. The proposed form grew out of the work of the Forms Modernization Project. Professor McKenzie said that the advisory committee also recommended publishing amendments to the Bankruptcy Rules to improve procedures for international bankruptcy cases. The proposals would: (1) remove the chapter 15-related provisions from Rules 1010 and 1011; (2) create a new Rule 1012 to govern responses to a chapter 15 petition; and (3) augment Rule 2002 to clarify the procedures for giving notice in cross-border proceedings.

The committee unanimously approved publication of proposed Official Form 401, the proposed amendments to Rules 1010, 1011, and 2002, and proposed new Rule 1012.

Informational Items

Professor Gibson reported that the advisory committee had withdrawn its proposed amendment to Rule 5005, which was published in 2013 and which would have replaced local rules on electronic signatures and permitted the filing of a scanned signature page of a document bearing the signature of an individual who is not a registered user of the CM/ECF system. The amendment would have allowed the scanned signature to have the same force and effect as the original signature and would have removed any requirement of retaining the original document with the wet signature. Professor Gibson said that the advisory committee had been persuaded by the public comments that the amendment was not needed and could be problematic.

Judge Wedoff said that his term as chair of the advisory committee was coming to a close and that Judge Sandra Ikuta would be taking over as chair. He added that he had very much appreciated the opportunity to serve as chair.

Judge Sutton said that Judge Wedoff had done amazing work, together with the reporters and the subcommittees. He added that Judge Wedoff's enthusiasm was infectious and that he was a national treasure for the Bankruptcy Rules. Judge Sutton said the committee was grateful for Judge Wedoff's service and his leadership.

REPORT OF THE ADMINISTRATIVE OFFICE

Julie Wilson and Ben Robinson provided the report of the Administrative Office. Ms. Wilson said that the Rules Office had been watching legislation that would attempt to address issues related to patent assertion entities. She said that a bill did pass in the House in December, but that recent developments indicated that the legislation was not moving forward in the Senate for now. She said that the Rules Office would continue to monitor the legislation.

Judge Sutton thanked the Rules Office for all its great work on the preparations for the committee's meeting.

NEXT COMMITTEE MEETING

The committee will hold its next meeting on January 8–9, 2014, in Phoenix, Arizona.

Respectfully submitted,

Andrea L. Kuperman
Chief Counsel

Jonathan C. Rose
Secretary

THIS PAGE INTENTIONALLY BLANK

TAB 2

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

DATE: October 3, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: A short history of the 1998 amendment to Rule 32

The proposals that are currently out for comment include proposed amendments to Rules 5, 21, 27, 35, and 40 that would impose type-volume limits for documents prepared using a computer. In addition, the proposed amendments would shorten Rule 32's word limits for briefs so as to reflect the pre-1998 page limits multiplied by 250 words per page (and would correspondingly shorten the word limits set by Rule 28.1 for cross-appeals).

Concerning the latter facet of the proposals, the Committee Note to the proposed amendments to Rule 32 states in part:

> When Rule 32(a)(7)(B)'s type-volume limits for briefs were adopted in 1998, the word limits were based on an estimate of 280 words per page. The basis for the estimate of 280 words per page is unknown, and the 1998 rules superseded at least one local circuit rule that used an estimate of 250 words per page based on a study of appellate briefs. The committee believes that the 1998 amendments inadvertently increased the length limits for briefs. Rule 32(a)(7)(B) is amended to reduce the word limits accordingly.

Judge Colloton's report to the Standing Committee further explained:

> The 1998 amendments transmuted the prior 50-page limit for briefs into a 14,000-word limit. This change appears to have been based on the assumption that one page was equivalent to 280 words (or 26 lines). While the estimate of 26 lines per page appears sound, research indicates that the estimate of 280 words per page is too high. A study of briefs filed under the pre-1998 rules shows that 250 words per page is closer to the mark.

In case it might be of assistance to Committee members in assessing the comments submitted on the pending proposals, this memo explores in slightly more depth the origins of the 14,000-word limit. This memo is based solely on a review of the

official records of the Advisory Committee and Standing Committee (i.e., meeting minutes and Committee reports) that are available on www.uscourts.gov. A comment submitted by Judge Easterbrook – who was a member of the Standing Committee during the 1990s and was for part of that time the Standing Committee's liaison to the Appellate Rules Committee – provides additional information about the deliberations that produced those amendments.

I think it is fair to say that the proposals that became the 1998 amendments were supported repeatedly by statements that 14,000 words was equivalent to 50 pages. Discussions of words-per-brief limits arose a few years into the Committee's discussions of possible changes to Rule 32. In 1994, the Committee heard testimony that 50 pages would equal 12,500 words on an "office typewriter" but would equal 14,000 words or more "today, using a proportionately spaced typeface." Based on charts showing that 12-point Courier font yields 250 words per page, and on the DC Circuit's new rule, the Committee crafted a proposal featuring a 12,500-word-per-brief limit.

Public comment on that proposal argued that a 12,500-word limit would reduce the length "below the traditional 50 page limit"; those commenters suggested a limit of 14,000 or 14,500 words. Some Committee members noted that sample pages using 280 words per page looked appropriate; conversely, other Committee members argued for the 12,500 limit, but did so without appearing to dispute the commenters' contention that 12,500 would shorten the existing limit. The Committee reverted to proposing a 14,000-word-per-brief limit, and its 1995 draft stated the belief "that the overall word limit of 14,000 words is the equivalent of a 50 page brief written with reasonable use of footnotes and single-spaced quotations."

Later in the process, when the Appellate Rules Committee in 1997 discussed and gave final approval to the Rule 32 proposal, some members apparently suggested "that 14,000 is not a good equivalent to the old 50-page brief"; these members argued for a 13,000-word limit, maintaining that 14,000 words "is closer to the length of a professionally printed … 50-page brief." A Committee member responded, though, that "this rule had been quite controversial principally because lawyers suspected that we were trying to shorten the length of briefs. Over time the proposed rule has become less controversial." Other members favored 14,000 words "in order to avoid reopening the controversy." The Committee kept the limit at 14,000 words.

When Judge Logan presented the proposal to the Standing Committee in 1997 for final approval, "[h]e pointed out that a 50-page brief would include about 14,000 words."

Here is a somewhat more detailed chronology. (In the appendix to this memo, I include excerpts from the documents on which i relied in compiling this chronology.)

1991: Appellate Rules Committee starts discussing Rule 32's type face requirements.

1992: Characters-per-inch:

> The Appellate Rules Committee requests permission to publish for comment proposed amendments to Rule 32. The amendments would require, inter alia, that briefs prepared "by any method other than the standard typographic process" have "no more than 11 characters per inch."
>
> The Standing Committee approves the proposal for publication.

1993: Characters-per-inch, same-content-per-page, words-per-page:

> In April, the Appellate Rules Committee discusses the public comments and compares the relative merits of characters-per-inch, characters-per-line, and characters-per-page limitations.
>
> In May, an Appellate Rules Committee report seeks permission to publish two alternative drafts of a revised Rule 32 proposal for further public comment. A majority of Appellate Rules Committee members favor a version that would require briefs (that were not produced by "standard typographic printing") to not "exceed on average the same content per page (including footnotes and quotations) as a brief produced by standard typographic printing." A two-member minority favors alternative limits of 11 characters per inch or 300 words per page.
>
> In June, the Standing Committee discusses these two proposals and at least one other alternative. It votes to "rewrite the committee note and republish the entire Rule 32 for further public comment." The minutes do not make entirely clear what will be published.
>
> In September, the Reporter (Professor Mooney) updates the Committee as follows: "a new proposal would be published on November 1. The new proposal would include a words per page limitation, although Judge Easterbrook had written to the Committee suggesting that characters per brief or words per brief would be preferable to words per page."[1]

1994: First detailed discussion of word / page conversion ratios

> In April, the Appellate Rules Committee holds a combined hearing and meeting. The witnesses are from a typography company and from Microsoft. The Committee decides to adopt (and adapt) a new draft of

[1] At this time, Judge Easterbrook was on the Standing Committee, but then-Chief Judge Sloviter was the Standing Committee's liaison to the Appellate Rules Committee. By October 1995 (if not earlier) Judge Easterbrook had become the liaison.

Rule 32 proposed by the witnesses. Participants initially propose setting conjunctive limits of 14,000 words per brief and 280 words per page. "The Committee asked the printing experts how those limits compare to the current 50 page limitation. The printing experts responded that in 1970 using an office typewriter, a 50 page brief would have contained approximately 12,500 words; but today, using a proportionately spaced typeface, a 50 page brief can greatly exceed 14,000 words without abusive use of footnotes or compacting the print, etc." The Committee decides to include a 50-page "safe harbor" for monospaced briefs (and also a safe harbor for proportionally spaced briefs).

Later in the meeting, the 14,000-word limit is lowered to 12,500 words: "In paragraph (a)(5) the word limitation for a principal brief was reduced from 14,000 to 12,500, and for a reply brief, from 7,000 to 6,250. The 12,500 word limit corresponds to the new D.C. circuit rule. Also the charts presented during the testimony the preceding day indicated that courier font in 12 point produces approximately 250 words per page, so that a 50 page brief in courier font in 12 point would have approximately 12,500 words." The safe harbors are lowered as well – for monospaced briefs, the safe harbor is 40 pages.

In May, the Appellate Rules Committee report requests publication of the new Rule 32 proposal, which would set limits of 12,500 words per brief and 280 words per page. ("The latter limitation is included to ensure that the typeface used is sufficiently large to be legible.")

In June, the Standing Committee approves the proposal for publication.

1995: Further discussion of conversion ratios

In April, the Appellate Rules Committee discusses the public comments and the conversion ratio and decides to change the proposal back to a 14,000-word limit:

> Having decided to retain word limits, Judge Logan asked whether the limits should be increased. Seven commentators objected to the 12,500 word limit in the published rule on the ground that it reduces the length below the traditional 50 page limit. The commentators suggested increasing the total number of words to 14,000 or 14,500. A motion was made and seconded to raise the limit to 14,000 words.
>
> Some members of the Committee believed that even if 12,500 words is shorter than the traditional 50 page brief in pica type, that 12,500 words is sufficient. A local rule in the D.C. Circuit limits a principal brief to 12,500 words and that length seems sufficient.

> Other members of the Committee were concerned that some cases warrant a longer brief and that it is more of a problem to cut short helpful discussion than to have some briefs longer than need be. A longer, more complete brief can be of significant assistance to the court.
>
> The Committee examined some of the sample brief pages prepared by Microsoft using proportional typefaces and complying with the 280 word per page limit in the published rule. The pages were attractive and easily legible. If each page has no more than 280 words, a 50 page brief would have 14,000 words. Although some members continued to support 12,500 as sufficient, it was argued that it would be better to provide more leeway because of the variation in word counting methods.
>
> The motion to increase the word limit to 14,000 passed by a vote of 7 to 1.

In June, the Committee's report seeks publication of the latest draft of Rule 32. The proposal sets conjunctive limits of 14,000 words per brief and 280 words per page. The Committee Note explains in part:

> The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. The Committee believes that the overall word limit of 14,000 words is the equivalent of a 50 page brief written with reasonable use of footnotes and single-spaced quotations. If the person preparing the brief does not want to certify the number of words in the brief, he or she may use the safe-harbor provision allowing 40 pages for a principal brief and 20 pages for a reply brief. The safe-harbor provision limits a monospaced principal brief to 40 pages rather [than] 50 to prevent the use of the safe-harbor provision to produce a 50 page heavily footnoted brief or one containing extensive single-spaced quotations. No safe-harbor is provided for proportionately spaced briefs because they are ordinarily prepared on a computer and an exact word count is readily available.

In July, the Standing Committee decides to defer publication of the Rule 32 proposal pending further consideration of assorted drafting issues.

In December, the Appellate Rules Committee report requests permission to publish yet another Rule 32 proposal (now folded into the restyling package). The latest proposal retains the 14,000-words-per-brief and 280-words-per-page limits, but lowers the safe-harbor to 30 pages. The Committee Note explains in part:

> Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50 page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing 'tricks' available with most personal computers to file a brief far longer than the 'old' 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30 page limit is imposed.
>
> The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level. playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

1996: New draft approved for publication

At the January 1996 Standing Committee meeting, Judge Easterbrook (who prepared the new Rule 32 draft) presents the draft. The Standing Committee approves the draft for publication.

1997: Further discussion of conversion ratios, and final approval

In April, the Appellate Rules Committee discusses the public comments, revises the proposal, and gives it final approval. The minutes state in part:

> [T]he requirement that the average number of words per page not exceed 280 words was deleted….
>
> There was discussion about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old

> 50-page brief. Fourteen thousand is closer to the length of a professionally printed brief [sic] 50-page brief. One member pointed out that this rule had been quite controversial principally because lawyers suspected that we were trying to shorten the length of briefs. Over time the proposed rule has become less controversial. In order to avoid reopening the controversy, several members spoke in favor of retaining the 14,000 word limit. A majority favored staying with 14,000; therefore, the word limitation was not changed.

In May, the Appellate Rules Committee's report requests final approval of the proposal. The Committee Note is identical, in relevant part, to the passage quoted above from the Committee Note in the published version.

In June, the Standing Committee gave final approval to the amendments to Rule 32. The minutes recount in part:

> Judge Logan pointed out that the advisory committee had eliminated the typeface distinction between text and footnotes and the specific limitation on the use of boldface. He added that the rule as published had included a limit of 90,000 characters for a brief. The advisory committee discovered, however, that some word processing programs counted spaces as characters, while others did not. Accordingly, the committee eliminated character count in favor of a limit of 14,000 words or 1,300 monofaced lines of text. He pointed out that a 50-page brief would include about 14,000 words.

Encl.

THIS PAGE INTENTIONALLY BLANK

Appendix: Excerpts from relevant Committee records

December 1991 Appellate Rules meeting (minutes here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP12-1991-min.pdf):

Committee discusses issues raised by responses of circuits in the course of reviewing their local rules. One issue concerns Rule 32's requirements:

4. Recurring Issues Raised by the Circuit Responses

The responses of the circuits evidenced concern with some recurring themes.

A. Typeface

Fed. R. App. P. 32 governs the form of briefs, appendices, and other papers. Rule 32(a) requires printed matter to be in 11 point type. In the age of computer generated documents, that terminology is obsolete. Several circuits have or are developing local rules that are keyed to computer generated type styles.

Judge Ripple stated that in light of the changing technology and the slow process for changing the federal rules, the committee might consider removing the type style requirements from the national rules. Instead, the national rules could require parties to use one of the type styles approved by the Administrative Office. The general counsel for the Administrative Office was of the opinion that such a delegation would be appropriate.

Judge Williams expressed a preference for having the federal rules include at least a safe harbor, that is state that "X" typeface is acceptable, as well as any others on the list approved by the Administrative Office.

Mr. Kopp was of the opinion that leaving that determination to the Administrative Office would not be prudent. At least if the changes go through the Advisory Committee, the users -- the judges and lawyers -- are involved in the decisional process.

The consensus was that the topic should be place on the agenda as a discussion item for a future meeting.

December 1992: Standing Committee votes to publish for comment proposed amendments to, inter alia, Rule 32, "to seek public comment during a period that would end on April 15, 1993." (See http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST12-1992-min.pdf) The report to the Standing Committee submitted in advance of that meeting (available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP12-1992.pdf) explained in part:

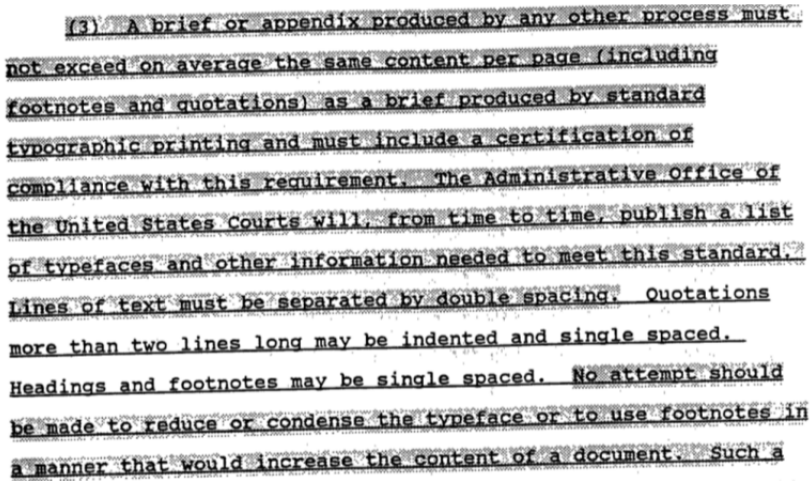
Rule 32 governs the form of documents; it has been amended in a number of ways. The amended rule requires that a brief or appendix prepared by any method other than the standard typographic process must be printed with no more than 11 characters per inch. The rule requires a brief or appendix to be bound or stapled in any manner that is secure, does not obscure the text, and that permits the document to lie flat when open. The number of a case must appear at the top center of a brief or appendix, and the title of the document must include the name of the party or parties on whose behalf the document is filed. The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix; the new rule also requires that a suggestion for rehearing in banc and a response to either a petition for panel rehearing or a suggestion for rehearing in banc be prepared in the same manner. Only a pro se party proceeding in forma pauperis may file carbon copies.

April 1993 (minutes here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP04-1993-min.pdf)

The Appellate Rules Committee discusses comments on the published proposal, which would have required that non-commercially-printed briefs have no more than "11 characters per inch." Debate includes discussion of the relative merits of characters-per-inch and characters-per-line and characters-per-page.

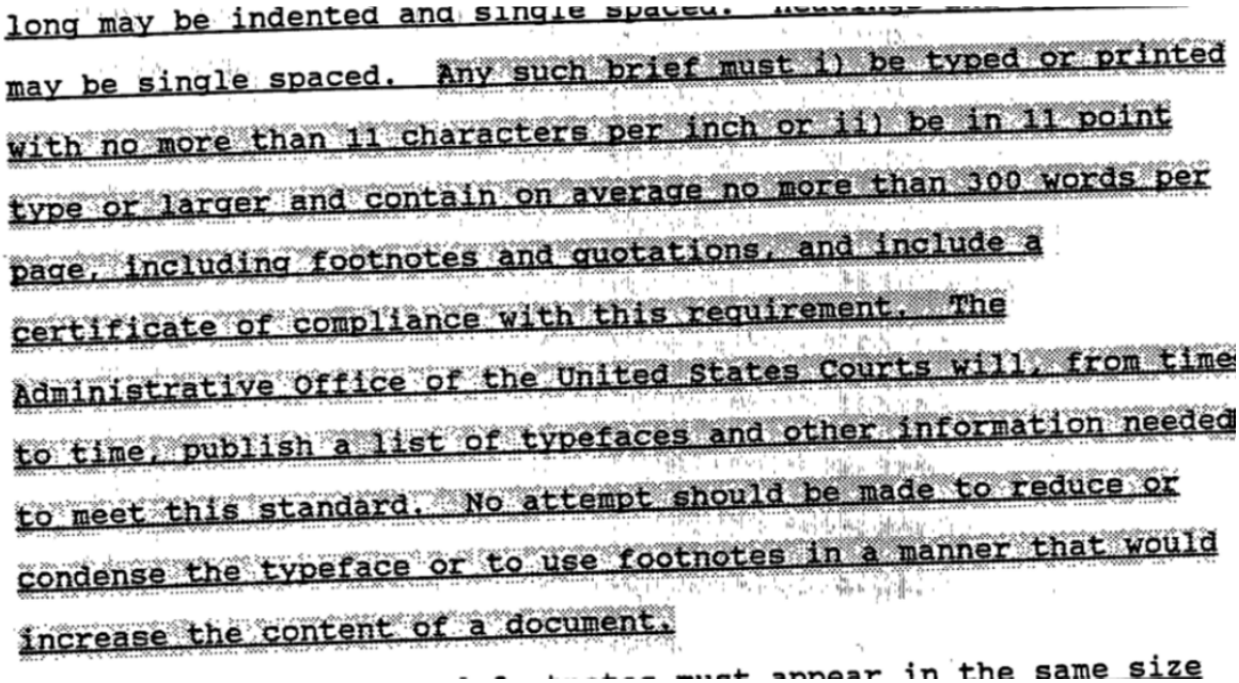
May 1993 (report to Standing Committee here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP5-1993.pdf):

Appellate Rules Committee asks permission to re-publish two alternative drafts of a revised Rule 32 proposal for further public comment. The "committee-approved" alternative sets the following requirement for non-typewritten (i.e., commercially printed) briefs:



(3) A brief or appendix produced by any other process must not exceed on average the same content per page (including footnotes and quotations) as a brief produced by standard typographic printing and must include a certification of compliance with this requirement. The Administrative Office of the United States Courts will, from time to time, publish a list of typefaces and other information needed to meet this standard. Lines of text must be separated by double spacing. Quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single spaced. No attempt should be made to reduce or condense the typeface or to use footnotes in a manner that would increase the content of a document. Such a

The alternative "preferred by two members of the advisory committee" would instead have set alternative limits for such briefs, one of which involved a word count of 300 words per page:


long may be indented and single spaced. [illegible]
may be single spaced. Any such brief must i) be typed or printed
with no more than 11 characters per inch or ii) be in 11 point
type or larger and contain on average no more than 300 words per
page, including footnotes and quotations, and include a
certificate of compliance with this requirement. The
Administrative Office of the United States Courts will, from time
to time, publish a list of typefaces and other information needed
to meet this standard. No attempt should be made to reduce or
condense the typeface or to use footnotes in a manner that would
increase the content of a document.
[illegible] must appear in the same size

June 1993 Standing Committee meeting (minutes here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-1993-min.pdf):

The Standing Committee discusses the two alternatives noted above plus at least one other alternative. It votes to "rewrite the committee note and republish the entire Rule 32 for further public comment." The minutes do not make entirely clear what will be published.

September 1993 Appellate Rules Committee meeting (minutes here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ap9-22.htm):

Most discussion centers on proposals to address motion length limits. Rule 32 briefly discussed: "Professor Mooney summarized the status of Rule 32, noting that a new proposal would be published on November 1. The new proposal would include a words per page limitation, although Judge Easterbrook had written to the Committee suggesting that characters per brief or words per brief would be preferable to words per page."

April 1994 Appellate hearing and meeting (minutes here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ap4-25.htm):

Appellate committee meets after hearing "testimony regarding the proposed amendments to Rule 32." Witnesses were "Mr. Paul Stack who is General Counsel of Monotype Typography, Inc., Mr. William Davis who also is from Monotype Typography, and Ms. Sarah Leary of Microsoft Corporation."

The relevant portions of the minutes are worth quoting in full:

Rule 32

The witnesses who had just completed their testimony, Mr. Paul Stack who is General Counsel of Monotype Typography, Inc., Mr. William Davis who also is from Monotype Typography, and Ms. Sarah Leary of Microsoft Corporation, were present. So that the Committee would be able to take advantage of the speakers expertise, Judge Logan began the meeting with discussion of Rule 32. Judge Logan stated that his goal for the morning was to have the Committee make substantive decisions about the direction of Rule 32 rather than to approve precise language. Judge Logan indicated that following the initial discussion, he would appoint a drafting subcommittee to prepare a new draft for the Committee's consideration the following morning.

The Reporter summarized two additional comments on Rule 32 that had been received since the preparation of the materials for the meeting.

The speakers, during their earlier testimony, had presented an alternative draft for the Committee's consideration. Judge Logan called for a vote on whether the Committee preferred to work with the published draft or with the new draft. The Committee preferred the new draft by a vote of six to one. A copy of the draft is attached to these minutes.

Subdivision (a) of the draft contained definitions. Paragraph (a)(1) defined a "monospaced typeface" as one in which "(i) all characters, including spaces, have the same advance width, (ii) there are no more than 11 characters to an inch, and (iii) the weight of the typeface design is regular or its equivalent." One member of the Committee asked whether justifying the right margin would make the advance width nonuniform since justification adds white space. Another member of the Committee responded that the spacing added to justify the right margin is not technically "advance width."

The definition of a "proportionately spaced typeface" in paragraph (a)(2) stated that it is a typeface in which "(i) individual characters have individual advance widths, (ii) the x-height (the height of the lower case `x') is equal to or greater than 2 millimeters, (iii) the em-width (the width of the upper case "M") is equal to or greater than 3.7 millimeters, (iv) the design is of a serifed, text, roman style, and (v) the weight of the typeface design is regular or its equivalent."

Some members of the Committee initially reacted negatively to including that level of detail in the national rule. Judge Logan reminded the Committee that it decided to address the typeface issue because of the proliferating local rules. The Committee concluded, however, that the draft rule seemed to address not only lawyers who prepare briefs, but also people who design typefaces and software. The Committee

hoped to simplify the draft so that it would be readily understandable by both audiences.

A suggestion developed that it might be possible to eliminate the "x" height and "em" width if the rule did three things:

1. required 1-1/4 inch side margins and 1 inch top and bottom margins;

2. limited a brief to a total of 14,000 words; and

3. limited each page to no more than 280 words.

If the text extended to the margins specified, each page contained no more than 280, and the brief as a whole were limited to no more than 14,000 words regardless of the total number of pages, the "x" height and "em" width would likely be met by default. This would permit the use of proportionately spaced typefaces and ensure that the typefaces were of sufficient size to be easily legible.

The Committee concluded that it wanted to permit both monospaced and proportionately spaced typefaces but that the rule should state a preference for proportionately spaced typefaces. Because of concern about the technical nature of the definitions, it was suggested that examples might be added to the definitions.

The Committee conceptually approved paragraphs (a)(3) and (a)(4) of the definitions.

Subdivision (b) of the draft dealt with the form of a brief and an appendix. The Committee conceptually approved paragraphs (b)(1), (b)(2), (b)(4), (b)(9) and (b)(10).

Paragraph (b)(3) established different margins for briefs using proportionately spaced typefaces and for those using monospaced typefaces. The draft suggested wider side margins (resulting in shorter lines of text) for proportionately spaced typeface. A proportionately spaced typeface fits more material in the same amount of space than a monospaced typeface of the same size. If the same line length is used for both typefaces, there is not only more text in the lines produced with a proportionately spaced typeface but the comprehensibility of the proportionately spaced document also declines. Therefore, the Committee approved different margins dependent upon the typeface used. Paragraph (b)(3) also authorized the use of pamphlet sized briefs. Technology is developing to the point that law firms soon will be able to produce the pamphlet sized briefs in-house. The consensus was that the pamphlet sized briefs are preferred and the rule should continue to permit them.

Paragraph (b)(7) of the draft provided that "[a]ll case citations in a brief must be underlined. A brief typeset in a proportionately spaced typeface accompanied by a true italic typeface may use the italic in lieu of underlining." A member of the Committee noted that the current rule is silent about the treatment of citations and there may be

no need to include such a provision. Other members of the Committee expressed preference for the use of italic rather than underlining and stated that if the rule deals with the issue, it should state a preference for italics. The Committee did not reach a consensus about the appropriateness of a provision such as (b)(7).

The Committee agreed that all references to the "appendix" should be removed from paragraphs (b)(1) through (5). An appendix is typically produced by photocopying existing documents. Paragraph (b)(8) provided that if photocopies of documents are included in the appendix "such pages may be informally renumbered if necessary." The Committee agreed that the pages must be renumbered in order of their appearance in the appendix. It was further suggested that it would be helpful if an appendix had a table of contents.

Subdivision (c) of the draft dealt with the length of a brief. It suggested that a principal brief should not exceed 14,000 words and that a reply brief should not exceed 7,000 words. The draft further required that a brief be accompanied by a declaration that it complies with the rule.

The Committee asked the printing experts how those limits compare to the current 50 page limitation. The printing experts responded that in 1970 using an office typewriter, a 50 page brief would have contained approximately 12,500 words; but today, using a proportionately spaced typeface, a 50 page brief can greatly exceed 14,000 words without abusive use of footnotes or compacting the print, etc.

The Committee expressed a desire to create safe harbors for briefs using either monospaced or proportionately spaced typefaces so that certification of compliance would be unnecessary. The draft suggested that a 50 page brief set in monospaced typeface should be conclusively presumed to be within the 14,000 word limit. The Committee concurred that such a safe harbor is necessary so that a person producing a brief with a typewriter would not need to manually count the words in the brief. The Committee expressed a hope that it could develop a similar sort of safe harbor for a brief set in a proportionately spaced typeface.

One member mentioned the desirability of including a provision preempting any local rules concerning length.

Paragraph (d) of the draft dealt with the form of other papers such as petitions for rehearing, suggestions for rehearing in banc, etc. The draft contained the same provision as the published rule stating that such documents must have a cover the same color as the party's principal brief. Some of the commentators on the published rule objected to requiring a cover at all, others wanted the rule to require the colors required by their local rules. One member of the Committee stated that the inclusion of such detail in the published rule was tied to the preemption issue. The details had been included in the rule to eliminate the pitfalls created by varying local rules on such issues.

At the conclusion of the discussion of Rule 32, Judge Logan asked Mr. Munford and the Reporter to join him that evening to work on a new draft. Judge Logan thanked those persons who had testified both for their informative testimony and for their answers to the Committee's technical inquiries.

The minutes of the preceding meeting were unanimously approved with only one correction, on line 11, page 24, the word "advice" should be changed to "advise."

Judge Logan then informed the Committee that he would take up the remaining proposed amendments that had been published for comment.

* * *

Rule 32

On the basis of the discussion the preceding day, a new draft of the first part of the Rule 32 had been prepared for the Committee's discussion. The new draft read as follows:

(a) Form of a Brief, an Appendix, and Other Papers

(1) A brief may be produced by typing, printing, or by any duplicating or copying process that produces a clear black image on white paper with a resolution of 300 dots per inch or more. The paper must be opaque, unglazed paper, both sides of the paper may be used if the resulting document is clear and legible. Carbon copies of a brief or appendix must not be used without the court's permission, except by pro se persons proceeding in forma pauperis.

(2) Either proportionately spaced typeface or monospaced typeface may be used in a brief but proportionately spaced typeface is preferred.

(A) "A proportionately spaced typeface" is one in which the individual characters have individual advance widths. The design must be of a serifed, text, in roman style. For example, Dutch Roman, Times Roman, and Times New Roman are all proportionately spaced typefaces.

(B) "A monospaced typeface" is a typeface in which all characters have the same advance width and there are no more than 11 characters to an inch. For example, both a typewriter with Pica type, and Courier font in 12 point are both monospaced typefaces.

(3) A brief must be on either 8-1/2 by 11 inch paper or 6-1/8 by 9-1/4 inch paper.

(A) A brief on 8-1/2 by 11 inch paper

(i) using a proportionately spaced typeface must have margins of 1-1/4 inch on the sides and 1 inch on the top and bottom;

(ii) using a monospaced typeface must have margins of 1 inch on the sides and 1-1/4 inch on the top and bottom; and

(iii) must be double spaced, but quotations more than two lines long may be indented and single-spaced; headings and footnotes may be single-spaced.

(B) A brief on 6-1/8 by 9-1/4 inch paper

(i) must use proportionately spaced typeface;

(ii) must have typeface not exceeding 4-1/6 by 7-1/6 inches; and

(iii) must be single spaced or its equivalent in leading.

(4) A brief may use bold typeface only for covers, headings and captions. Case citations must be underlined unless a distinct italic typeface is used.

(5) Except by permission of the court, a principal brief must not exceed 14,000 words and a reply brief must not exceed 7,000 words, and in either case there must be on average no more than 280 words per page including footnotes and quotations. The word count shall not include the corporate disclosure statement, table of contents, table of citations, certificate of service and any addendum containing statutes, rules, regulations, etc. The brief must be accompanied by a certification of compliance with the word limits of this paragraph. In preparing this certificate, a party may rely upon the word count of the word processing system used to prepare the brief. No certificate is required if the brief is

(A) in at least 12 point proportionately spaced typeface and does not exceed

(i) 40 pages for a principal brief, or

(ii) 20 pages for a reply brief; or

(B) in monospaced typeface and does not exceed

(i) 50 pages for a principal brief, or

(ii) 25 pages for a reply brief.

(6) An appendix must be in the same form as a brief but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, a legible photocopy of any document found in the record may be included. The pages of the appendix must be separated by tabs, one for each document, or consecutively numbered.

In paragraph (a)(1), the draft provided that brief may be produced using both sides of the paper as long as the brief is clear and legible. This was responsive to one of the comments on the published rule. Two members of the Committee noted their circuits

had affirmatively rejected a suggestion that briefs be double sided. A motion was made that the rule be left silent on the issue of single or double-sided briefs, leaving determination of the issue to local rule. The motion was defeated by a vote of 3 to 5 so the double-sided provision remains in the draft.

Paragraph (a)(2) defined proportionately spaced and monospaced typefaces. The second and third sentences of (a)(2)(A) were amended to read as follows: "The design must be of a serifed, roman, text style. Examples are the Roman family of typefaces, Garamond, and Palatino." The second sentence of (a)(2)(B) was amended to read as follows: "Examples are Pica type and Courier font in 12 point."

In paragraph (a)(4) the words "bold typeface" were replaced by "boldface," and "[c]ase citations" was changed to "[c]ase names."

In paragraph (a)(5) the word limitation for a principal brief was reduced from 14,000 to 12,500, and for a reply brief, from 7,000 to 6,250. The 12,500 word limit corresponds to the new D.C. circuit rule. Also the charts presented during the testimony the preceding day indicated that courier font in 12 point produces approximately 250 words per page, so that a 50 page brief in courier font in 12 point would have approximately 12,500 words.

The page limits in the safe-harbor provisions in (a)(5) were lowered to 30 pages for a principal brief and 15 pages for a reply brief using a proportionately spaced typeface and to 40 pages for a principal brief and 20 pages for a reply brief using a monospaced type face. With regard to a brief prepared with a typewriter rather than a computer, it was recognized that such a person should be able to file a 50 page brief. But it was further recognized that unless such a brief was larded with footnotes, the certification could honestly be made without counting every word. If a typed brief is heavily footnoted, several members of the Committee felt that it would be appropriate to require the preparer to count all the words in order to make the certification.

The first sentence of paragraph (a)(6), regarding preparation of the appendix was amended to state: "An appendix must be in the same form as a brief but when an appendix is bound in volumes having pages 8-1/2 by 11 inches, a legible photocopy of any document found in the record or of a published court or agency decision may be included." The sentence requiring the pages of an appendix to be tabulated or consecutively numbered was omitted.

The remainder of the Rule was taken from the draft prepared prior to the meeting beginning at page 71 of the GAP materials.

On page 73, paragraph (b)(1) was omitted and paragraph (b)(3) was amended by making it applicable to a petition for rehearing, a suggestion for rehearing in banc, and any

response to either. The effect of those changes was to omit any cover requirements for those documents.

The Reporter was asked to consider all of subdivision (b) in light of the redrafting of subdivision (a) and to make the word limitation and certification requirements inapplicable to papers other than briefs.

May 1994 report of Appellate Rules Committee (available here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP5-1994.pdf ; proposed Rule 32 amendment starts at page 45 of the PDF):

Requests publication of a new Rule 32 proposal; this time,

The rule establishes new length limitations for briefs. A principal brief is limited to a total of 12,500 words and a reply brief may not exceed 6,250 words. In addition, the average number of words per page may not exceed 280 words. The latter limitation is included to ensure that the typeface used is sufficiently large to be easily legible.

June 1994 Standing Committee meeting (minutes here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-1994-min.pdf , with relevant part starting at p.12 of PDF):

The Standing Committee approves the proposal for publication.

April 1995 Appellate meeting (minutes here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/min-ap4.htm)[1]:

The advisory committee's discussion of comments on the length limits in proposed Rule 32 was as follows:

4. Length

Regarding the length limitation, twelve commentators opposed use of word limitations (both total words per brief and average number of words per page); one other opposed applying word limits to pro se litigants proceeding in forma pauperis. Another five commentators implicitly rejected the word limitations by saying that the rule should use page limits. A motion was made to use word counts. The motion passed unanimously.

[1] The copy of the agenda book posted on the AO site (here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Agenda%20Books/Appellate/AP1995-04.pdf), appears to have its pages out of order and may be incomplete. I was unable through word searches to find any comments pertinent to the length issues.

One commentator suggested that the word counts should be replaced by a character count because a character count eliminates the variations resulting from the different word counting methods used by software programs. Although various word processing programs count words differently, a difference of 200 or 300 words per brief is insignificant compared to the variation possible under the current rule. No motion was made to use a character count.

Having decided to retain word limits, Judge Logan asked whether the limits should be increased. Seven commentators objected to the 12,500 word limit in the published rule on the ground that it reduces the length below the traditional 50 page limit. The commentators suggested increasing the total number of words to 14,000 or 14,500. A motion was made and seconded to raise the limit to 14,000 words.

Some members of the Committee believed that even if 12,500 words is shorter than the traditional 50 page brief in pica type, that 12,500 words is sufficient. A local rule in the D.C. Circuit limits a principal brief to 12,500 words and that length seems sufficient. Other members of the Committee were concerned that some cases warrant a longer brief and that it is more of a problem to cut short helpful discussion than to have some briefs longer than need be. A longer, more complete brief can be of significant assistance to the court.

The Committee examined some of the sample brief pages prepared by Microsoft using proportional typefaces and complying with the 280 word per page limit in the published rule. The pages were attractive and easily legible. If each page has no more than 280 words, a 50 page brief would have 14,000 words. Although some members continued to support 12,500 as sufficient, it was argued that it would be better to provide more leeway because of the variation in word counting methods.

The motion to increase the word limit to 14,000 passed by a vote of 7 to 1.

The next issue considered was retention of the 280 words per page limit. Retention was unanimously approved.

The next day, the Committee discussed a proposed re-draft and decided to seek re-publication of that proposed re-draft.

June 1995 Appellate report (available here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP6-1995.pdf):

The report explains the proposed re-draft of the Rule 32 amendment as follows:

Rule 32 - Form of a Brief or Appendix

Rule 32 is amended in several significant ways.

a. The amended rule permits a brief to be produced using either a monospaced typeface or a proportionately spaced typeface. Monospaced and proportionately spaced typefaces are defined in the rule.

b. The provisions for pamphlet-sized briefs have been deleted.

c. All references to use of carbon copies have been deleted.

d. The rule establishes new length limitations for briefs which are defined separately for proportionately spaced briefs and monospaced briefs. A proportionately spaced brief is limited to a total of 14,000 words and a reply brief must not exceed 7,000 words. In addition, the average number of words per page must not exceed 280 words. The latter limitation is included to ensure that the typeface used is sufficiently large to be easily legible. The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. If a page count is used rather than a word count, a monospaced principal brief must not exceed 40 pages, and a reply brief must not exceed 20 pages.

e. The rule requires a certificate of compliance with the form, format, typeface, and length provisions of Rule 32(a)(1) through (4).

As explained in the proposed Committee Note, the 14,000-word limit was deemed the equivalent of 50 pages. In this iteration, the safe-harbor limit was set at 40 pages:

The length of a monospaced brief may be measured by the same word limits, both overall and per page, applicable to a proportionately spaced brief, or by the total number of pages. The Committee believes that the overall word limit of 14,000 words is the equivalent of a 50 page brief written with reasonable use of footnotes and single-spaced quotations. If the person preparing the brief does not want to certify the number of words in the brief, he or she may use the safe-harbor provision allowing 40 pages for a principal brief and 20 pages for a reply brief. The safe-harbor provision limits a monospaced principal brief to 40 pages rather 50 to prevent the use of the safe-harbor provision to produce a 50 page heavily footnoted brief or one containing extensive single-spaced quotations. No safe-harbor is provided for proportionately spaced briefs because they are ordinarily prepared on a computer and an exact word count is readily available.

July 1995 Standing Committee minutes (available here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST07-1995-min.pdf):

The Standing Committee decided to defer publication of the Rule 32 proposal pending further consideration of assorted drafting issues.

October 1995 Appellate minutes (here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/min-ap10.htm):

No relevant discussion.

December 1995 Appellate report to Standing Committee (available here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP12-1995.pdf)

Requests re-publication of yet another Rule 32 proposal (now folded into the restyling package). The safe-harbor limit is now down to 30 pages:

The rule establishes new length limitations for briefs. If page counting is used to measure the length of a brief, a principal brief may not exceed 30 pages, and a reply brief may not exceed 15 pages. Other counting methods that approximate the current 50 page limit are, however, permitted.

- A brief may have a total of 14,000 words as long as the average number of words per page does not exceed 280.
- Alternatively, a brief may have a total of 90,000 characters as long as the average number of characters per page does not exceed 1,800.
- A brief using monospaced typeface may have 1,300 lines of text.

The proposed Committee Note begins to resemble the Note that would ultimately accompany the final version. The Note states in part:

Paragraph (a)(7). Type-Volume Limitation.

Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a

typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50 page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30 page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

January 1996 Standing Committee minutes (here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/jan1996.pdf):

The Standing Committee approved the package (including Rule 32) for publication. The Rule 32 proposal was presented by Judge Easterbrook:

> Judge Logan stated that the advisory committee had adopted a draft revision of Rule 32 prepared by Judge Easterbrook. He asked Judge Easterbrook to summarize the changes.
>
> Judge Easterbrook stated that most of the features in the rule had been discussed by the Standing Committee at prior meetings. He had attempted to redraft the rule in light of various concerns expressed by committee members at the July 1995 meeting. He stated that the advisory committee's goal was to write a rule that would facilitate good practices by attorneys.
>
> The revised rule strived for both simplicity and equality. It used simpler terms than earlier drafts, although printers' terms could not be eliminated completely. The revision also achieved equality between those who use computers and those who use typewriters.
>
> Judge Easterbrook stated that uniformity was also an important objective of the rule.
>
> As revised, it would abrogate local rules that impose requirements not set forth in the national rule. Therefore, a brief that complied with the national rule would be acceptable in every court.
>
> On the other hand, the rule would allow the circuit courts to reduce requirements and accept documents not in full compliance with certain aspects of the national rule. For example, a brief in 14-point typeface would be acceptable everywhere, but a particular circuit court could authorize a brief printed in 12-point type.
>
> Judge Easterbrook stated that the advisory committee had deferred consideration of a proposed amendment to require attorneys to file with the court a copy of the computer disk used to prepare their brief.

As amended, the rule would also require an attorney certificate of compliance with the length limitations. The certificate would serve two practical functions: (1) It would make it clear to the clerk's office that the lawyer is aware of the requirements of the rule and has tried to comply with them. (2) The court could rely on the lawyer's certificate and the word count or character count of the word-processing system used to prepare the brief.

The revised rule also contains a safe harbor provision providing that a certificate of compliance is not required for a principal brief that does not exceed 30 pages in length.

April 1996 Appellate minutes (here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/AP0496.pdf):

Apparently no relevant discussion.

April 1997 Appellate minutes here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ap4-97.htm

The relevant discussion went as follows:

Rule 32

In addition to stylistic changes, several substantive changes were recommended in order to simplify the rule. First, the length limitations based on character counts were deleted because some word processing programs treat spaces and punctuation as characters, while other programs do not. Second, the requirement that the average number of words per page not exceed 280 words was deleted. Third, in 32(a)(5), the provision permitting footnotes to be in 12 point type was deleted. Fourth, in 32(a)(6) the restrictions on the use of boldface type and of all capitals were deleted.

There was discussion about reducing the word count from 14,000 to 13,000 because 14,000 is not a good equivalent to the old 50-page brief. Fourteen thousand is closer to the length of a professionally printed brief 50-page brief. One member pointed out that this rule had been quite controversial principally because lawyers suspected that we were trying to shorten the length of briefs. Over time the proposed rule has become less controversial. In order to avoid reopening the controversy, several members spoke in favor of retaining the 14,000 word limit. A majority favored staying with 14,000; therefore, the word limitation was not changed.

The commentator's suggestion that 32(d) be amended to emphasize that local variations concerning form are "one direction only" was discussed at length. Specifically the proposal was to state that a court may "waive" requirements but may not add to them. The suggestion was ultimately dismissed because the rule already makes it sufficiently clear that additional requirements may not cause a brief to be rejected.

There was discussion about the mixture of singular and plural nouns in the title of Rule 32. The Advisory Committee voted to make them all plural, but noted that the title of the rules do not consistently use either singulars or plurals. The Committee asked Bryan Garner to assume review of the titles.

The Advisory Committee noted that the Committee Note will need to be amended to conform to the changes made in the text of the rule. The Reporter was also asked to try to incorporate some of the examples found in the seventh circuit's explanation of its rule.

May 1997 Appellate report to Standing Committee (here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/AP5-1997.pdf):

The report summarizes a number of comments; the commenters do not specifically address the word / page conversion ratio. The proposed Rules 32(a)(7)(A) and (B), shown at page 316 of the PDF, track the language of the current Rule. The Committee Note provides in part:

Paragraph (a)(7). Type-Volume Limitation.

Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospaced typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50 page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available

with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30 page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

The length can be determined either by counting words, ~~characters~~, or lines. That is, the length of a brief is determined not by the number of pages but by the number of words, ~~characters~~, or lines in the brief. This gives every party the same opportunity to present an argument without regard to the typeface used and eliminates any incentive to use footnotes or typographical "tricks" to squeeze more material onto a page.

The word ~~or character~~ counting methods can be used with any typeface. One can choose to count either words or characters. A character count (count of each letter, number, punctuation mark, etc.) is highly consistent across word-processing programs but is not required by the rule because it is not easily done with some programs. A person using a typewriter, however, can easily determine the maximum number of characters per line and certify that the number of characters per page and in the brief does not exceed the maximum. (For example, a typewriter with pica type produces no more than 10 characters per inch. One line of text, therefore, has not more than 65 characters per line.) Different word-processing programs do not produce as consistent a word count, but the rule permits use of word counts because the variations from program to program are small and some programs do not count characters. The rule imposes not only an overall word/character limit (the number of words or characters in the brief) but also limits the average number of words or characters per page. This latter provision ensures legibility; it does not permit a person to squeeze too many words on a page.

A monospaced brief can meet the volume limitation by using the word or ~~character count, or a~~ line count. If the line counting method is used, the number of lines may not exceed 1,300 — 26 lines per page in a 50 page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.

June 1997 minutes of Standing Committee (here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ST06-1997-min.pdf)

The minutes provide in relevant part:

FED. R. APP. P. 32

Judge Logan said that following publication the advisory committee had made a few changes in Rule 32, governing the form of briefs.

The committee decided to retain 14-point typeface as the minimum national standard for briefs that are proportionally spaced. It had received many comments from appellate judges that the rule should require the largest typeface possible. But it then ameliorated the rule by giving individual courts the option of accepting briefs with smaller type fonts.

One of the members pointed out that the object of the advisory committee was to have a rule that governed all courts, making it clear that a brief meeting national standards must be

accepted in every court of appeals. There was, however, substantial disagreement as to what the specific national standards should be. The compromise selected by the advisory committee was to set forth the minimum standard of 14-point typeface—meeting the needs of judges who want large type—but allowing individual courts to permit the filing of briefs with smaller type if they so chose.

Judge Logan pointed out that the advisory committee had eliminated the typeface distinction between text and footnotes and the specific limitation on the use of boldface. He added that the rule as published had included a limit of 90,000 characters for a brief. The advisory committee discovered, however, that some word processing programs counted spaces as characters, while others did not. Accordingly, the committee eliminated character count in favor of a limit of 14,000 words or 1,300 monofaced lines of text. He pointed out that a 50-page brief would include about 14,000 words.

The committee voted without objection to approve the proposed amendments and send them to the Judicial Conference.

The minutes of the **fall 1997** Appellate Rules meeting (here: http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Minutes/ap9-97.htm) state:

> Judge Garwood made a series of announcements: Prof. Mooney, longtime Reporter to the Committee, has been appointed a member of the Committee, and Prof. Patrick J. Schiltz of Notre Dame Law School has been appointed to replace her as Reporter. Mr. Letter has replaced Mr. Robert E. Kopp as the representative of the Acting Solicitor General. Judge Alex Kozinski has resigned from the Committee; his replacement has not yet been appointed. Judge Stanwood R. Duval, Jr., of the Eastern District of Louisiana has been appointed to the Committee, but was unable to attend today's meeting. Judge Phyllis A. Kravitch will replace Judge Easterbrook as the liaison from the Standing Committee, and Mr. Fulbruge will replace Mr. Fisher as the liaison from the appellate clerks.
>
> Judge Logan explained that he technically remains Chair of the Advisory Committee until October 1, when Judge Garwood's appointment as Chair becomes effective. However, Judge Logan asked Judge Garwood to preside at today's meeting because the focus of the meeting will be to set priorities for Judge Garwood's tenure.

TAB 3

THIS PAGE INTENTIONALLY BLANK

TAB 3A

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

DATE: October 3, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

RE: Item No. 08-AP-R (disclosure requirements)

This item focuses on local circuit provisions that impose disclosure requirements beyond those set by the Appellate Rules. Some circuits require considerably more in the way of disclosure than do Appellate Rules 26.1[1] and 29(c).[2] The Committee has begun to discuss whether any of those additional requirements should be considered for inclusion in the national Rules.

Since the time of the Committee's spring meeting, Judge Chagares, Neal Katyal, and Kevin Newsom agreed to act as working group to advance the inquiry into this question. I enclose my August 19, 2014 memo (which sketches a typology of local disclosure requirements); a September 10, 2014 memo by Mr. Newsom and Mary Ann Couch; and a September 15, 2014 memo by Professor Katyal and Sean Marotta.[3] The members of the working group generously devoted their time to analyze the topics identified in my August memo. Topics 1 and 2 (ownership interests in a party; and other affiliations with a party) form the focus of the Katyal & Marotta memo. Topics 3 through 6 (intervenors; amici; and other financial interests) are treated in the Newsom & Couch memo. Judge Chagares's guidance on Topics 7 through 9 (connections with participants in the litigation; criminal appeals; and bankruptcy appeals) is reflected in Part II of this memo.[4]

---

[1] Appellate Rule 26.1(a) provides: "Any nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."

[2] Appellate Rule 29(c)(1) requires corporate amici to provide "a disclosure statement like that required of parties by Rule 26.1." Rule 29(c)(4) requires the amicus to state "the identity of the amicus curiae, its interest in the case, and the source of its authority to file." Rule 29(c)(5) requires nongovernmental amici to disclose information about the authorship and funding of the brief.

[3] I also enclose copies of 28 U.S.C. §§ 455 and 47 and Canon 3 of the Code of Conduct for United States Judges.

[4] In Part II, I combine the insights provided by Judge Chagares with my own additional comments. Judge Chagares did not have an opportunity to review this memo prior to its inclusion in the agenda book, and any errors are mine.

Part I of this memo highlights a few areas for the Committee's attention. The Subcommittee's deliberations suggest that consideration of these areas may prove particularly worthwhile.

I. Suggested topics for Committee discussion

Participants in the subcommittee deliberations focused first on the topic of criminal appeals. There was a consensus that Appellate Rule 26.1(a)'s disclosure requirement should be read to encompass corporate defendants in criminal cases; as noted in Part II.B of this memo, there are some indications of non-compliance with that requirement in such cases, but compliance may improve now that the Circuit Clerks' attention has been drawn to the issue. Participants also suggested that it would be useful to consider adopting, in the Appellate Rules, an organizational-victim disclosure requirement like that currently included in Criminal Rule 12.4.

With respect to the topics treated in the Katyal / Marotta memo, the subcommittee's discussion focused on forms of ownership other than stock. Although some participants believed that current Appellate Rule 26.1(a) should elicit disclosure of such alternative forms of ownership, it is not clear that all attorneys would understand the current rule to encompass such forms. It might be worthwhile to consider whether the Rule might be amended to refer to "any publicly held *entity* that owns 10% or more of *an ownership interest* in the party."

As to the topics addressed in the Newsom / Couch memo, discussion focused first on intervenors. Although intervention at the appellate stage may be somewhat rare, it would seem that once intervention is granted, the intervenor ought to be subject to the same disclosure requirements as any party. Discussion of disclosures required of amici highlighted the fact that decisions in this area would be aided by additional guidance concerning the ways in which an amicus's involvement could affect a judge's recusal obligations.

II. Analysis of Topics 7 through 9

As noted above, Judge Chagares shared with the subcommittee members his analysis of Topics 7 through 9. I summarize that analysis here, along with some further comments of my own.

A. Connection with a prior or current participant in the litigation

A judge's connection to a lawsuit or to a party, attorney, or litigant may require a judge to recuse herself. For instance, "[n]o judge shall hear or determine an appeal from the decision of a case or issue tried by him."[5] A judge must also recuse himself in cases where "he served as lawyer in the matter in controversy,"[6] or in the case of government employment, where he "participated as counsel, adviser or material witness concerning

[5] 28 U.S.C. § 47.
[6] 28 U.S.C. § 455(b)(2).

the proceeding or expressed an opinion concerning the merits of the particular case in controversy."[7] Finally, a judge must recuse when she is a party (or officer, director or trustee of a party),[8] has "personal knowledge of disputed evidentiary facts concerning the proceeding,"[9] or has been a material witness.[10]

A recusal obligation may also arise in less direct ways. For example, a judge must recuse if "a lawyer with whom he previously practiced law" was involved with the case during their association or that lawyer has been a material witness in the case.[11] A judge must also recuse himself in cases where he or his spouse,[12] as well as all persons within three degrees of relationship to either of them, or the spouse of such a person, (1) is a party or attorney in a proceeding, or (2) is known to the judge to have an interest in the proceeding or is likely to be a material witness in the proceeding.[13]

Two circuits require disclosures concerning a judge's prior participation in the case, though neither of those local provisions covers all possible instances of such participation. The Third Circuit's requirement that the litigants file a disclosure "[i]f any judge *of this court* participated at any stage of the case, in the trial court or in related state court proceedings"[14] covers many possible instances of a judge's own prior participation, but does not account for the fact that district judges and judges from other circuits frequently sit by designation on the Third Circuit. The Eleventh Circuit, by requiring "a complete list of the trial judge(s),"[15] addresses both the possibility that a judge sitting on the court of appeals might have participated as a trial judge[16] and the possibility that a judge sitting on the court of appeals might be related to one who participated as a trial judge; the Eleventh Circuit provision, however, does not address the possibility that a circuit judge might have participated in a related state-court proceeding.

Five circuits' disclosure requirements seek information about lawyers' participation in the case. The Eleventh Circuit's requirement is the broadest: it requires

---

[7] *Id.* § 455(b)(3).
[8] *Id*. § 455(b)(5)(i).
[9] *Id*. § 455(b)(1).
[10] *Id*. § 455(b)(2).
[11] *Id*. § 455(b)(2).
[12] "Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship." Code of Conduct for United States Judges, Canon 3(C) cmt. (2014).
[13] 28 U.S.C. § 455(b)(5). *See also* Canon 3C(1)(c) (requiring recusal when the judge knows that he, his spouse, or his minor child residing in the judge's household "has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding.").
[14] Third Circuit Local Appellate Rule 26.1.2(a) (emphasis added).
[15] Eleventh Circuit Rule 26.1-1. Presumably the term "trial judge" encompasses magistrate judges as well as district judges.
[16] This could occur if a circuit judge sat by designation on the district court or if a newly-appointed circuit judge had previously been a district judge or magistrate judge.

disclosure of "all attorneys" (and others) "that have an interest in the outcome of a particular case or appeal."[17] This provision may leave readers unsure what constitutes an "interest."[18] The four other circuits' provisions, with some variations in focus, seek information about attorneys and/or firms that have previously appeared;[19] such requirements do not seem likely to be overly burdensome for litigants and would provide valuable information.

B. Disclosures in criminal appeals

A review of local circuit provisions concerning disclosures in criminal appeals reveals two areas of interest – first, corporate defendants, and second, victims.

When a corporate defendant is a party to an appeal in a criminal case, current Appellate Rule 26.1(a) would appear by its terms to require the usual disclosures from that corporate party.[20] However, an informal survey of the Circuit Clerks revealed that, in some instances, attorneys have resisted complying with this disclosure requirement and have asserted that Appellate Rule 26.1 does not apply in criminal cases. Such resistance may explain why two circuits have felt the need to reinforce the national rule with local provisions imposing a corporate-disclosure requirement in criminal appeals.[21]

---

[17] Eleventh Circuit Rule 26-1.1 states that the disclosure must list "all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal ...."

[18] By contrast, some other circuits require disclosures of those with *financial* interests. For example, Fifth Circuit Rule 28.2.1 requires a "certificate of interested persons" that provides "a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation."

[19] The Fifth Circuit's rule focuses on *opposing* counsel, whereas the Seventh Circuit's rule focuses on counsel for the *disclosing litigant*. *Compare* Fifth Circuit Rule 28.2.1(stating that disclosure must "list the names of opposing law firms and/or counsel in the case") *with* Seventh Circuit Rule 26.1(b) ("The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court."). The Tenth Circuit's rule focuses on *attorneys*, whereas the Federal Circuit's rule also requires disclosure concerning *firms*. *Compare* Tenth Circuit Rule 46.1(D)(4) ("Attorneys not entering an appearance in this court must be listed if they have appeared for any party in a proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court.") *with* Federal Circuit Rule 47.4(a)(4) (disclosure must list "[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").

[20] See footnote 1, *supra*, for the text of Rule 26.1(a).

[21] Fourth Circuit Rule 26.1(a)(1)(B) provides: "A corporate party in a criminal or post-conviction case must file a disclosure statement." Sixth Circuit Rule 26.1(a) provides in part: "[A]ll corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual

On the other hand, prosecutions of corporations are relatively rare, and the survey of the Circuit Clerks may have served the function of raising awareness of this issue and generating additional enforcement of the current rule.

In contrast to the requirement of disclosure by corporate *parties*, Appellate Rule 26.1 does not require disclosures concerning crime *victims*. In this respect, the Appellate Rules differ from the Criminal Rules, which – in addition to imposing a corporate-party disclosure requirement that mirrors Appellate Rule 26.1 – require disclosures concerning "[o]rganizational [v]ictim[s]." Criminal Rule 12.4(a) provides:

> (1) Nongovernmental Corporate Party. Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.
>
> (2) Organizational Victim. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

The Third Circuit imposes an organizational-victim disclosure requirement by local rule.[22] The Eleventh Circuit requires disclosure of all victims' identities.[23]

Such disclosure requirements seem sensible. It is certainly possible that a judge's interest in or relationship with a victim could require a judge's recusal. *See, e.g.*, *United States v. Lauersen*, 348 F.3d 329, 336-37 (2d Cir. 2003) ("[W]e believe that recusal is required only where the extent of the judge's interest in the crime victim is so substantial, or the amount that the victim might recover as restitution is so substantial, that an objective observer would have a reasonable basis to doubt the judge's impartiality."), *aff'd on other grounds on reh'g*, 362 F.3d 160 (2d Cir. 2004), *judgment vacated on other grounds*, 543 U.S. 1097 (2005). Such a case might involve a judge granting a victim restitution. *See United States v. Rogers*, 119 F.3d 1377, 1384 (9th Cir. 1997) (discussing the possibility of recusal because the judge owned stock in the victim bank that received restitution but holding that, under the circumstances, recusal was not required).

---

criminal defendants."

[22] Third Circuit Local Appellate Rule 26.1.1(d) provides:

> In criminal appeals, the government must file a disclosure statement if an organization is a victim of the crime. If the organizational victim is a corporation, the statement must also identify any parent corporation and any publicly held corporation that owns 10% or more of its stock to the extent it can be obtained through due diligence. The government may seek to be relieved from the requirements of this rule by filing a motion demonstrating that compliance is impossible.

[23] Eleventh Circuit Rule 26.1-1 provides: "In criminal and criminal-related appeals, the certificate shall also disclose the identity of the victim(s)."

C. Disclosures in bankruptcy appeals

Bankruptcy appeals present distinct issues concerning disclosures. Not all of those involved in a bankruptcy proceeding are considered "parties to the proceeding" that a judge must consider in determining whether to recuse.[24] Advisory Opinion No. 100, Identifying Parties in Bankruptcy Cases for Purposes of Disqualification (June 2009), is helpful in sorting out who is a party in the proceeding for bankruptcy purposes. That Advisory Opinion recognizes that "simply being a creditor or an interest holder of a bankruptcy estate is not a sufficient interest to make that creditor 'a party to the proceeding'" and "the acts of filing a proof of claim, or submitting a ballot on a proposed plan of reorganization" will similarly not "raise the creditor or interest holder to the status of a party. It takes something more." The Advisory Opinion then identifies who is "a party": (1) the debtor, (2) members of the creditors' committee, (3) the trustee, (4) parties to an adversary proceeding, and (5) participants in a contested matter.[25]

The Third Circuit's local rule accords with this guidance; the rule requires the debtor or trustee to disclose "(1) the debtor, if not named in the caption, (2) the members of the creditors' committees or the top 20 unsecured creditors, and (3) any entity not named in the caption which is an active participant in the proceeding."[26] The Eleventh Circuit has a very similar rule, but adds the requirement to disclose "other entities whose stock or equity value may be substantially affected by the outcome of the proceeding."[27]

Encls.

---

[24] *See* Canon 3(C)(1)(c), (d) (requiring, inter alia, recusal when the judge, his spouse, and certain relations are a "party to the proceeding" or have a financial interest in such a party).

[25] Although there is "the possibility that a creditor or interest holder's status may at some time change to a 'party,'" Advisory Opinion 100, that is less likely to occur once the case reaches the court of appeals.

[26] Third Circuit Local Appellate Rule 26.1.1(c). *See also* Third Circuit IOP 11.2.2(b) ("Ownership of a small percentage of the outstanding shares of a publicly traded corporation that is listed as a creditor of the bankrupt who is a party to the lawsuit is not a 'financial interest' in the subject matter in controversy or in a party to the proceeding unless the owner has an interest that can be substantially affected by the outcome of the proceeding.").

[27] Eleventh Circuit Rule 26.1-1.

TAB 3B

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

DATE: August 19, 2014

TO: Subcommittee on disclosure requirements

FROM: Catherine T. Struve, Reporter

RE: Topics for investigation

Thank you very much for your willingness to contribute to this project. Here is a list of the ways in which local circuit provisions add requirements beyond those set by Appellate Rules 26.1 and 29(c)(1). I include an appendix setting forth the key provisions cited here.[1] I have tried to sort the provisions thematically; thus, some provisions appear in more than one part of the list. This memo is somewhat long, so I am including a table of contents for easier reference:

Table of Contents

[1] I also have compiled a spreadsheet that contains a more comprehensive list of local circuit provisions, including peripheral provisions not included in the appendix. Please let me know if you would like a copy of that spreadsheet.

Detailed List of Topics

1. Disclosures concerning ownership interests in a party

a. Provisions requiring disclosures ***by*** parties other than corporations[2]

i. Associations. See D.C. Circuit Rule 26.1(a).

ii. Joint ventures. See D.C. Circuit Rule 26.1(a).

iii. Partnerships. See D.C. Circuit Rule 26.1(a).

iv. Syndicates. See D.C. Circuit Rule 26.1(a).

v. "Other similar entit[ies]." See D.C. Circuit Rule 26.1(a).

vi. Parties generally

(1) Tenth Circuit Rule 46.1(D)(1) ("Each entry of appearance must be accompanied by a certificate" making specified disclosures).

[2] Some of these provisions require disclosures beyond ownership interests.

(2) Eleventh Circuit Rule 26.1-1 (requiring specified disclosures by "appellants, appellees, intervenors and amicus curiae, including governmental parties").

vii. Parties generally, with specified exclusions

(1) Fourth Circuit Rule 26.1(a)(1)(A): "A party in a civil, agency, bankruptcy, or mandamus case, other than the United States or a party proceeding in forma pauperis, must file a disclosure statement, except that a state or local government is not required to file a disclosure statement in a case in which the opposing party is proceeding without counsel."

(2) Fifth Circuit Rule 28.2.1: "Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees ...."

(3) Sixth Circuit Rule 26.1(a): "With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants."

(4) Seventh Circuit Rule 26.1(a): "Every attorney for a non-governmental party or amicus curiae, and every private attorney representing a governmental party, must file a statement under this rule."

(5) Federal Circuit Rule 47.4(a): "To determine whether recusal by a judge is necessary or appropriate, an attorney--except an attorney for the United States--for each party, including a party seeking or permitted to intervene, and for each amicus curiae, must file a certificate of interest."

b. Provisions requiring disclosure ***of*** ownership interests (other than ownership by a parent corporation or public corporation owning 10% of party's stock)

i. Parent "companies"

(1) See D.C. Circuit Rule 26.1(a); *see also id.* (defining "parent companies" to "include all companies controlling the specified

entity directly, or indirectly through intermediaries").[3]

ii. Publicly-held "companies" that hold 10% or greater ownership interest in the party

(1) See D.C. Circuit Rule 26.1(a) (requiring disclosure of "any publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in the entity").

iii. Publicly held entities other than corporations

(1) Fourth Circuit Rule 26.1(a)(2)(C): "Whenever required by FRAP 26.1 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded, or state that there are no such entities."

c. Provisions requiring specific information concerning a corporation

i. Eleventh Circuit Rule 26.1-3(c): "A corporate entity must be identified by its full corporate name as registered with a secretary of state's office and, if its stock is publicly listed, its stock ("ticker") symbol must be provided after the corporate name."

2. Provisions requiring disclosure of other affiliations with a party[4]

a. Third Circuit Local Appellate Rule 26.1.1(a): "... [E]ach corporation that is a party to an appeal, whether in a civil, bankruptcy, or criminal case, must file a corporate affiliate/financial interest disclosure statement on a form provided by the clerk that identifies every publicly owned corporation with which it is affiliated but which is not named in the appeal. The form must be completed

---

[3] This definition of "parent" appears to accord with Appellate Rule 26.1. See 1998 Committee Note to Appellate Rule 26.1(a) ("[Appellate Rule 26.1(a)] requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well.").

[4] On the subject of a party's affiliates, see the 1998 Committee Note to Appellate Rule 26.1(a): "[D]isclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation."

whether or not the corporation has anything to report."

b. Sixth Circuit Rule 26.1(b)(1): "Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation."

c. Eleventh Circuit Rule 26-1.1: Disclosure must list "all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party."

3. Provisions requiring disclosures by intervenors

i. D.C. Circuit Rule 12(f) ("Any disclosure statement required by Circuit Rule 26.1 must accompany a motion to intervene....").

ii. Fourth Circuit Rule 26.1(a)(2) (listing "Information to Be Disclosed by Parties, Including Intervenors.").

iii. Eleventh Circuit Rule 26.1-1 (requiring specified disclosures by "appellants, appellees, intervenors and amicus curiae, including governmental parties").

4. Provisions requiring disclosures regarding amici

a. Requiring disclosures by amici other than corporations

i. Associations. See D.C. Circuit Rule 26.1(a).

ii. Joint ventures. See D.C. Circuit Rule 26.1(a).

iii. Partnerships. See D.C. Circuit Rule 26.1(a).

iv. Syndicates. See D.C. Circuit Rule 26.1(a).

v. "Other similar entit[ies]." See D.C. Circuit Rule 26.1(a).

vi. All amici

(1) Eleventh Circuit Rule 26.1-1 (requiring specified disclosures by "appellants, appellees, intervenors and amicus curiae, including governmental parties"). See also Eleventh Circuit Rule 29-1 ("Motions for leave to file a brief of amicus curiae must comply with FRAP 27 and 11th Cir. R. 27-1, including the requirement of a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules.").

(2) Federal Circuit Rule 29(a): "(a) Content; Form. In addition to the contents required by Federal Rule of Appellate Procedure 29, the brief of an amicus curiae must include a certificate of interest (see Federal Circuit Rule 47.4) in front of the table of contents."

vii. All amici with specified exceptions.

(1) Sixth Circuit Rule 26.1(a): "With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement....."

(2) Seventh Circuit Rule 26.1(a): "Every attorney for a non-governmental party or amicus curiae, and every private attorney representing a governmental party, must file a statement under this rule."

b. Requiring disclosure of those with ownership interests in an amicus (other than ownership by a parent corporation or public corporation owning 10% of amicus's stock)

i. Parent "companies." See D.C. Circuit Rule 26.1(a); *see also id.* (defining "parent companies" to "include all companies controlling the specified entity directly, or indirectly through intermediaries").[5]

[5] This definition of "parent" appears to accord with Appellate Rule 26.1. See 1998 Committee Note to Appellate Rule 26.1(a) ("[Appellate Rule 26.1(a)" requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as

ii. Publicly-held "companies" that hold 10% or greater ownership interest in the amicus. See D.C. Circuit Rule 26.1(a) (requiring disclosure of "any publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in the entity").

c. Requiring disclosure of other affiliates of amici

i. Sixth Circuit Rule 26.1(b)(1): "Whenever a corporation ... which appears as amicus curiae[] is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is [an] amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is [an] amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation."

d. Requiring amici to disclose interested entities

i. Fourth Circuit Rules 26.1(b)(2), (a)(2)(B), & (a)(2)(C) (applying to corporate amici the local disclosure requirement about publicly held entities with direct financial interests in the litigation).

ii. Fifth Circuit Rule 29.2: ".... The brief must include a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief...."

iii. Sixth Circuit Rule 26.1(b)(2): "Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the ... amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation."

e. Requiring disclosure of amicus's lawyers

i. Seventh Circuit Rule 26.1(b): "The statement must disclose the names of

---

well.").

all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court."

5. Disclosure of other financial interests in the litigation

   a. [Public corporations / publicly held entities / persons] with financial interests in the litigation

      i. Third Circuit Local Appellate Rule 26.1.1(b): "Every party to an appeal must identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest...."

      ii. Fourth Circuit Rule 26.1(a)(2)(B): "A party must identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or state that there is no such corporation."

         (1) See also Fourth Circuit Rule 26.1.(a)(2)(C) (reporting requirements about publicly held corporations also require same "information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded").

      iii. Fifth Circuit Rule 28.2.1: Disclosure "must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation."

         (1) See also Fifth Circuit Rule 28.2.1(a) ("Each certificate must list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court."); Fifth Circuit Rule 28.2.1(b) (directing counsel to "list names of all [financially interested] persons and entities and identify their connection and interest").

      iv. Sixth Circuit Rule 26.1(b)(2): "Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the

party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation."

v. Tenth Circuit Rules 46.1(D)(1) ("Each entry of appearance must be accompanied by a certificate listing the names of all interested parties not in the caption of the notice of appeal so that the judges may evaluate possible disqualification or recusal.") & 46.1(D)(2) ("The certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation. For corporations, see Fed. R. App. P. 26.1.").

vi. Eleventh Circuit Rule 26-1.1: Disclosure must list "all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party."

b. See also Third Circuit IOP 11.2.2(c) ("An insurance policy issued to a judge or a member of his or her family is not a 'financial interest' in the insurance company.").

6. Identity and nature of parties

a. Pseudonymous parties

i. Seventh Circuit Rule 26.1(b): " If any litigant is using a pseudonym, the statement must disclose the litigant's true name. A disclosure required by the preceding sentence will be kept under seal."

b. Real parties in interest

i. Federal Circuit Rule 47.4(a)(2): Disclosure must include "[t]he name of the real party in interest if the party named in the caption is not the real party in interest."

c. Nature and purpose of entity

i. See D.C. Circuit Rule 26.1(b) (disclosure statement by corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus "must identify the represented entity's

general nature and purpose, insofar as relevant to the litigation").

d. Unincorporated entity's members

i. See D.C. Circuit Rule 26.1(b) (disclosure by "an unincorporated entity whose members have no ownership interests" must "include the names of any members of the entity that have issued shares or debt securities to the public," except for "the names of members of a trade association or professional association"); see also id. (defining "trade association" as "a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership").

e. Trade associations

i. Fourth Circuit Rule 26.1(a)(2)(D): "A party trade association must identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member."

ii. See also D.C. Circuit Rule 26.1(b) (quoted in Part 6.d, supra).

iii. See also Third Circuit IOP 11.2.2(a): "With respect to 'financial interest' as used in 28 U.S.C. § 455, ownership of a small percentage of the outstanding shares of a publicly traded corporation which is a member of a trade association that is a party to the lawsuit is not a 'financial interest' in the subject matter in controversy or in a party to the proceeding unless the owner has an interest that can be substantially affected by the outcome of the proceeding."

7. Connection with prior or current participant in the litigation

a. Judge's prior participation

i. Third Circuit Local Appellate Rule 26.1.2(a): "If any judge of this court participated at any stage of the case, in the trial court or in related state court proceedings, appellant, promptly after filing the notice of appeal, must separately file with the clerk a notice of the name of the judge and the other action, and must send a copy of such notice to appellee's counsel. Appellee has a corresponding responsibility to so notify the clerk if, for any reason, appellant fails to comply with this rule fully and accurately."

ii. Eleventh Circuit Rule 26.1-1: Disclosure must include "a complete list of

the trial judge(s)."

b. Litigants' participation

i. See D.C. Circuit Rule 28(a)(1)(A) ("The appellant or petitioner must furnish a list of all parties, intervenors, and amici who have appeared before the district court, and all persons who are parties, intervenors, or amici in this court....").

c. Lawyers' participation

i. Fifth Circuit Rule 28.2.1: Disclosure must "list the names of opposing law firms and/or counsel in the case."

ii. Seventh Circuit Rule 26.1(b): "The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court."

iii. Tenth Circuit Rule 46.1(D)(4): "Attorneys not entering an appearance in this court must be listed if they have appeared for any party in a proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court."

iv. Eleventh Circuit Rule 26-1.1: Disclosure must list "all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal ...."

v. Federal Circuit Rule 47.4(a)(4): Disclosure must list "[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."

d. Related cases[6]

i. D.C. Circuit Rule 28(a)(1)(C) (requiring "[a] statement indicating whether the case on review was previously before this court or any other court and, if so, the name and number of such prior case. The statement must also contain similar information for any other related cases currently pending

[6] Obviously, information concerning related cases may be relevant to questions other than judicial recusal, but I include this category because it could be germane to a judge's connection to a case.

in this court or in any other court of which counsel is aware.... If there are no related cases, the certificate must so state."); see also id. ("For purposes of this rule, the phrase 'any other court' means any other United States court of appeals or any other court (whether federal or local) in the District of Columbia. The phrase 'any other related cases' means any case involving substantially the same parties and the same or similar issues.").

ii. See also Ninth Circuit Rule 28-2.6 (requiring disclosure of "any known related case pending in this Court"); id. (defining "related" cases to include "cases previously heard in this Court which concern the case being briefed").

8. Disclosures in criminal appeals

a. As a point of comparison, Criminal Rule 12.4(a) provides:

(1) Nongovernmental Corporate Party. Any nongovernmental corporate party to a proceeding in a district court must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

(2) Organizational Victim. If an organization is a victim of the alleged criminal activity, the government must file a statement identifying the victim. If the organizational victim is a corporation, the statement must also disclose the information required by Rule 12.4(a)(1) to the extent it can be obtained through due diligence.

b. Corporate party

i. Fourth Circuit Rule 26.1(a)(1)(B): "A corporate party in a criminal or post-conviction case must file a disclosure statement."

ii. Sixth Circuit Rule 26.1(a): "With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants."

c. Victim

i. Eleventh Circuit Rule 26.1-1: " In criminal and criminal-related appeals, the certificate shall also disclose the identity of the victim(s)."

d. Organizational victim

i. Third Circuit Local Appellate Rule 26.1.1(d): "In criminal appeals, the government must file a disclosure statement if an organization is a victim of the crime. If the organizational victim is a corporation, the statement must also identify any parent corporation and any publicly held corporation that owns 10% or more of its stock to the extent it can be obtained through due diligence. The government may seek to be relieved from the requirements of this rule by filing a motion demonstrating that compliance is impossible."

9. Disclosures in bankruptcy appeals[7]

a. Debtor

i. Third Circuit Local Appellate Rule 26.1.1(c) (debtor, if not named in caption).

ii. Eleventh Circuit Rule 26.1-1 (debtor).

b. Creditors' committees / top unsecured creditors

i. Third Circuit Local Appellate Rule 26.1.1(c) ("the members of the creditors' committees or the top 20 unsecured creditors"). See also Third Circuit IOP 11.2.2(b) ("Ownership of a small percentage of the outstanding shares of a publicly traded corporation that is listed as a creditor of the bankrupt who is a party to the lawsuit is not a 'financial interest' in the subject matter in controversy or in a party to the proceeding unless the owner has an interest that can be substantially affected by the outcome of the proceeding.").

ii. Eleventh Circuit Rule 26.1-1 ("members of the creditor's committee").

c. Active participants in the proceeding

i. Third Circuit Local Appellate Rule 26.1.1(c) ("any entity not named in the

[7] As a (perhaps somewhat remote) point of comparison, Bankruptcy Rule 7007.1(a) provides: "Any corporation that is a party to an adversary proceeding, other than the debtor or a governmental unit, shall file two copies of a statement that identifies any corporation, other than a governmental unit, that directly or indirectly owns 10% or more of any class of the corporation's equity interests, or states that there are no entities to report under this subdivision."

caption which is an active participant in the proceeding").

ii. Eleventh Circuit Rule 26.1-1 ("any entity which is an active participant in the proceedings").

d. Other interested entities

i. Eleventh Circuit Rule 26.1-1 ("other entities whose stock or equity value may be substantially affected by the outcome of the proceedings").

10. Timing of disclosures (earlier or otherwise distinct from FRAP)

a. Appellate Rule 26.1(b) requires the Rule 26.1(a) statement to be filed with the party's principal brief or with any earlier motion, response, petition, or answer in the court of appeals. FRAP 26.1(b) explicitly invites local rulemaking to set an earlier deadline. A number of circuits do set earlier deadlines:

b. D.C. Circuit Rule 12(c) (provisional version of the certificate required by D.C. Circuit Rule 28(a)(1) must be attached to docketing statement); D.C. Circuit Rule 28(a)(1)(A) (certificate must state parties, intervenors, and amici, and must include D.C. Circuit Rule 26.1 disclosure if required). See also D.C. Circuit Rule 12(f) ("Within 7 days of service of the docketing statement, an appellee must file with the court any statement required by Circuit Rule 26.1. "); D.C. Circuit Rule 15(c) (timing in administrative-review matters).

c. Third Circuit Rule 26.1.1(a) ("Promptly after the notice of appeal is filed, each corporation that is a party to an appeal ... must file a corporate affiliate/financial interest disclosure statement on a form provided by the clerk that identifies every publicly owned corporation with which it is affiliated but which is not named in the appeal....").

d. Fourth Circuit Rule 26.1(d): "A party's disclosure statement must be filed within 14 days of docketing of the appeal, unless earlier pleadings are submitted for the Court's consideration, in which case the disclosure statement shall be filed at that time."

e. Seventh Circuit Rule 26.1(c): "The statement under this rule and Fed. R. App. P. 26.1 must be filed no later than 21 days after docketing the appeal, with a party's first motion or response to an adversary's motion, or when directed by the court, whichever time is earliest. A disclosure statement also must accompany any petition for permission to appeal under Fed. R. App. P. 5 and must be included with each party's brief. See Fed. R. App. P. 28(a)(1), (b)."

f. Eighth Circuit Rule 26.1A: "The Corporate Disclosure Statement must be filed

within 7 days after receipt of notice that the appeal has been docketed in this court."

g. Tenth Circuit Rules 46.1(A) ("Within 14 days after an appeal or other proceeding is filed, counsel for the parties must file written appearances ....") & 46.1(D)(1) ("Each entry of appearance must be accompanied by a certificate listing the names of all interested parties not in the caption of the notice of appeal so that the judges may evaluate possible disqualification or recusal.").

h. Eleventh Circuit Rule 26.1-2(a): "The certificate described in 11th Cir. R. 26.1-1 must be filed by the appellant (and cross-appellant) with this court within 14 days after the date the appeal is docketed in this court, or along with the filing in this court by any party of any motion, petition, or pleading, whichever occurs first."

   i. See also Eleventh Circuit Rules 26.1-2(c) (requiring opponent's response to initial certification); 26.1-2(d) (providing in alternative for joint certificate by parties).

i. Federal Circuit Rule 26.1: "The corporate disclosure statement must be included in the certificate of interest prescribed in Federal Circuit Rule 47.4. A certificate of interest must be filed by any party represented by counsel within 14 days of the date of docketing of the appeal or petition. See Federal Circuit Rule 47.4 for additional requirements."

   i. See also Federal Circuit Rule 47.4(a) ("The certificate of interest must be filed within 14 days of the date of docketing of the appeal or petition, except that for an intervenor or amicus curiae, the certificate of interest must be filed with the motion and with the brief."); Federal Circuit Rule 47.4(b) ("The certificate must be filed with the entry of appearance. The certificate--first filed--must also be filed with each motion, petition, or response thereto, and in each principal brief and brief amicus curiae.").

11. Distinct local supplementation requirements

a. Seventh Circuit Rule 26.1(d): "Counsel must file updated disclosure statements under this rule and Fed. R. App. P. 26.1 within 14 days of any change in the information required to be disclosed."

b. Eleventh Circuit Rule 26.1-2(f): "After a party has filed its initial certificate, that party is required to notify the court immediately of any additions, deletions, corrections or other changes that should be made to its certificate. A party must do so by filing an amended certificate with the court or by including an amended certificate with a party's brief, petition, answer, motion or response. A party must: (1) prominently indicate on the amended certificate the fact that it has been

amended, and (2) must clearly identify the person or entity that has been added, deleted, corrected or otherwise changed."

i. See also Eleventh Circuit Rule 26.1-2(h) (requiring opponent's response to amendment deleting person or entity from a certificate).

c. Federal Circuit Rule 47.4(c): "If any of the information required in Federal Circuit Rule 47.4(a) changes after the certificate is filed and before the mandate has issued, the party must file an amended certificate within 7 days of the change."

12. Enforcement of disclosure requirement

a. Eleventh Circuit Rule 26.1-2(e): "The certificate described in 11th Cir. R. 26.1-1 must be included within the principal brief filed by any party and also must be included in any petition, answer, motion or response filed by any party. The clerk is not authorized to submit to the court any brief (except for the reply brief of an appellant or cross-appellant), petition, answer, motion or response that does not contain the certificate, but may receive and retain the papers pending supplementation of the papers with the required certificate."

b. See also Eleventh Circuit IOP 26.1-3 ("The court will not act upon any papers requiring a Certificate of Interested Persons and Corporate Disclosure Statement, including emergency filings, until the certificate is filed, except to prevent injustice.").

THIS PAGE INTENTIONALLY BLANK

Appendix: Key local provisions relating to disclosure requirements

Cite	Provision
D.C. Circuit Rule 26.1	(a) A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus curiae in any proceeding must file a disclosure statement, at the time specified in FRAP 26.1; Circuit Rules 5, 8, 12, 15, 18, 21, 27, and 35(c); or as otherwise ordered by the court, identifying all parent companies and any publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in the entity. A revised corporate disclosure statement must be filed any time there is a change in corporate ownership interests that would affect the disclosures required by this rule. For the purposes of this rule, "parent companies" include all companies controlling the specified entity directly, or indirectly through intermediaries. (b) The statement must identify the represented entity's general nature and purpose, insofar as relevant to the litigation. If the entity is an unincorporated entity whose members have no ownership interests, the statement must include the names of any members of the entity that have issued shares or debt securities to the public. No such listing need be made, however, of the names of members of a trade association or professional association. For purposes of this rule, a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

D.C. Circuit Rule 28(a)(1)	(a) Contents of Briefs: Additional Requirements. Briefs for an appellant/petitioner and an appellee/respondent, and briefs for an intervenor and an amicus curiae, must contain the following in addition to the items required by FRAP 28: (1) Certificate. Immediately inside the cover and preceding the table of contents, a certificate titled "Certificate as to Parties, Rulings, and Related Cases," which contains a separate paragraph or paragraphs, with the appropriate heading, corresponding to, and in the same order as, each of the subparagraphs below. (A) Parties and Amici. The appellant or petitioner must furnish a list of all parties, intervenors, and amici who have appeared before the district court, and all persons who are parties, intervenors, or amici in this court. An appellee or respondent, intervenor, or amicus may omit from its certificate those persons who were listed by the appellant or petitioner, but must state: "[Except for the following,] all parties, intervenors, and amici appearing [before the district court and] in this court are listed in the Brief for _____." Any party or amicus curiae that is a corporation, association, joint venture, partnership, syndicate, or other similar entity must make the disclosure required by Circuit Rule 26.1. (B) Rulings Under Review. Appropriate references must be made to each ruling at issue in this court, including the date, the name of the district court judge (if any), the place in the appendix where the ruling can be found, and any official citation in the case of a district court or Tax Court opinion, the Federal Register citation and/or other citation in the case of an agency decision, or a statement that no such citation exists. Such references need not be included if they are contained in a brief previously filed by another person, but the certificate must state: "[Except for the following,] references to the rulings at issue appear in the Brief for _____." (C) Related Cases. A statement indicating whether the case on review was previously before this court or any other court and, if so, the name and number of such prior case. The statement must also contain similar information for any other related cases currently pending in this court or in any other court of which counsel is aware. For purposes of this rule, the phrase "any other court" means any other United States court of appeals or any other court (whether federal or local) in the District of Columbia. The phrase "any other related cases" means any case involving substantially the same parties and the same or similar issues. If there are no related cases, the certificate must so state.

Third Circuit Local Appellate Rule 26.1.1	26.1.1 Disclosure of Corporate Affiliations and Financial Interest (a) Promptly after the notice of appeal is filed, each corporation that is a party to an appeal, whether in a civil, bankruptcy, or criminal case, must file a corporate affiliate/financial interest disclosure statement on a form provided by the clerk that identifies every publicly owned corporation with which it is affiliated but which is not named in the appeal. The form must be completed whether or not the corporation has anything to report. (b) Every party to an appeal must identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. The form must be completed only if a party has something to report under this section. (c) In all bankruptcy appeals, counsel for the debtor or trustee of the bankruptcy estate must promptly file with the clerk a list identifying (1) the debtor, if not named in the caption, (2) the members of the creditors' committees or the top 20 unsecured creditors, and (3) any entity not named in the caption which is an active participant in the proceeding. If the debtor or trustee of the bankruptcy estate is not a party, the appellant must file this list with the clerk. (d) In criminal appeals, the government must file a disclosure statement if an organization is a victim of the crime. If the organizational victim is a corporation, the statement must also identify any parent corporation and any publicly held corporation that owns 10% or more of its stock to the extent it can be obtained through due diligence. The government may seek to be relieved from the requirements of this rule by filing a motion demonstrating that compliance is impossible.

Third Circuit Local Appellate Rule 26.1.2	26.1.2 Notice of Possible Judicial Disqualification (a) If any judge of this court participated at any stage of the case, in the trial court or in related state court proceedings, appellant, promptly after filing the notice of appeal, must separately file with the clerk a notice of the name of the judge and the other action, and must send a copy of such notice to appellee's counsel. Appellee has a corresponding responsibility to so notify the clerk if, for any reason, appellant fails to comply with this rule fully and accurately. (b) A party seeking disqualification of a judge for any other reason must file a motion, which must comply with FRAP 27 and L.A.R. 27.
Third Circuit IOP 11.2	11.2.1 The provisions of 28 U.S.C. § 455 and 28 U.S.C. § 144 re recusal are fully incorporated here. 11.2.2(a) With respect to “financial interest” as used in 28 U.S.C. § 455, ownership of a small percentage of the outstanding shares of a publicly traded corporation which is a member of a trade association that is a party to the lawsuit is not a “financial interest” in the subject matter in controversy or in a party to the proceeding unless the owner has an interest that can be substantially affected by the outcome of the proceeding. (b) Ownership of a small percentage of the outstanding shares of a publicly traded corporation that is listed as a creditor of the bankrupt who is a party to the lawsuit is not a “financial interest” in the subject matter in controversy or in a party to the proceeding unless the owner has an interest that can be substantially affected by the outcome of the proceeding. (c) An insurance policy issued to a judge or a member of his or her family is not a “financial interest” in the insurance company.

Fourth Circuit Rule 26.1	(a) Disclosure Requirements Applicable to Parties, Including Intervenors. (1) Who Must File. (A) Civil, Agency, Bankruptcy, and Mandamus Cases. A party in a civil, agency, bankruptcy, or mandamus case, other than the United States or a party proceeding in forma pauperis, must file a disclosure statement, except that a state or local government is not required to file a disclosure statement in a case in which the opposing party is proceeding without counsel. (B) Criminal and Post-Conviction Cases. A corporate party in a criminal or post-conviction case must file a disclosure statement. (2) Information to Be Disclosed by Parties, Including Intervenors. (A) Information Required by FRAP 26.1. A party must identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock, or state that there is no such corporation. (B) Information About Other Financial Interests. A party must identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or state that there is no such corporation. (C) Information About Other Publicly Held Legal Entities. Whenever required by FRAP 26.1 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded, or state that there are no such entities. (D) Information About Trade Association Members. A party trade association must identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member. [continues on next page of this table]

Fourth Circuit Rule 26.1	[continued] (b) Disclosure Requirements Applicable to Corporate Amicus Curiae. (1) Who Must File. If an amicus curiae is a corporation, the amicus curiae brief must include a disclosure statement. (2) Information to Be Disclosed by Corporate Amicus Curiae. A corporate amicus curiae must disclose the same information that sections (a)(2)(A), (B) & (C) require parties to disclose. (c) Form. The disclosure statement shall be on a form provided by the clerk. A negative statement is required if a filer has no disclosures to make. (d) Time of Filing. A party's disclosure statement must be filed within 14 days of docketing of the appeal, unless earlier pleadings are submitted for the Court's consideration, in which case the disclosure statement shall be filed at that time. (e) Amendment. Filers are required to amend their disclosure statements when necessary to maintain their current accuracy.
Fifth Circuit Rule 26.1.1	The court uses a “Certificate of Interested Persons” in lieu of a Corporate Disclosure Statement. See 5th Cir. R. 28.2.1.

Fifth Circuit Rule 28.2.1	Certificate of Interested Persons. The certificate of interested persons required by this rule is broader in scope than the corporate disclosure statement contemplated in Fed. R. App. P. 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by Fed. R. App. P. 26.1(a). Counsel and unrepresented parties must supplement their certificates of interested persons whenever the information that must be disclosed changes. (a) Each certificate must list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court. (b) The certificate must be in the following form: (1) Number and Style of Case; (2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. (Here list names of all such persons and entities and identify their connection and interest.) _____ Attorney of record for _____ Attorney of record for

Fifth Circuit Rule 29.2	29.2 Contents and Form. Briefs filed under this rule must comply with the applicable Fed. R. App. P. provisions and with 5th Cir. R. 31 and 32. The brief must include a supplemental statement of interested parties, if necessary to fully disclose all those with an interest in the amicus brief. The brief should avoid the repetition of facts or legal arguments contained in the principal brief and should focus on points either not made or not adequately discussed in those briefs. Any non-conforming brief may be stricken, on motion or sua sponte.

Sixth Circuit Rule 26.1	(a) Parties Required to Make Disclosure. With the exception of the United States government or agencies thereof or a state government or agencies or political subdivisions thereof, all parties and amici curiae to a civil or bankruptcy case, agency review proceeding, or original proceedings, and all corporate defendants in a criminal case shall file a corporate affiliate/financial interest disclosure statement. A negative report is required except in the case of individual criminal defendants. (b) Financial Interest to Be Disclosed. (1) Whenever a corporation that is a party to an appeal, or which appears as amicus curiae, is a subsidiary or affiliate of any publicly owned corporation not named in the appeal, counsel for the corporation that is a party or amicus shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the parent corporation or affiliate and the relationship between it and the corporation that is a party or amicus to the appeal. A corporation shall be considered an affiliate of a publicly owned corporation for purposes of this rule if it controls, is controlled by, or is under common control with a publicly owned corporation. (2) Whenever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation, counsel for the party or amicus whose interest is aligned with that of the publicly owned corporation or its affiliate shall advise the clerk in the manner provided by subdivision (c) of this rule of the identity of the publicly owned corporation and the nature of its or its affiliate's substantial financial interest in the outcome of the litigation. (c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this court, whichever first occurs.

Seventh Circuit Rule 26.1	(a) Who Must File. Every attorney for a non-governmental party or amicus curiae, and every private attorney representing a governmental party, must file a statement under this rule. A party or amicus required to file a corporate disclosure statement under Fed. R. App. P. 26.1 may combine the information required by subsection (b) of this rule with the statement required by the national rule. (b) Contents of Statement. The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court. If any litigant is using a pseudonym, the statement must disclose the litigant's true name. A disclosure required by the preceding sentence will be kept under seal. (c) Time for Filing. The statement under this rule and Fed. R. App. P. 26.1 must be filed no later than 21 days after docketing the appeal, with a party's first motion or response to an adversary's motion, or when directed by the court, whichever time is earliest. A disclosure statement also must accompany any petition for permission to appeal under Fed. R. App. P. 5 and must be included with each party's brief. See Fed. R. App. P. 28(a)(1), (b). (d) Duty to Update. Counsel must file updated disclosure statements under this rule and Fed. R. App. P. 26.1 within 14 days of any change in the information required to be disclosed.
Eighth Circuit Rule 26.1A	The Corporate Disclosure Statement must be filed within 7 days after receipt of notice that the appeal has been docketed in this court.

Ninth Circuit Rule 28-2.6	Statement of Related Cases. Each party shall identify in a statement on the last page of its initial brief any known related case pending in this Court. As to each such case, the statement shall include the name and Court of Appeals docket number of the related case and describe its relationship to the case being briefed. Cases are deemed related if they: (a) arise out of the same or consolidated cases in the district court or agency; (b) are cases previously heard in this Court which concern the case being briefed; (c) raise the same or closely related issues; or (d) involve the same transaction or event. If no other cases in this Court are deemed related, a statement shall be made to that effect. The appellee need not include any case identified as related in the appellant's brief.

Tenth Circuit Rule 46.1	(A) Attorneys. Within 14 days after an appeal or other proceeding is filed, counsel for the parties must file written appearances in a form approved by the court (see Appendix A, Form 2). Other attorneys whose names subsequently appear on filed papers must also file written appearances. .... (B) Pro Se. A party appearing without counsel may notify the clerk in writing of that status by filing an entry of appearance on a form approved by the court .... (C) Change of Address. ... (D) Certification of Interested Parties. (1) Certificate. Each entry of appearance must be accompanied by a certificate listing the names of all interested parties not in the caption of the notice of appeal so that the judges may evaluate possible disqualification or recusal. (2) List. The certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation. For corporations, see Fed. R. App. P. 26.1. (3) Generic Description. An individual listing is not necessary if a large group of persons or firms can be specified by a generic description. (4) Attorneys. Attorneys not entering an appearance in this court must be listed if they have appeared for any party in a proceeding sought to be reviewed, or in related proceedings that preceded the original action being pursued in this court. (5) No Additional Parties. If there are no additional parties, entities, or attorneys in any of these categories not previously reported to the court, a report to that effect also is required. (6) Obligation to Amend. The certificate must be kept current.

Eleventh Circuit Rule 26.1-1	A certificate shall be furnished by appellants, appellees, intervenors and amicus curiae, including governmental parties, which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party. In criminal and criminal-related appeals, the certificate shall also disclose the identity of the victim(s). In bankruptcy appeals, the certificate shall also identify the debtor, the members of the creditor's committee, any entity which is an active participant in the proceedings, and other entities whose stock or equity value may be substantially affected by the outcome of the proceedings. The certificate contained in the first brief filed must include a complete list of all persons and entities known to that party to have an interest in the outcome of the particular case or appeal. The certificate contained in the second and all subsequent briefs filed must include only persons and entities omitted from the certificate contained in the first brief filed and in any other brief that has been filed. Counsel who believe that the certificate contained in the first brief filed and in any other brief that has been filed is complete may simply certify to that effect. The certificate contained in each motion or petition filed must include a complete list of all persons and entities known to that party to have an interest in the outcome of the particular case or appeal. The certificate contained in a response or answer to a motion or petition, or a reply to a response, must include only persons and entities that were omitted from the certificate contained in the motion or petition. Counsel who believe that the certificate contained in the motion or petition is complete may simply certify to that effect. In a petition for en banc consideration, the petitioner's certificate shall also compile and include a complete list of all persons and entities listed on all certificates filed in the appeal prior to the date of filing of the petition for en banc consideration. If the court grants en banc rehearing, the requirements set forth in the second paragraph of this rule also apply to en banc briefs.

Eleventh Circuit Rule 26.1-2	(a) The certificate described in 11th Cir. R. 26.1-1 must be filed by the appellant (and cross-appellant) with this court within 14 days after the date the appeal is docketed in this court, or along with the filing in this court by any party of any motion, petition, or pleading, whichever occurs first. (b) On the same day a certificate is served, the party filing it must also complete the court's web-based certificate at www.ca11.uscourts.gov, providing the information required by that form. Pro se parties are not required or authorized to complete the web-based certificate. (c) Within 14 days after the filing of the initial certificate, the opposing party must file a notice either indicating that the certificate initially filed is correct and complete, or adding any interested persons or entities omitted from the initial certificate. (d) In the alternative, the parties may file a joint certificate within 14 days after the date the appeal is docketed in this court, or along with the filing in this court of any motion, petition, or pleading, whichever occurs first. (e) The certificate described in 11th Cir. R. 26.1-1 must be included within the principal brief filed by any party and also must be included in any petition, answer, motion or response filed by any party. The clerk is not authorized to submit to the court any brief (except for the reply brief of an appellant or cross-appellant), petition, answer, motion or response that does not contain the certificate, but may receive and retain the papers pending supplementation of the papers with the required certificate. (f) After a party has filed its initial certificate, that party is required to notify the court immediately of any additions, deletions, corrections or other changes that should be made to its certificate. A party must do so by filing an amended certificate with the court or by including an amended certificate with a party's brief, petition, answer, motion or response. A party must: (1) prominently indicate on the amended certificate the fact that it has been amended, and (2) must clearly identify the person or entity that has been added, deleted, corrected or otherwise changed. (g) On the same day an amended certificate is served, that party must also update the web-based certificate to reflect the amendments. (h) If a party files an amendment that deletes a person or entity from a certificate, the opposing party must, within 10 days after the filing of the amended certificate, file a notice indicating whether or not it agrees that the deletion is proper.

Eleventh Circuit Rule 26.1-3	(a) The certificate described in 11th Cir. R. 26.1-1 must immediately follow the cover page within a brief, and must precede the text in a petition, answer, motion or response. (b) The certificate must list persons (last name first) and entities in alphabetical order, have only one column, and be double-spaced. (c) A corporate entity must be identified by its full corporate name as registered with a secretary of state's office and, if its stock is publicly listed, its stock ("ticker") symbol must be provided after the corporate name. (d) At the top of each page the court of appeals docket number and short style must be noted (name of first-listed plaintiff or petitioner v. name of first-listed defendant or respondent). Each page of the certificate must be separately sequentially numbered to indicate the total number of pages comprising the certificate (e.g., C-1 of 3, C-2 of 3, C-3 of 3). These pages do not count against any page limitations imposed on the papers filed.
Eleventh Circuit Rule 29-1	Motions for leave to file a brief of amicus curiae must comply with FRAP 27 and 11th Cir. R. 27-1, including the requirement of a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules.
Eleventh Circuit IOP 42-4(1)	Voluntary Dismissal With Prejudice. Such motions to dismiss with prejudice are submitted to the court. Any such motion shall contain a Certificate of Interested Persons and Corporate Disclosure Statement as described in FRAP 26.1 and the accompanying circuit rules. A joint motion to dismiss must be signed by counsel for each party encompassed by the motion, and a Certificate of Interested Persons and Corporate Disclosure Statement contained in a joint motion to dismiss must compile and include a complete list of all persons and entities known by all applicable parties to have an interest in the outcome of the particular case or appeal.
Federal Circuit Rule 26.1	The corporate disclosure statement must be included in the certificate of interest prescribed in Federal Circuit Rule 47.4. A certificate of interest must be filed by any party represented by counsel within 14 days of the date of docketing of the appeal or petition. See Federal Circuit Rule 47.4 for additional requirements.

Federal Circuit Rule 29(a)	(a) Content; Form. In addition to the contents required by Federal Rule of Appellate Procedure 29, the brief of an amicus curiae must include a certificate of interest (see Federal Circuit Rule 47.4) in front of the table of contents.
Federal Circuit Rule 47.4	(a) Purpose; Contents. To determine whether recusal by a judge is necessary or appropriate, an attorney--except an attorney for the United States--for each party, including a party seeking or permitted to intervene, and for each amicus curiae, must file a certificate of interest. The certificate of interest must be filed within 14 days of the date of docketing of the appeal or petition, except that for an intervenor or amicus curiae, the certificate of interest must be filed with the motion and with the brief. A certificate of interest must be in the form set forth in the appendix to these rules, and must contain the information below in the order listed. Negative responses, if applicable, are required as to each item on the form. (1) The full name of every party or amicus represented in the case by the attorney. (2) The name of the real party in interest if the party named in the caption is not the real party in interest. (3) The corporate disclosure statement prescribed in Federal Rule of Appellate Procedure 26.1. (4) The 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. (b) Filing. The certificate must be filed with the entry of appearance. The certificate--first filed--must also be filed with each motion, petition, or response thereto, and in each principal brief and brief amicus curiae. (c) Changes. If any of the information required in Federal Circuit Rule 47.4(a) changes after the certificate is filed and before the mandate has issued, the party must file an amended certificate within 7 days of the change.

BRADLEY ARANT BOULT CUMMINGS LLP

MEMORANDUM

TO	Cathie Struve
FROM	Kevin Newsom Mary Ann Couch
DATE	September 10, 2014
SUBJECT	FRAP Disclosure Project

This memorandum addresses the extent to which certain disclosure requirements elicit information that is material to a judge's disqualification and/or recusal. Situations requiring recusal include those (1) where a judge has an actual bias against a party and (2) where a judge's impartiality might reasonably be questioned. 28 U.S.C. §§ 455(a), 455(b)(1); Code of Conduct for United States Judges, Canon 3C(1). This memorandum surveys local rules that require disclosures relating to (1) intervenors, (2) amici and their lawyers, (3) other financial interests in the litigation, and (4) the identity and nature of parties, and then analyzes whether such disclosures are material to a judge's determination whether to disqualify himself and/or recuse.

(1) Intervenors

Several circuits require intervenors to submit disclosure statements in the same circumstances, and including the same information, as named parties. *See* D.C. Cir. Rule 12(f); 4th Cir. Rule 26.1(a)(2); 11th Cir. Rule 26.1-1. Because, upon intervention, an intervenor enjoys the rights of a named party to the proceeding, *see, e.g.*, *City of Cleveland v. Nuclear Regulatory Comm'n*, 17 F.3d 1515, 1517 (D.C. Cir. 1994), an intervenor's disclosure can assist judges' recusal determinations for the same basic reasons (and to the same extent) that a party's initial disclosure assists those determinations. Requiring intervenors to file party-like disclosure statements enables judges to discover additional entities that may have a real interest in the outcome of the case, including subsidiaries, affiliates, and parent corporations. Although an intervenor might not join an appeal until after the case has been assigned to a particular panel or judge, in the more likely scenario the intervenor will join at the outset. In either event, it will be important for the judge to consider whether the intervenor's presence in the case presents a disqualification issue. For example, if an entity intervenes in an action and the judge or judge's spouse owns stock in entity or its parent company, a disclosure statement on behalf of the intervenor will assist the judge in discovering that a potential disqualifying issue exists. Even if a judge does not learn of the disqualifying interest until after being assigned to the case, the judge still needs to consider the issue so that he can either recuse or, if possible, dispose of the disqualifying interest. *See* Advisory Opinion No. 69, *Removal of Disqualification by Disposal of Interest* (June 2009) (contemplating the issue of a disqualifying interest arising from an intervenor after the judge has been assigned the case).

One Federal Place 1819 Fifth Avenue North Birmingham, AL 35203-2119 PHONE:205.521.8000 FAX:205.521.8800 BABC.COM

(2) Amici

With respect to disclosures by amici, there are two principal issues: (1) which amici should have to make disclosures, and (2) what those amici should have to disclose.

As to the first issue, the D.C., Fourth, Sixth, Seventh, Eleventh and Federal Circuits also impose certain disclosure requirements on amici. Although Federal Rule of Appellate Procedure 26.1(a) does not expressly require amici to make any disclosures, and among named parties requires disclosures only from corporations, several circuits require disclosures by amici other than corporations. *Compare* Fed. R. App. P. 26.1(a), *with* D.C. Cir. Rule 26.1(a); 6th Cir. Rule 26.1(a); 7th Cir. Rule 26.1(a); 11th Cir. Rule 26.1-1; Fed. Cir. Rule 29(a). Disclosures by non-corporate amici could lead to disqualification issues that merit recusal. One of the most obvious bases for disqualification arises when a judge has a financial interest in the subject matter in controversy. 28 U.S.C. § 455(b)(4). But the financial interest that can lead to disqualification is not limited to *corporate* financial interests; "financial interest" is defined as "ownership of a legal or equitable interest . . . or a *relationship as director, adviser, or other active participant in the affairs of a party*." *Id.* § 455(d)(4) (emphasis added); *see also* Canon 3(C)(3)(c). Moreover, if a judge's interest in an amicus—whether financial or non-financial (*e.g.*, a seat on the board)—is one "that could be affected substantially by the outcome of the proceeding," then the judge must recuse, regardless of whether the amicus is technically a corporate entity. *See id.* § 455(b)(4). Finally, the "catch-all" provision requiring recusal in any proceeding in which a judge's impartiality might reasonably be questioned may also come into play with non-corporate amici. *See* § 455(a); *see also* Advisory Opinion No. 49, *Disqualification Based on Financial Interest in Member of a Trade Association* (June 2009) (finding no impropriety with a judge who owns a small percentage of the publicly-traded shares of one or more members of a trade association that is a party, so long as the interest is not substantially affected by the outcome of the proceeding). Thus, requiring non-corporate amici to submit disclosure statements could well lead to material information that a judge can consider when determining whether or not to recuse.

The Eleventh and Federal Circuits require disclosure statements from all amici; the Sixth and Seventh Circuits exempt governmental amici; the D.C. Circuit requires disclosure statements from all corporations, associations, joint ventures, partnerships, syndicates, or other similar entities appearing as amici, without reference (one way or the other) to governmental amici. *Compare* 11th Cir. Rule 26.1-1; Fed. Cir. Rule 29(a), *with* 6th Cir. Rule 26.1(a); 7th Cir. Rule 26.1(a), *and* D.C. Cir. Rule 26.1(a). Only one disclosure rule directly references a judge's financial interest related to a government entity requiring recusal. *See* 28 U.S.C. § 455(d)(4)(iv) (stating that a judge's ownership of a government security is a "financial interest" only if the outcome of the proceeding could substantially affect the security's value). Similarly, if a judge receives a military or other government pension, disqualification is mandatory if the outcome of the case could substantially affect the amount of the pension or the judge's right to receive the pension. *See* Advisory Opinion No. 75, *Disqualification Based on Military or Other Governmental Pensions* (June 2009). Thus, while it is possible that requiring all amici (including government entities) to submit disclosure statements could lead to information material to a judge's recusal determination in some cases, the likelihood seems somewhat lower with respect to governmental than non-governmental amici.

With respect to the second question—*what* an amicus must disclose—the D.C. Circuit has fairly explicit (and comparatively broad) requirements; that court requires amici to disclose parent companies

and publicly-held companies that hold 10% or greater ownership interest in the amicus. D.C. Cir. Rule 26.1(a). Unlike the D.C. Circuit's rule, which applies to "companies," the federal rule (relating to parties) requires only *corporate* parties to identify parent *corporations* and publicly held *corporations* that own 10% or more of their stock. Fed. R. App. P. 26.1(a). Because the disqualification rules require recusal in the event a judge has a financial interest in any entity (whether formally a corporation or otherwise) or if the judge is a director, adviser, or active participant in the affairs of that entity, the D.C. Circuit's rule requiring identification of *companies* with an ownership interest in an amicus likely will more broadly alert judges to disqualifying interests of which the judge might not otherwise be aware. *See* 28 U.S.C. § 455(d)(4); Canon 3(C)(3)(c).

The Fourth, Fifth, and Sixth Circuits require amici to identify affiliates and other interested entities. *See* 4th Cir. Rule 26.1(b)(2) (requiring corporate amici to submit the same disclosure information as parties); 5th Cir. Rule 29.2 (requiring disclosure of all entities with an interest in the amicus brief); 6th Cir. Rule 26.1(b)(1), (b)(2) (requiring identity of affiliates and relationship between affiliates, amicus, and their interest in the litigation). These rules can help a judge determine if he or she has a financial interest or is a director, adviser, or active participant in the affairs of an affiliate or other interested entity of the amicus. In particular, the Fifth Circuit's rule requiring disclosure of entities with an interest in the amicus brief can also yield important information, such as the names of non-profits or other entities that have an interest in the *brief* (but not necessarily a financial interest in the amicus itself), but are otherwise unknown to the judge.

The Seventh Circuit specifically requires amici to disclose the names of all law firms who have appeared for the amicus in the case—including proceedings in the district court or before an administrative agency, whose names may not appear on the appellate brief's cover. *See* 7th Cir. Rule 26.1(b). This provision can be an important source of information material to a judge's determination of disqualification or recusal. A judge must recuse if the interest between her former law firm coincides with the law firm's interest in the case. *See* 28 U.S.C. § 455(b)(2); Canon 3C(1)(b) (requiring disqualification if "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter"). A judge must also recuse if a lawyer in the case is a family member within three degrees of relationship to the judge. *See* 28 U.S.C. § 455(b)(5)(ii); Canon 3C(1)(d)(ii) (requiring disqualification if a judge or judge's spouse, or person related to either within the third degree of relationship is "acting as a lawyer in the proceeding"). Moreover, if a judge's impartiality would reasonably questioned because of the attorney's participation on behalf of the amicus, that could be an additional reason for recusal. *See* 28 U.S.C. § 455(a); *but see* Richard Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, § 8.9, 2d Ed. (2007) (noting that the mere fact that a judge and attorney were formerly members of the same law firm will seldom warrant judicial disqualification). Thus, requiring amici to disclose the names of their attorneys may help judges detect whether or not recusal is necessary.

(3) Other Financial Interests in the Litigation

Many circuits require parties to identify corporations, persons, and other entities with financial interests in the litigation, above and beyond what Federal Rule 26.1(a) requires. *See* 3rd Cir. Rule 26.1.1(b); 4th Cir. Rule 26.1(a)(2)(B); 5th Cir. Rule 28.2.1; 6th Cir. Rule 26.1(b)(2); 10th Cir. Rule 46.1(D)(1); 11th Cir. Rule 26-1.1. Because a judge must recuse when the judge knows that he, his spouse, or his minor child has a financial interest (however small) in the subject matter in controversy,

these local rules can help judges detect financial interests that require recusal of which they may not otherwise have knowledge. *See* 28 U.S.C. § 455(b)(4); Canon 3C(1)(c).

Eleventh Circuit Rule 26-1.1 requires, among other things, that the disclosure list all subsidiaries, conglomerates, affiliates, and parent corporations that own 10% or more of the party's stock. Unlike Federal Rule 26.1(a), which requires disclosure only of parent corporations and any publicly held corporation that owns 10% or more of a party's stock, the Eleventh Circuit's rule requires parties to give judges more detailed information on subsidiaries and affiliates that may prompt disqualification. For example, if a judge owns stock in a subsidiary that is not a named party, but whose parent corporation is a party, the judge may need to recuse if the litigation could substantially affect the subsidiary. *See* Advisory Opinion No. 57, *Disqualification Based on Stock Ownership in Parent Corporation of a Party or Controlled Subsidiary of a Party* (June 2009).

The Fourth and Sixth Circuits require disclosure when an entity has a financial interest in the outcome of the litigation by reason of insurance, franchise agreement, indemnity agreement, or other profit sharing agreement. *See* 4th Cir. Rule 26.1(a)(2)(B); 6th Cir. Rule 26.1(b)(2). These provisions may also help a judge in determining whether disqualification is necessary. For example, if a judge has a financial interest in an entity that has franchise agreement or insurance policy with a party to the case, these rules will enable a judge to more easily determine whether recusal is necessary. However, most courts have held that the fact that a judge is a policyholder of an insurance company with an interest in the case is not reason for disqualification. *See* Flamm, § 6.6; Advisory Opinion No. 26, Disqualification Based on Holding Insurance Policy from Company that is a Party (June 2009) (finding that "when an insurance company is a party, the judge ordinarily need not recuse unless . . . the outcome of the proceeding could substantially affect the value of the judge's interest in the company").

The Fifth and Tenth Circuits explicitly require disclosure of all persons and legal entities that are interested (financially or otherwise) in the litigation. *See* 5th Cir. Rule 28.2.1; 10th Cir. Rule 46.1(D)(2). This broad requirement captures all possible disqualifying interests—from individual persons to business entities—that may prompt a judge's recusal. Thus, requiring disclosure of any and all individuals or entities that have an interest in the litigation can help a judge determine whether a disqualifying interest exists.

(4) Identity and Nature of the Parties

Several circuits require parties to disclose the identity and nature of parties not readily ascertainable from the pleadings. *See* 7th Cir. Rule 26.1(b) (requiring identity of pseudonymous parties); Fed. Cir. Rule 47.4(a)(2) (requiring name of real party in interest); D.C. Cir. Rule 26.1(b) (requiring identity of entity's nature and purpose and disclosure of unincorporated entity's members that have issued shares or debt securities to the public); 4th Cir. Rule 26.1(a)(2)(D) (requiring trade associations to identify publicly held members whose stock or equity value could be substantially affected by the proceedings). Each of these rules likely gives a judge information material to the judge's decision of whether or not to recuse.

The Seventh and Federal Circuits' rules requiring disclosure of pseudonymous parties and the real party in interest can facilitate a judge's determination of whether to recuse. *See* 4th Cir. Rule 26.1(a)(2)(D); 7th Cir. Rule 26.1(b). A judge must recuse if he has a personal bias or prejudice concern-

ing a party, if he, his spouse, or minor child has a financial interest or other interest in the controversy that could be substantially affected by the outcome of the proceeding, or if he, his spouse, or person within the third degree of relationship is a party to the proceeding or officer, director, or trustee of a party. 28 U.S.C. § 455(b); Canon 3C(1). If there is a question of impartiality because of a judge's relationship with a party, he must also recuse. 28 U.S.C. § 455(a). Without disclosure by a pseudonymous party or real party in interest of their otherwise-unknown identities, a judge is unable to determine if a disqualifying interest exists. Thus, these local rules likely give judges information that is material to the recusal determination.

The Fourth Circuit requires a party trade association to identify any publicly held member whose stock or equity value could be substantially affected by the litigation, but the D.C. Circuit specifically exempts trade associations from disclosing names of their members. *Compare* 4th Cir. Rule 26.1(a)(2)(D), *with* D.C. Cir. Rule 26.1(b); *see also* 3rd Cir. I.O.P 11.2.2(a) (explaining that a judge's ownership of a small percentage of the shares of a publicly traded corporation that is a member of a party trade association is not a financial interest requiring disqualification unless the judge's interest would be substantially affected by the proceedings); Advisory Opinion No. 49, *Disqualification Based on Financial Interest in Member of a Trade Association* (June 2009) (finding "no impropriety in a judge serving in a proceeding where a trade association appears as a party, even though the judge owns a small percentage of the publicly-traded shares of one or more members of the association, so long as that interest could not be substantially affected by the outcome of the proceeding"). The Fourth Circuit's rule—requiring disclosure of trade association members whose value could be *substantially* affected by the litigation—appears to capture those interests that would be material to a judge's recusal determination. Based on the advisory opinion from the Committee on Codes of Conduct, a judge's ownership of publicly-traded shares of one or more members of a trade association appearing as a party does not create a disqualification issue *unless* the interest could be substantially affected by the outcome of the proceeding. *See* Advisory Opinion No. 49; *see also* 3rd Cir. I.O.P 11.2.2(a).

THIS PAGE INTENTIONALLY BLANK

Hogan Lovells

MEMORANDUM

Hogan Lovells US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
T +1 202 637 5600
F +1 202 637 5910
www.hoganlovells.com

TO	Subcommittee on Disclosure Requirements	**ORGANIZATION**	Advisory Committee on Rules of Appellate Procedure
FROM	Neal Kumar Katyal Sean Marotta	**TELEPHONE**	(202) 637-5600
DATE	September 15, 2014		
	By Electronic Mail		
SUBJECT	Appellate Rule 26.1 Research Project - Disclosing Parties and Corporate Information Disclosed		

This memorandum considers which parties should make Appellate Rule 26.1 disclosures and what corporate relationships parties should disclose. In particular, this memorandum discusses: (1) which parties other than corporations should be required to make an Appellate Rule 26.1 disclosure; (2) what ownership interests should be disclosed; (3) whether additional information regarding a corporation other than ownership interests should be disclosed; and (4) whether a corporation should disclose its affiliates.

Generally speaking, the disclosure statement demanded by Appellate Rule 26.1(a) allows judges to determine if they "ha[ve] a financial interest in the subject matter in controversy or in a party to the proceeding" that would require automatic recusal under 28 U.S.C. § 455(b)(4) and Canon 3C(1)(c). *See* Advisory Committee Note, 1998 Amendment (explaining this purpose). To that end, Appellate Rule 26.1(a) requires a corporate party to divulge its parent and grandparent corporations and those publicly traded corporations that own 10% or more of the party's stock. A judge's ownership of even a single share in any of these entities should trigger automatic recusal, and therefore parties' disclosure of these entities is essential. Advisory Committee Note, 1998 Amendment.

Recusal is required, however, in more cases than these. *See generally* 28 U.S.C. § 455(a)-(b). To that end, circuits have promulgated local rules that require non-corporate parties to make a Rule 26.1 disclosure and that require disclosure of more than just parent, grandparent, and 10%-

stock-ownership companies. We consider below aspects of these local rules and whether they are likely to elicit information relevant to a judge's recusal decision.

I. What Non-Corporate Parties Should Be Required To Make An Appellate Rule 26.1 Disclosure?

The local circuit rules requiring non-corporate parties to file a disclosure statement can be grouped into two categories.

First, the D.C. Circuit makes explicit that all nongovernmental, non-individual entities, such as joint ventures and partnerships, must make a Rule 26.1 disclosure. *See* D.C. Circuit Rule 26.1(a). As a doctrinal matter, these parties' inclusion is sensible. The financial-interest prohibition applies to all "parties" to a proceeding, not solely to entities organized as corporations. 28 U.S.C. § 455(b)(4).

As a practical matter, however, it is unlikely that businesses not organized as corporations use the word "corporation" in Appellate Rule 26.1 as a reason not to file a disclosure statement. We are not aware, for example, of a limited partnership formed by two publicly traded corporations that has claimed it was exempt from filing a disclosure statement because it was not a "corporation."

If the Committee believes that Appellate Rule 26.1(a) should be modified to make explicit that the disclosure requirement applies to all nongovernmental, non-individual entities, it could state that "[e]xcept for governmental parties and individuals, any party to a proceeding" must make a disclosure. But further consideration is probably warranted to determine whether an amendment is warranted to clarify what is—at most—a mild ambiguity in the existing text.

Second, the local circuit rules from outside of the D.C. Circuit demand disclosure from non-corporate parties in accordance with their other non-uniform disclosure provisions. For instance, it makes sense for the Tenth Circuit to require all parties to make a disclosure in light of the fact that the court requires the disclosing party to list all attorneys who have appeared in the case. *See* Tenth Circuit Rule 46.1(d)(4). Whether these non-corporate parties should be required to make a disclosure is logically dependent on whether information beyond corporate ownership interests should be disclosed in the Appellate Rule 26.1 statement. Those topics are addressed by other memoranda.

II. What Ownership Interests, Other Than The Party's Parent Corporations And Publicly Traded Corporations That Own More Than 10% Of The Stock In A Party, Should Be Disclosed?

The D.C. Circuit and Fourth Circuit both clarify the ownership-interest disclosure in doctrinally correct, but likely practically immaterial, ways.

First, the D.C. Circuit clarifies that disclosure is required of any greater-than-10% ownership interest, not just stock. *See* D.C. Circuit Rule 26.1(a). So, for instance, a publicly traded corporation that owns a 10% membership interest in a limited liability company or a 10% partnership interest in a limited partnership must be disclosed on a party's Appellate Rule 26.1 statement. This is the doctrinally correct approach. Because a "financial interest" is "ownership of a legal or equitable interest, however small," 28 U.S.C. § 455(d)(4), it makes no difference whether that interest is stock or some equivalent unit.

Second, the Fourth Circuit clarifies that the word "corporation" in Appellate Rule 26.1(a) encompasses all non-individual, nongovernmental entities whose ownership interests are publicly traded, such as master limited partnerships and real estate investment trusts. Fourth Circuit Rule 26.1(a)(2)(C). As with the D.C. Circuit's local rule requiring non-individual, nongovernmental businesses to file disclosure statements, *see* D.C. Circuit Rule 26.1(a), this is the doctrinally correct approach. Nothing in 28 U.S.C. § 455 justifies a distinction between businesses that are organized as corporations and businesses organized in some other way.

As with the entities required to file disclosure statements, however, it is doubtful that parties use the word "stock" or "corporation" in Appellate Rule 26.1(a) to avoid disclosure. Should the Committee determine that an amendment is in order, it might clarify that a party must disclose "any publicly held entity that owns 10% or more of an ownership interest in the party."

III. Should Any Other Specific Information Regarding A Corporate Party Be Disclosed?

Unique among the circuits, the Eleventh Circuit requires that a corporate entity "be identified by its full corporate name as registered with a secretary of state's office and, if the stock is publicly held, its stock ("ticker") symbol must be provided after the corporate name." Eleventh Circuit Rule 26.1-3(b). The rule does not state the reason for this requirement, but it presumably facilitates conflicts review by the Court's "two automated/electronic systems." Letter from Amy C. Nerenberg, Eleventh Circuit's Clerk's Office, to Counsel of Record, *Woliciki-Gables* v. *Arrow International, Inc.*, No. 09-14342 (Mar. 31, 2014) (describing the Eleventh Circuit's conflicts-review system in a case where a judge participated despite owning shares of an interested company).

We see no reason for Appellate Rule 26.1 to require this level of specificity. Screening technology presumably varies among the circuits and evolves over time, and no national rule can address all circuits' systems. The formatting necessitated by automated programs is, in our view, likely best addressed by local rules or administrative orders.

IV. Should A Corporation Be Required To Disclose Affiliates?

Finally, three circuits—the Third, Sixth, and Eleventh—require corporations to disclose their affiliates. *See* Third Circuit Rule 26.1.1(a); Sixth Circuit Rule 26.1(b)(1); Eleventh Circuit Rule 26.1-1. The three circuits disagree as to when an affiliate must be disclosed. The Third and Sixth Circuits require that corporations always disclose publicly traded affiliates. *See* Third Circuit Rule 26.1.1(a); Sixth Circuit Rule 26.1(b)(1). The Eleventh Circuit, by contrast, requires an affiliate to be disclosed only when it "ha[s] an interest in the outcome of the particular case or appeal," but does not limit the disclosure to publicly traded entities. Eleventh Circuit Rule 26.1-1.

Doctrinally, it is clear that affiliates need not be routinely disclosed. The Advisory Committee Note to the 1998 Amendments observes that "although several circuit rules require identification" of a party's publicly traded subsidiaries and affiliates, the Committee deliberately deleted that requirement from Appellate Rule 26.1. The Committee explained that "disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary," because even if "a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation."

The Committee on Codes of Conduct concurs. It has advised that although a judge should always recuse when a party "is controlled by a corporation in which the judge owns stock," the judge need not automatically recuse when "the judge owns stock in the subsidiary rather than the parent corporation, and the parent corporation appears as party in a proceeding." Committee on Codes of Conduct, Advisory Opinion No. 57, *Disqualification Based on Stock Ownership in Parent Corporation of a Party or Controlled Subsidiary of a Party* (June 2009). If ownership of a subsidiary corporation controlled by a party does not trigger automatic recusal, neither should ownership of a company with the same corporate parent as a party.

The only basis to require disclosure of affiliates of a party, then, is to allow a judge to determine whether his interest in the affiliate "will be substantially affected by the proceeding" and thus require recusal under Canon 3C(1)(c) and 28 U.S.C. § 455(b)(4). *Id.* There is no doctrinal answer to the question of whether the remote possibility that a judge's interest in a company might be substantially affected by a proceeding involving a corporate sibling is sufficient to require disclosure of affiliates as a matter of course. The Committee must instead weigh the burden of disclosure on parties against its value to judges. That policy question is beyond this memorandum's scope.

28 U.S.C.A. § 455

§ 455. Disqualification of justice, judge, or magistrate judge

Currentness

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate judge, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate judge, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 908; Dec. 5, 1974, Pub.L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub.L. 95-598, Title II, § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub.L. 100-702, Title X, § 1007, 102 Stat. 4667; Dec. 1, 1990, Pub.L. 101-650, Title III, § 321, 104 Stat. 5117.)

Notes of Decisions (1575)

28 U.S.C.A. § 455, 28 USCA § 455
Current through P.L. 113-125 (excluding P.L. 113-121) approved 6-30-14

End of Document

THIS PAGE INTENTIONALLY BLANK

28 U.S.C.A. § 47

§ 47. Disqualification of trial judge to hear appeal

Currentness

No judge shall hear or determine an appeal from the decision of a case or issue tried by him.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 872.)

Notes of Decisions (10)

28 U.S.C.A. § 47, 28 USCA § 47
Current through P.L. 113-125 (excluding P.L. 113-121) approved 6-30-14

End of Document

THIS PAGE INTENTIONALLY BLANK

CODE OF CONDUCT FOR UNITED STATES JUDGES

The duties of judicial office take precedence over all other activities. In performing the duties prescribed by law, the judge should adhere to the following standards:

(A) *Adjudicative Responsibilities.*

(1) A judge should be faithful to, and maintain professional competence in, the law and should not be swayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should hear and decide matters assigned, unless disqualified, and should maintain order and decorum in all judicial proceedings.

(3) A judge should be patient, dignified, respectful, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity. A judge should require similar conduct of those subject to the judge's control, including lawyers to the extent consistent with their role in the adversary process.

(4) A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may:

(a) initiate, permit, or consider ex parte communications as authorized by law;

(b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication;

(c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or

(d)with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters.

(5) A judge should dispose promptly of the business of the court.

(6) A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's

direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

(B) *Administrative Responsibilities.*

(1) A judge should diligently discharge administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court personnel.

(2) A judge should not direct court personnel to engage in conduct on the judge's behalf or as the judge's representative when that conduct would contravene the Code if undertaken by the judge.

(3) A judge should exercise the power of appointment fairly and only on the basis of merit, avoiding unnecessary appointments, nepotism, and favoritism. A judge should not approve compensation of appointees beyond the fair value of services rendered.

(4) A judge with supervisory authority over other judges should take reasonable measures to ensure that they perform their duties timely and effectively.

(5) A judge should take appropriate action upon learning of reliable evidence indicating the likelihood that a judge's conduct contravened this Code or a lawyer violated applicable rules of professional conduct.

(C) *Disqualification.*

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:

(a)the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b)the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge or lawyer has been a material witness;

(c)the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding;

(d)the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is:

(i) a party to the proceeding, or an officer, director, or trustee of a party;

(ii) acting as a lawyer in the proceeding;

(iii) known by the judge to have an interest that could be substantially affected by the outcome of the proceeding; or

(iv) to the judge's knowledge likely to be a material witness in the proceeding;

(e)the judge has served in governmental employment and in that capacity participated as a judge (in a previous judicial position), counsel, advisor, or material witness concerning the proceeding or has expressed an opinion concerning the merits of the particular case in controversy.

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's

spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system; the following relatives are within the third degree of relationship: parent, child, grandparent, grandchild, great grandparent, great grandchild, sister, brother, aunt, uncle, niece, and nephew; the listed relatives include whole and half blood relatives and most step relatives;

(b) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policyholder in a mutual insurance company, or a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(d) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation.

(4) Notwithstanding the preceding provisions of this Canon, if a judge would be disqualified because of a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the judge (or the judge's spouse or minor child) divests the interest that provides the grounds for disqualification.

(D)*Remittal of Disqualification*. Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

COMMENTARY

Canon 3A(3). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and businesslike while being patient and deliberate.

The duty under Canon 2 to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary applies to all the judge's activities, including the discharge of the judge's adjudicative and administrative responsibilities. The duty to be respectful includes the responsibility to avoid comment or behavior that could reasonably be interpreted as harassment, prejudice or bias.

Canon 3A(4). The restriction on ex parte communications concerning a proceeding includes communications from lawyers, law teachers, and others who are not participants in the proceeding. A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out adjudicative

responsibilities. A judge should make reasonable efforts to ensure that law clerks and other court personnel comply with this provision.

A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.

Canon 3A(5). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. A judge should monitor and supervise cases to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to take reasonable measures to ensure that court personnel, litigants, and their lawyers cooperate with the judge to that end.

Canon 3A(6). The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21 (b)).

Canon 3B(3). A judge's appointees include assigned counsel, officials such as referees, commissioners, special masters, receivers, guardians, and personnel such as law clerks, secretaries, and judicial assistants. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

Canon 3B(5). Appropriate action may include direct communication with the judge or lawyer, other direct action if available, reporting the conduct to the appropriate authorities, or, when the judge believes that a judge's or lawyer's conduct is caused by drugs, alcohol, or a medical condition, making a confidential referral to an assistance program. Appropriate action may also include responding to a subpoena to testify or otherwise participating in judicial or lawyer disciplinary proceedings; a judge should be candid and honest with disciplinary authorities.

Canon 3C. Recusal considerations applicable to a judge's spouse should also be considered with respect to a person other than a spouse with whom the judge maintains both a household and an intimate relationship.

Canon 3C(1)(c). In a criminal proceeding, a victim entitled to restitution is not, within the meaning of this Canon, a party to the proceeding or the subject matter in controversy. A judge who has a financial interest in the victim of a crime is not required by Canon 3C(1)(c) to disqualify from the criminal proceeding, but the judge must do so if the judge's impartiality might reasonably be questioned under Canon 3C(1) or if the judge has an interest that could be substantially affected by the outcome of the proceeding under Canon 3C(1)(d)(iii).

Canon 3C(1)(d)(ii). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

CANON 4: A JUDGE MAY ENGAGE IN EXTRAJUDICIAL ACTIVITIES THAT ARE CONSISTENT WITH THE OBLIGATIONS OF JUDICIAL OFFICE

CANON 5: A JUDGE SHOULD REFRAIN FROM POLITICAL ACTIVITY

Compliance with the Code of Conduct

Applicable Date of Compliance

Last revised (Transmittal 02-016) March 20, 2014

Download Judicial Code of Conduct for United States Judges (pdf)

TAB 4

THIS PAGE INTENTIONALLY BLANK

TAB 4A

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

DATE: October 3, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 09-AP-D and 11-AP-F

Item No. 09-AP-D arises from John Kester's suggestion that the Committee consider whether the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009), warrants a rulemaking response. Item No. 11-AP-F arises from a suggestion by Amy M. Smith that the Civil Rules should be amended to provide for a permissive interlocutory appeal "from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege."[1]

The Committee considered these questions at several meetings (in 2010, 2013, and 2014). During summer 2014, Judge Fay, Mr. Letter, and Mr. Katsas discussed the possibility of crafting a provision that would permit interlocutory appeals from privilege rulings. This memo reflects insights gained from those discussions as well as some subsequent research.

Even when an attorney-client-privilege ruling is momentous, it can be difficult for the party aggrieved by the ruling to obtain immediate appellate review. As I discuss further below, mandamus review is reserved for cases that are in some way exceptional. While disobeying a court's order may produce an appealable contempt sanction,[2] it is arguably problematic to

[1] I enclose a copy of Ms. Smith's letter.

[2] "A nonparty can appeal an order of either civil or criminal contempt; a party can appeal an order of criminal contempt, but is not supposed to be able to appeal an order of civil contempt." 15B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper § 3914.23. As Professor Cooper explains, "a party who wishes to pursue the disobedience and contempt path to appeal cannot know whether the resulting contempt order will be appealable. The consequence for the party may be an onerously coercive civil contempt sanction with no means of review until the perhaps far distant day of final judgment. As a means of appeal, disobedience and contempt is not attractive." *Id.*

condition access to appellate review on a party's willingness to violate a court order.[3] The technical requisites for review under 28 U.S.C. § 1292(b) will not always be met,[4] and even when they are, review under Section 1292(b) requires the permission of both the district court and the court of appeals.

Such considerations underpin the proposal for a new permissive-review rule. However, it would be challenging to draft a provision that would appropriately cabin the opportunity for interlocutory appeal of a privilege ruling. The likeliest mechanism, as suggested by Ms. Smith, would be one that grants the court of appeals discretion whether to accept the appeal.[5] But further choices would need to be made. Drafters would need to consider, for example, whether the mechanism should encompass some or all of the following rulings concerning attorney-client privilege:

- A ruling that the privilege does not apply because its requisites are not met (e.g., the communication was not between an attorney and client, or was not initially

---

[3] It may sometimes be possible for a plaintiff to invite dismissal of its claim in response to its noncompliance with a discovery order. *See, e.g.*, *United States v. Procter & Gamble Co.*, 356 U.S. 677, 679-81 (1958) (holding that the district court's order requiring the government to produce a grand jury transcript was reviewable on appeal from the order dismissing the government's complaint, where the government had invited the dismissal as a response to its noncompliance with the production order). But in addition to the obvious strategic concerns that such a bet-the-case strategy would raise, there is the further problem that an invited dismissal might not always be viewed as bringing the discovery order up for review. *See* 15B Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper § 3914.23 ("This means of obtaining appellate review remains open, although the tendency of some courts to limit the opportunity for review upon invited dismissal may cause inappropriate difficulties.").

[4] Section 1292(b) provides in relevant part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order ....

[5] *Cf.* Civil Rule 23(f) (authorizing a court of appeals to "permit an appeal from an order granting or denying class-action certification").

made in confidence).[6]

- A ruling that the privilege does not apply because of a choice of the law governing the privilege under Evidence Rule 501.

- A ruling that the privilege was initially applicable but has been waived through later disclosure of the communication.

- A ruling that the privilege originally applied but has been waived through subject matter waiver as a result of the disclosure of a related communication.

- A ruling that the crime-fraud exception applies.

- A ruling that a party's failure to include a privileged communication on its privilege log justifies an order requiring the disclosure of that communication.

- A ruling that the privilege *does* apply and protects the communication from discovery and use.

This is only a short, non-exhaustive list of the sorts of rulings that might be encompassed in a permissive-appeal mechanism, and this list focuses only on attorney-client privilege rulings.[7] Claims of attorney-client privilege frequently overlap with claims of work-product protection; should the permissive-appeal mechanism encompass work-product protection rulings as well?[8] What of other types of privilege claims (doctor-patient privilege; priest-penitent privilege; presidential-communications privilege; state secrets privilege; etc.)? What of orders requiring the disclosure of trade secrets?

Some have also expressed concern that permitting parties to seek leave to appeal privilege rulings could create a serious additional burden on the courts of appeals. If such a mechanism were available, a disappointed litigant could seek leave to appeal without incurring costs beyond the attorney time necessary to draft the request; by contrast, under current law a litigant will weigh very carefully the importance of the issue before deciding to incur a contempt sanction or to seek mandamus review.

---

[6] This category, in turn, could encompass various sub-topics, such as the contours of the common interest privilege.

[7] A further distinction, I suppose, might be drawn between orders entered after an *in camera* review of the relevant documents and orders made without such an *in camera* review.

[8] If so, should the mechanism encompass all work-product-protection rulings, or only those where there is a claim of opinion work product?

To assess the concern that providing an avenue for such appeals would "open the floodgates" to such petitions for permission to appeal, one might consider 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*. The briefing in *Mohawk Industries* addressed that empirical question, focusing principally on the period from April 1997 through mid-2009.[9] During that time period, the petitioner and the Chamber of Commerce of the United States of America identified only some twelve collateral-order appeals from attorney-client privilege rulings in the Third, Ninth, and D.C. Circuits[10] – an average of one appeal per year in

---

[9] *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir 1997), in which the court of appeals took collateral-order jurisdiction of a challenge to an attorney-client privilege and work-product protection ruling, was decided in April 1997 (with the opinion amended in May 1997). The petitioner in *Mohawk Industries* filed its merits brief in April 2009, and the Court issued its decision in December 2009. The petitioner focused its study on the period from April 1997 through April 2009:

> [A] review of the opinions published in the Federal Reporter and those included in the Federal Appendix from the three circuits that have recognized collateral order jurisdiction in this context (the Third, Ninth, and D.C. Circuits) reveals that since *In re Ford* was decided in 1997, these circuits have exercised collateral order jurisdiction in a total of approximately eleven appeals in which the appellant sought immediate review of an order compelling a party to disclose information protected by the attorney-client privilege.

Brief for Petitioner at 40, *Mohawk Industries*, 558 U.S. 100 (No. 08-678). The Chamber of Commerce focused on a more abbreviated period in the Ninth and D.C. Circuits. *See* Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 32-34, *Mohawk Industries*, 558 U.S. 100 (No. 08-678) ("Chamber Amicus Brief").

[10] The Third Circuit cases were: *In re Ford Motor Co.*, 110 F.3d 954 (3d Cir 1997); *Montgomery County v. MicroVote Corp.*, 175 F.3d 296 (3d Cir. 1999); *Coregis Insurance Co. v. Law Offices of Carole F. Kafrissen, P.C.*, 57 F. App'x 58 (3d Cir. 2003); *In re Cendant Corp. Securities Litigation*., 343 F.3d 658 (3d Cir. 2003); *Wachtel v. Health Net, Inc*., 482 F.3d 225 (3d Cir. 2007); *Newman v. General Motors Corp*., 228 F. App'x 245 (3d Cir. 2007); and *In re Teleglobe Communications Corp.*, 493 F.3d 345 (3d Cir. 2007).

The D.C. Circuit cases were: *United States v. Legal Services for New York City*, 249 F.3d 1077 (D.C. Cir. 2001); *United States v. Philip Morris Inc.*, 314 F.3d 612 (D.C. Cir. 2003); and *United States v. British American Tobacco (Investments) Ltd.*, 387 F.3d 884 (D.C. Cir. 2004).

The Ninth Circuit cases were: *Alvarez v. Woodford*, 81 F. App'x 119 (9th Cir. 2003); and *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078 (9th Cir. 2007). I do not include, in the Ninth Circuit count, a case in which the Ninth Circuit denied collateral-order review on the ground that the disclosure had already taken place. *See Truckstop.net, LLC v. Sprint Corp*., 547 F.3d 1065, 1070 (9th Cir. 2008) ("Although Sprint Communications' inadvertent disclosure

the three circuits combined. This quantitative finding corresponds with Justice Alito's recollection of his experience in the Third Circuit: "I was on the Third Circuit for eight years under this regime. And it didn't seem to me that the sky was falling. In fact I can't remember any cases, any appeals involving this issue, and we had lots of cases of a variety of kinds." Transcript of Oral Argument at 28, *Mohawk Industries*, 558 U.S. 100 (No. 08-678).

Admittedly, during the early portion of this twelve-year period the availability of such review may not have been clear in all three circuits,[11] so perhaps the estimate of one-appeal-per-year is artificially low as a measurement of the amount of work generated by the availability of collateral-order review of such rulings. Moreover, as the Court observed in *Mohawk Industries*, the relative scarcity of such appeals "may be due to the fact that the practice in all three Circuits [wa]s relatively new and not yet widely known." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009). In that regard, it might be significant to note that in at least nine of the twelve appeals identified in the *Mohawk Industries* briefs, the appellants were represented by sophisticated litigators.[12] If the appealability of attorney-client privilege rulings were addressed in a Rule, one might expect the greater accessibility of the national Rules (compared with appellate caselaw) to generate greater awareness among members of the bar and, thus, greater numbers of attempts to appeal.

The pool of orders from which an appeal might be taken seems likely to be a large one. As an extremely rough measurement, I searched in the DCT database on WestlawNext for one year's worth of opinions that used the term "attorney client privilege" (with or without a

---

during the course of discovery of the Neal e-mail may be unfortunate, the chicken has already flown the coop—the alleged harm from disclosure has already occurred.").

[11] *See, e.g.*, Chamber Amicus Brief at 34 n.12 ("Immediate appeal of this class of orders [i.e., orders requiring disclosure of information assertedly protected by attorney-client privilege] was arguably available under Ninth Circuit caselaw even before *Napster* [was decided in 2007], but the availability of such review was not crystal clear.").

[12] In this count, I am including *In re Ford Motor Co.*, 110 F.3d 954, 956 (3d Cir. 1997) (White & Williams); *United States v. Legal Services for New York City*, 249 F.3d 1077, 1079 (D.C. Cir. 2001) (Debevoise & Plimpton); *In re Cendant Corp. Securities Litigation*, 343 F.3d 658, 659 (3d Cir. 2003) (Mayer, Brown); *United States v. Philip Morris Inc*., 314 F.3d 612, 614 (D.C. Cir. 2003) (Chadbourne & Parke); *United States v. British American Tobacco (Investments) Ltd.*, 387 F.3d 884, 885 (D.C. Cir. 2004) (Chadbourne & Parke and Shaw Pittman); *Wachtel v. Health Net, Inc*., 482 F.3d 225, 226 (3d Cir. 2007) (Epstein, Becker & Green; Morgan, Lewis; and Gibbons, Del Deo); *Newman v. General Motors Corp.*, 228 F. App'x 245 (3d Cir. 2007) (Mayer, Brown); *In re Teleglobe Communications Corp*., 493 F.3d 345, 351 (3d Cir. 2007) (Shearman & Sterling and Young, Conaway, Stargatt & Taylor); *In re Napster, Inc. Copyright Litigation*, 479 F.3d 1078, 1082 (9th Cir. 2007) (Weil Gotshal).

hyphen);[13] that search pulled up 1,191 decisions (156 reported decisions and 1,035 unreported decisions).[14] Obviously, only some of those decisions would turn out, on further examination, to be decisions on questions of attorney-client privilege, and only a still smaller subset would turn out to be decisions denying (as opposed to upholding) a claim of privilege.[15] On the other hand,

---

[13] The search was: da(aft 12/31/2012) and da(bef 1/1/2014) and ("attorney-client privilege" "attorney client privilege").

[14] These numbers reflect the results obtained when I ran the search on October 1, 2014. For reasons that remain unclear, the same search pulled up slightly different numbers of results on other days.

[15] The briefing in *Mohawk Industries* recounted some studies that roughly support these suppositions. Attorneys for the respondent performed one such study:

> A Westlaw search for the terms "attorney-client" and "privilege" in the "federal district courts" database between 2004 and 2009 produced a staggering 4,446 reported cases. To get a more detailed sense of the volume, we searched that database for those same terms in six two-month periods over the last three years and examined each case to learn whether the attorney-client issue was actually adjudicated (as opposed to being mentioned in passing or in relation to some other privilege) and whether disclosure was ordered.

Brief for Respondent at 47, *Mohawk Industries*, 558 U.S. 100 (No. 08-678). The results of that more detailed analysis were as follows:

> In the most recent two-month period surveyed, May-June 2008, there were 216 reported written decisions mentioning the attorney-client privilege, 93 decisions adjudicating an attorney-client privilege claim, and 46 disclosure orders. The previous two-month periods reflect similar volume: January-February 2008 (190, 92, 47), May-June 2007 (219, 97, 51), January-February 2007 (203, 100, 66), January-February 2006 (91, 38, and 21), and May-June 2006 (159, 64, 37). These numbers understate matters significantly because they reflect only decisions reported by one online service and exclude all oral rulings, such as those made in pretrial conferences, by phone during depositions, or in response to objections at trial.

Id. at 47 n.7. Roughly similar proportions are reflected in the findings set out in an amicus brief: "A search of Westlaw's 'DCT' database for the second half of 2008 (July 1 through December 31), for example, reveals 498 cases discussing the attorney-client privilege, 234 of which included dispositions of privilege claims. Among those 234 dispositions, at least 104 included decisions that the privilege had been waived, that it did not apply, or that it applied to some communications but not others." Brief of Former Article III Judges and Law Professors as Amici

though WestlawNext's database no doubt includes all district court decisions reported in official reporters, it appears that the database's collection of unreported decisions is limited to those submitted to it by each district court.[16]

Accordingly, it seems difficult to predict how large the effect would be (on the court of appeals' workload) if a Rule were promulgated that authorized appeals from attorney-client privilege rulings. There is one additional angle that might be of interest in assessing the proposal to create such an avenue for immediate appeals – namely, how good a chance is there, under current law, that a litigant could employ an existing avenue to secure immediate review of a denial of attorney-client privilege?

In analyzing that question, it may be useful to focus on the possibility of obtaining mandamus review. As the *Mohawk Industries* Court observed, "in extraordinary circumstances—*i.e.*, when a disclosure order 'amount[s] to a judicial usurpation of power or a clear abuse of discretion,' or otherwise works a manifest injustice—a party may petition the court of appeals for a writ of mandamus." *Mohawk Industries*, 558 U.S. at 111 (quoting *Cheney v. United States Dist. Court for D.C.*, 542 U.S. 367, 390 (2004)). A full survey of the circuits' mandamus practices lies beyond the scope of this memo, but the following incomplete sketch may offer a sense of the overall landscape. The sketch focuses largely on post-*Mohawk Industries* decisions,[17] because in some circuits the pre-*Mohawk Industries* possibility of collateral-order review could have foreclosed a party from obtaining mandamus review.[18]

The basic requisites for relief under the All Writs Act are well known. Mandamus is a "drastic and extraordinary" form of relief. *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (quoting *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947)). Accordingly, the party seeking the writ must show that it has "no other adequate means" of relief, that the party's right

---

Curiae in Support of Respondent at 28, *Mohawk Industries*, 558 U.S. 100 (No. 08-678).

[16] This is my understanding based on a conversation with a reference attorney at WestlawNext.

[17] For pre-*Mohawk Industries* caselaw, *see, e.g.*, *In re United States*, 397 F.3d 274, 283 (5th Cir. 2005) (per curiam) (in a case involving the federal government's claims of attorney-client and deliberative-process privilege and work-product protection, noting that "this court, in accord with other circuits, has considered and issued writs of mandamus over discovery orders implicating privilege claims").

[18] Thus, in a case where the aggrieved party sought review prior to the Court's decision in *Mohawk Industries* and the court of appeals granted a writ of mandamus after that decision, the court of appeals observed that the criterion that the petitioner has "no other means to obtain the desired relief" was "met because collateral order appeal [wa]s no longer available." *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010).

to the writ is "clear and indisputable," and that issuance of the writ is otherwise "appropriate under the circumstances." *Cheney*, 542 U.S. at 380-81 (internal quotation marks omitted). It has long been recognized that mandamus can be employed to review a discovery order for "usurpation of judicial power or a clear abuse of discretion." *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) (internal quotation marks omitted).[19]

Although the circuits appear to vary in their willingness to employ mandamus review to police attorney-client privilege rulings,[20] the current state of the law permits a court of appeals latitude[21] to issue the writ when the court perceives a need to address confusion in the lower courts or to remedy a decision that will cause significant adverse effects. Petitioners are sometimes turned away on the ground that redress is available after final judgment[22] – particularly if the court believes that other measures may suffice to protect the petitioner's interests in the interim.[23] On the other hand, a strong showing of harm[24] – especially if coupled

---

[19] The *Schlagenhauf* Court approved the use of the writ in that case to review a question of first impression concerning the validity of Civil Rule 35, and also endorsed the ancillary use of the writ to provide guidance on the interpretation of Rule 35's language. *See Schlagenhauf*, 379 U.S. at 110-11.

[20] *See, e.g.*, *Holt-Orsted v. City of Dickson*, 641 F.3d 230, 236 (6th Cir. 2011) ("This court ordinarily has not allowed immediate review of discovery orders involving claims of privilege under the collateral order doctrine, but instead favors mandamus as the appropriate method of review (and even then only in extraordinary cases).").

[21] The writ of mandamus is a flexible tool that allows the court of appeals to decide on a case-by-case basis whether a particular ruling warrants review. By contrast, the collateral-order doctrine operates more categorically. *See Abelesz v. OTP Bank*, 692 F.3d 638, 649 (7th Cir. 2012) (explaining in the context of a challenge to the exercise of territorial jurisdiction that "[t]he justification for immediate appeal [under the collateral-order doctrine] must be based on the entire category of similar cases rather than the potential benefits in the particular case").

[22] *See, e.g.*, *In re Shelbyzme LLC*, 547 F. App'x 1001, 1002 (Fed. Cir. 2013) (unpublished opinion) (declining to review lower court's determination about the crime-fraud exception based on the "limited record" and citing *Mohawk Industries* for the proposition that review after trial provided a viable alternative); *United States ex rel. Gohil v. Aventis Pharm., Inc.*, 387 F. App'x 143, 147 (3d Cir. 2010) (unpublished opinion) (citing *Mohawk Industries* for the proposition that later review would suffice, and also noting the petitioner's anemic showing of harm); *United States v. Copar Pumice Co.*, 714 F.3d 1197, 1210 (10th Cir. 2013) ("Post-judgment appeal following the entry of a final appealable order can remedy any error the district court may have made in its discovery rulings.").

[23] *See Shelbyzme*, 547 F. App'x at 1002 n.* ("We expect that these communications and related documents will be kept under seal to mitigate the harmful effects caused by disclosure....

with concerns about the interests of third parties[25] or bolstered by amicus filings[26] – will increase the chances of mandamus relief. Novel and important questions[27] are more likely to give rise to mandamus review than routine or fact-bound questions.[28] But novelty is not always required;

In addition, it may be advisable for the district court, in making findings after trial, to indicate separately what findings it would make without the documents obtained as a result of the piercing of the privilege at issue here.").

[24] For an example of a pre-*Mohawk Industries* case finding harm from disclosure of assertedly privileged material, see *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 860-61 (3d Cir. 1994) (finding collateral-order review was unavailable because "the district court's order is effectively reviewable on appeal from a final judgment," but also holding that mandamus review was warranted because, inter alia, "the petitioners have no other adequate means to attain relief from the district court's order that compels the disclosure of privileged information and work product").

[25] *Cf. S.E.C. v. Rajaratnam*, 622 F.3d 159, 164 (2d Cir. 2010) (addressing "disclosure of wiretapped conversations from defendants in a civil enforcement proceeding to a civil enforcement agency" and holding that "a writ of mandamus is warranted, because the district court clearly exceeded its discretion in ordering disclosure of thousands of conversations involving hundreds of parties, prior to any ruling on the legality of the wiretaps and without limiting the disclosure to relevant conversations").

[26] In *In re Kellogg Brown & Root, Inc*., 756 F.3d 754 (D.C. Cir. 2014) ("*KBR*"), the court seemed swayed by input from amici about uncertainty suffered by businesses as a result of the lower court's ruling. *See id.* at 762-63.

[27] The Federal Circuit will employ mandamus review "of discovery orders that turn on claims of privilege when (1) there is raised an important issue of first impression, (2) the privilege would be lost if review were denied until final judgment, and (3) immediate resolution would avoid the development of doctrine that would undermine the privilege." *In re Seagate Tech., LLC*, 497 F.3d 1360, 1367 (Fed. Cir. 2007) (en banc) (quoting *In re Regents of Univ. of Cal*., 101 F.3d 1386, 1388 (Fed. Cir. 1996)). In *Seagate,* for instance, the court used mandamus review to "clarify the scope of the waiver of attorney-client privilege and work product protection that results when an accused patent infringer asserts an advice of counsel defense to a charge of willful infringement." *Id.* at 1365. *See also United States v. Copar Pumice Co.*, 714 F.3d 1197, 1210 (10th Cir. 2013) ("Defendants claim the unresolved legal question regarding whether federal or state law governs the privilege here warrants the issuance of a writ of mandamus, but Defendants do not explain how the discovery dispute here is of substantial importance to the administration of justice.").

[28] On the other hand, a petitioner may have greater difficulty in obtaining the writ if the issue is very difficult as well as novel. *See, e.g.*, *United States v. Moussaoui*, 333 F.3d 509, 517

"flagrant[] misappli[cation]" of well-established doctrine can also trigger mandamus,[29] as can an especially harmful if relatively mundane ruling,[30] and the courts can also factor in concerns about separation of powers or federalism.[31] As noted, the writ will not actually issue on a mere showing of error below; the test is variously stated but requires some elevated level of error on the part of the trial court.[32] That being so, there may be some hesitancy to issue the writ out of concern that the writ stigmatizes the judge who issued the challenged order – although some courts have attempted to lessen that stigma by redefining the requisite level of error.[33]

(4th Cir. 2003) (in response to government's request for writ of mandamus with respect to order directing it to produce an enemy combatant witness, denying the writ on the ground that "[t]he substantive issues involved here are complex and difficult, and the answer is not easily discerned").

[29] *In re City of New York*, 607 F.3d 923, 940 n.17 (2d Cir. 2010) (law-enforcement privilege case).

[30] *See, e.g.*, *Hernandez v. Tanninen*, 604 F.3d 1095, 1101 (9th Cir. 2010) (granting mandamus despite finding "nothing novel" about the petitioner's "claim to the attorney-client or work product privileges or the scope of either," and reasoning in part that "[t]he breadth of the waiver finding, untethered to the subject-matter disclosed, constitutes a particularly injurious privilege ruling").

[31] *See In re City of New York*, 607 F.3d 923, 939 n.16 (2d Cir. 2010).

[32] *See, e.g.*, *In re Whirlpool Corp*., 597 F.3d 858, 860 (7th Cir. 2010) (per curiam) (denying mandamus on the ground that the petitioner had "fail[ed] to establish that the district court's rejection of Whirlpool's position was patently erroneous or usurpative in character—in other words, a serious error"); *Hernandez v. Tanninen*, 604 F.3d 1095, 1102 (9th Cir. 2010) (basing the grant of mandamus in part on the court of appeals' holding that "[t]he district court clearly erred in finding an unlimited waiver of the attorney-client and work product privileges"); *United States v. Copar Pumice Co.*, 714 F.3d 1197, 1210 (10th Cir. 2013) (holding that mandamus would be inappropriate because, inter alia, "[d]efendants have not asserted or explained how the district court's rulings were a clear usurpation of power or a gross abuse of discretion" (internal quotation marks omitted)). *Compare In re Pac. Pictures Corp*., 679 F.3d 1121, 1126 n.2 (9th Cir. 2012) ("Petitioners assert that, because this case presents an issue of first impression, they must demonstrate simple rather than clear error.... We assume but do not decide that Petitioners need show only error.").

[33] *See S.E.C. v. Rajaratnam*, 622 F.3d 159, 172 n.8 (2d Cir. 2010) ("[T]he phrase 'abuse of discretion,' long a term of art, is somewhat unfortunate.... [W]e prefer to use the term 'exceed,' which in our view more accurately conveys the notion of a decision that cannot be located within the range of permissible decisions" (some internal quotation marks omitted).); *In re City of New York*, 607 F.3d 923, 943 n.21 (2d Cir. 2010) (in a case involving law-enforcement

It may also be worth noting that the petitioner need not always *obtain* the writ in order to achieve its goals. Both the D.C. Circuit and the Supreme Court have recently engaged in analyses – in the mandamus context – that first addressed whether the lower court erred (leaving for a later step the determination of whether a writ of mandamus should issue). This past summer, the D.C. Circuit granted a writ of mandamus and vacated a district court order that had "generated substantial uncertainty about the scope of the attorney-client privilege in the business setting." *In re Kellogg Brown & Root, Inc*., 756 F.3d 754, 756 (D.C. Cir. 2014) ("*KBR*"). The court structured its analysis as follows: "The threshold question is whether the District Court's privilege ruling constituted legal error. If not, mandamus is of course inappropriate. If the District Court's ruling was erroneous, the remaining question is whether that error is the kind that justifies mandamus." *Id.* at 756-57.[34] The *KBR* court's order-of-decision ruling seems both unusual[35] and petitioner-friendly: even when the court of appeals denies the writ, if it has first ruled that the district court erred, then the petitioner may in effect have secured the result that it desired.

The Supreme Court employed an arguably similar order of decision in reviewing the denial of a writ of mandamus by the Federal Circuit in *United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). The Federal Circuit had engaged in a detailed review of the merits, but denied the writ because it found no error. *See In re United States*, 590 F.3d 1305, 1306 (Fed. Cir. 2009) (holding "that the United States cannot deny an Indian tribe's request to discover communications between the United States and its attorneys based on the attorney-client privilege when those communications concern management of an Indian trust and the United States has not claimed that the government or its attorneys considered a specific competing

---

privilege, noting that "[a]n appellate court sometimes disagrees with a district court, even when the appellate court applies a deferential standard of review," and that such disagreement "does not mean that the district court has acted arbitrarily or committed any form of 'abuse' in the ordinary sense of the word").

[34] That "remaining question" disaggregates into the three *Cheney* questions (no other adequate means, clear and indisputable, and otherwise appropriate). *See KBR*, 756 F.3d at 760. The *KBR* court noted that, in attorney-client privilege appeals, the petitioner will often meet the no-other-adequate-means requirement, but will only rarely meet the clear-and-indisputable-right requirement (in *KBR* itself, all three requirements were met). *See id.* at 760-63.

[35] That is to say, it seems unusual in the context of mandamus review, where courts tend to review the merits under a more deferential standard rather than looking for error simpliciter. The *KBR* order of decision is somewhat reminiscent of the approach to qualified-immunity questions that asks whether the plaintiff's constitutional rights were violated before considering whether it would have been clear to a reasonable official under the circumstances that the defendant's action violated the plaintiff's constitutional rights. *See generally Pearson v. Callahan*, 555 U.S. 223, 236 (2009) (authorizing lower federal courts "to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first").

interest in those communications"), *rev'd and remanded sub nom. United States v. Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011). The Supreme Court reversed, *see Jicarilla Apache Nation*, 131 S. Ct. at 2331. In doing so, 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] on remand will follow our holding here regarding the applicability of the fiduciary exception in the present context." *Id.* at 2331 n.12. Justice Sotomayor complained that this statement by the majority "effectively grant[ed] extraordinary relief to the Government upon no showing whatsoever that the stringent conditions for mandamus have been met." *Id.* at 2342 n.11 (Sotomayor, J., dissenting).

In sum, the courts of appeals have considerable authority to grant mandamus relief with respect to privilege rulings, and even in cases where a court of appeals does not issue the writ, it may issue an opinion that can serve as a source of guidance on remand. Although the circuits vary in their willingness to employ writs of mandamus to review orders requiring disclosure of assertedly privileged information, Professor Cooper's summary of the overall landscape seems apt:

> The extraordinary writs in many ways are ideally suited to meet the need for occasional interlocutory review. Review can be provided to resolve new questions that otherwise might elude appellate review, to protect important or clear claims of privilege or privacy, or even to protect against the overwhelming burdens that can be imposed by unfettered discovery. At the same time, stern reminders about the extraordinary nature of writ review can deter the floods of appeals that could flow all too easily from the common dissatisfactions with discovery.[36]

In considering whether to proceed with a proposal concerning immediate appeals of attorney-client privilege rulings, the Committee may thus wish to consider whether the perceived need for such a provision sufficiently counterbalances the evident challenges that would arise in the drafting process.

Encl.

[36] 16 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Fed. Prac. & Proc. Juris. § 3935.3.

TAB 4B

THIS PAGE INTENTIONALLY BLANK

STEPTOE & JOHNSON PLLC
ATTORNEYS AT LAW

Chase Tower, Sixth Floor
P.O. Box 2190
Clarksburg, WV 26302-2190
(304) 624-8000 (304) 624-8183 Fax
www.steptoe-johnson.com

Writer's Contact Information
(304) 624-8137
amy.smith@steptoe-johnson.com

March 5, 2010

11-AP-F

10-CV-A

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
Washington, DC 20544

Re: Suggestion and Recommendation

Dear Mr. McCabe:

Pursuant to the Procedures for the Conduct of Business by the Judicial Conference Committees on Rules of Practice and Procedure, I am writing to make a suggestion and recommendation with respect to the Federal Rules of Civil Procedure. This suggestion and recommendation would require an amendment to Federal Rule of Civil Procedure 37 to authorize discretionary interlocutory appeals from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege.

On December 8, 2009, the Supreme Court decided *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). In that case, the Court held that disclosure orders adverse to the attorney-client privilege do not qualify for immediate appeal under the collateral order doctrine because postjudgment appeals, together with other review mechanisms, suffice to protect the rights of litigants and preserve the vitality of the attorney-client privilege. *Id.* at 603. The Court bolstered its conclusion with reference to Congress's amendment in 1990 of the Rules Enabling Act, 28 U.S.C. §§ 2071-2077, to authorize the Court to adopt rules "defin[ing] when a ruling of a district court is final for the purposes of appeal under section 1291," *id.* 2072(c), and its subsequent enactment of 28 U.S.C. § 1292(e), which empowered the Court to prescribe rules in accordance with the Rules Enabling Act to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under Section 1292. Indeed, this is the *only* portion of the opinion in which Justice Thomas joined. *See id.* at 609-10.

In 1998, the Supreme Court employed the rulemaking authority in Section 1292(e) in promulgating Federal Rule of Civil Procedure 23(f). Rule 23(f) permits an interlocutory appeal from an order granting or denying class certification at the sole discretion of the court of appeals. The current version of Rule 23(f), which was amended in December of 2009, provides that a petition for permission to appeal must be filed with the circuit clerk within fourteen days after the order is entered. An appeal does not stay proceedings in the district court absent an order to that effect entered either in the district court or court of appeals.

Note that also in 1998, Federal Rule of Appellate Procedure 5, which governs appeals by permission, was similarly amended to accommodate new rules such as Rule 23(f) authorizing additional interlocutory appeals. Rather than add a separate rule governing each such appeal, it was believed preferable to amend Rule 5 so that it would govern all such appeals.

5353313

Please consider my suggestion and recommendation to promulgate an amendment to Rule 37 to add a new subsection similar to the amendment in Rule 23(f) permitting an interlocutory appeal from a district court's order granting or denying a motion to compel discovery of information claimed to be protected by the attorney-client privilege at the sole discretion of the court of appeals, and providing that a petition for permission to appeal must be filed with the circuit clerk within fourteen days after the order is entered. Similar to the practice under Rule 23(f), an appeal under any amendment to Rule 37 should not stay proceedings in the district court absent an order to that effect entered either in the district court or court of appeals.

Thank you for your attention to this matter.

Very truly yours,

Amy M. Smith

AMS/jw
000001.00006

5345715.1

TAB 5

THIS PAGE INTENTIONALLY BLANK

TAB 5A

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

DATE: October 3, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve

RE: Item No. 13-AP-H

Appellate 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."

Since the time of the Committee's spring 2014 meeting, a subcommittee composed of Justice Eid, Judge Taranto, and Professor Barrett has been considering whether these rules warrant amendment in light of issues raised in *Ryan v. Schad*, 133 S. Ct. 2548 (2013) (per curiam), and *Bell v. Thompson*, 545 U.S. 794 (2005). In particular, the subcommittee has focused on two principal questions – first, concerning the authority (if any) of a court of appeals to stay the mandate following a denial of certiorari, and second, concerning the action (if any) required in order to implement any such stay. Based on the subcommittee's discussions, this memo presents options for the Committee's consideration.

Part I of this memo discusses a proposed change to clarify that stays of the mandate under Rule 41(b) cannot occur through mere inaction and instead require entry of an order. Part II discusses three possible approaches to the question of a court of appeals' authority to stay the mandate following denial of certiorari.

I. Clarifying that Rule 41(b) stays require an order

In *Bell*, the Supreme Court said that "[i]t is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction." 545 U.S. at 805. The Rule provides merely that "[t]he court may shorten or

extend the time." The court of appeals in *Bell* purported to stay the issuance of the mandate after denial of certiorari without notifying the parties, and the State in that case proceeded to set an execution date in a capital case without realizing that the mandate never had issued. The Supreme Court assumed, *arguendo*, "that a court may stay the mandate without entering an order" before holding that the court of appeals abused its discretion.

The original version of the Rule stated that "[t]he mandate of the court shall issue 21 days after the entry of judgment *unless the time is shortened or enlarged by order.*" The words "by order" were deleted as part of the 1998 restyling, which moved the relevant part of the rule from subdivision (a) into subdivision (b). As with all the restyling Committee Notes, the Note to Rule 41 states that most of the changes were "intended to be stylistic only." The Committee may wish to consider whether Rule 41(b) should be amended to clarify whether a court of appeals may extend the time of issuance of the mandate by inaction or whether it must issue an order to extend the time.

The subcommittee members perceived good reasons to require an affirmative act by the court. Litigants – particularly those not well versed in appellate procedure – may overlook the need to check that the court of appeals has issued its mandate in due course after handing down a decision. And, in *Bell*, the lack of notice was one of the factors that contributed to the Court's finding that staying the mandate was an abuse of discretion.[1] Requiring any stay of the mandate under Rule 41(b) to be accomplished by court order would address this problem. If an attorney receives a CM/ECF notice of a docket entry indicating that a judge has ordered the clerk to withhold the mandate, that will alert the attorney to the non-issuance of the mandate. It is also possible that requiring formal entry of a stay order would facilitate review of the court of appeals' decision to stay the mandate.[2]

Assuming that the Committee agrees that it would make sense to require a formal order for a Rule 41(b) stay, the question arises whether that requirement should be in the national Rules or whether it should be left to local circuit requirements. There are several reasons why a national rule amendment may be preferable. First, the importance of providing notice to litigants weighs in favor of applying this requirement in all the circuits. Second, it is difficult to conceive of local variations that would justify treating this question differently in different circuits. Third, a survey of applicable local provisions discloses that only the Eleventh Circuit has actually imposed such a

[1] *See Bell*, 545 U.S. at 804.

[2] *See Henry v. Ryan*, No. 09-99007, 2014 WL 4397948, at *14 (9th Cir. Sept. 4, 2014) (Tallman, J., joined by O'Scannlain, Callahan, Bea, and Ikuta, JJ., dissenting from grant of reh'g en banc) ("[U]nless the en banc panel issues a formal stay of the mandate, our unorthodox actions might very well evade Supreme Court review. If the en banc panel issues such a stay, then Arizona could seek Supreme Court review of the stay. If it doesn't, then our failure to issue the mandate may escape review for an indeterminate period of time ....").

requirement on itself in its local rules, and even that provision does not cover all the circumstances that might arise.[3]

One might also ask whether this issue arises with sufficient frequency to warrant a rule amendment. A rather labor-intensive study would likely be necessary to measure systematically the frequency with which courts fail to issue mandates in the absence of a formal stay order. However, recent developments in the Ninth Circuit suggest that the issue may recur with some regularity. In *Henry v. Ryan*, a capital habeas case, the en banc court recently entered an order that has the effect of staying the mandate in *Henry* pending the court of appeals' en banc rehearing proceeding in a different case. (I enclose a copy of the relevant order and opinions in *Henry*.) The opinions concurring in and dissenting from this order disagree on several points – one of which is whether the court's failure to issue the *Henry* mandate in due course after the denial of panel rehearing and rehearing en banc constituted a stay of the mandate.[4]

If the Committee were inclined to amend the Rule to clarify that an order is required for a Rule 41(b) stay of the mandate, it could propose amending Rule 41(b) as follows:

> **(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.

II. Addressing the court's authority (if any) to stay the mandate after denial of certiorari

The Court has twice declined to decide whether Rule 41 requires a court of appeals to issue the mandate immediately after the filing of the Supreme Court's order denying the petition for writ of certiorari in a case. In *Bell* and *Schad*, the petitioners

[3] Eleventh Circuit IOP 6 accompanying Appellate Rule 35 addresses instances when a judge directs the clerk to withhold the mandate during a poll with respect to sua sponte rehearing en banc. See Eleventh Circuit IOP 6 accompanying Eleventh Circuit Rule 35 ("If a petition for rehearing or a petition for rehearing en banc has not been filed by the date that mandate would otherwise issue, the Clerk will make an entry on the docket to advise the parties that a judge has notified the clerk to withhold the mandate."). *Compare* Ninth Circuit Advisory Committee Note to Rule 25-2 (advising litigant to tell Clerk if, inter alia, "the mandate has not issued within 28 days after the time to file a petition for rehearing has expired").

[4] *Compare Henry v. Ryan*, No. 09-99007, 2014 WL 4397948, at *3 (9th Cir. Sept. 4, 2014) (Fletcher, J., concurring in grant of reh'g en banc) ("Acting on behalf of the panel, the clerk's office in this case stayed the mandate pursuant to Rule 41(b), as it routinely does in all capital cases."), *with id.* at *9 (Tallman, J., joined by O'Scannlain, Callahan, Bea, and Ikuta, JJ., dissenting from grant of reh'g en banc) ("[N]o order staying the mandate was ever entered by the panel or by the Clerk's office. Withholding issuance of the mandate is not the same as entering a stay order.").

argued that the mandatory language of Rule 41(d)(2)(D) admits of no exceptions, and that a court of appeals thus has no discretion to stay the issuance of the mandate. The respondent in *Bell* countered that Rule 41(d)(2)(D) "is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari." 545 U.S. at 803. He argued that Rule 41(b) grants a court of appeals authority to stay its mandate for other reasons following the Supreme Court's denial of certiorari and rehearing. In both *Bell* and *Schad*, the Court assumed, arguendo, that Rule 41 authorizes a further stay of the mandate following the denial of certiorari, but held that the court of appeals in both cases abused its discretion in doing so. The Court ruled that any authority to stay the mandate after denial of certiorari may be exercised only in "extraordinary circumstances."[5] *Schad*, 133 S. Ct. at 2551.

The subcommittee discussed the possibility of amending Rule 41 to clarify whether a court of appeals has discretion to stay the mandate after a denial of certiorari. Two options, of course, are identified by the competing views of the current Rule described by the Court in *Bell*: Rule 41 could be revised to require that a court of appeals must issue the mandate immediately after a denial of certiorari, with no exceptions. Or Rule 41 could be revised to authorize a court of appeals to stay the mandate, even after the denial of certiorari, in extraordinary circumstances.

As to each of these options, the subcommittee discussed both policy arguments and possible doctrinal constraints. With respect to the latter point, subcommittee

---

[5] In *Henry v. Ryan*, Judge Fletcher argued that the "extraordinary circumstances" test applies only when the mandate was stayed solely for the purposes of allowing time for a party to petition for certiorari. *See Henry*, 2014 WL 4397948, at *5 (Fletcher, J., concurring in grant of reh'g en banc) ("The fact that there are reasons to stay proceedings other than for the purpose of allowing the Supreme Court to consider Henry's petition for certiorari means that this case is governed instead by Rule 41(b), with the result that 'extraordinary circumstances' within the meaning of *Bell* and *Schad* are not required."). I am not convinced by Judge Fletcher's reading of *Bell v. Thompson*. Judge Fletcher relied in part on this passage from *Bell*:

> While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare. *See, e.g.*, *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895 (C.A.5 1995); *Alphin v. Henson*, 552 F.2d 1033 (C.A.4 1977). In the typical case, where the stay of mandate is entered solely to allow this Court time to consider a petition for certiorari, Rule 41(d)(2)(D) provides the default: "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."

Bell, 545 U.S. at 806. It seems to me that, in fact, the *Bell v. Thompson* Court presents the "rare" examples of *First Gibraltar Bank* and *Alphin* as illustrations of cases that might present the requisite extraordinary circumstances. Both *First Gibraltar Bank* and *Alphin* involved instances in which Congress altered governing statutory law after the issuance of the panel opinion and before the denial of certiorari. *See infra* note 19.

members queried whether a court of appeals' authority to stay its mandate arises only from Rule 41 or whether additional sources ground that authority. In Part II.A, I note support for the view that the courts of appeals have some inherent authority to stay their mandates, and I also note some case law citing a statutory source for such stay authority. The subcommittee further discussed whether a rule adopted pursuant to the Rules Enabling Act could validly alter the scope of any such inherent and/or statutory authority; in Part II.B, I suggest that such a rule could channel a court's inherent authority to stay the mandate but probably could not eliminate it (or, at least, could not do so without leaving in place an effective substitute to address instances where the integrity of the court's judgment is at stake). Finally, with these bounds in mind, I turn in Parts II.C and D to a discussion of policy and drafting issues.

A. Inherent and/or statutory authority for a stay of the mandate after denial of certiorari

Although the caselaw is sparse, there is some reason to believe that, even apart from Rule 41, the courts of appeals have inherent authority to stay their mandates under sufficiently compelling circumstances. Moreover, there is some (again, sparse) caselaw support for the view that stay authority also stems from 28 U.S.C. § 2106.

Prior to *Schad*, the Ninth Circuit had held that the courts of appeals have inherent authority to stay their mandates in appropriate circumstances. *See Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529 (9th Cir. 1989) ("[A] circuit court has the inherent power to stay its mandate following the Supreme Court's denial of certiorari."); *Beardslee v. Brown*, 393 F.3d 899, 901 (9th Cir. 2004) ("This inherent authority is not undercut by the time limits specified in Fed. R.App. P. 41(b).").[6] In *Schad*, however, the Court expressly disapproved of *Beardslee*, stating that "*Beardslee* was based on the Sixth Circuit's decision in *Bell*, which we reversed." *Schad*, 133 S. Ct. at 2552. *Bryant* and *Beardslee*, thus, are not entirely reliable precedent for the proposition that the courts of appeals possess inherent authority to stay their mandates. However, *Bryant* and *Beardslee* both concerned instances where the impetus for the stay was a change in the governing law that postdated the filing of the petition for certiorari.[7] Might there be other, more compelling, circumstances in which inherent authority to stay the mandate would exist?

The particular institutional concern with the integrity of court judgments could ground an argument that the court of appeals has inherent authority to stay a mandate in order to investigate a claim of fraud on the court of appeals. It is well established that a

---

[6] *See also United States v. Black,* 733 F.2d 349, 351 (4th Cir. 1984) ("Although this court did not explicitly recall or stay the mandate, we had inherent power to do so."). (In *Black*, the statement concerning stay of the mandate was dictum, because the mandate had issued. *See id*.)

[7] *See Bryant*, 886 F.2d at 1527-28 (enactment of statute postdated filing of certiorari petition); *Beardslee*, 393 F.3d at 901 (Ninth Circuit decision in a separate case postdated filing of certiorari petition). For discussion of the possibility that an amendment of governing statutory law during the pendency of a certiorari petition justifies a further stay of the mandate under Rule 41(b), *see infra* footnote 19 and accompanying text.

federal court has "inherent power ... to vacate its own judgment upon proof that a fraud has been perpetrated upon the court." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). This is true in a case where the court of appeals discovers (after issuance of its mandate) that a fraud was committed upon it. *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 247 (1944) (holding that "undisputed evidence filed with the Circuit Court of Appeals in a bill of review proceeding reveals such fraud on that Court as demands, under settled equitable principles, the interposition of equity to devitalize the 1932 judgment despite the expiration of the term at which that judgment was finally entered"); *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946) (discussing a case in which the court of appeals in 1944 vacated a 1935 decision due to bribery of a panel judge, and noting that "[t]he inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question"). These cases indicate that the courts of appeals have inherent authority to *recall* their mandates in order to investigate claims of fraud on the court – and one could argue that the greater power (to recall the mandate) should logically include the lesser power (to stay the mandate).

During the subcommittee's discussions, the All Writs Act was mentioned as a possible statutory source of authority for stays of the mandate. 28 U.S.C. § 1651(a) provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." The All Writs Act does empower a federal appellate court to issue a writ directed to a lower court to *enforce* the appellate court's judgment.[8] I have not, however, found cases that employ the All Writs Act as authority for a court of appeals to *stay* its mandate.

A different possible statutory source of a court of appeals' authority to stay its mandate might be found in 28 U.S.C. § 2106,[9] which provides that "[t]he Supreme Court

[8] *See, e.g.*, *Fed. Home Loan Bank of San Francisco v. Hall*, 225 F.2d 349, 385 n.12 (9th Cir. 1955) ("An appellate court has unquestioned power under 28 U.S.C.A. Sec. 1651(a) to enforce compliance with its decree by directly enjoining action contrary thereto.").

[9] 28 U.S.C. § 2101(f) can be read to authorizes stays of the mandate, but the Section 2101(f) stay power focuses only on stays to permit a litigant to seek certiorari review. Section 2101(f) provides:

> In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of security, approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay.

or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, *or require such further proceedings to be had as may be just under the circumstances*." (Emphasis added.) The Second Circuit has relied upon the latter portion of Section 2106 as authority for staying its mandate in cases where the court of appeals deems it just to allow a criminal defendant time to consider whether to withdraw his or her appeal in light of the implications of the court's ruling.[10] The Supreme Court did not discuss Section 2106 in either *Schad* or *Bell*.

B. Altering inherent and/or statutory authority by rule

To the extent that a court of appeals' authority to stay its mandate emanates from sources other than Rule 41, the ability of the rulemakers to alter that authority by amending Rule 41 depends in part on the source of the additional authority. So long as such an amendment complied with the scope restrictions set by the Rules Enabling Act,[11]

Section 2101(f) addresses a stay of "execution and enforcement of" a judgment or decree. At least one case treats a Section 2101(f) stay as an action distinct from staying or recalling a mandate. *See United States v. Barnett*, 330 F.2d 369, 369-70 (5th Cir. 1963) (en banc, per curiam opinion) ("After setting aside a stay of execution of this Court's mandate pursuant to 28 U.S.C.A. § 2101(f) by one of the Judges of this Court, the Court then directed that its mandate be recalled and amended ...."). Other authorities suggest some degree of overlap between a Section 2101(f) stay and a Rule 41(b) stay. *See, e.g.*, *CFTC v. British Am. Commodity Options Corp*., 434 U.S. 1316, 1319 (1977) (Marshall, J., in chambers) (denying application to vacate stay of court of appeals' mandate and noting preliminarily that the stay had been sought from the court of appeals "under 28 U.S.C. § 2101(f) and Fed.Rule App.Proc. 41(b)"). In any event, Section 2101(f) stays exist specifically for the purpose of permitting a party to obtain a writ of certiorari, so this statute would not seem to authorize a further stay of the mandate after denial of certiorari.

[10] *See United States v. Bohn*, 959 F.2d 389, 395 (2d Cir. 1992) ("Since appellants could not necessarily have anticipated the risks that their 'victory' would entail, we deem it appropriate ... to afford them the opportunity to accept their current sentences instead of facing the risk of imprisonment."); *United States v. Figueroa*, 647 F.3d 466, 471 (2d Cir. 2011) ("[W]e will stay our mandate for an additional thirty days beyond the normal interval provided by Federal Rule of Appellate Procedure 41(a) [*sic*] —or beyond the disposition of any timely petitions for rehearing, whichever period is longer—to allow defense counsel to confer with appellants one final time regarding the risks of pursuing their sentencing challenges on appeal.").

[11] *See* 28 U.S.C. § 2072(b) (providing that rules promulgated pursuant to the Rules Enabling Act "shall not abridge, enlarge or modify any substantive right"). Might a case arise in which the application of a rule limiting the court of appeals' stay authority overstepped this scope limitation? For example, if a court of appeals were in future to be presented with evidence that its affirmance of the denial of habeas relief in a capital case had rested on fraud on the court of appeals, would a rule removing all ability to stay or recall the mandate abridge the prisoner's substantive rights? It seems possible that the application of a complete bar on stay or recall of the mandate might violate substantive rights in such a

the amendment could supersede any contrary statute.[12] Whether the rule amendment could validly displace a court's inherent authority to stay its mandate seems to me to depend on the scope and effect of such displacement.

Because such a rule would be promulgated pursuant to the delegation of authority under the Rules Enabling Act, and because Congress presumably cannot delegate more authority than it possesses itself,[13] I analyze this question by asking whether Congress would have authority to enact legislation limiting the courts' inherent stay powers. Congress does possess the ability to alter the functioning of some inherent powers of the Article III courts:

> The inherent powers of a federal court are not beyond congressional control; on the contrary, there is a large area of shared space in which the courts can act in the absence of enabling legislation but must acquiesce in the face of it. Nonetheless, there are limits to what Congress can do in regulating the courts' inherent power. For example, Congress can impose some procedural requirements upon the exercise of the contempt power, which is an inherent power of every court. It cannot, however, wholly withdraw that power or, even short of that, impose regulations that would cripple courts in its exercise.[14]

It seems possible to argue, analogously, that a rule imposing procedural requirements on the court of appeals' stay or recall of its mandate could be valid, whereas a rule that entirely eliminated the court of appeals' power to stay or recall a mandate could be invalid as applied to some situations – as where questions arose concerning whether the judgment was obtained by fraud.

In this connection, it may be useful to note the treatment of a parallel issue in Civil Rule 60. A request for relief from a judgment under Civil Rule 60(b)(3) on grounds of fraud must be made within a reasonable time, which can be no later than a year after entry of judgment. *See* Civil Rule 60(c)(1). But that time limit explicitly does not

---

situation – though, granted, such a situation would be very rare. And a rule that channeled, rather than eliminated, the stay and recall powers would be much less vulnerable to an Enabling Act challenge.

[12] *See* 28 U.S.C. § 2072(b) ("All laws in conflict with [rules promulgated pursuant to the Rules Enabling Act] shall be of no further force or effect after such rules have taken effect."). Concededly, the rulemakers have in recent years sought legislative changes when adopting rule amendments that were expected to supersede existing statutes. See for example the Appeal Time Clarification Act of 2011, Pub. L. No. 112-62, Nov. 29, 2011, 125 Stat. 756, which took effect on the same day as the 2011 amendments to Appellate Rule 4(a)(1)(B).

[13] I do not explore here whether supervisory authority possessed by the Supreme Court with respect to the lower federal courts could be argued to supplement the authority delegated by Congress in the Rules Enabling Act.

[14] Amy Coney Barrett, *Procedural Common Law*, 94 Va. L. Rev. 813, 842-43 (2008) (footnotes omitted).

circumscribe the court's authority to vacate a judgment due to fraud on the court: Rule 60(d)(3) provides that Rule 60 "does not limit a court's power to ... set aside a judgment for fraud on the court." The 1946 Committee Note to Rule 60(b) explains that "the rule expressly does not limit the power of the court, when fraud has been perpetrated upon it, to give relief under the saving clause," and cites the *Hazel-Atlas* case "[a]s an illustration of this situation."[15]

This brief discussion suggests that a rule amendment entirely removing the ability of a court of appeals to stay or recall its mandate after denial of certiorari might constitute an impermissible infringement on the courts' inherent powers. On the other hand, a rule that removed authority to stay the mandate but left intact the authority to recall it would seem considerably less problematic, because the ability to recall the mandate would seem to leave the court with an effective substitute for the stay power.

C. Policy questions

As noted above, the subcommittee considered three possible approaches to Rule 41's treatment of the court of appeals' authority to stay its mandate after the denial of certiorari: first, proposing a rule amendment that would remove such authority; second, proposing a rule amendment that would limit such authority to extraordinary circumstances; and third, taking no action to address this issue.

The first approach – amending Rule 41 to require issuance of the mandate in all instances immediately after denial of certiorari – would serve the interest of finality and winning litigants' reliance interests, and would be a good fit in the general run of cases. As the *Bell v. Thompson* Court observed, "As a practical matter, a decision by this Court denying discretionary review usually signals the end of litigation.... By providing a mechanism for correcting errors in the courts of appeals before Supreme Court review is requested, the Federal Rules of Appellate Procedure ensure that litigation following the denial of certiorari will be infrequent." 545 U.S. at 806.

Such an approach, however, would foreclose the possibility of a stay in a truly extraordinary and compelling case – for example, an instance in which the winning litigant was later found to have perpetrated a fraud upon the court of appeals. In such an extraordinary circumstance, as noted above, the courts of appeals are recognized to have the authority to *recall* their mandate;[16] and, as I argued in Part II.B, a rule amendment could be vulnerable to challenge if it were to purport to remove both the authority to stay

---

[15] For a helpful discussion of the sometimes-murky distinction between fraud on the court and other types of fraud, see 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 2870.

[16] *See, e.g., Calderon v. Thompson*, 523 U.S. 538, 550 (1998) ("In light of 'the profound interests in repose' attaching to the mandate of a court of appeals … the power can be exercised only in extraordinary circumstances. The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." (quoting 16 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 3938, p. 712 (2d ed.1996))).

the mandate and the authority to recall it in such a circumstance. The proposal considered by the subcommittee would remove only the stay authority, and not the recall authority.[17] One might ask, therefore, what purpose would be served by requiring the court to issue the mandate only to immediately recall it. On the other hand, one might ask why it is necessary to authorize the courts of appeals to stay a mandate after denial of certiorari if there is an existing vehicle to consider an extraordinary case through recall of the mandate.

The second approach would amend Rule 41 to specify that a court of appeals can stay its mandate after denial of certiorari only in extraordinary circumstances. Such an approach would avoid any question of encroachment on a court's inherent power to stay the mandate, because the circumstances that fall within the heartland of the inherent power – such as the discovery of a fraud on the court of appeals – would presumably count as extraordinary circumstances. A safety valve allowing for stays in extraordinary circumstances would permit courts of appeals to address the rare cases in which a compelling need for a stay arises, without requiring recourse to the more cumbersome device of first issuing and then recalling the mandate. So, for example, if the court of appeals had decided an appeal based on a controlling federal statute and Congress amended that statute after the panel decision and before the denial of certiorari, the court of appeals could extend an existing stay after the certiorari denial in order to permit time to consider the effects of the statutory change.[18] As this example suggests, the requisite extraordinary circumstances would be rare. It seems possible that a rule explicitly noting the possibility of a further stay post-certiorari denial might increase the frequency of requests for such stays; but the additional workload for the courts of appeals might not be all that great, because in most instances such requests would warrant denial without much analysis.

The third approach would be to take no action on this issue. During the subcommittee's discussions, a member asked whether the question of post-certiorari-denial stays of the mandate arises outside the context of capital cases. If not, the member suggested, then the Court's decisions in *Bell* and *Schad* may have settled the questions that are likeliest to arise. In fact, questions concerning post-certiorari stays have arisen outside the death-penalty context. The two decisions cited by the *Bell* Court as examples of extraordinary circumstances – *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895 (5th

---

[17] A subcommittee member expressed concern that a rule amendment removing the stay authority could be read by courts to limit, as well, the recall authority. To address this concern, language could be added to the Committee Note disclaiming intent to affect the recall authority. Admittedly, courts vary in their willingness to consult Committee Notes when interpreting a rule. But, for the reasons suggested in Part II.B, interpreting a rule removing stay authority to also eliminate recall authority would render the rule vulnerable to serious challenge when applied to an instance where the courts traditionally have possessed inherent authority to recall their mandate in order to address fraud on the court. Accordingly, even without reference to a Committee Note, I would hope that a court would interpret the rule to avoid such a validity problem.

[18] *See, e.g.*, *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1530 (9th Cir. 1989) ("Congress's action while this case was pending on certiorari justifies a stay of the mandate ....").

Cir. 1995) (per curiam), and *Alphin v. Henson*, 552 F.2d 1033 (4th Cir. 1977) – were civil suits in which the court of appeals stayed its mandate to allow for consideration of legislative changes that occurred during the pendency of the certiorari petition.[19] And the rare instances in which a court of appeals has recalled its mandate include a number of civil cases.[20] But though these cases demonstrate that the question does sometimes arise outside the context of death penalty litigation, capital cases do seem to form a large proportion of the case law.[21]

---

[19] In *First Gibraltar*, the court of appeals initially held in April 1994 that federal law "preempted Texas homestead law insofar as Texas law prohibits federal savings associations from taking enforceable security interests in homestead property through [reverse annuity mortgages] and line of credit conversion mortgages." *First Gibraltar Bank, FSB v. Morales*, 19 F.3d 1032, 1049 (5th Cir. 1994), *opinion vacated and superseded*, 42 F.3d 895 (5th Cir. 1995). In July 1994, the Texas state officials filed a petition for certiorari. In September 1994 Congress enacted legislation that, inter alia, exempted certain state homestead provisions from preemption by the statutory framework that was at issue in *First Gibraltar*. Meanwhile, the court of appeals had stayed its mandate "for two independent reasons; first, to permit an en banc poll ... and second, to allow the State to petition for certiorari." *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 897 (5th Cir. 1995). After the Supreme Court denied certiorari in October 1994, the stay of the mandate enabled the court of appeals to alter its judgment in order to account for the new legislation. *See id.* at 898, 902.

In *Alphin*, the court of appeals initially ruled that plaintiffs who obtained an injunction but not damages on their claims under Section 2 of the Sherman Act could not recover attorney fees. *See Alphin v. Henson*, 538 F.2d 85, 86 (4th Cir. 1976) (per curiam), *opinion withdrawn in part*, 552 F.2d 1033 (4th Cir. 1977). In June 1976 the court of appeals stayed its mandate to permit the plaintiffs to seek certiorari review. In September 1976 Congress enacted legislation that made clear that a damages recovery was not a precondition to the award of attorney fees in such cases. On November 15, 1976, the Supreme Court denied certiorari; on November 17, the plaintiffs sought leave from the court of appeals to file a second rehearing petition; on November 19, the court of appeals further stayed its mandate pending determination of the plaintiffs' request; and on November 22 the court of appeals received notice of the denial of certiorari. The stay of the mandate enabled the court of appeals to alter its judgment to direct the award of attorney fees to the plaintiffs. *See Alphin v. Henson*, 552 F.2d 1033, 1035-36 (4th Cir. 1977).

[20] *See, e.g.*, *Butler v. Acad. Ins. Grp., Inc.*, 36 F.3d 1091, at *3 n.5 (4th Cir. 1994) (unpublished per curiam opinion) ("[W]hen we remanded the case to the district court to allow Butler to challenge the award of damages on Academy's counterclaim, we failed to envision a situation where Academy would end up owing Butler money. We see no reason to punish Butler for the cumulative effect of the district court's error and this court's lack of sufficient imagination by imposing this barrier to his recovery. We accordingly relax this portion of our mandate to allow the district court to enter judgment in favor of Butler."). *See generally* 16 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, Fed. Prac. & Proc. § 3938 (discussing recall of the mandate).

[21] For death penalty cases in addition to *Bell* and *Schad*, see *Henry v. Ryan*, No. 09-99007, 2014 WL 4397948 (9th Cir. Sept. 4, 2014); *Beardslee v. Brown*, 393 F.3d 899, 902 (9th Cir. 2004) (finding that "exceptional circumstances exist justifying a temporary stay of the issuance of the mandate"), *disapproved by Ryan v. Schad*, 133 S. Ct. 2548, 2552 (2013)

D. Drafting issues

In this part, I offer sketches of proposed amendments that would implement the first and second options discussed in Part II.C. Before setting out those sketches, I briefly outline two considerations that informed the drafting. The first concerns the possible effect of Appellate Rule 2 on limitations imposed by Appellate Rule 41. The second concerns the difference in wording between Rules 41(d)(2)(B) and 41(d)(2)(D).

Appellate 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)." According to the original Committee Note to Rule 2: "The primary purpose of this rule is to make clear the power of the courts of appeals to expedite the determination of cases of pressing concern to the public or to the litigants by prescribing a time schedule other than that provided by the rules. The rule also contains a general authorization to the courts to relieve litigants of the consequences of default where manifest injustice would otherwise result. Rule 26(b) prohibits a court of appeals from extending the time for taking appeal or seeking review." Any proposal to amend Rule 41 to make mandatory the issuance of the mandate should consider whether the availability of authority to suspend the rules under Rule 2 would frustrate the purpose of an amendment, and whether Rule 2 should amended as well. For illustrative purposes, I include proposed amendments to Rule 2 in the sketches that follow.

The subcommittee also discussed 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)

("*Beardslee* was based on the Sixth Circuit's decision in *Bell*, which we reversed."); *Coe v. Bell*, 210 F.3d 371 (6th Cir. 1999) ("The issuance of a mandate upon receipt of a Supreme Court order denying certiorari is a ministerial act this court is compelled to perform pursuant to Rule 41(d)(2)(D). To stay the mandate following denial of certiorari is therefore an extraordinary act equivalent to a decision by this court to recall the mandate.").

For an interesting example where the court of appeals denied the *state*'s request for a stay of the mandate, *see Adamson v. Lewis*, 955 F.2d 614, 620-21 (9th Cir. 1992) (en banc) ("Any stay of mandate would have to be justified upon the same grounds as would justify a recall of mandate. In this case, the result of the application of subsequent Supreme Court authority would not change the result of our *en banc* opinion."). In *Adamson*, the court of appeals had held Adamson's death sentence to be unconstitutional; the Director of Arizona's Department of Corrections petitioned for certiorari; the Supreme Court rejected similar constitutional challenges to Arizona's death penalty regime in other cases, but denied certiorari in Adamson's case (apparently because, with two Justices taking no part, there were not enough votes to grant certiorari, vacate, and remand for reconsideration in light of the decisions in the other cases); the State sought to stay the court of appeals' mandate in *Adamson* to allow for reconsideration in light of the recent Supreme Court rulings; and the court of appeals denied the request and issued the mandate. *See id.* at 616-17; *id.* at 621-22 (Brunetti, J., joined by Alarcón and Beezer, JJ., dissenting).

directs, as noted above, 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***.**" *Schad* illustrates that 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." The court of appeals in *Schad* pegged the endpoint of its stay to what turned out to be the later of these points (the "final disposition" in the Supreme Court), and the Court did not appear to criticize this choice.

The subcommittee discussed whether it would be desirable to amend Rule 41(d)(2)(D) to refer to "the Supreme Court's final disposition," and the tentative conclusion was that it would not be desirable. The difference in wording likely stems from the fact that Rule 41(d)(2)(B) encompasses instances when the Supreme Court *grants* certiorari – so that a reference to the "final disposition" includes those cases in which the Court issues a decision on the merits. As a matter of current practice, it seems likely that the Clerk's Office promptly issues the mandate as a matter of course upon receipt of the order denying certiorari.[22] It is very rare for the Supreme Court to grant rehearing of the denial of certiorari.[23] A rule that authorized the court of appeals routinely to delay issuance of the mandate (beyond the time when a copy of the order denying certiorari is filed) merely because a rehearing petition is pending in the Supreme Court would therefore authorize delays in issuing the mandate in many cases where there is no reasonable prospect that the initial denial of certiorari will be disturbed.[24]

---

[22] Mr. Gans confirmed that such is the practice in the Eighth Circuit. *See also* D.C. Circuit Handbook XIII.C ("Upon notification of the denial of the petition by the Supreme Court, this Court's mandate will be issued promptly."); Sixth Circuit Rule 41(c) ("Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately.").

[23] *See* Supreme Court Rule 44.2 (grounds for petition for rehearing of order denying petition for certiorari "shall be limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented"); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 15.I.6(b), pp. 841-45 (10th ed. 2013).

[24] Moreover, if there is a real prospect that five Justices will vote to grant rehearing of the denial of certiorari, the petitioner could seek an order suspending the order denying certiorari. *See* Supreme Court Rule 16.3 ("The order of denial will not be suspended pending disposition of a petition for rehearing except by order of the Court or a Justice."); *Boumediene v. Bush*, 550 U.S. 1301, 127 S. Ct. 1725, 1727 (2007) (Roberts, C.J., in chambers) ("This most extraordinary relief will not be granted unless there is a 'reasonable likelihood of this Court's reversing its previous decision and granting certiorari.'" (quoting *Richmond v. Arizona*, 434 U.S. 1323 (1977) (Rehnquist, J., in chambers))); S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 6.XX.43, pp. 521-22 (10th ed. 2013).

1. Option One (barring stays after denial of certiorari)

Here is a very rough sketch of possible amendments to implement the first policy option noted above (barring further stays of the mandate after a denial of certiorari). The sketch includes an amendment to Rule 2 in order to avoid the possibility that a court would simply invoke Rule 2 in order to suspend the operation of the relevant provisions in Rule 41.

Rule 2. Suspension of Rules

On its own or a party's motion, 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 Rules 26(b) and 41(d)(2)(D).

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. Subject to Rule 41(d)(2)(D),[25] tThe court may shorten or extend the time by order.

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

(d) **Staying the Mandate.**

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

[25] Would it be clearer to omit "Subject to Rule 41(d)(2)(D)" from Rule 41(b) and instead insert at the start of Rule 41(d)(2)(D) the phrase "Notwithstanding Rule 41(b)," ?

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

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

(D) 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.

2. **Option Two (stays after denial of certiorari only in extraordinary circumstances)**

Here is a very rough sketch of possible amendments to implement the second policy option noted above (permitting further stays of the mandate after a denial of certiorari only in extraordinary circumstances).

Rule 2. Suspension of Rules[26]

On its own or a party's motion, 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 Rules 26(b) and 41(d)(2)(D).

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

[26] Although I reproduce the Rule 2 amendment here as well, it is unclear that such an amendment would be particularly necessary; how many cases would arise in which a court would find no extraordinary circumstances but would nonetheless be willing to invoke Rule 2 to suspend the relevant portion of Rule 41?

(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. Subject to Rule 41(d)(2)(D),[27] tThe court may shorten or extend the time by order.

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

(d) **Staying the Mandate.**

(1) **On Petition for Rehearing or Motion.** The timely filing of a 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) 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) 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) The court may require a bond or other security as a condition to granting or continuing a stay of the mandate.

[27] Would it be clearer to omit "Subject to Rule 41(d)(2)(D)" from Rule 41(b) and instead insert at the start of Rule 41(d)(2)(D) the phrase "Notwithstanding Rule 41(b)," ?

(D) Unless it finds that extraordinary circumstances justify it in ordering a further stay, tThe 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.

III. Conclusion

If the Committee is inclined to consider amendments to Rule 41 to address matters discussed here, the clarification proposed in Part I of this memo seems like the most straightforward change: Requiring stays of the mandate to be accomplished by order would serve an important notice-giving function while not impeding in any significant way the ability of the court of appeals to exercise its stay authority. By contrast, the questions addressed in Part II of this memo seem more challenging.

Encl.

THIS PAGE INTENTIONALLY BLANK

TAB 5B

THIS PAGE INTENTIONALLY BLANK

2014 WL 4397948
Only the Westlaw citation is currently available.
United States Court of Appeals,
Ninth Circuit.

Graham S. HENRY, Petitioner–Appellant,
v.
Charles L. RYAN, Respondent–Appellee.

No. 09–99007. | Sept. 4, 2014.

Attorneys and Law Firms

Robin C. Konrad, Esquire, Assistant Federal Public Defender, Dale A. Baich, Esquire, Assistant Federal Public Defender, FPDAZ-Federal Public Defender's Office, Phoenix, AZ, for Petitioner-Appellant.

Jonathan Bass, Lacey Stover Gard, Assistant Attorney General, AGAZ-Office of the Arizona Attorney General, Tucson, AZ, Jeffrey A. Zick, Esquire, Assistant Attorney General, Arizona Attorney General's Office, Phoenix, AZ, for Respondent-Appellee.

D.C. No. 2:02–CV–00656–SRB.

ORDER

KOZINSKI, Chief Judge:

***1** Upon the vote of a majority of nonrecused active judges, it is ordered that this case be reheard en banc pursuant to Federal Rule of Appellate Procedure 35(a) and Circuit Rule 35–3. The April 8, 2014, three judge panel order denying Henry's motion to reconsider the panel's November 1, 2013, order denying the petition for panel rehearing shall not be cited as precedent by or to any court of the Ninth Circuit.

Judges MURGUIA and FRIEDLAND did not participate in the deliberations or vote in this case.

Judge W. FLETCHER, concurring:

On June 19, 2013, a three judge panel of our court unanimously denied habeas relief in this capital case. *Henry v. Ryan*, 720 F.3d 1073 (9th Cir.2013). Among other things, Henry claimed that the Arizona courts had committed an error under *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). The panel assumed without deciding that the Arizona courts had committed an *Eddings* error. 720 F.3d at 1091. It nonetheless denied relief on the ground that any error was harmless under the standard of *Brecht v. Abrahamson*, 507 U.S. 619, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). The panel did not apply a structural error standard. *Id.* at 1089. On November 1, the panel denied Henry's petition for rehearing. No member of our court called the case en banc.

On March 12, 2014, our court granted en banc review of *McKinney v. Ryan*, 730 F.3d 903 (9th Cir.2013). A central question before the en banc court in *McKinney* will be whether *Eddings* error is structural. On March 14, two days after we granted en banc review in *McKinney*, Henry moved for full-court reconsideration of the denial of his petition for rehearing en banc in light of *McKinney*. On March 27, the judge of our court who serves as en banc coordinator entered an order, on behalf of the court, denying the motion as procedurally improper.

Then, in a motion for reconsideration addressed to the three judge panel, Henry sought a stay of proceedings in light of the grant of en banc rehearing in *McKinney* and the grant of a stay in *Poyson v. Ryan*, 743 F.3d 1185 (9th Cir.2014). *Poyson* is a separate *Eddings* case in which the three judge panel had denied habeas relief and in which an en banc call had failed. Noting that the panel in *Poyson* had stayed proceedings to await the outcome in *McKinney*, Henry wrote in his motion:

> Mr. Henry is similarly situated to Mr. Poyson: Mr. Henry and Mr. Poyson both raised a causal-nexus issue in their petitions for rehearing, and their petitions for rehearing were denied within one week of each other. Mr. Poyson's panel has now amended its order denying panel rehearing and is instead staying the case pending the resolution of *McKinney*. [If the

> panel denies Mr. Henry's motion,] [t]he prejudice to Mr. Henry will be great—he will be executed, while Mr. McKinney or Mr. Poyson may be spared.

Motion at 7. Henry therefore asked the panel to "stay the proceedings pending the resolution of the en banc proceedings in *McKinney*." *Id.* at 8.

***2** On April 8, the panel denied Henry's motion on the merits. Two of the panel judges joined in a published per curiam order. The third judge, the author of the panel opinion that had denied habeas relief, dissented, contending that the panel should stay proceedings to await *McKinney*. Two days later, on April 10, a judge of our court called en banc the panel's order. After an exchange of memoranda arguing for and against the en banc call, in accordance with our usual practice, a majority of the active judges on our court voted to reconsider en banc the panel's order denying the stay.

Some of our colleagues now dissent from our court's decision to rehear en banc the panel's order. They do not dispute that a potentially dispositive issue in *McKinney*—whether an *Eddings* error by the state court is structural—is also potentially dispositive in *Henry*. They nonetheless contend that we should not reconsider en banc the panel's order. With respect, our dissenting colleagues are mistaken.

Our dissenting colleagues' first contention may be disposed of fairly quickly. They contend that our court has acted improperly under our own internal procedures in voting to reconsider en banc the panel's order. They contend that the call came too late. If the calling judge had called en banc on April 10 the panel's decision denying habeas relief in Henry's *case*, the dissenters would be correct. But the calling judge did not do that. Rather, the calling judge called en banc the panel's April 8 *order* denying Henry's request to stay proceedings to await *McKinney*.

Federal Rule of Appellate Procedure 35(a)(1) provides that en banc reconsideration is appropriate when "necessary to secure or maintain uniformity of the court's decisions." Ninth Circuit Rule 27–10(b) specifically contemplates that orders issued in response to motions may be reheard en banc, as does our General Order 6.11. Our long-standing and consistent practice has been to allow en banc calls of orders, *see, e.g.*, *Andreiu v. Ashcroft*, 253 F.3d 477 (9th Cir.2001) (en banc) (en banc rehearing of a panel order denying a stay of removal), even when those orders have been entered after the panel's decision on the merits of a case. *See, e.g., Garcia v. Google, Inc.*, No. 12–57302, Docket Entry No. 46 (9th Cir. Mar. 6, 2014) (order issued by our en banc coordinator notifying the parties that an order of the three judge panel "denying a stay of the panel's prior orders" had been called en banc, and noting that "[t]he *en banc* call is confined to the stay order only, and the parties should address only the order in the briefing").

Our dissenting colleagues' other contentions deserve more sustained attention.

Our dissenting colleagues contend that because the Supreme Court has denied certiorari, Federal Rule of Appellate Procedure 41(d)(2)(D) requires immediate issuance of the mandate. Dissent at 8–10. The language upon which they rely provides, "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." If taken out of context, this language means what the dissenters want it to mean. But if taken in context, it does not.

***3** In relevant part, Rule 41 provides as follows:

> **(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.*
>
> ...
>
> **(d) Staying the Mandate.**
>
> **(1) On Petition for Rehearing or Motion.** The timely filing of a 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)** *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)** 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.*
>
> ...
>
> **(D)** *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.*

Fed. R.App. P. 41 (emphasis added).

The Supreme Court has not read Rule 41(d)(2)(D) in the way our dissenting colleagues want to read it. The Court reads it to apply only to stays of mandate entered for the sole purpose of allowing the Supreme Court to consider a petition for certiorari. When a stay of mandate is entered for some other purpose, Rule 41(b) applies.

Our Circuit Rule 22–2(e) provides, "When the panel affirms a denial or reverses a grant of a first petition or motion [in a capital case], it shall enter an order staying the mandate pursuant to FRAP 41(b)." Acting on behalf of the panel, the clerk's office in this case stayed the mandate pursuant to Rule 41(b), as it routinely does in all capital cases. That stay remains in effect.

In *Bell v. Thompson*, 545 U.S. 794, 125 S.Ct. 2825, 162 L.Ed.2d 693 (2005), and *Ryan v. Schad*, —— U.S. ——, 133 S.Ct. 2548, 186 L.Ed.2d 644 (2013), the Supreme Court held that the mandate should have been issued after a denial of certiorari. But the Court made clear in both *Bell* and *Schad* that Rule 41(d)(2)(D) is the "default rule" applicable only to stays entered solely for the purpose of allowing time for the Supreme Court to consider a petition for certiorari. The Court wrote in *Bell:*

> In the typical case, where the stay of mandate is entered *solely* to allow this Court time to consider a petition for certiorari, Rule 41(d)(2)(D) provides the default: "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."

***4** 545 U.S. at 806, 125 S.Ct. 2825 (emphasis added). The Court quoted this language from *Bell* in *Schad. See* 133 S.Ct. at 2550. In *Schad*, the Court explained the reason for Rule 41(d)(2)(D):

> Federal Rule of Appellate Procedure 41(d)(2)(D) sets forth the default rule 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." (Emphasis added.) The reason for this Rule is straightforward: "[T]he stay of mandate is entered *solely* to allow this Court time to consider a petition for certiorari." *Bell*, 545 U.S.[ ]at 806 [125 S.Ct. 2825][.]

133 S.Ct. at 2550 (first and second alterations in original) (second emphasis added).

The Court's explanation of the reason for the "default rule" makes plain the scope of Rule 41(d)(2)(D). When a stay of mandate is entered "solely" for the purpose of allowing the Court to consider a petition for certiorari, the stay has served its purpose as soon as the Court denies certiorari. In that case, the mandate must issue immediately. But there is a negative pregnant in the Court's explanation. When a stay of mandate serves a purpose other than allowing the Court time to consider a petition for certiorari, the "default rule" does not apply.

If a stay is not entered for the sole purpose of allowing time for the Court to consider a petition for certiorari, the governing language is in Rule 41(b): "The court may shorten or extend the time." Immediately before the passage from *Bell*, quoted above, the Court wrote, with respect to Rule 41(b):

> While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare. *See, e.g., First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895 (C.A.5 1995); *Alphin v. Henson*, 552 F.2d 1033 (C.A.4 1977).

545 U.S. at 806, 125 S.Ct. 2825.

In *First Gibraltar* and *Alphin*, cited with approval in *Bell* as examples of "rare" cases in which a stay was appropriate, the courts of appeals stayed the mandate after

the Court denied certiorari. In both cases, there was a reason for the stay independent of the Supreme Court's consideration of the petition for certiorari, based on something that had occurred before the filing of the Court's denial. In *First Gibraltar,* the Fifth Circuit had stayed the mandate before the Court's denial of certiorari not only to allow time for the Court to consider the petition for certiorari. It had also stayed the mandate "for a reason independent of the petition for certiorari"—"to permit an en banc poll." 42 F.3d at 897–98. In *Alphin,* the Fourth Circuit had stayed the mandate in order to allow the Court to consider a petition for certiorari. Four days after the Court denied certiorari, but before the order denying certiorari was received by the Fourth Circuit, that court stayed the mandate in order to decide the plaintiffs' motion for leave to file a second petition for rehearing. 552 F.2d at 1034.

***5** In the case now before us, we have *both* of these circumstances. We have continued to stay the mandate, despite the denial of certiorari, in order "to permit an en banc poll" (*First Gibraltar*), and we have done so in order to decide a motion for reconsideration (*Alphin*). The Court wrote in *Bell* that cases such as *First Gibraltar* and *Alphin* are "rare." But they do exist, and *First Gibraltar* and *Alphin* demonstrate that the case now before us is one of them.

Our dissenting colleagues also contend that Henry has not satisfied the "extraordinary circumstances" test of *Bell* and *Schad. See* Dissent at 10–12. We do not believe that the "extraordinary circumstances" test of *Bell* and *Schad* applies to this case. In *Bell* and *Schad,* the only basis for the stay was Rule 41(d)(2). The fact that there are reasons to stay proceedings other than for the purpose of allowing the Supreme Court to consider Henry's petition for certiorari means that this case is governed instead by Rule 41(b), with the result that "extraordinary circumstances" within the meaning of *Bell* and *Schad* are not required. Our dissenting colleagues nonetheless contend that "extraordinary circumstances" are required, and that *Bell* and *Schad* compel us to issue the mandate.

In *Bell,* the Court reversed the Sixth Circuit, which had withheld its mandate "without entering a formal order" for more than five months after denial of a petition for rehearing of a denial of certiorari by the Court. 545 U.S. at 796, 804, 125 S.Ct. 2825. After having previously affirmed the district court's denial of habeas relief in a capital case, the Sixth Circuit issued a new opinion vacating the district court's decision and remanding for an evidentiary hearing two days before a scheduled execution and more than five months after the Court had denied the petition for rehearing of its denial of certiorari. *Bell,* 545 U.S. at 799, 801, 125 S.Ct. 2825; *Schad,* 133 S.Ct. at 2551. The Court held that the Sixth Circuit had abused its discretion for three interrelated reasons.

The Court first emphasized that the Sixth Circuit had not informed the parties that it was reconsidering its decision. On the assumption that the mandate had issued, the State of Tennessee scheduled an execution date, which, "in turn, led to various proceedings in state and federal court to determine Thompson's present competency to be executed." 545 U.S. at 805, 125 S.Ct. 2825. The Court wrote, "The Court of Appeals could have spared the parties and the state judicial system considerable time and resources if it had notified them that it was reviewing its original panel decision." *Id.* Further, the Court noted that the Sixth Circuit had very little basis for reversing itself and issuing a new opinion. *Id.* at 806–13, 125 S.Ct. 2825. Finally, the Court concluded that the Sixth Circuit had not accorded sufficient respect to the state court judgment. The Court wrote, "By withholding the mandate for months—based on evidence that supports only an arguable constitutional claim—while the State prepared to carry out Thompson's sentence, the Court of Appeals did not accord the appropriate level of respect to that judgment." *Id.* at 813, 125 S.Ct. 2825; *see also Schad,* 133 S.Ct. at 2551 (summarizing the three reasons given in *Bell*).

***6** In *Schad,* decided eight years later, the Court denied certiorari. After the Court's denial, Schad moved in our court to stay the mandate to await the result of a pending en banc case. *Id.* at 2550. We declined to issue a stay on that ground. *Id.* Instead, on February 1, 2013, one month before the state ultimately planned to execute Schad, we *sua sponte* construed Schad's motion as a motion to reconsider our prior denial of his motion to remand to the district court in light of *Martinez v. Ryan,* —— U.S. ——, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012). *Id.* We then granted the motion, as we had *sua sponte* construed it, and remanded to the district court for proceedings under *Martinez. Id.*

The Court in *Schad* described *Bell,* and then wrote that we had "similarly" abused our discretion in *Schad. Id.* at 2551. The Court pointed out that "months earlier," in July 2012, we had denied a motion to remand to the district court to address the *Martinez* issue. *Id.* at 2250–51. The Court wrote that arguments made in favor of remand in

February 2013 were "identical" to arguments we had rejected in July 2012. *Id.* at 2252. Further, when we decided in February 2013 not to issue the mandate, it had been ten months since the Court's decision in *Martinez,* and nearly seven months since we had initially rejected Schad's *Martinez* request. *Id.* at 2251–52.

The circumstances in this case are very different.

First, when the Court denied certiorari in *Bell* and *Schad,* there were no ongoing proceedings in the court of appeals of which the parties had notice. In *Bell,* one judge on the Sixth Circuit had decided to reread the record and had found evidence that had previously been overlooked. Based on that evidence, the threejudge panel reversed its prior denial of habeas and issued a new opinion two days before the scheduled execution. *See Bell,* 545 U.S. at 801, 125 S.Ct. 2825; *Schad,* 133 S.Ct. at 2551. More than five months had elapsed between the Court's final disposition of the petition for certiorari and the Sixth Circuit's issuance of the new opinion. It is unclear precisely when the Sixth Circuit judge reread the record. But the important point, emphasized by the Court, was that during the entire more-than-five-month period after the Court's denial of the petition for rehearing of the denial of certiorari, no party was aware that the court of appeals was reconsidering its previous denial of habeas. Likewise, in *Schad,* the Court emphasized that there were no ongoing proceedings in our court when it denied certiorari. After the Court denied certiorari, the petitioner moved for a stay of the mandate, and we then remanded to the district court for a *Martinez* hearing.

By contrast, there were ongoing proceedings in this case, of which the parties were well aware, when the Supreme Court denied certiorari. We granted en banc rehearing in *McKinney* on March 12, 2014. Based on our grant of en banc rehearing in *McKinney,* Henry promptly moved for reconsideration of the panel's previous denial of his petition for rehearing, seeking a stay to await the result in *McKinney.* The panel denied the motion on April 8. A judge of our court called the panel's decision en banc on April 10, and the parties were made aware of the call. The State was asked to provide a response to Henry's motion, which it did on May 2. The Supreme Court denied certiorari on June 9.

***7** Second, there was substantial detrimental reliance in *Bell,* based on the lack of notice by the court that it was considering further action. The Court in *Bell* was sharply critical of the Sixth Circuit because its failure to enter a formal stay after the denial of certiorari misled the state into thinking that it could go forward with its scheduled execution date. On the assumption that there was no stay of the mandate, the parties conducted hearings in both state and federal court concerning the petitioner's competency to be executed. 545 U.S. at 805, 125 S.Ct. 2825. By contrast, there has been no detrimental reliance based on lack of notice here. The state has been aware, from the beginning, of Henry's desire for reconsideration in light of our grant of en banc rehearing in *McKinney.*

Third, there were substantial and unexcused delays in *Bell* and *Schad.* In *Bell,* more than five months passed between the Court's final denial of certiorari and the issuance of the Sixth Circuit's new opinion, with no notice to the parties. In *Schad,* we remanded to the district court to address the *Martinez* issue ten months after *Martinez* was decided, and seven months after we had initially denied a motion for a *Martinez* remand. By contrast, Henry moved promptly for a stay after en banc rehearing was granted in *McKinney.* The panel's order denying Henry's motion was called en banc two days after the order was entered. The parties were notified the following day. The Supreme Court did not deny certiorari until nearly two months later.

Fourth, there were no new facts or arguments in either *Bell* or *Schad* that justified the courts' changes of heart. In *Bell,* the court had made a mistake by overlooking evidence, and one judge investigated and evaluated the case anew based on evidence that had been previously submitted in a motion to supplement the record. 545 U.S. at 799–800, 125 S.Ct. 2825. In *Schad,* we had already denied a *Martinez* motion, and no new *Martinez*-based argument caused the court to change its mind and grant the motion it had previously denied. By contrast, the argument made in Henry's motion was a new argument, based on the grant of en banc rehearing in *McKinney.* Henry argued that consistency in the application of law required that we await the outcome of our en banc rehearing in *McKinney.* This consistency argument had not been made previously. Indeed, it could not have been because en banc rehearing had not yet been granted.

Fifth, the relief awarded in *Bell* and *Schad* interrupted imminent executions. In *Bell,* the Sixth Circuit's opinion reversing its denial of habeas relief was issued two days before the scheduled execution. *Schad,* 133 S.Ct. at 2551. In *Schad,* our order remanding to the district court for a *Martinez* hearing was entered just over a month before the state ultimately planned to execute Schad. *Id.* at 2550. In

both cases, the relief interrupted, at a late date, an orderly process that was then underway. By contrast, there is no scheduled execution in *Henry*, and a stay of the mandate would not interrupt an orderly process. Indeed, the converse is true. If a stay of the mandate is not granted, the orderly en banc process that is now underway would be interrupted.

***8** In short, this case is nothing like *Bell* or *Schad*. We did not stay the mandate for five months following the Supreme Court's denial of a petition for rehearing of a denial of certiorari "without entering a formal order," with no notice to the parties. *See Bell*, 545 U.S. at 796, 805, 125 S.Ct. 2825. We did not, after five months of such silence, issue a new opinion reversing course. *See id.* at 801, 125 S.Ct. 2825. We are not considering "identical" arguments that we had previously rejected. *See Schad*, 133 S.Ct. at 2552; *see also Bell*, 545 U.S. at 806, 125 S.Ct. 2825 (noting that the court of appeals had already rejected "the same arguments" that it later adopted). We are not, at the last minute, disrupting a scheduled execution in which the state has already invested considerable time and resources in preparation. *See Schad*, 133 S.Ct. at 2551.

Instead, there were ongoing proceedings in *Henry*, of which the parties were well aware and in which they were fully involved, when the Supreme Court denied certiorari. There have been no substantial, unexcused delays: Henry moved for reconsideration shortly after en banc rehearing was granted in *McKinney*. The panel's order denying Henry's motion was called en banc two days after the panel's denial. The argument made in Henry's motion for reconsideration was a new argument, based on the grant of en banc rehearing in *McKinney* -an argument that had not, and could not have, been made previously. Finally, no orderly execution process has been scheduled that we are disrupting at the last minute. If anything, if a stay of mandate is not continued, the orderly en banc process currently pending would be interrupted.

Because the relevant rule is Rule 41(b) rather than Rule 41(d)(2)(D), the "extraordinary circumstances" test of *Bell* and *Schad* does not apply to this case. The vast difference between the circumstances in *Bell* and *Schad* and those in this case demonstrate that those cases do not control. Instead, *First Gibraltar* and *Alphin*, both cited with approval in *Bell*, indicate that we properly exercised our authority under Rule 41(b).

* * *

A denial of a motion for reconsideration is, in ordinary circumstances, utterly routine. But the circumstances here are far from ordinary. A critical issue in *Henry* is whether an *Eddings* error is structural, requiring automatic reversal. This issue is common to a number of pending Arizona capital cases. The *Henry* panel treated an *Eddings* error as non-structural. The panel was unanimous, holding that any *Eddings* error was harmless under *Brecht*. *Henry*, 720 F.3d at 1089–91. No one called the panel's decision en banc.

But then the landscape changed. We narrowly decided not to rehear en banc a second *Eddings* case, *Poyson v. Ryan*. We then voted to take en banc a third *Eddings* case, *McKinney v. Ryan*. *McKinney* was originally scheduled to be heard en banc in June, but we postponed the hearing until we could decide whether to take en banc yet a fourth *Eddings* case, *Hedlund v. Ryan*, 750 F.3d 793 (9th Cir.2014).

***9** If we hold in *McKinney* that *Eddings* error is structural, it is possible, perhaps even likely, that Henry will be entitled to a new sentencing hearing. Panels in three other Arizona *Eddings* cases have stayed proceedings to await *McKinney*. Despite the fact that in *Poyson* the en banc call failed, the *Poyson* panel has stayed proceedings. The panel in *Hedlund* has now stayed proceedings. A separate panel has stayed proceedings in *Clabourne v. Ryan*, 745 F.3d 362 (9th Cir.2014).

The only panel that has not stayed proceedings is the *Henry* panel. If the panel's order stands, Henry will be executed. He will be executed even if we hold en banc in *McKinney* that an *Eddings* error is structural. That is, Henry will be executed even if our law, established in *McKinney*, says that he should not be. There is an easy and procedurally proper way to avoid this result. We can stay proceedings in *Henry*, as we have in *Poyson* and *Clabourne*, to allow for the orderly and fair administration of our system of justice.

Concurrence in grant of rehearing en banc by Judge WILLIAM A. FLETCHER.

Judge TALLMAN, with whom Judges O'SCANNLAIN,

CALLAHAN, BEA, and IKUTA join, dissenting from the grant of rehearing en banc:

***9** If one is remembered for the rules one breaks, then our court must be unforgettable. By taking this capital habeas case en banc now—after certiorari has been denied by the Supreme Court and well after the deadline for en banc review by our court has passed—we violate the Federal Rules of Appellate Procedure and our own General Orders. We also ignore recent Supreme Court authority that has reversed us for doing the same thing in the past. No circuit is as routinely reversed for just this type of behavior. We ought to know better.

I

Here's what happened: The panel issued its unanimous opinion denying federal habeas relief to Henry on June 19, 2013. *Henry v. Ryan*, 720 F.3d 1073 (9th Cir.2013). Henry sought panel rehearing and rehearing en banc. The warden filed a response. No judge called for a vote to take the case en banc, so the panel filed a unanimous order denying panel rehearing and rehearing en banc on November 1, 2013.

The mandate should have issued on November 8, 2013, pursuant to the clear text of Federal Rule of Appellate Procedure 41(b): "The court's mandate must issue ... 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 ." Although the court may extend the time, Henry did not request a stay and none was granted.

The concurrence states that the Clerk's office, "[a]cting on behalf of the panel," stayed the mandate pursuant to Ninth Circuit Rule 22–2(e).[1] But no order staying the mandate was ever entered by the panel or by the Clerk's office. Withholding issuance of the mandate is not the same as entering a stay order. Had the parties been told a stay was entered, the State surely would have asked the Supreme Court to vacate it once certiorari was denied.

***10** Regardless, even if a stay had been entered pursuant to the Circuit Rule, Henry's case still should have mandated within 90 days. Federal Rule of Appellate Procedure 41(d)(2)(B) states: "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." But Henry did not request and was not granted a stay extension for good cause. And he did not file a petition for writ of certiorari within 90 days. Instead, he delayed even further by requesting and receiving a two-month extension of time from the Supreme Court.

Some five months after the denial of the petition for rehearing en banc—well after the deadline for en banc review had passed—Henry asked for full-court reconsideration. Henry's request was based on *McKinney v. Ryan*, 745 F.3d 963 (9th Cir.2014), which had subsequently gone en banc. He hoped (and still hopes) that *McKinney* will change the circuit's law in such a way as to nullify his death sentence. His motion was denied.

Henry next petitioned for certiorari. But he was not quite done with us. He filed a third motion for reconsideration, this time seeking relief from the panel.[2] Although the concurrence repeatedly characterizes this motion as a request to stay proceedings in light of *McKinney*, the motion was not a request for a stay. The motion was titled "Motion for Panel Reconsideration of Order Denying Petition for Panel Rehearing in Light of *McKinney v. Ryan* and *Poyson v. Ryan* " and it requested "reconsideration of the denial of [Henry's] petition for panel rehearing."[3] The motion was properly denied.[4] *Henry v. Ryan*, 748 F.3d 940 (9th Cir.2014).

Then things went wrong. A judge called for a vote on whether to take the order denying the motion for reconsideration en banc. I believe that the call was improper. The court should have rejected it. It didn't.

Then, before the vote, on June 9, 2014, the Supreme Court denied Henry's petition for certiorari. *See Henry v. Ryan*, —— U.S. ——, 134 S.Ct. 2729, —— L.Ed.2d —— (2014) (denying certiorari). We received notice the next day. Accordingly, our mandate should have issued immediately. It didn't. We held our mandate (and hold it still).

The vote proceeded and was successful. Here we are.

II

Under our General Orders, we cannot take a case en banc the way we have taken this case en banc. There are only seven paths to an en banc vote. Each path is described in our General Orders. First, the panel that originally receives the case may call for an en banc vote. G.O. 5.2(b). This is the only path that does not have a deadline. The next five each involve an event that triggers a countdown of some limited number of days for an interested judge to call for an en banc vote. Those five triggering events are:

***11** • The receipt of notification that a party has petitioned for the case to be heard en banc initially. G.O. 5.2(a).

• The denial by the panel of a petition for rehearing en banc. G.O. 5.4(b)(2) & (c)(1).

• The denial by the panel of a petition for rehearing by the panel. G.O. 5.4(b)(3).

• Entry of an order by the panel publishing a previously unpublished disposition. G.O. 5.4(c)(3).

• The panel's substantive amendment of its previous disposition. G.O. 5.3(a).

Finally, there is a catch—all provision—General Order 5.4(c)(3). Under that provision, even when none of the five listed events occur, a judge can *sua sponte* call for an en banc vote, so long as the call is made within "seven days of the expiration of the time for filing a petition for panel rehearing or rehearing en banc." G.O. 5.4(c)(3).

Per our General Orders, these are the only seven paths to take a case en banc. This case took none of them: it was not a panel call; it was too late to fall under the catch-all provision; and the event that triggered the call here isn't any of the five triggering events described in the General Orders. Rather, it was the panel's denial of Henry's third motion to reconsider. Put simply, the call came too late. The clock had run. And our rules don't permit us to extend the en banc window to resurrect the opportunity by taking en banc the denial of an improper motion to reconsider.

In an effort to justify the propriety of the call, the concurrence relies on General Order 6.11 and Ninth Circuit Rule 27–10(b). But neither rule is availing. By its express terms, General Order 6.11 applies only to orders issued by *motions* panels. *See* G.O. 6.11 ("Any motion or petition seeking en banc review of an order issued by a motions panel shall be processed as a motion for reconsideration en banc."). It does not expressly permit en banc review of orders, like the one here, that are issued by *merits* panels. Nor does it appear that Ninth Circuit Rule 27–10(b) applies to motions for reconsideration of merits panel orders. *See* Ninth Circuit Rule 27–10(b) ("The rule applies to any motion seeking review of a motions panel order ..."). Even if it did, Henry is only entitled to one motion for reconsideration under the Rule. *See id.* ("A party may file only one motion for clarification or reconsideration of a panel order."). This is Henry's *third*. This court cannot call en banc an order denying a motion Henry was not even permitted to make.

The concurrence also relies on Federal Rule of Appellate Procedure 35(a)(1) to assert that en banc reconsideration is appropriate when "necessary to secure or maintain uniformity of the court's decisions." While true, the concurrence does not contend, nor does the Rule provide, that we can call orders issued by a merits panel en banc.

My reading of these rules may call into question the propriety of how the court has treated some past cases. Until *Henry,* the complications of the position promoted by the concurrence were not clear. These potential complications are glaring. If the en banc panel is only permitted to revisit the challenged order, as the concurrence contends, then its authority would be limited to forcing the threejudge panel to reconsider its prior denial of panel rehearing. That isn't likely to achieve much; reversing the panel order denying reconsideration doesn't allow the en banc court to reach what the concurrence contends is the "critical issue" of "whether an *Eddings* error is structural, requiring automatic reversal." To reach that issue, it must do more. It must change the underlying panel opinion or go beyond the motion that triggered the call and grant Henry a stay—exceeding the concurrence's self-proclaimed and unenforceable limits as to the scope of its review. Instead, the veiled purpose of this en banc call, at least through the eyes of the concurrence, is to revisit the panel's opinion after *McKinney* is decided. But that clock has long since run.

***12** Let's label this en banc challenge for what it is: An untimely and improper attack on the panel disposition. By taking the case en banc, we break our own rules in a way that threatens our ability to process cases. *See Hollingsworth v. Perry,* 558 U.S. 183, 196–97, 130 S.Ct. 705, 175 L.Ed.2d 657 (2010) (noting that a court's failure

to comply with neutral rules and principles can "compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments").

Critically, there is no need for such exceptional action. Contrary to the concurrence's representation, our denial of Henry's untimely petition would not necessarily result in his execution. The Supreme Court of Arizona would still have to issue a warrant of execution. That court might wait for our en banc decision in *McKinney*. Even if the warrant issued, Henry would be entitled to seek a stay and other relief from the Arizona courts, and if that failed, from the federal courts, including ours. Granting an untimely petition for rehearing based on potential future changes in the law in unrelated cases interferes with the ordinary processes for habeas petitions, which provide adequate alternatives for a defendant to raise meritorious issues.

III

Our General Orders aren't our only victim. We have also completely ignored controlling Supreme Court authority that tells us what we are obligated to do.

"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." Fed. R.App. P. 41(d)(2)(D). Even the author of the concurrence himself has previously acknowledged in the AEDPA context that the "initial" denial of certiorari is the "effective" and "final" denial of certiorari. *See United States v. Buckles*, 647 F.3d 883, 887 (9th Cir.2011) (Fletcher, J.) ("Finality attaches when [the Supreme Court] ... denies a petition for a writ of certiorari." (quoting *Clay v. United States*, 537 U.S. 522, 527, 123 S.Ct. 1072, 155 L.Ed.2d 88 (2003))). The Supreme Court denied Henry's certiorari petition on June 9, 2014. *Henry v. Ryan*, —— U.S. ——, 134 S.Ct. 2729, ——L.Ed.2d —— (2014). Now, nearly three months later, we still withhold the mandate.

And by doing so, we defy the rule of law. Our defiance is well and recently practiced. Just last year, in *Ryan v. Schad*, the Supreme Court held that we abused our discretion by doing what we repeat now—failing to issue the mandate in a death penalty case following the denial of certiorari. —— U.S. ——, 133 S.Ct. 2548, 2551–52, 186 L.Ed.2d 644 (2013). The sting of that rebuke still lingers, yet we act as though we cannot feel it.

The concurrence asserts that Rule 41(b) provides an initial avenue around our obligation to issue the mandate in this case. It doesn't. Although that rule permits the court to "shorten or extend the time" to issue the mandate, it is not a carte blanche to withhold the mandate indefinitely or to ignore more specific rules that apply here. The ability to "shorten or extend the time" is permissive. Fed. R.App. P. 41(b) (using the word "may"). A court must take affirmative action to avoid the default one-week time frame for issuance of the mandate. *See id.* To the degree that the concurrence contends that the court entered a stay, it misconstrues the record. No stay was ever entered here. Indeed, we have never issued any order concerning our mandate in this case. The default rule should have been applied with the mandate issuing on November 8, 2013.

***13** Moreover, the concurrence cannot be correct even under its own theory that Rule 41(d)(2)(D) only applies when a stay is entered for the *sole* purpose of permitting Supreme Court review. This theory requires the court to have stayed the mandate pending the denial of certiorari and to again have stayed the mandate pending the en banc vote on whether to take the order denying reconsideration en banc. *See, e.g., First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895, 896–98 (5th Cir.1995) (per curiam) (involving entry of an actual stay); *Alphin v. Henson*, 552 F.2d 1033, 1035–36 (4th Cir.1977) (per curiam) (same). But no stays were ever entered. So, if the concurrence's legal position is right, the mandate still should have issued. The concurrence's position essentially boils down to the principle that by doing nothing (e.g., by failing to enter a stay as well as failing to issue the mandate), the court can do whatever it wants.

And Rule 41(d)(2)(D) itself does not provide an out by way of an unwritten exception for "extraordinary circumstances." The Supreme Court has twice declined to adopt that exception. *Schad*, 133 S.Ct. at 2549–51; *Bell v. Thompson*, 545 U.S. 794, 803, 125 S.Ct. 2825, 162 L.Ed.2d 693 (2005). Instead, it has twice assumed that the exception exists, but then found its high standard unmet. *Schad*, 133 S.Ct. at 2550–51; *Bell*, 545 U.S. at 803–04, 125 S.Ct. 2825. And it would have to be a high standard: "Deviation from normal mandate procedures is a power 'of last resort, to be held in reserve against grave, unforeseen contingencies.' " *Schad*, 133 S.Ct. at 2551

(quoting *Calderon v. Thompson*, 523 U.S. 538, 550, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)).[5]

It is hard to imagine how Henry's case could meet this standard given that it was unmet in *Schad* and *Bell*. Those cases—both capital—demonstrate that a death sentence alone does not satisfy the extraordinary circumstances standard. *See id.* at 2550; *Bell*, 545 U.S. at 803, 125 S.Ct. 2825. And circuit law is no help. The few circuit cases that have arguably found extraordinary circumstances were not even habeas cases. *See Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1529–30 (9th Cir.1989) (involving a change in statutory law that occurred before the denial of certiorari); *First Gibraltar Bank*, 42 F.3d at 896–98 (same); *Alphin*, 552 F.2d at 1035–36 (same). So they didn't involve the same "finality and comity concerns" at issue in *Schad* and *Bell*. *See, e.g.*, *Schad*, 133 S.Ct. at 2551 ("[F]inality and comity concerns, based in principles of federalism, demand that federal courts accord the appropriate level of respect to state judgments." (internal quotation marks omitted)).

Moreover, they all share something that Henry's case lacks—they all involved a change in statutory law that occurred before the denial of certiorari. *See Bryant*, 886 F.2d at 1529–30; *First Gibraltar Bank*, 42 F.3d at 896–98; *Alphin*, 552 F.2d at 1035–36. Those changes gave rise to extraordinary circumstances. Here, the law hasn't changed at all. Presumably, my colleagues who voted for further delay merely foresee or perhaps hope that, with *McKinney*, it will.[6]

***14** Never before has any court deemed such a hope sufficiently extraordinary. And it can't be. The law changes all the time.[7] Nothing so ordinary could be extraordinary. So our court, by voting to rehear this case *ultra vires*, is bold indeed. Not only do we ignore *Schad* and *Bell*, but we also extend extraordinary circumstances beyond any previous authority.

IV

Moreover, unless the en banc panel issues a formal stay of the mandate, our unorthodox actions might very well evade Supreme Court review. If the en banc panel issues such a stay, then Arizona could seek Supreme Court review of the stay. If it doesn't, then our failure to issue the mandate may escape review for an indeterminate period of time while we await oral argument and a decision from the en banc panel in *McKinney* many months from now.

V

Our court has succumbed to the temptation to hold this case, already in its third decade, even longer. Some of us may be driven by opposition to the death penalty. Or some may feel that Henry should get the benefit, if any, of *McKinney* because a third capital defendant, Poyson, was granted a stay pending *McKinney's* resolution. *Poyson v. Ryan*, 743 F.3d 1185, 1187 (9th Cir.2013).

Whatever they are, motivations are beside the point. We should follow the law. Instead, we lay flame to orderly case-processing rules, comity due to state court judgments, and principles of finality. "[Fire's] real beauty is that it destroys responsibility and consequences. A problem gets too burdensome, then into the fire with it." Ray Bradbury, *Farenheit 451* 109 (Simon & Schuster 2012). We should be more cautious.

I respectfully dissent.

Footnotes

1 Ninth Circuit Rule 22–2(e) states: "When the panel affirms a denial or reverses a grant of a first petition or motion [in a capital case], it shall enter an order staying the mandate pursuant to FRAP 41(b)." But this language appears under the heading "Stays of Execution" and is itself ambiguous.

2 In addition to violating principles of comity, the motion was untimely under Ninth Circuit Rule 27–10(a)(1). It was also improper because it amounted to Henry's third motion to reconsider the panel decision, which is prohibited under Ninth Circuit Rule 27–10(b).

[3] The closest Henry came to requesting a stay in the body of the motion is the following sentence: "[T]he Court's recent decision in *Poyson* that amended its previous denial of panel rehearing and stayed the case pending resolution in *McKinney* provides support for this panel to do the same." In his conclusory "wish list," he expressed his desire that the panel, after granting the motion to reconsider, would vacate his petition for panel rehearing and grant a stay pending *McKinney*.

[4] One judge dissented from the order denying the motion.

[5] In *Thompson*, we were reversed for *sua sponte* recalling our mandate in a capital case to revisit the merits of an earlier three judge panel opinion denying habeas relief. The Supreme Court held that an appellate court abuses its discretion unless it acts to avoid a miscarriage of justice as defined in Supreme Court habeas corpus jurisprudence. 523 U.S. at 558, 118 S.Ct. 1489.

[6] Of course, this hope assumes that Henry's case will be controlled by the en banc court's decision in *McKinney*. However, there are a number of factors that distinguish the two cases. Contrary to the concurrence's suggestion, the panel majority does not believe that there was *Eddings* error at all in Henry's case. But we will leave that discussion for another day.

[7] The concurrence asserts that "Henry's motion was a new argument." But it was not. Henry raised his *Eddings* claim in his brief, in his petition for rehearing en banc, and in his petition for certiorari. The only "new" development was our decision to grant rehearing en banc in *McKinney* and the panel's decision to stay proceedings in *Poyson*. But these developments in unrelated cases do not justify our retention of this appeal after Henry's petition for rehearing en banc has been denied and the Supreme Court has denied certiorari.

THIS PAGE INTENTIONALLY BLANK

TAB 6

THIS PAGE INTENTIONALLY BLANK

TAB 6A

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

DATE: October 3, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

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

The Committee has long had on its docket a number of proposals that relate to the impact of electronic filing and service. The Standing Committee's CM/ECF Subcommittee – with Judge Chagares as its Chair and Professor Capra as its Reporter – has been considering possible amendments to all five sets of national Rules that would take account of the shift to electronic transmission and storage of documents and information. One of the first products of those discussions – an amendment to Appellate Rule 26 that would abrogate the "three-day rule" as it applies to electronic service – is currently out for public comment. This memo focuses on other possible amendments relating to electronic filing and service.[1]

The Subcommittee has discussed the possibility of drafting amendments that will adjust the Rules so that they (1) define "information in written form" to include electronic materials and (2) define various actions that can be done with paper documents to include the analogous action performed electronically. Part I of this memo discusses the possibility of such amendments.

At its fall meeting, the Civil Rules Committee will consider a proposal for a national rule that makes electronic filing mandatory, with exceptions (1) for good cause and (2) as provided by local rule. The proposal would also authorize electronic service (subsequent to initial process) irrespective of party consent, subject once again to the good-cause and local-rule exceptions. Part II of this memo considers whether the Committee should propose similar changes to the Appellate Rules at this time.

[1] In addition to the topics discussed in this memo, Committee members will recall that the Subcommittee has considered 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 Bankruptcy Rules Committee, at its spring 2014 meeting, considered adopting a rule on electronic signatures but decided not to proceed with the proposal. I do not address this topic in the current memo; it was addressed in some detail in Part III of my April 2014 memo to the Committee, and it does not seem that there is reason to revisit the topic at the present time.

The Civil Rules Committee will also consider a proposal concerning elimination of the requirement of proof of service when service is accomplished through CM/ECF. Part III of this memo discusses the possibility of a similar amendment to the Appellate Rules.

I. Adjusting rules that were drafted with paper in mind

Apart from the published proposal to change the three-day rules, the CM/ECF Subcommittee has been considering the possibility of changes that would more broadly adapt the Rules to the realities of electronic filing. Such changes will be more challenging to draft than the three-day rule proposal.

Professor Capra has prepared for discussion purposes a draft rule that would provide two definitions. 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:

> **Information in Electronic Form and Action by Electronic Means**
>
> **a) Information in Electronic Form:** In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
>
> **b) Action by Electronic Means:** In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

Adopting the first of these definitions will be unproblematic; tailoring the second definition to fit current appellate practice is likely to prove somewhat more complicated. I will refer to the second definition as the Electronic-Action Template.

A. Information in electronic form

For purposes of the Appellate Rules, I think that there should be no problem with a rule that defines "information in written form" to include "electronically stored information." Such a definition seems like a broader version of an already-extant provision. Rule 25(a)(2)(D) provides that "[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." For similar provisions, see Bankruptcy Rule 5005(a)(2); Civil Rule 5(d)(3).

B. Action by electronic means

The Electronic-Action Template – which would set a default rule that "any action that can or must be completed by filing or sending paper may also be accomplished by electronic means" – might pose more complications. Although all the courts of appeals have now made the transition to CM/ECF, for some of those courts the transition is still in the recent past. Practices can be expected to evolve as the circuits gain experience with electronic filing and service. To assess where things currently stand, I surveyed local circuit provisions relating to electronic filing and service. The results are collected in Appendix A (which sets out the text of the most salient provisions) and Appendix B (which lists in index format other provisions that seemed less central to the topics treated in this memo). Here, I summarize the circuits' provisions concerning actions that may be taken electronically and actions that may not.

Some circuits have local provisions stating that certain actions may be taken electronically. In addition to the standard provisions concerning the parties' electronic filing and service (discussed in Part II of this memo), examples are:

- Service of the notice of appeal on a represented party, when the notice of appeal was filed electronically in the district court.[2]

- Entry of the court of appeals' judgment.[3]

- Notice and service of the court of appeals' judgment and opinion[4] – but some provisions specify that parties who have not consented to electronic service must be served in paper form.[5]

---

[2] *See* Second Circuit Rule 3.1.

[3] *See* D.C. Circuit Rule 36(a); D.C. Circuit Rule 45(c); First Circuit CM/ECF Rule 5; Third Circuit Local Appellate Rule 113.5(a); Fifth Circuit Rule 25.2.6; Sixth Circuit Rule 25(e)(1)(B); Sixth Circuit Guide to Electronic Filing 9.1 and 10.2; Seventh Circuit ECF Procedures (e)(1); Ninth Circuit Rule 25-5(h); Eleventh Circuit Guide to Electronic Filing Section 5.5; Federal Circuit Rule ECF-11(A).

[4] *See* D.C. Circuit Rule 36(b); D.C. Circuit Rule 45(d); First Circuit CM/ECF Rule 10; Fourth Circuit Rule 25(a)(10); Fifth Circuit Rule 25.2.11; Seventh Circuit ECF Procedures (j)(2); Tenth Circuit CM/ECF Manual Section II.E; Eleventh Circuit Guide to Electronic Filing Sections 5.5 and 7.4; Federal Circuit Rule ECF-11(A).

[5] *See* D.C. Circuit Rule 36(b); D.C. Circuit Rule 45(d); First Circuit CM/ECF Rule 10; Fourth Circuit Rule 25(a)(10); Fifth Circuit Rule 25.2.11; Seventh Circuit ECF Procedures (j)(3); Tenth Circuit CM/ECF Manual Section II.E; Federal Circuit Rule ECF-11(C). *See also* Federal Circuit Rule ECF-8(A) (court will serve pro se litigants in paper form).

- Filing a petition for agency review,[6] a petition for an extraordinary writ,[7] or another case-initiating document.[8]

The circuits also have local provisions stating that certain actions may *not* be taken electronically. Examples are:

- Filings in the court of appeals that initiate the proceeding in the court of appeals (such as petitions for leave to appeal, petitions for review of agency action, petitions for extraordinary writs, requests for leave to file a successive habeas petition).[9]
    - By contrast, because notices of appeal from a district court judgment are filed in the district court, one provision notes that local district court provisions govern those filings.[10]
    - The default rule in the Second Circuit is that most case-initiating documents must be filed by email to a special court email address.[11] The Sixth Circuit requires counsel to file case-initiating documents via email or on CD.[12]
- Filings prior to a case's docketing in the court of appeals.[13]

---

[6] *See* Second Circuit Rule 15.1.

[7] *See* Second Circuit Rule 21.1(a).

[8] *See* Fourth Circuit Rule 25(a)(1)(A)(i) (providing the option of using the "Submit New Case" function in CM/ECF); Ninth Circuit Rule 25-5(c); Tenth Circuit CM/ECF Manual Section II.A.3.a (authorizing options of ECF, paper, or email but requiring appendices to be filed in paper form).

[9] *See* D.C. Circuit Rule ECF-1; First Circuit CM/ECF Rule 1(a); Third Circuit Local Appellate Rule 25.1(a); Third Circuit Local Appellate Rule 112.2(b) (petition for writ of certiorari to Supreme Court of Virgin Islands); Third Circuit Local Appellate Rule 113.1; Sixth Circuit IOP 22(a) (pro se request for leave to file successive petition); Eighth Circuit Rule 25A(c); Eleventh Circuit Guide to Electronic Filing Section 4.5; Federal Circuit Rule ECF-1; Federal Circuit Rule ECF-8(B) ("[p]etitions for review and notics of appeal filed pursuant to [Appellate Rule] 15"); Federal Circuit Rule ECF-8(C) (petitions for permission to appeal and permissions for extraordinary writs to be filed in paper with accompanying CD-ROM). *See also* Fifth Circuit Rule 25.2.2 ("Filing Users may be required to file case-initiating documents ... in paper format.").

[10] *See* First Circuit CM/ECF Rule 1.

[11] *See* Second Circuit Rule 25.1(c)(2).

[12] *See* Sixth Circuit Rule 5; Sixth Circuit Rule 15 & accompanying IOP; Sixth Circuit Rule 25(b)(1). *See also* Sixth Circuit IOP 21(a) (petition for extraordinary writ is to be filed "in paper format with an electronic copy as provided in 6 Cir. R. 25(b)(1) and (3)"); Sixth Circuit IOP 22(a) (counseled successive-petition applications to be filed "electronically ... with an electronic copy").

[13] *See* First Circuit CM/ECF Rule 1(b). *See also* Sixth Circuit IOP 15(b) (motion for stay filed simultaneously with petition for review of agency determination must be filed

- Filings under seal[14] and motions for leave to file under seal.[15]
    - However, five circuits allow electronic filing of sealed documents.[16]
- Filing appendices to briefs.[17]
- Filing a document that, in digital form, is oversize.[18]
- Filing Criminal Justice Act vouchers.[19]

---

in both paper and electronic forms); Federal Circuit Rule ECF-8(D)(1) (stay and emergency motions to be filed in paper for cases not yet opened in ECF).

[14] *See* D.C. Circuit Rule ECF-8(B); D.C. Circuit Handbook III.K; First Circuit Rule 11.0(c)(2); First Circuit CM/ECF Rule 1(d) (non-public documents including sealed documents); First Circuit CM/ECF Rule 7; Second Circuit Rule 25.1(j)(2); Eighth Circuit Rule 25A(g); Ninth Circuit Rule 25-5(b) (requiring paper filing unless entire case is sealed); Eleventh Circuit Guide to Electronic Filing Section 4.5(7) ("document filed under seal or requested to be filed under seal" should be in paper form); Eleventh Circuit Guide to Electronic Filing Section 9.1 (motion may ordinarily be filed electronically but "[d]ocuments requested to be sealed must be submitted in paper format"); Federal Circuit Rule ECF-8(D), (E), & (F) (motions to seal may be filed electronically, but sealed documents are to be filed and served in paper). *Compare* Federal Circuit Rule ECF-9 (providing instructions for electronically filing confidential and non-confidential versions of documents).

[15] *See* First Circuit Rule 11.0(c)(2); First Circuit CM/ECF Rule 1(c); Eighth Circuit Rule 25A(g). *Compare* Third Circuit Local Appellate Rules 113.7(a) & (b) (motions and orders concerning sealing presumptively may be filed electronically); Third Circuit Local Appellate Rule 113.7(d) (ex parte motions must be filed in paper form); Sixth Circuit Rule 25(h) (presumptively permitting electronic filing of motions and orders); Sixth Circuit Guide to Electronic Filing 7.1 (same); Ninth Circuit Rule 25-5(b) (requiring paper filing unless entire case is sealed); Ninth Circuit Rule 27-13(a) (same).

[16] *See* Third Circuit Local Appellate Rule 30.3(b); Third Circuit Local Appellate Rule 113.7(c) (sealed documents may be filed in paper form with clerk's permission); *id.* Committee Comment ("The court's electronic filing system is capable of accepting sealed documents electronically ...."); Fourth Circuit Rule 25(c)(3)(E); Sixth Circuit Rule 25(h)(4); Seventh Circuit ECF Procedures (g)(1) & (2) (motion and proposed filing "must be filed electronically"); *id.* (g)(3) (order "may be filed electronically"); *id.* (g)(4) (indicating that court will provide direction on whether sealed filing is to be made in paper or electronically); Tenth Circuit CM/ECF Manual Section II.G.

[17] *See* First Circuit CM/ECF Rule 1(e); Eighth Circuit Rule 25A(c); Tenth Circuit CM/ECF Manual Section II.A.3.b.

[18] *See* Sixth Circuit Rule 25(b)(2)(D); Sixth Circuit Guide to Electronic Filing 3.2(4).

[19] *See* First Circuit CM/ECF Rule 1(f); Fourth Circuit Rule 25(a)(1)(E); Sixth Circuit Rule 25(b)(2)(C); Sixth Circuit Guide to Electronic Filing 3.2(3); Eighth Circuit Rule 25A(c); Eleventh Circuit Guide to Electronic Filing Section 4.5(8).

- Filing a document relating to an attorney misconduct complaint.[20]
- Service *on* a non-ECF filer.[21]
- Service *by* a non-ECF filer.[22]
- Serving a document when the original of that document was filed in paper form.[23]
- Serving a case-initiating document.[24]
- Serving a sealed document.[25]

This list suggests several topics on which the Committee might wish to focus when considering how to tailor the Electronic-Action Template. An additional topic concerns the starting points and end points of time periods under the Appellate Rules.[26]

---

[20] *See* Sixth Circuit Rule 25(b)(2)(B); Sixth Circuit Guide to Electronic Filing 3.2(2); Federal Circuit Rule ECF-8(G).

[21] *See* First Circuit CM/ECF Rule 4; First Circuit CM/ECF Rule 10; Second Circuit Rule 25.1(h)(4) (service on non-ECF-user who has not consented to electronic service); Third Circuit Local Appellate Rule 25.1(b) (service on party who "has not consented to electronic service"); Third Circuit Local Appellate Rule 27.2(b) (same); Third Circuit Local Appellate Rule 31.1(a) (same); Third Circuit Local Appellate Rule 113.4(a) (non-Filing Users must be served in accordance with FRAP and local rules); Fourth Circuit Rule 25(a)(4); Fifth Circuit Rule 25.2.5; Sixth Circuit Rule 25(f)(1)(B); Sixth Circuit Guide to Electronic Filing 10.1; Seventh Circuit ECF Procedures (d)(1); Eighth Circuit Rule 25A(d); Ninth Circuit Rule 25-5(g); Tenth Circuit Rule 25.4; Tenth Circuit CM/ECF Manual Section II.D.1 (non-CM/ECF-user must be served "in another appropriate manner – either via hard copy or email"); Tenth Circuit CM/ECF Manual Section II.D.3 (non-CM/ECF-user "must be served conventionally"); Eleventh Circuit Guide to Electronic Filing Section 7.3; Federal Circuit Rule ECF-6(C); Federal Circuit Rule ECF-8(A) (service in paper form "unless the parties have agreed in writing to electronic service between themselves").

[22] *See* Ninth Circuit Rule 25-5(g); Federal Circuit Rule ECF-8(A) (service in paper form "unless the parties have agreed in writing to electronic service between themselves").

[23] *See* First Circuit CM/ECF Rule 4.

[24] See Fourth Circuit Rules 25(a)(1)(A) & (B); Tenth Circuit CM/ECF Manual Section II.A.3.a; Tenth Circuit CM/ECF Manual Section II.D.4.a ("copies must be served via conventional methods in paper form or via email").

[25] *See* Fourth Circuit Rule 25(a)(7); Fourth Circuit Rule 25(c)(3)(F). *See also* Federal Circuit Rule ECF-9(B) ("Electronic versions of confidential documents must be served by [an] alternate method ....").

[26] As to compliance with the end point of a time period, see Rules 4(c)(1) and 25(a)(2)(D) (inmate filings); 25(a)(2)(A) (for filings by mail, clerk must receive paper within deadline); 25(a)(2)(B) (filings of brief or appendix by mail or third-party carrier must be mailed or dispatched within deadline); 25(c)(4) (mail / carrier service is complete upon delivery; e-service is complete upon transmission absent notice of failure); 26(a)(4)

On consideration, though, I think that the Electronic-Action Template should not affect the operation of the starting-point and ending-point provisions. The Template *allows* action to be taken electronically, but it does not address the ancillary *effects* of an actor's choice of electronic or other means of taking the action. Thus, a provision that addresses whether a filing is timely by reference to the filing method should continue to operate the same way: It will still be true that paper filings must generally be received by the clerk within the deadline,[27] that special rules will apply for the timing of briefs filed by first-class mail[28] or third-party commercial carrier,[29] that inmates can take advantage of special timing provisions under the inmate-filing rules,[30] that special provisions will define what constitutes completion of service by mail or commercial carrier (on the one hand)[31] and what constitutes completion of service by electronic means (on the other),[32] that the choice of method for filing a notice of appeal with the United States Tax Court will determine how the notice's timeliness is measured,[33] and that yet another provision will continue to define when the "last day" ends based on the method of filing.[34] Likewise, the implication of the chosen method of filing or service for the starting point of other parties' deadlines will be unaffected.[35]

Accordingly, I suggest that the Committee focus its attention on Rules that discuss *actions* that might be taken electronically, rather than on Rules that address the ancillary timing effects of the choice among different methods of filing or service. The key topics include those noted, above, in the list of local circuit provisions. In addition, one key topic to consider is the filing of the notice of appeal in connection with an appeal as of right from a district court, a bankruptcy appellate panel, or the United States Tax Court. The Appellate Rules set the time period for filing the notice of appeal[36] and they specify that it must be filed in the relevant lower court. The Appellate Rules specify the manner of filing a notice of appeal with the Tax Court[37] and they specify means of

---

(definition of "last day" varies by type of filing method).

As to starting points for time periods, see Rules 4(c)(2) and (3) (appeals by other parties after inmate files a notice of appeal); 26(c) (three-day rule applies unless the relevant paper is delivered by same-day, non-electronic means).

[27] *See* Rule 25(a)(2)(A).

[28] *See* Rule 25(a)(2)(B)(i).

[29] *See* Rule 25(a)(2)(B)(ii).

[30] *See* Rules 4(c)(1) and 25(a)(2)(C).

[31] *See* Rule 25(c)(4) ("complete on mailing or delivery to the carrier").

[32] *See id.* ("complete on transmission, unless the party making service is notified that the paper was not received by the party served").

[33] *See* Rule 13(a)(2).

[34] *See* Rule 26(a)(4).

[35] *See* Rules 4(c)(2) and (3) and Rule 26(c).

[36] *See* Rule 4(a)(1) (civil appeals from district court); Rule 4(b)(1) (criminal appeals from district court); Rule 6(b)(1) (incorporating by reference the terms of Rule 4(a)(1) and providing that "district court" means "appellate panel"); Rule 13(a)(1) (appeals from the Tax Court).

[37] *See* Rule 13(a)(2) ("The notice of appeal may be filed either at the Tax Court clerk's office in the District of Columbia or by mail addressed to the clerk.").

determining the timeliness of such a notice,[38] as well as a means of determining the timeliness of an inmate's notice of appeal.[39] But the Appellate Rules do not specify the methods for filing a notice of appeal in a district court or with a bankruptcy appellate panel; rather, Rule 1(a)(2) provides that "[w]hen these rules provide for filing a motion or other document in the district court, the procedure must comply with the practice of the district court."[40] The Rules do, however, specify how to determine when the "last day" of the period ends.[41]

How would the Electronic-Action Template affect these rules? As to the filing of a notice of appeal in a district court or with a bankruptcy appellate panel, it seems to me that the better reading would be that the manner of filing would continue to be governed by the lower court's rules. The Electronic-Action Template applies only to actions discussed "[i]n these rules," and the Appellate Rules do not generally discuss the actions that constitute filing in the district court or with the bankruptcy appellate panel. (As noted, the Appellate Rules discuss timeliness and time-counting issues, but leave to the rules of the district court or bankruptcy appellate panel the task of specifying which filing methods are permitted.) But I admit that it might be possible for confusion to arise concerning whether the Electronic-Action Template authorizes electronic filing of the notice of appeal, given that other features of the notice of appeal are discussed in detail in Appellate Rules 3 and 4 – which might lead a casual reader to believe that the term "any action" "[i]n these rules" encompasses the filing of the notice of appeal. Perhaps it would be worthwhile to consider exempting Rule 3(a)(1)[42] from the operation of the Electronic-Action Template.

As to notices of appeal from the United States Tax Court, the analysis would differ. It appears that the Tax Court currently does not permit notices of appeal to be filed electronically.[43] But if the Electronic-Action Template were adopted without exceptions, it would purport to modify Appellate Rule 13(a)(2) – which specifies how to file the notice of appeal in the Tax Court – and would thus purport to authorize electronic filing in the Tax Court. If the Tax Court had no electronic-filing facility at all, then perhaps such a purported authorization would cause little confusion, because the absence of any such facility should alert would-be appellants that they should not rely on electronic filing. But the Tax Court *does* offer electronic filing, and the existence of the

---

[38] *See* Rule 13(a)(2) ("If sent by mail the notice is considered filed on the postmark date, subject to § 7502 of the Internal Revenue Code, as amended, and the applicable regulations.").

[39] *See* Rule 4(c)(1).

[40] Rule 1(a)(2) applies to appeals from a bankruptcy appellate panel, with "district court" read to refer to the BAP. *See* Rule 6(b)(1).

[41] *See* Rule 26(a)(4).

[42] Rule 3(a)(1) provides: "An appeal permitted by law as of right from a district court to a court of appeals may be taken only by filing a notice of appeal with the district clerk within the time allowed by Rule 4. At the time of filing, the appellant must furnish the clerk with enough copies of the notice to enable the clerk to comply with Rule 3(d)."

[43] *See* United States Tax Court, Practitioners' Guide to Electronic Case Access and Filing 33 (2014) ("[P]etitions and notices of appeal may not be eFiled ....").

Tax Court's electronic filing system could render particularly dangerous a provision that purported to authorize electronic filing of the notice of appeal. Accordingly, it would seem necessary to exempt Rule 13(a)(2) from the operation of the Electronic-Action Template.

Turning to the topics, noted above, on which the local circuit provisions shed light, it is possible to perceive several categories of action in which the Electronic-Action Template would be harmless and potentially useful. These categories include the entry of judgments; service by the clerk on a CM/ECF user; most non-case-initiating filings by a CM/ECF user; and service effected between parties who are both CM/ECF users. But there are other categories of action that, in some or all circuits, cannot currently be taken electronically. These categories including filing case-initiating documents; filing documents prior to docketing in the court of appeals; filing under seal; filing appendices; filing generally (if one is not allowed to use CM/ECF);[44] service on or by a non-ECF filer; and service of a case-initiating document, a sealed document, or another document that was filed in paper form. In each of these instances, it is possible to discern practical reasons for the current reluctance (by one or more circuits) to permit those actions to be taken electronically. It seems likely that this list will become shorter over time, as courts become more experienced with the use of CM/ECF for case-initiating filings, sealed filings, and the like; but it also seems likely that some of these exceptions will persist for the foreseeable future. It would seem necessary, therefore, to exempt these categories from the Electronic-Action Template.

There may well be other actions – yet to be identified – that are addressed in the Appellate Rules and that should not automatically be permitted to occur electronically. (One such topic, noted in my April 2014 memorandum, concerns electronic signatures; some circuits have rather elaborate local provisions on point.[45]) This preliminary sketch, though, should help to illustrate the drafting choices that would arise in attempting to confine the Electronic-Action Template to the areas where it would be useful, and to exclude it from those areas where it would cause mischief. It would be relatively straightforward to draft language exempting Rules 3(a)(1) and 13(a)(2) from the operation of the template. But what would be the best way to exempt the categories of filing and service noted in the preceding paragraph? Some of those categories might be addressed by exempting specified Appellate Rules from the operation of the Electronic-Action Template (most case-initiating documents, for instance, could be addressed by exempting Rules 5(a)(1), 15(a)(1), 15(b)(1),[46] 21(a)(1), and 21(c)). But other categories in the list are not tied to any specific rules, and for those categories it would seem necessary to draft an exemption that described the type of action to be exempted.

I do not attempt in this memo to set out a sketch of such an amendment, because it seems more prudent to await further instruction from the Committee before doing so.

---

[44] See Part II for a discussion of circuits that do not permit pro se litigants to use CM/ECF.

[45] See the local provisions listed under "Signatures" in Appendix B.

[46] Rule 15(b)(1), though, addresses both case-initiating filings (applications) and non-case-initiating filings (cross-applications).

II. Adopting national rules that mandate electronic filing and service

The Appellate Rules currently authorize the adoption of local rules mandating electronic filing, subject to reasonable exceptions. Appellate Rule 25(a)(2)(D) provides:

> A court of appeals may by local rule permit or require papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.[47]

The Appellate Rules do not currently authorize local rules to *require* the use of electronic service; instead, they purport to allow such service only with the recipient's consent. The methods of service authorized by the Appellate Rules include "electronic means, if the party being served consents in writing."[48] The Rules also address the use of the court's electronic facilities for purposes of service[49] and the treatment of the date of electronic service.[50]

Participants in the CM/ECF Subcommittee deliberations have begun to discuss whether the national rules should be amended to require electronic filing and to remove the consent requirement for electronic service. At its fall 2014 meeting the Civil Rules Committee will consider the possibility of amending Civil Rule 5(d)(3)[51] as follows:

> (d) FILING. * * *
>
> (3) *Electronic Filing, Signing, or Verification*. ~~A court may, by local rule, allow papers to be filed~~ All filings must be made, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. Paper filing must be allowed for good cause, and may be allowed for other reasons by local rule. ~~A local rule may require electronic filing only if reasonable exceptions are allowed.~~

---

[47] A predecessor to this provision was adopted in 1991 and authorized local rules *permitting* electronic filing. In 2002, the rule was amended to authorize local rules *requiring* electronic filing subject to reasonable exceptions.

[48] Appellate Rule 25(c)(1)(D). Rule 25(c)'s electronic-service provisions were adopted in 2002.

[49] Appellate Rule 25(c)(2) provides: "If authorized by local rule, a party may use the court's transmission equipment to make electronic service under Rule 25(c)(1)(D)."

[50] Appellate Rule 25(c)(4) provides in part: "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served."

[51] Civil Rule 5(d)(3) authorizes local rules that "allow" e-filing, and also states that "[a] local rule may require electronic filing only if reasonable exceptions are allowed."

The Civil Rules Committee will also consider the possibility of adopting the following amendment to Civil Rule 5's service provisions:

> (b) Service: How Made. * * *
>
> (2) *Service in General*. A paper is served under this rule by: * * *
>
> (E) sending it by electronic means — unless ~~if~~ the person ~~consented in writing~~ shows good cause to be exempted from such service or is exempted from electronic service by local rule — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served;

The presence of this item on the Civil Rules Committee's docket[52] suggests that it may make sense for the Appellate Rules Committee to consider whether similar changes should be made to Appellate Rule 25. It is notable that the development of these Rules has in at least one instance blessed developments that had already occurred as a matter of local practice. When the electronic-filing provision was originally adopted in 1991, it merely authorized the adoption of local rules that *permitted* the use of electronic filing. When this provision was revised in 2006 to authorize the adoption of local rules that *require* electronic filing, the Committee Note made clear that the amendment was designed to bring the national rule into conformity with existing local practices:

> Amended Rule 25(a)(2)(D) acknowledges that many courts have required electronic filing by means of a standing order, procedures manual, or local rule. These local practices reflect the advantages that courts and most litigants realize from electronic filing. Courts that mandate electronic filing recognize the need to make exceptions when requiring electronic filing imposes a hardship on a party. Under Rule 25(a)(2)(D), a local rule that requires electronic filing must include reasonable exceptions, but Rule 25(a)(2)(D) does not define the scope of those exceptions. Experience with the local rules that have been adopted and that will emerge will aid in drafting new local rules and will facilitate gradual convergence on uniform exceptions, whether in local rules or in an amended Rule 25(a)(2)(D).[53]

As the Committee Note's reference to the usefulness of local experience suggests, it seems advisable to consider how the circuits' local provisions treat the questions of electronic filing and service. As to electronic filing, all thirteen circuits set a presumptive requirement that all attorney filers file electronically[54] but permit exemptions on a

---

[52] I enclose a copy of Professor Cooper's fall 2014 memorandum on electronic-filing topics.

[53] 2006 Committee Note to Appellate Rule 25(a)(2)(D).

[54] *See* D.C. Circuit Rule ECF-2(a) (requiring attorneys to register for CM/ECF); D.C. Circuit Rule ECF-1 (requiring electronic filing of documents subsequent to case-

showing of sufficient justification.[55] Some circuits bar pro se litigants from using CM/ECF.[56] At least three circuits authorize (but do not require) pro se litigants to use CM/ECF.[57] Still other circuits authorize pro se litigants to seek court permission to use CM/ECF;[58] in the latter group, some circuits distinguish between pro se inmate litigants

---

initiating documents); First Circuit CM/ECF Rules Preamble; First Circuit CM/ECF Rule 1; First Circuit CM/ECF Rule 2; Second Circuit Rule 25.1(b)(1) & (2); Second Circuit Rule 25.1(c)(1); Third Circuit Local Appellate Rule 25.1(a); Third Circuit Local Appellate Rule 113.1(a); Third Circuit Local Appellate Rule 113.2(a); Fourth Circuit Rule 25(a)(1); Fourth Circuit Rule 25(a)(2); Fifth Circuit Rule 25.2.3; Sixth Circuit Rule 25(a)(1); Sixth Circuit Guide to Electronic Filing 3.1; Seventh Circuit Rules 25(a) & (b) (setting requirement of electronic filing but exempting "unrepresented litigants who are not themselves lawyers"); Seventh Circuit ECF Procedures (a)(1) & (b)(1); Eighth Circuit Rule 25A(a); Ninth Circuit Rule 25-2 and 25-5(a); Tenth Circuit CM/ECF Manual Sections II.A.2 and II.B.1; Eleventh Circuit Rule 25-3(a); Federal Circuit Rule 25(a); Federal Circuit Rule ECF-2(A).

[55] *See* D.C. Circuit Rule 25(b) ("good cause"); D.C. Circuit Rule ECF-8(D) ("good cause"); First Circuit CM/ECF Rule 1 ("good cause"); Second Circuit Rule 25.1(j)(1) ("extreme hardship or exceptional circumstances"); Third Circuit Local Appellate Rule 113.1(e) ("good cause"); Third Circuit Local Appellate Rule 113.2(e) ("extraordinary circumstances"); Fourth Circuit Rule 25(a)(1) (requiring attorneys to file electronically "[u]nless granted an exception for good cause or unless filing only a motion to withdraw from representation"); Fifth Circuit Rule 25.2.3 ("good cause"); Sixth Circuit Electronic Case Filing Frequently Asked Questions #5 ("Exemptions for attorney filers will be granted for good cause. The court expects to grant few exemptions."); Seventh Circuit Rule 25(c) (motion based on "good reason" and filed at least 7 days before due date); Eighth Circuit Rule 25A(a) ("good cause"); Ninth Circuit Registration for Appellate ECF and Overview of Appellate ECF # 15 ("Exemptions for attorney filers and court reporters will be granted for good cause. The Court expects to grant few exemptions."); Tenth Circuit CM/ECF Manual Section II.A.2 ("good cause ... in a particular case"); Eleventh Circuit Rule 25-3(b) (motion based on "good cause" and filed at least 14 days before due date); Federal Circuit Rule ECF-13 ("good cause"). See also Eighth Circuit Rule 28A(a) (exempt attorneys "must submit their briefs through email").

[56] *See* Sixth Circuit Rule 25(b)(2)(A); Sixth Circuit Guide to Electronic Filing 3.3 (clerk will scan pro se filings and input them into ECF system); Seventh Circuit Rule 25(b) (filings by "unrepresented litigants who are not themselves lawyers" must be in paper form); Eleventh Circuit Guide to Electronic Filing Sections 4.5(1) and 4.6 (unrepresented non-attorney parties must file in paper form and the Clerk will scan the filings and place them in the ECF system); Federal Circuit Rule ECF-2(B); Federal Circuit Rule ECF-8(A) (clerk will scan paper filings and place them in CM/ECF).

[57] *See* Third Circuit Local Appellate Rule 25.1(c); Third Circuit Local Appellate Rule 31.1(b)(5); Third Circuit Local Appellate Rule 113.2(b); Eighth Circuit Rule 25A(a); Ninth Circuit Rule 25-5(a).

For pro se litigants who do not register for CM/ECF, the Eighth Circuit Clerk will scan filings and enter them in the CM/ECF system. See Eighth Circuit Rule 25B.

[58] *See* D.C. Circuit Rule ECF-2(B); D.C. Circuit Rule ECF-8(A); Second Circuit Rule 25.1(b)(3); Fourth Circuit Rule 25(a)(2); Tenth Circuit CM/ECF Manual Sections II.A.2

and other pro se litigants.[59] Even when a filer is generally required to use CM/ECF, local provisions sometimes *require* particular types of filings to be made in paper form[60] and sometimes *permit* other types of filings to be made in paper form.[61]

As to electronic service, all thirteen circuits have local provisions stating that registration for CM/ECF constitutes consent to electronic service,[62] which typically would mean service by means of the notice of docket activity (NDA) generated by CM/ECF.[63]

Without delving into the drafting specifics, the essence of the proposal now under consideration by the Civil Rules Committee would seem to be a set of amendments that would, in the national rules, require CM/ECF filing (unless good cause is shown for, or a local rule permits or requires,[64] paper or another non-CM/ECF mode[65] of filing) and authorize service by means of the CM/ECF system's notice of docket activity (unless

---

and II.B.2.

[59] *See* First Circuit CM/ECF Rules Preamble (electronic filing is "voluntary for all non-incarcerated pro se litigants"); First Circuit CM/ECF Rule 2 (same); Fifth Circuit Rules 25.2.1 and 25.2.3 ("[n]on-incarcerated pro se litigants" in civil cases may seek permission to register for CM/ECF).

[60] *See* Part I, *supra*.

[61] *See* D.C. Circuit Rule ECF-8(c) (large, odd-sized, or illegible documents); Fourth Circuit Rule 25(a)(1)(A)(ii) (providing option of filing case-initiating documents in paper form); Federal Circuit Rule ECF-8(H) (illegible or oddly-shaped documents).

[62] *See* D.C. Circuit Rule 25(c); D.C. Circuit Rule ECF-2(D); First Circuit CM/ECF Rule 2; Second Circuit Rule 25.1(h)(1); Third Circuit Local Appellate Rule 31.1(d); Third Circuit Local Appellate Rule 113.2(c); Fourth Circuit Rule 25(a)(2); Fifth Circuit Rule 25.2.3; Sixth Circuit Rule 25(c)(2); Sixth Circuit Guide to Electronic Filing 2.1 and 10.1; Seventh Circuit ECF Procedures (b)(3); Eighth Circuit Rule 25A(d); Ninth Circuit Rule 25-5(g); Tenth Circuit CM/ECF Manual Section II.B.3; Eleventh Circuit Guide to Electronic Filing Section 7.1; Federal Circuit Rule ECF-2(D).

[63] *See* First Circuit CM/ECF Rule 4; Second Circuit Rule 25.1(h)(2); Third Circuit Local Appellate Rule 113.4(a); Fourth Circuit Rule 25(a)(4); Fifth Circuit Rule 25.2.5; Sixth Circuit Rule 25(f)(1)(A); Sixth Circuit Guide to Electronic Filing 10.1; Seventh Circuit ECF Procedures (d)(1); Eighth Circuit Rule 25A(d) (NDA constitutes service on CM/ECF users and parties "who have provided the clerk with their email address"); Ninth Circuit Rule 25-5(g); Tenth Circuit CM/ECF Manual Section II.D.1; Eleventh Circuit Guide to Electronic Filing Section 7.2; Federal Circuit Rule ECF-6(A).

For case-initiating documents, the Second Circuit requires service by email on other CM/ECF users. *See* Second Circuit Rule 25.1(h)(3).

[64] I include "require" here because I am not sure that references to local rules that *permit* non-ECF filing would necessarily be read to encompass local rules that *require* non-ECF filing.

[65] Other modes might include by email to a court email address, by submission of a file on CD-ROM or USB, or by fax. Among these methods, faxing seems likely to become obsolete sooner than the others.

good cause is shown for exempting, or a local rule exempts, the person to be served from using CM/ECF).

How would adoption of such a proposal – as part of the Appellate Rules – change practice in the courts of appeals? In a case where all parties are represented by counsel, it seems unlikely to change much. All the circuits currently require attorneys to use CM/ECF, and thus they also require attorneys to "consent" to electronic service by means of the notice of docket activity. The "good cause" exemption would roughly capture the contours of the exemptions provided in current local circuit rules. Authorizing local rules to permit or require additional exemptions would allow the circuits to continue (if they choose) to treat pro se litigants (or a subset of pro se litigants) differently for purposes of electronic filing and service, and would also allow the circuits to continue requiring or permitting non-CM/ECF filing and service in specific instances. In fact, such amendments might capture most or all of the benefits that would flow from adoption of the Electronic-Action Template, while avoiding most or all of the drafting difficulties and possible unintended consequences discussed in Part I of this memo.

III. Proof of service

John Rabiej has asked why the Appellate Rules require proof of service when service is accomplished through CM/ECF:

> FRAP 25(d) requires a proof of service to appear or be affixed to the papers filed. The Notice of Docket Activity generated by CM/ECF constitutes service, but it does not replace the certificate of service. I can see why a certificate of service is required in pro se cases if CM/ECF is not used. But I am having difficulty envisioning why a certificate of service is required when CM/ECF is used. As a practical matter, how is this certificate of service handled? Does a lawyer electronically file a certificate under penalty of perjury stating that the document was transmitted to the court via CM/ECF, which generated a Notice of Docket Activity, which was sent to all parties. That would seem to add nothing to the Notice of Docket Activity, which already indicates who has been served.

As discussed in the enclosed memorandum by Professor Cooper, the Civil Rules Committee is considering a similar question with respect to Civil Rule 5(d)(1)'s requirement of a certificate of service. (As that memorandum notes, one possible approach could be to say something like: "a certificate of service also must be filed, but a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.") These developments suggest that the time may be ripe to consider a possible change to Appellate Rule 25(d).

Rule 25(d) provides:

(d) Proof of Service.

(1) A paper presented for filing must contain either of the following:

(A) an acknowledgment of service by the person served; or

(B) proof of service consisting of a statement by the person who made service certifying:

(i) the date and manner of service;

(ii) the names of the persons served; and

(iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

(2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

(3) Proof of service may appear on or be affixed to the papers filed.

Other provisions that require proof of service can be found in Appellate Rules 5(a)(1),[66] 21(a)(1),[67] 21(c),[68] and 39(d)(1),[69] Bankruptcy Rule 8008(d),[70] and Civil Rule 5(d)(1).[71]

An initial question might be why Appellate Rule 39(d)(1) includes a reference to proof of service. Rule 25(d) would seem to apply to any "paper presented for filing" in the court of appeals,[72] rendering Rule 39(d)(1)'s reference to proof of service redundant.[73]

---

[66] Rule 5(a)(1) provides: "To request permission to appeal when an appeal is within the court of appeals' discretion, a party must file a petition for permission to appeal. The petition must be filed with the circuit clerk with proof of service on all other parties to the district-court action."

[67] Rule 21(a)(1) provides: "A party petitioning for a writ of mandamus or prohibition directed to a court must file a petition with the circuit clerk with proof of service on all parties to the proceeding in the trial court. The party must also provide a copy to the trial-court judge. All parties to the proceeding in the trial court other than the petitioner are respondents for all purposes."

[68] Rule 21(c) provides: "An application for an extraordinary writ other than one provided for in Rule 21(a) must be made by filing a petition with the circuit clerk with proof of service on the respondents. Proceedings on the application must conform, so far as is practicable, to the procedures prescribed in Rule 21(a) and (b)."

[69] Appellate Rule 39(d)(1) provides: "A party who wants costs taxed must--within 14 days after entry of judgment--file with the circuit clerk, with proof of service, an itemized and verified bill of costs."

[70] Bankruptcy Rule 8008(d) provides:

> Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and of the names of the persons served, certified by the person who made service. The clerk of the district court or the clerk of the bankruptcy appellate panel may permit papers to be filed without acknowledgment or proof of service but shall require the acknowledgment or proof of service to be filed promptly thereafter.

The pending amendments to Part VIII of the Bankruptcy Rules – which are currently on track to take effect in December 2014 – would relocate the relevant provision to a new Rule 8011(d) but would retain the proof-of-service requirement.

[71] Civil Rule 5(d)(1) requires a "certificate of service":

> Any paper after the complaint that is required to be served--together with a certificate of service--must be filed within a reasonable time after service. But disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission.

Criminal Rule 49(b) would seem to incorporate the "certificate of service" requirement, because it provides in part that "[s]ervice must be made in the manner provided for a civil action."

[72] As the Committee is aware, the Appellate Rules "govern procedure in the United States courts of appeals," Rule 1(a)(1), whereas when a document is filed in the district court,

It therefore might be useful – if other related amendments are brought forward – to amend Rule 39(d)(1) to delete the reference to proof of service: "A party who wants costs taxed must--within 14 days after entry of judgment – file with the circuit clerk~~, with proof of service,~~ an itemized and verified bill of costs."

The more central question is whether Rule 25(d) could be revised so that it no longer requires a proof of service in instances when service is accomplished by means of the "notice of docket activity" (NDA) generated by CM/ECF. Interestingly, twelve of the thirteen circuits have local provisions that make clear that the NDA does *not* replace the certificate of service.[74] By contrast, in the Second Circuit a local provision indicates that filling out the "service" section in CM/ECF constitutes compliance with Appellate Rule 25(d)'s requirement for a certificate of service.[75] Does this twelve-to-one split reflect the influence of a model electronic-filing provision consulted by drafters when formulating the local circuit rules on electronic filing?[76] Or does it also reflect a substantive view, in almost all the circuits, that important values are served by continuing to require the certificate of service? It seems possible that the requirement of the certificate of service could be useful in establishing the filer's understanding concerning which parties could be served electronically and which could not.[77]

In light of the lopsided circuit split in favor of continuing to require a certificate of service even where service is made through the NDA in CM/ECF, the Committee may wish to ask Mr. Gans to survey the Circuit Clerks concerning whether, and why, the certificate of service is important in such cases. Even if the Committee ultimately

---

"the procedure must comply with the practice of the district court," Rule 1(a)(2).

[73] The references in Rules 5 and 21 are also redundant, in this view. But I do not suggest deleting them, because – as noted below – those Rules concern case-initiating filings in the courts of appeals.

[74] *See* D.C. Circuit Rule 25(c); D.C. Circuit Rule ECF-7; First Circuit IOP V(A); First Circuit CM/ECF Rule 4; Third Circuit Local Appellate Rule 25.1(b) and accompanying Committee Comment; Third Circuit Local Appellate Rule 27.2(b); Third Circuit Local Appellate Rule 31.1(d); Third Circuit Local Appellate Rule 113.4(c) ("The certificate of service must state either that the other party is a Filing User and is served electronically by the Notice of Docket Activity or that the other party will be served with paper documents pursuant to FRAP 25(c)."); Fourth Circuit Rule 25(a)(4); Fifth Circuit Rule 25.2.5; Sixth Circuit Rule 25(f)(2); Sixth Circuit Guide to Electronic Filing 10.1; Seventh Circuit ECF Procedures (d)(2); Eighth Circuit Rule 25A(d); Eighth Circuit Rule 25B(c); Ninth Circuit Rule 25-5(g); Tenth Circuit Rule 25.4; Eleventh Circuit Guide to Electronic Filing Section 7.2; Federal Circuit Rule ECF-6(B).

[75] *See* Second Circuit Rule 25.1(h)(2).

[76] I am merely speculating about the existence of such a model based on the similarities among a number of the local circuit provisions.

[77] *See* First Circuit CM/ECF Rule 4 ("ECF Filers must include certificates of service with any electronically filed document which state whether the parties being served are ECF Filers being served electronically by the Notice of Docket Activity or whether they are being served using an alternate method of service permitted by Fed. R. App. P. 25(c)(1), and, if so, which method.").

concludes that the NDA can replace the certificate of service in many instances, there will continue to be exceptions. An obvious exception will occur when the litigant who is served does not participate in CM/ECF. Another exception will arise in some instances when the litigant who makes service does not participate in CM/ECF.[78] Also, I am guessing that filings (made in the court of appeals) that *initiate* an appellate case in the court of appeals will not work the same way as later filings in that same case. That is to say, at the time that the very first filing in an appellate matter is docketed in the court of appeals, the CM/ECF system may not be set up to generate a notice of docket activity (as a result of that filing) to the other litigants in the case. For that reason, Appellate Rules 5(a)(1) (petitions for permission to appeal), 21(a)(1) (mandamus petitions), and 21(c) (petitions for other extraordinary writs) seem to me to raise distinct issues.[79]

One possibility might be to revise Rule 25(d) along the following lines:

> **(d) Proof of Service**.
>
> (1) ~~A paper presented for filing must contain~~ Proof of service consists of either of the following:
>
> (A) an acknowledgment of service by the person served; or
>
> (B) ~~proof of service consisting of~~ a statement by the person who made service certifying:
>
> (i) the date and manner of service;
>
> (ii) the names of the persons served; and
>
> (iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.
>
> (2) When a brief or appendix is filed by mailing or dispatch in accordance with Rule 25(a)(2)(B), the proof of service must also state the date and manner by which the document was mailed or dispatched to the clerk.

[78] Even when the litigant whose paper is being served does not participate in CM/ECF, sometimes service will be accomplished electronically by means of the CM/ECF system. As Mr. Gans has mentioned to the Committee, the Eighth Circuit has adopted a special rule allowing prisoners and other pro se litigants to file with the Clerk, who then serves their documents to registered users through CM/ECF.

[79] The Committee may also wish to consider according the same treatment to case-initiating filings under Rules 15(a)(1) and 15(b)(1).

(3) ~~Proof of service may appear on or be affixed to the papers filed.~~ When service is made under Rules 25(c)(1)(D) and 25(c)(2) by means of a notice of docket activity generated by CM/ECF, no proof of service is required [unless otherwise stated by these Rules or by a local rule]. When service is made by any other means, proof of service must appear in or be affixed to the paper presented for filing.

IV. Conclusion

Part I of this memo reviewed the possible effects of the electronic-filing template on practice under the Appellate Rules. It concluded that the most dramatic effects would arise from the portion of the template that would permit actions to be taken electronically. In the context of the Appellate Rules, such a rule would affect numerous instances when a paper must be filed or served – including a number of instances in which local circuit provisions currently bar or limit electronic filing or service. Part I noted possible difficulties in tailoring the template to account for all such instances.

Part II of this memo considered the possibility of adopting national Rules that would presumptively require electronic filing (subject to exceptions for good cause or by local rule) and would presumptively authorize electronic service (subject to exceptions for good cause or by local rule). It might be easier to draft such provisions than to adapt the template (discussed in Part I) to the Appellate Rules – and, because the effects of the template would be felt most markedly in connection with filing and service, an Appellate Rule presumptively requiring electronic filing and presumptively authorizing electronic service could capture most of the benefits of the template without incurring all of the accompanying risks.

Finally, Part III of the memo considered the possibility of adjusting the certificate-of-service requirement in Appellate Rule 25 to account for the usefulness of the notice of docket activity generated by the CM/ECF system. Further inquiry is warranted to discern the reasons why twelve of thirteen circuits have local provisions establishing that the NDA is not a substitute for the certificate of service. But unless the certificate requirement still serves a purpose in instances where an NDA has been generated, this amendment may be worth pursuing as well.

Encl.

THIS PAGE INTENTIONALLY BLANK

Appendix A:
Local circuit provisions setting requirements for electronic filing and/or service[80]

Cite	Provision
DC Circuit Rules 25(a) - (c)	(a) Filing by Electronic Means. The court will accept for filing documents submitted, signed, or verified by electronic means that comply with procedures established by the court. In cases assigned to the court's Case Management/Electronic Case Files (CM/ECF) system, the clerk is authorized to permit or to require a party to file by electronic means. The clerk also may require paper copies of any document filed electronically. (b) Exceptions. Upon motion and a showing of good cause, the court may exempt a party from the electronic filing requirements and authorize filing by means other than use of the CM/ECF system. (c) Service of Documents by Electronic Means. Registration for the court's CM/ECF system constitutes consent to electronic service of all documents as provided in these rules and the Federal Rules of Appellate Procedure. The Notice of Docket Activity that is generated by the court's CM/ECF system constitutes service of the filed document on all parties who have consented to electronic service. For any document that is not filed electronically and for any party who has not consented to electronic service, the document must be served by an alternative method of service, in accordance with the Federal Rules of Appellate Procedure and this court's rules. The Notice of Docket Activity generated by the court's CM/ECF system does not replace the certificate of service required by FRAP 25.
DC Circuit Rules 36(a) & (b)	(a) Entry. In cases assigned to the court's Case Management/Electronic Case Files (CM/ECF) system, all judgments will be filed electronically in accordance with Circuit Rule 25 and the procedures established by the court. That filing constitutes entry of the judgment on the docket as required by FRAP 36(a). (b) Notice. Upon the entry of the judgment in a case assigned to the CM/ECF system, the clerk will electronically transmit a Notice of Docket Activity to all parties who have consented to electronic service. Electronic transmission of the Notice of Docket Activity constitutes the notice and service required by FRAP 36(b) and 45(c). For any party who has not consented to electronic service, the clerk must serve in paper form a copy of the opinion or the judgment, if no opinion was written, which notes the date the judgment was entered.
DC Circuit Rules 45(c) & (d)	(c) Entry of Court-Issued Documents. Except as otherwise provided by these rules or court order, all orders, opinions, judgments, and other documents issued by the court in cases assigned to the court's Case Management/Electronic Case Files (CM/ECF) system will be filed electronically in accordance with Circuit Rule 25 and the procedures established by the court. Any such filing constitutes under FRAP 36 and

[80] In the interests of brevity, this chart omits provisions that deal with ancillary matters. Such provisions are listed in Appendix B.

	45(b) entry on the docket maintained by the clerk. Any order, judgment, or other court-issued document filed electronically without the original signature of a judge or authorized court personnel has the same force and effect as if the judge or clerk had signed a paper copy. Orders also may be issued as "text-only" entries on the docket, without an attached document. Such orders are official and binding. (d) Notice of Orders and Judgments. Immediately upon the entry of an order or judgment in a case assigned to the CM/ECF system, the clerk will electronically transmit a Notice of Docket Activity to all parties who have consented to electronic service. Electronic transmission of the Notice of Docket Activity constitutes the notice and service required by FRAP 36(b) and 45(c). For any party who has not consented to electronic service, the clerk must immediately serve in paper form a notice of entry with a copy of any opinion.
DC Circuit ECF-1	ECF-1. Scope of Electronic Filing System Except as otherwise prescribed by Circuit rule or order of the court, all cases filed on and after September 1, 2009, will be assigned to the court's CM/ECF system. Case-initiating documents, including petitions for permission to appeal, petitions for review or notices of appeal from agency action, and petitions for writ of mandamus and other original proceedings in this court, must be filed in paper form. Except as otherwise prescribed by Circuit rule or court order, all briefs, motions, petitions for rehearing, and other documents subsequently filed in any case by a filer registered in accordance with ECF-2 must be filed electronically using the CM/ECF system....
DC Circuit ECF-2	(A) Attorneys who appear before this court must register for the court's CM/ECF system.... Registration requirements will be posted on the court's web site and may include training as a prerequisite to registration as an ECF filer. (B) At the discretion of the court, a party to a pending civil case who is not represented by an attorney may be permitted to register as an ECF filer solely for purposes of that case. A pro se party who desires to register as an ECF filer must file a motion in this court, describing the party's access to the internet and confirming the capacity to file and receive documents electronically on a regular basis. If permission is granted, the pro se party may be required to complete CM/ECF training provided by the clerk as a prerequisite to registration as an ECF filer. If a pro se party retains an attorney, the attorney must enter an appearance. .... (D) Registration as an ECF filer constitutes consent to electronic service of all documents as provided in the Federal Rules of Appellate Procedure and the rules of this court. See D.C. Cir. Rule 25©.
DC Circuit ECF-5(A)	Consequences of Electronic Filing (A) The Docket. Electronic transmission of a document to the CM/ECF system consistent with this order, together with the transmission of a Notice of Docket Activity from the court, constitute filing of the document under

	the Federal Rules of Appellate Procedure and the rules of this court, and constitute under FRAP 36 and 45(b) entry of the document on the docket maintained by the clerk. If the court requires a party to file a motion for leave to file, both the motion and document at issue should be submitted electronically. If leave is granted, the underlying document will remain on the docket; if leave is denied, the docket will so reflect.
DC Circuit ECF-5©	(C) Time of Filing. Except in the case of documents first filed in paper form and subsequently submitted electronically under ECF-1, a document filed electronically is deemed filed on the date and at the time stated on the Notice of Docket Activity from the court. Unless a time for filing is specified by court order, filing must be completed before midnight Eastern Time to be considered timely filed that day.
DC Circuit ECF-7	Service of Documents by Electronic Means The Notice of Docket Activity that is generated by the court's CM/ECF system constitutes service of the filed document on all parties who have registered for the CM/ECF system but does not replace the certificate of service required by FRAP 25. Any party who has not consented to electronic service must be served by an alternative method of service, in accordance with the Federal Rules of Appellate Procedure and this court's rules. See D.C. Cir. Rule 25©.
DC Circuit ECF-8	Exceptions to Requirement of Electronic Filing and Service (A) A party proceeding pro se must file documents in paper form with the clerk and must be served with documents in paper form, unless the pro se party has been permitted to register as an ECF filer for that case. (B) A motion to file documents under seal, including any exhibits and attachments, and all documents containing material under seal may not be filed or served electronically unless the court orders otherwise. Matters under seal are governed by Circuit Rule 47.1. (C) Exhibits, attachments, or appendix items that (1) exceed 500 pages or 1500 kilobytes; (2) are not in a format that readily permits electronic filing, such as odd-sized documents; or (3) are illegible when scanned into electronic format may be filed in paper form. Documents filed pursuant to this subsection must be served by an alternative method of service authorized by FRAP 25, and the filer must file electronically a notice of paper filing. (D) Upon motion and a showing of good cause, the court may exempt a party from the electronic filing requirements and authorize filing by means other than use of the CM/ECF system. See D.C. Cir. Rule 25(b).
DC Circuit Handbook III.K	A motion to file documents under seal, including any exhibits and attachments, and all documents containing material under seal may not be filed or served electronically unless the Court orders otherwise.
First Circuit Rule 11.0(c)(2)	Motions to seal or sealed documents should never be filed electronically. See Administrative Order Regarding Case Management/Electronic Case Files System.
First	(a) Electronic Case Filing. Pursuant to Fed. R. App. P. 25(a)(2)(D) and

Circuit Rule 25.0(a)	(c)(2), the court has established procedures for electronic filing of documents, with certain exceptions, and authorized electronic service of documents using the court's transmission equipment, as set forth in the Administrative Order Regarding Case Management/Electronic Case Files System and any amendments to that order.
First Circuit IOP V(A)	A. General. In accordance with Fed. R. App. P. 27(d)(3), all motions must be accompanied by 3 copies unless the motion is filed electronically in compliance with the court's electronic filing system, and a proof of service showing the type of service that was made, i.e., by mail or by hand delivery or electronically. The date of service establishes the due date for filing the response per Fed. R. App. P. 27(a)(3).
First Circuit CM/ECF Rules	Effective January 1, 2010, use of the electronic filing system is mandatory for all attorneys filing in this court, unless they are granted an exemption, and is voluntary for all non-incarcerated pro se litigants proceeding without counsel.
First Circuit CM/ECF Rule 1	Rule 1--Scope of Electronic Filing Except as otherwise prescribed by local rule or order, all cases will be assigned to the court's electronic filing system. Upon motion and a showing of good cause, the court may exempt an attorney from the provisions of this Rule and authorize filing by means other than use of the electronic filing system. After January 1, 2010, all documents filed by counsel must be filed electronically using the electronic filing system unless counsel obtains an exemption, except for the following types of documents, which must be filed only in paper form: a. documents filed in the court of appeals which initiate cases, including for example, petitions for review, petitions for permission to appeal, applications to enforce an agency order, petitions for a writ of mandamus or prohibition, and applications for leave to file a second or successive petition for relief pursuant to 28 U.S.C. § 2254 or § 2255; b. any document filed before a case is docketed by the court; c. motions to seal; d. sealed, ex parte, or otherwise non-public documents, including for example, pre-sentence reports and statements of reasons in a judgment of criminal conviction; e. appendices to briefs; and f. vouchers filed in accordance with the Criminal Justice Act, 18 U.S.C. § 3006A, and other documents relating to compensation and reimbursement for representation and for ancillary services and expenses. Notices of appeal, although they initiate appeals, are filed in the district court and, thus, are subject to the relevant district court's procedures governing electronic filing. Although a brief ... must be filed electronically after January 1, 2010, paper copies of briefs are still required to be filed..... At the time a brief is filed electronically, it must be served on all other parties, as required by Federal

	Rules of Appellate Procedure 25(b) and 31(b). See Rule 4 of this Order..... Appendices must be filed and served in paper form at the time the electronic version of the brief is filed. ....
First Circuit CM/ECF Rule 2	Attorneys who practice in this court must register as ECF Filers.... Attorneys and non-incarcerated pro se litigants may register at www.ca1.uscourts.gov. Before filing an electronic document using the court's electronic filing system, ECF Filers must complete the computer-based training modules listed as mandatory on the court's website. ECF Filers should also familiarize themselves with the CM/ECF User's Guide. The computer-based training modules and the CM/ECF User's Guide, together with other training materials concerning electronic filing in the First Circuit, including Frequently Asked Questions, are available on the court's website at www.ca1.uscourts.gov. A non-incarcerated party to a pending case who is not represented by an attorney may, but is not required to, register as an ECF Filer for purposes of that case. If a pro se party retains an attorney, the attorney must advise the clerk by filing an appearance form and, after January 1, 2010, must also register as an ECF Filer if he or she has not already done so. Registration as an ECF Filer constitutes consent to electronic service of all documents as provided in these rules and in the Federal Rules of Appellate Procedure. All ECF Filers have an affirmative duty to inform the clerk immediately of any change in their e-mail address.... ....
First Circuit CM/ECF Rule 3	Consequences of Electronic Filing Electronic transmission of a document to the electronic filing system in compliance with these rules, together with the transmission of a Notice of Docket Activity from the court, constitutes filing of the document under the Federal Rules of Appellate Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under Fed. R. App. P. 36 and 45(b). If leave of court is required to file a document and the document may be filed electronically under Rule 1 of this Order, both the motion and document at issue should be submitted electronically. If leave is granted, the docket will so reflect. .... Except in the case of documents first filed in paper form and subsequently submitted electronically, an electronically filed document is deemed filed at the date and time stated on the Notice of Docket Activity from the court. Unless otherwise required by statute, rule, or court order, filing must be completed by midnight in the time zone of the circuit clerk's office in Boston to be considered timely filed that day. ECF Filers are advised that they should contact the clerk's office if they transmit a document to the electronic filing system but do not receive a Notice of Docket Activity. If a Notice of Docket Activity was not transmitted by the court, the ECF Filer's filing attempt failed and the document was not filed.
First	Service of Documents by Electronic Means

Circuit CM/ECF Rule 4	The Notice of Docket Activity that is generated by the court's electronic filing system constitutes service of the filed document on all ECF Filers. The system identifies which parties in a particular case are ECF filers. Parties who are not registered as ECF Filers must be served with a copy of any electronically filed document in some other way authorized by Fed. R. App. P. 25(c)(1). Similarly, a document filed in paper form pursuant to Rule 1 of this Order must be served using an alternate method of service prescribed by Fed. R. App. P. 25(c)(1). However, paper copies of briefs filed electronically and already served on all parties do not need to be served. The Notice of Docket Activity does not replace the certificate of service required by Fed. R. App. P. 25(d). ECF Filers must include certificates of service with any electronically filed document which state whether the parties being served are ECF Filers being served electronically by the Notice of Docket Activity or whether they are being served using an alternate method of service permitted by Fed. R. App. P. 25(c)(1), and, if so, which method. The certificate must also provide the other information required by Fed. R. App. P. 25(d)(1).
First Circuit CM/ECF Rule 5	Entry of Court-Issued Documents Except as otherwise provided by local rule or court order, all public orders, opinions, judgments, and proceedings of the court in cases assigned to the electronic filing system will be filed in accordance with these rules, which will constitute entry on the docket kept by the clerk under Fed. R. App. P. 36 and 45(b). Any order or document electronically issued by the court without the original signature of a judge or authorized court personnel has the same force and effect as if the judge or clerk had signed a paper copy of the order. Orders also may be issued as "text-only" entries on the docket, without an attached document. Such orders are official and binding.
First Circuit CM/ECF Rule 7	As required by Rule 1 of this Order, sealed documents and motions for permission to file a document under seal should be filed only in paper form. Sealed documents must be filed in compliance with 1 Cir. R. 11.0(c) and 1 Cir. R. 30.0(g). If an entire case is sealed, all documents in the case are considered sealed unless the court orders otherwise or, in the case of a court order, opinion, or judgment, the court releases the order, opinion or judgment for public dissemination.
First Circuit CM/ECF Rule 10	Immediately upon the entry of a public order, opinion or judgment in a case assigned to the electronic filing system, the clerk will electronically transmit a Notice of Docket Activity to ECF Filers in the case. Electronic transmission of the Notice of Docket Activity constitutes the notice and service of the order, opinion, or judgment required by Fed. R. App. P. 36(b) and 45(c). The clerk must give notice in paper form to a person who has not consented to electronic service in accordance with the Federal Rules of Appellate Procedure.
Second Circuit	If a party to a civil action in the district court files a notice of appeal electronically in accordance with the Federal Rules of Civil Procedure and

Rule 3.1	the district court's local rules, the district clerk may satisfy the service requirements of FRAP 3(d) as to a counseled party to the appeal by effecting service electronically.
Second Circuit Rule 15.1	If the petitioner is represented by counsel, the petitioner's attorney may remit the filing fee to the circuit clerk electronically in accordance with the instructions posted on the court's website. The attorney must (1) register as a Filing User under LR 25.1, (2) file the petition for review electronically with the fee, and (3) if not already admitted, seek admission to the court under LR 46.1 immediately upon filing the petition for review.
Second Circuit Rule 21.1(a)	Electronic Payment of Filing Fee. If the petitioner is represented by counsel, the petitioner's attorney may remit the required filing fee to the circuit clerk electronically in accordance with the instructions posted on the court's website. The attorney must (1) register as a Filing User under LR 25.1, (2) file the petition for a writ electronically with the fee, and (3) if not already admitted, seek admission to the court under LR 46.1 immediately upon filing the petition for a writ.
Second Circuit Rule 25.1	(a) Definitions and Scope. (1) Definitions. (A) Document. "Document" means any paper submitted to the court in a case. (B) PDF.... (C) Initiating Document. "Initiating document" means any document, including a petition for review of an agency decision; petition for a writ of mandamus, prohibition, or other extraordinary writ; successive habeas petition; or motion for leave to file an appeal; filed directly in this court to initiate a proceeding seeking consideration by this court. (D) Filing User. "Filing User" means anyone who registers to file electronically under (b). (E) Sealed Document. "Sealed document" means all or any portion of a document placed under seal by order of a district court or an agency or by order of this court upon the filing of a motion. (2) Scope. This rule applies to all appeals filed on or after January 1, 2010 .... (b) Registration. (1) Admitted Attorneys. An attorney admitted to practice in this court must register as a Filing User with PACER.... (2) Non-Admitted Attorneys. An attorney not admitted to practice in this court but who files a petition for review of an agency decision under LR 15.1, a petition for writ of mandamus or prohibition or other extraordinary writ under LR 21.1, or an attorney admission application under LR 46.1 must register as a Filing User with PACER. (3) Pro Se Parties. A pro se party who wishes to file electronically must seek permission from the court .... (c) Electronic Filing Requirements. (1) Documents Other Than Initiating Documents. A Filing User must file

	every document, other than an initiating document, electronically in PDF in accordance with the CM/ECF instructions posted on the court's website. (2) Initiating Documents. Unless filing under LR 15.1 or LR 21.1, an attorney who is not exempt under (j) must file an initiating document by emailing it to <newcases@ca2.uscourts.gov>. (d) Timing of Electronic Filing. (1) Documents Filed in CM/ECF. A document filed electronically in CM/ECF is considered filed as of the date and time indicated on the notice of docket activity ("NDA") that the court automatically generates following the filing transmission. (2) Initiating Documents. An initiating document filed electronically under (c)(2) is considered filed as of the date and time indicated on the email submission. (3) Technical Failure. Upon motion, the clerk may accept as timely filed a document untimely filed as the result of a technical failure. (e) Format. .... (f) Signature. .... (g) Submission of Paper Copies. .... (h) Service. (1) Acceptance of Service. Registration as a Filing User constitutes consent to electronic service of all documents. (2) Documents Filed in CM/ECF. A document filed in CM/ECF is considered served upon another Filing User when that Filing User receives the NDA. A Filing User satisfies FRAP 25(d)'s proof of service requirements by completing the "service" section in CM/ECF when filing a document. (3) Initiating Documents. A Filing User must serve an initiating document on another Filing User by email. (4) Paper Copies. Service of a paper copy of a document is not required unless the recipient is not a Filing User and has not consented to other service. (i) Hyperlinks..... (j) Exemptions. (1) Counsel. Upon motion and a showing of extreme hardship or exceptional circumstances, the clerk may exempt counsel in a particular case from the electronic filing requirements. If the clerk grants counsel an exemption, the clerk will determine the manner of filing and service. (2) Sealed Documents. A sealed document or a document that is the subject of a motion to seal is exempt from the electronic filing requirement and must be filed with the clerk in the manner the court determines. Within 7 days after the sealed document is filed, a redacted version of the document must be electronically filed on the docket, unless the court orders otherwise. (3) Oversized Documents.....
Third Circuit Local	Electronic Filing and Service (a) Except for original petitions such as a petition for writ of mandamus or petition for review of an agency order, counsel must file all documents

Appellate Rule 25.1	electronically in accordance with the procedures of L.A.R. Misc. 113. In addition to electronically filing on CM/ECF, ten paper copies of briefs and four paper copies of the appendices must be filed with the clerk for the convenience of the court. No paper copies of motions or petitions for rehearing need be filed unless directed by the clerk. (b) Service of electronically filed documents is governed by L.A.R. Misc. 113.4. If the opposing party has not consented to electronic service, the filer must use an alternate method of service prescribed FRAP 25(c). The method of service, whether electronic through the court's docketing system or by alternate means, must be specified in the certificate of service. (c) Litigants proceeding pro se may, but are not required, to file documents electronically. ... Committee Comments: .... The notice of docket activity generated by CM/ECF notes whether notice has been sent to opposing parties by the court's electronic docketing system. This does not substitute for a certificate of service.
Third Circuit Local Appellate Rule 27.2(a) & (b)	(a) Counsel must file electronically all motions, responses to motions, and replies to such responses in accordance with the procedures of L.A.R. Misc. 113. No paper copies of motions need be filed unless directed by the clerk. (b) Service of electronically filed documents is governed by L.A.R. Misc. 113.4. If the opposing party has not consented to electronic service, the filer must use an alternate method of service prescribed FRAP 25(c). The method of service, whether electronic through the court's docketing system or by alternate means, must be specified in the certificate of service. Motions must ordinarily be served on other parties by means equally expeditious to those used to file the motion with the court. When time does not permit actual service on other parties, or the moving party has reason to believe that another party may not receive the motion in sufficient time to respond before the court acts (as in certain emergency motions), the moving party should notify such other parties by telephone, e-mail, or facsimile of the filing of the motion.
Third Circuit Local Appellate Rule 30.3(b)	(b) Records sealed in the district court and not unsealed by order of the court must be not be included in the paper appendix. Paper copies of sealed documents must be filed in a separate sealed envelope. When filed electronically, sealed documents must be filed as a separate docket entry as a sealed volume.
Third Circuit Local Appellate Rule 31.1	31.1 Number of Copies to Be Filed and Served (a) Unless otherwise required by this court, each party must file ten (10) paper copies (i.e., an original and nine copies) of each brief* with the clerk for the convenience of the court and, unless counsel has consented to electronic service, serve one (1) paper copy on counsel for each party separately represented..... (b) In addition to the paper briefs, counsel for any party or amicus curiae must file with the court the same brief in electronic form.

	(1) Filing must be done on the court's electronic filing system as provided in L.A.R. Misc. 113 or such other method as the court specifies. (2) The brief must be in PDF format..... (3) The date of filing the brief is the date the electronic version of the brief is received by the Clerk, provided that ten paper copies are mailed as provided in Rule 25(a)(2)(B), FRAP on the same day as electronic transmission. (4) The electronic version of the brief is the official record copy of the brief.... (5) Litigants proceeding pro se need not file an electronic brief. (c) ... (d) A party who is a Filing User as provided in L.A.R. Misc. 113.4 consents to electronic service of the brief through the court's electronic docketing system (CM/ECF). Service by alternate means must be made on all parties who are not Filing Users. The certificate of service must note what method of service was used for each party served.
Third Circuit Local Appellate Rule 112.2(b)	(b) Petitioner must file, with proof of service, an original and three copies of the petition for writ of certiorari [to the Supreme Court of the Virgin Islands]. Petitioner must serve one copy of the petition for writ of certiorari on each of the parties to the proceedings in the Supreme Court of the Virgin Islands. When filing the petition, petitioner must pay the docketing fee, which shall be the same as the fees charged for an original proceeding such as a petition for writ of mandamus or petition for review of an agency order, in the Court of Appeals. Counsel for the petitioner must enter an appearance within 14 days of filing a petition. Once the case has been opened on the court's electronic docketing system, all documents must be filed electronically in accordance with L.A.R. Misc. 113.
Third Circuit Local Appellate Rule 113.1	Scope of Electronic Filing (a) Except as otherwise prescribed by local rule or order, all cases will be assigned to the court's electronic filing system. Case-initiating documents in original proceedings in the court of appeals must be filed in paper format. Except as otherwise prescribed by local rule or court order, all briefs, motions, petitions for rehearing, and other documents subsequently filed in any case with the court by a Filing User registered as set forth under Rule 113.2 must be filed electronically using the electronic filing system. .... (e) Upon motion and a showing of good cause, the court may exempt a Filing User from the provisions of this Rule and authorize filing by means other than use of the electronic filing system.
Third Circuit Local Appellate Rule 113.2	Eligibility, Registration, Passwords (a) Attorneys who intend to practice in this court ... must register as Filing Users of the court's electronic filing system. Registration requirements ... may include training as a prerequisite to registration as a CM/ECF Filing User. (b) A party to a pending civil case who is not represented by an attorney

	may, but is not required to, register as a Filing User in the electronic filing system solely for purposes of that case. Filing User status will be terminated upon termination of the case. If a pro se party retains an attorney, the attorney must advise the clerk. (c) Registration as a Filing User constitutes consent to electronic service of all documents as provided in these rules and with the Federal Rules of Appellate Procedure. .... (e) Upon motion showing extraordinary circumstances, the clerk may grant an exemption from electronic filing.
Third Circuit Local Appellate Rule 113.3	Consequences of Electronic Filing (a) Electronic transmission of a document to the electronic filing system consistent with these rules, together with the transmission of a Notice of Docket Activity from the court, constitutes filing of the document under the Federal Rules of Appellate Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the clerk under FRAP 36 and 45(b). If the court requires a party to file a motion for leave to file a document, both the motion and document at issue should be submitted electronically; the underlying document will be filed if the court so directs. (b) .... When a document has been filed electronically, the official record is the electronic document stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under Rule 113.1, a document filed electronically is deemed filed at the date and time stated on the Notice of Docket Activity from the court. (c) Filing must be completed by midnight on the last day Eastern Time to be considered timely filed that day.
Third Circuit Local Appellate Rule 113.4	Service of Documents by Electronic Means (a) The Notice of Docket Activity that is generated by the court's electronic filing system constitutes service of the filed document on all Filing Users. Parties who are not Filing Users must be served with a copy of any document filed electronically in accordance with the Federal Rules of Appellate Procedure and the local rules. (b) If the document is not filed and served electronically through the court's CM/ECF system, the filer must use an alternative method of service prescribed by FRAP 25(c). (c) The Notice of Docket Activity generated by the court's electronic filing system does not replace the certificate of service required by FRAP 25. The certificate of service must state either that the other party is a Filing User and is served electronically by the Notice of Docket Activity or that the other party will be served with paper documents pursuant to FRAP 25(c).
Third Circuit Local Appellate Rule 113.5	Entry of Court-Issued Documents (a) Except as otherwise provided by local rule or court order, all orders, decrees, judgments, and proceedings of the court relating to cases filed and maintained in the CM/ECF system will be filed in accordance with these rules, which will constitute entry on the docket kept by the clerk under

	FRAP 36 and 45(b). Court orders, decrees, judgments, and other documents filed by the court will contain an electronic signature. Any order or other court issued document filed electronically without a hand-written signature of a judge or authorized court personnel has the same force and effect as if the judge or clerk had signed a paper copy of the order. (b) Orders also may be entered as "text-only" entries on the docket, without an attached document. Such orders are official and binding.
Third Circuit Local Appellate Rule 113.7	Sealed Documents (a) A motion to file documents under seal may be filed electronically unless prohibited by law, local rule, or court order. (b) If the court grants the motion, the order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. (c) With permission of the clerk, documents ordered placed under seal may be filed in paper form only. A paper copy of the authorizing order must be attached to the documents under seal and delivered to the clerk. (d) Ex parte motions, e.g., to file a document under seal, must be filed in paper form only. ... Committee Comments: The court's electronic filing system is capable of accepting sealed documents electronically from filing users, either directly into a sealed case in which the attorney is a participant or as a sealed filing in an otherwise unsealed case. See L.A.R. Misc. 113.4, which addresses service of sealed documents filed electronically. See L.A.R. Misc. 113.12 for other provisions addressing privacy concerns arising from electronic filing. Attorneys must not include private and/or confidential information in their motions to file a document under seal and must fulfill their obligations under L.A.R. Misc. 113.12.
Fourth Circuit Rule 25(a)(1)	With the exception of administrative matters, all cases filed in the Court are assigned to the Court's Case Management/Electronic Case Filing System (CM/ECF). (1) Scope of Electronic Filing. Unless granted an exception for good cause or unless filing only a motion to withdraw from representation, counsel must file all documents in accordance with the requirements of this rule. Pro se litigants are not required to file documents electronically but may be authorized to file electronically in a pending case upon motion and compliance with the Court's CM/ECF registration requirements.... (A) New Cases. New petitions for review, applications for enforcement, petitions for permission to appeal, petitions for mandamus or prohibition, and motions to authorize successive post-conviction applications must be filed using one of the following options: (i) Submit New Case through CM/ECF Utilities: File petition in electronic form by selecting "Submit New Case" under CM/ECF Utilities and uploading the petition as a new case. Paper copies are not required, but the petition must be served conventionally, outside the CM/ECF system. The petition is deemed filed as of the date the

	electronic document was received by the clerk's office; or (ii) File in Paper Form: File the original petition in paper form and serve the petition conventionally, outside the CM/ECF system. The petition is filed as of the date the paper document was received in the clerk's office. Additional copies are not required. (B) Briefs. Formal briefs must be filed and served electronically..... The brief is deemed filed as of the date and time stated on the notice of docket activity for the electronic brief, provided that paper copies are mailed, dispatched to a third-party commercial carrier, or delivered to the clerk's office on the next business day. Service of the paper brief is not required if the brief was served electronically on counsel and on any party not represented by counsel. (C) Administrative Records. .... (D) Appendices. ... (E) Vouchers. Criminal Justice Act and other payment vouchers are maintained as financial records separate from the docket. The original must be filed in paper rather than electronic form, and no copies are required.
Fourth Circuit Rule 25(a)(2)	Eligibility, Registration, Passwords. Attorneys who intend to practice in this Court should register as filing users of the Court's CM/ECF system. If permitted by the Court, a party to a pending civil case who is not represented by an attorney may register as a filing user of the Court's CM/ECF system solely for purposes of that case. A pro se party's filing user status will be terminated upon termination of the case or termination of the party's pro se status. Completion of the Fourth Circuit Electronic Case Filer Application constitutes consent to electronic service of all documents as provided in this rule and the Federal Rules of Appellate Procedure..... ....
Fourth Circuit Rule 25(a)(3)	Consequences of Electronic Filing. Electronic transmission of a document to CM/ECF consistent with this rule, together with the transmission of a notice of docket activity from the Court, constitutes filing of the document under the Federal Rules of Appellate Procedure and the Court's local rules and constitutes entry of the document on the docket kept by the clerk under FRAP 36 and 45(b). A document filed electronically is deemed filed at the date and time stated on the notice of docket activity from the Court. Unless otherwise directed by the Court, filing must be completed before midnight Eastern Time, as shown on the notice of docket activity, to be considered timely filed that day. .....
Fourth Circuit Rule 25(a)(4)	Service of Documents by Electronic Means. The notice of docket activity that is generated by the Court's electronic filing system constitutes service of the filed document on any registered CM/ECF users. Parties who are not registered for electronic service through CM/ECF must be served conventionally, outside the CM/ECF system, with a copy of any document

	filed electronically. If a document (such as a sealed document or a new case) cannot be served electronically, the filer must serve the document conventionally, outside the CM/ECF system. The notice of docket activity generated by the Court's electronic filing system does not replace the certificate of service required by FRAP 25(d).
Fourth Circuit Rule 25(a)(7)	Sealed Documents. Sealed material must be filed in accordance with Local Rule 25(c) and served conventionally, outside the CM/ECF system.
Fourth Circuit Rule 25(a)(10)	Notice of Court Orders and Judgments. Immediately upon the entry of an order, judgment, or opinion in a case assigned to CM/ECF, the clerk will electronically transmit a notice of docket activity to filing users in the case. Electronic transmission of the notice of docket activity constitutes the notice and service required by FRAP 36(b) and 45(c). The clerk must give notice in paper form to a person who has not consented to electronic service in accordance with the Federal Rules of Appellate Procedure.
Fourth Circuit Rules 25(c)(3)(E) & (F)	(E) Method of Filing: (i) Appendices: Local Rule 30(b)(4) sets forth the number of paper copies required for public and sealed volumes of the appendix. Sealed volumes are accompanied by a certificate of confidentiality or motion to seal, in both paper and electronic form. Electronic sealed volumes are filed using the entry SEALED APPENDIX, which automatically seals the appendix for Court access only. (ii) Formal Briefs: Local Rule 31(d) sets forth the number of paper copies required for public and sealed versions of formal briefs. The sealed version is accompanied by a certificate of confidentiality or motion to seal, in both paper and electronic form. The electronic sealed version of the brief is filed using the entry SEALED BRIEF, which automatically seals the brief for Court access only. (iii) Other Documents: Any other sealed document is filed electronically using the entry SEALED DOCUMENT, which automatically seals the document for Court access only. A certificate of confidentiality or motion to seal is also filed electronically. (F) Method of Service: All sealed appendices, briefs, and documents must be served in paper form, because only the Court can access the sealed electronic appendix, brief, or document.
Fifth Circuit Rule 25.2	Electronic Case Filing Procedures. 25.2.1 Electronic Filing. At the court's direction, the clerk will set an implementation date for an initial period of voluntary, and a subsequent date for mandatory, use of the court's electronic filing system. *[N.B.: The Fifth Circuit website states that "The Fifth Circuit U.S. Court of Appeals began MANDATORY electronic case fiing on March 15, 2010."]* Thereafter, all cases will be assigned to the court's electronic filing system. Counsel must register as Filing Users under Rule 25.2.3 and comply with the court's

	electronic filing standards, posted separately on the court's website, www.ca5.uscourts.gov, unless excused for good cause. Non-incarcerated pro se litigants may request the clerk's permission to register as a Filing User, in civil cases only, under such conditions as the clerk may authorize. .... 25.2.2 Filings in Original Proceedings. Filing Users may be required to file case-initiating documents in original proceedings, e.g., mandamus, petitions for second and successive habeas corpus relief, petitions for review, etc., in paper format. Subsequent documents may be filed electronically and in paper format as prescribed by the clerk. 25.2.3 Filing Users: Eligibility, Registration, Passwords. All counsel not excused from filing electronically must register themselves, or any additional approved designee, as Filing Users of the court's electronic filing system. The clerk will define the registration requirements and continuing duty of counsel to keep their contact information current, see 5th Cir. R. 46.1, and will determine necessary training to receive Filing User registration. Non-incarcerated pro se litigants granted Filing User status under Rule 25.2.1 will have Filing User status terminated as prescribed by the clerk, generally at the termination of the case. If a pro se party, permitted to register as a Filing User, retains an attorney, that counsel must advise the clerk. A Filing User's registration constitutes consent to electronic service of all documents as provided in the Fed. R. App. P. and the 5th Cir. R. .... A Filing User may move to withdraw from participation in the electronic filing system for good cause shown. 25.2.4 Consequences of Electronic Filing. A Filing User's electronic transmission of a document to the electronic filing system consistent with these rules and the court's electronic filing standards, together with the court's transmission of a Notice of Docket Activity, constitutes filing of the document under the Fed. R. App. P. and 5th Cir. R., and constitutes entry of the document on the docket under Fed. R. App. P. 36 and 45(b). If a party must file a motion for leave to file, both the motion and document at issue must be submitted electronically and in identical paper form; the underlying document will be filed if the court so directs. .... Except for documents first filed in paper form and subsequently submitted electronically under 5th Cir. R. 25.2.2, an electronically filed document is deemed filed at the date and time stated on the court's Notice of Docket Activity. Filing must be completed by 11:59 p.m. Central Time to be considered timely filed that day. 25.2.5 Service of Documents by Electronic Means. The court's electronic Notice of Docket Activity constitutes service of the filed document on all Filing Users. Parties who are not Filing Users must be served with a copy of any document filed electronically in accordance with the Fed. R. App. P. 25

	and 5th Cir. R. 25. If the document is not available electronically, the filer must use an alternative method of service. The court's electronic Notice of Docket Activity does not replace the certificate of service required by Fed. R. App. P. 25(d). 25.2.6 Entry of Court--Issued Documents. .... 25.2.7 Attachments and Exhibits .... 25.2.8 Sealed Documents. A Filing User may move to file documents under seal in electronic form if permitted by law, and as authorized in the court's electronic filing standards. The court's order authorizing or denying the electronic filing of documents under seal may be filed electronically. Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court. If filed traditionally, a paper copy of the authorizing order must be attached to the documents under seal and delivered to the clerk. 25.2.9 Retention Requirements. ... 25.2.10 Signatures. ... 25.2.11 Notice of Court Orders and Judgment. The clerk will transmit electronically a Notice of Docket Activity to Filing Users in the case when entering an order or judgment. This electronic transmission constitutes the notice and service of the opinion required by Fed. R. App. P. 36(b) and 45(c). The clerk must give notice in paper form in accordance with those rules to a person who has not consented to electronic service. 25.2.12 Technical Failures.... 25.2.13 Public Access/Redaction of Personal Identifiers. ... 25.2.14 Hyperlinks. ... 25.2.15 Changes....
Fifth Circuit Rule 26.1	Computing Time. Except for briefs and record excerpts, all other papers, including petitions for rehearing, are not timely unless the clerk actually receives them within the time fixed for filing. Briefs and record excerpts are deemed filed on the day sent to the clerk electronically where permitted by 5th Cir. R. 30 and 31, by a third-party commercial carrier for delivery within 3 days, or on the day of mailing if the most expeditious form of delivery by mail is used. The additional 3 days after service by mail, by electronic means, or after delivery to a commercial carrier for delivery within 3 days referred to in Fed. R. App. P. 26(c), applies only to matters served by a party and not to filings with the clerk of such matters as petitions for rehearing under Fed. R. App. P. 40, petitions for rehearing en banc under Fed. R. App. P. 35, and bills of costs under Fed. R. App. P. 39.
Sixth Circuit Rule 5	A petition for permission to appeal and all subsequent documents shall be filed electronically as provided in 6 Cir. R. 25 and this court's Guide to Electronic Filing, unless otherwise ordered by the court....
Sixth Circuit Rule 12	The appearance must be filed electronically. 6 Cir. R. 25(a)(1)
Sixth Circuit	The Tax Court's electronic records are not easily transferable to this court. Therefore, a Tax Court appeal has an appendix instead of an electronic

IOP 14	record on appeal. The appendix and all other filings generally must be filed electronically.
Sixth Circuit Rule 15	A petition for review of an agency order and all subsequent documents shall be filed electronically, in accordance with 6 Cir. R. 25 and this court's Guide to Electronic Filing, unless otherwise ordered by the court.
Sixth Circuit IOP 15	(a) Petition, Application. A party seeking review or enforcement of an agency order must file the petition for review or application for enforcement electronically as provided in 6 Cir. R. 25(b)(1). (b) Motion for Stay. A party filing a motion for a stay at the same time as the petition for review must file the motion in paper format with an electronic copy as provided in 6 Cir. R. 25(b)(1). (c) Other Documents. All other documents must be filed electronically unless the court orders otherwise. 6 Cir. R. 25(a).
Sixth Circuit Rule 18	A motion for stay must be filed electronically as provided in 6 Cir. R. 25(b)(1).
Sixth Circuit IOP 21(a)	(a) A party seeking an extraordinary writ may file the petition in paper format with an electronic copy as provided in 6 Cir. R. 25(b)(1) and (3).
Sixth Circuit IOP 22(a)	(a) Motion to File a Second or Successive Application Under 28 U.S.C. § 2254 or § 2255. An applicant not represented by counsel seeking authorization to file a second or successive application in the district court under 28 U.S.C. § 2254 or § 2255 must file the motion in paper format. If an applicant is represented by counsel, the request for authorization to file the application should be filed electronically as provided in 6 Cir. R. 25 with an electronic copy as provided in 6 Cir. R. 25(b)(1).
Sixth Circuit Rule 25(a)	Electronic Filing Required. (1) Requirement. All documents must be filed electronically using the Electronic Case Filing (ECF) system unless these rules or a court order provide otherwise. These rules and the Guide to Electronic Filing govern electronic filing. (2) Form of Electronic Filing. Electronically filed documents must be in PDF format and must conform to technical requirements established by the Judicial Conference or the court. When possible, documents must be in Native PDF format and not created by scanning. (3) Paper Filings Not Accepted. When these rules require electronic filing, the clerk will not accept a paper filing.
Sixth Circuit Rule 25(b)	Exceptions to Electronic Filing. (1) Case Initiating Documents--Exceptions to Electronic Filing. (A) Definition. The following are “case initiating documents” governed by this subrule (b)(1): (i) A petition for permission to appeal under Fed. R. App. P. 5; (ii) A petition for review or application for enforcement of an agency order under Fed. R. App. P. 15; (iii) A motion for a stay filed with a petition for review of an agency order; (iv) A petition for a writ of mandamus or prohibition or other extraordinary

	writ under Fed. R. App. P. 21; (v) A motion to authorize filing in the district court of a second or successive application for a writ of habeas corpus under 6 Cir. R. 22(b); and (vi) Any other document initiating an original action in this court. (B) Manner of Filing. A party represented by counsel must file a case initiating document electronically, as either a PDF file attached to an e-mail directed to the clerk's office or in CD format, as provided in the Guide to Electronic Filing. (2) Other Exceptions. The following must be filed in paper format: (A) In Pro Per Filings. A document filed by a party not represented by counsel. (B) Attorney Misconduct Proceedings. Documents involving complaints of attorney misconduct. (C) CJA Representation. Documents involving compensation or expense reimbursement for representation under the Criminal Justice Act. (D) Large Documents. A document that exceeds the limit for the size of electronic filing, as specified in the electronic case filing section of the court's web site. (3) Filing in Paper Format. Unless these rules require otherwise, a party filing in paper format must file only a signed original. (4) Proof of Filing in Paper Format. When the court allows or requires filing in paper format, the filer may obtain a file-stamped copy at the time of filing in person or by providing the clerk with a preaddressed stamped envelope and an extra copy of the document.
Sixth Circuit Rule 25(c)	ECF Registration and Use. (1) Requirements for ECF Registration..... (2) Registration Is Consent to Electronic Service. An attorney's registration is written consent: (A) to electronic service of documents as provided by the Federal Rules of Appellate Procedure and these rules, and (B) to receive electronic correspondence, orders, and opinions from the court. (3) Login Name and Password..... (4) Changes in Information. .... (B) Service on Obsolete Address. Service on an obsolete email address is valid service if the attorney failed to give notice of a change.
Sixth Circuit Rule 25(e)	Filing; Entry; Official Record. (1) Filing and Entry--ECF--Filed Documents. (A) Filing by Party. (i) Filing and Entry. Electronic transmission of a document and transmission of the Notice of Docket Activity (NDA) from the court constitute filing the document under the Federal Rules of Appellate Procedure and entry of that document in the docket under Fed. R. App. P. 45(b)(1). (ii) Time of Filing. An electronically-filed document is filed at the time

	shown on the NDA. Electronic filing does not alter a filing deadline. Where the deadline is a specific time of day, the electronic filing must be completed by that time. (B) Filing by Court. Electronic filing of an order, decree, notice, opinion, or judgment constitutes entry in the docket under Fed. R. App. P. 36 and 45(b)(1) and (c). (2) Official Record. ... (3) Disposal of Paper Filings. ....
Sixth Circuit Rule 25(f)	Service of Documents Filed Electronically. (1) Method of Service. (A) NDA Constitutes Service. The ECF system sends a Notice of Docket Activity (NDA) to registered attorneys in the case. This constitutes service on them and no other service is necessary. (B) Service on Unregistered Parties and Attorneys. The filer must serve parties not represented by counsel and attorneys not registered for electronic filing by other means under Fed. R. App. P. 25(c). (2) Certificate of Service. A document presented for filing must contain a proof of service. Fed. R. App. P. 25(d). The NDA does not replace the proof of service.
Sixth Circuit Rule 25(h)	Sealed Documents. (1) Sealing or Limiting Access to Orders and Opinions. An order or opinion is generally part of the public record. A party that seeks to seal or restrict access to an order or opinion must do so by motion. (2) Motion. A motion to file sealed documents may be filed electronically unless prohibited by law, local rule, or court order. At the same time as filing the motion, the movant must provide the court and other parties a copy of the documents at issue. The movant must consult with the clerk before submitting the documents. The movant may provide the court's copy by sending a CD or an email to the clerk's office with a PDF file as provided in the Guide to Electronic Filing. (3) Order. If the court grants the motion, the order authorizing filing of sealed documents may be filed electronically unless prohibited by law. (4) Filing. Upon this court's entry of an order granting a motion to seal documents, those documents are to be filed via the court's electronic filing system (ECF). (5) Sealed Documents From Lower Court or Agency. Documents sealed in the lower court or agency must continue to be filed under seal in this court. The filing must comply with the requirements of the court or agency that originally ordered or authorized the documents to be sealed.
Sixth Circuit Rule 31	(a) Electronic Briefs. When a party is required to file a brief electronically, the clerk will not accept a paper copy. Fed. R. App. P. 25(c) and 6 Cir. R. 25(f) govern service of a brief filed electronically. (b) Paper Briefs.... (c) Time to File. (1) Generally. The court will set a briefing schedule specifying the due dates for briefs. Except as specified in subrules (c)(2)-(3), the time limits in

	Fed. R. App. P. 31(a)(1) apply except that the time limit for the filing of the brief of the appellant is as indicated by the clerk, since the electronic record is no longer "filed" as that term was formerly construed. ...
Sixth Circuit Guide to Electronic Filing	The United States Court of Appeals for the Sixth Circuit requires attorneys to file documents electronically, subject to exceptions set forth in the Sixth Circuit Rules and this Guide, using the Electronic Case File (ECF) system. 1. Definitions. .... 1.4. Registered Attorney means an attorney who has registered under section 2 below and is therefore authorized to file documents electronically and to receive service on the ECF system. 1.5. Initiating Filing means the motion, petition, or other document initiating an original proceeding in this court, including those filed under Rules 5, 15 or 21 of the Federal Rules of Appellate Procedure. 1.6. Document means any order, opinion, judgment, petition, application, notice, transcript, motion, brief or other document filed in the court of appeals. 1.7. Traditionally filed document means a document submitted to the clerk in paper form for filing. 1.8. NDA (Notice of Docket Activity) is a notice generated automatically by the ECF system at the time a document is filed and a docket entry results. This notice sets forth the time of filing, the text of the docket entry, and the name of the attorney(s) required to receive notice of the filing. If a PDF document is attached to the docket entry, the NDA will also identify the person filing the document, the type of document, and a hyperlink to the filed document. Any document filed by the court will similarly list those to whom electronic notice of the filing is being sent. 2. Registration; Passwords. 2.1. To participate in the ECF system, an attorney must register to file and serve documents electronically. Registration constitutes consent to receive electronic service of all documents as provided by the Federal Rules of Appellate Procedure and the Rules of the Sixth Circuit, as well as to receive electronic notice of correspondence, orders, and opinions issued by the court. ... 2.3. .... Service on an obsolete e-mail address will still constitute valid service on a registered attorney if the attorney has failed to notify the clerk of a new address. .... 3. Mandatory Electronic Filing; Exceptions. 3.1. Except as otherwise required by the Sixth Circuit Rules or by order of the court, all documents submitted by attorneys in cases filed with the Sixth Circuit must be filed electronically, using the Electronic Case Filing (ECF) system. The Sixth Circuit Rules and this Guide govern electronic filings. If the Sixth Circuit Rules and this Guide are inconsistent, the Sixth Circuit

	Rules control. 3.2. All electronically filed documents must be in PDF form and must conform to all technical requirements established by the Judicial Conference or the court. Whenever possible, documents must be in Native PDF form and not created by scanning. The following documents are exempted from the electronic filing requirement and are to be filed in paper format: (1) Any document filed by a party that is unrepresented by counsel; (2) Documents relating to complaints of attorney misconduct; (3) Vouchers or other documents relating to claims for compensation and reimbursement of expenses incurred with regard to representation afforded under the Criminal Justice Act; and (4) Documents that exceed any limit that the court may set for the size of electronic filings. 3.3. No unrepresented party may file electronically; unrepresented parties must submit documents in paper format. The clerk will scan such documents into the ECF system, and the electronic version scanned in by the clerk will constitute the appeal record of the court as reflected on its docket. 4. [Reserved]. 5. Record on Appeal and Appendices.... 6. Briefs on Appeal--Proof Briefs Eliminated.... 7. Documents Filed Under Seal. 7.1. A motion to file documents under seal may be filed electronically unless prohibited by law, local rule, or court order. If the court grants the motion, the order authorizing the filing of documents under seal may be filed electronically unless prohibited by law. 7.2. Documents filed under seal in the court from which an appeal is taken shall continue to be filed under seal on appeal to this court. Documents filed under seal shall comply with all filing requirements of the court that originally ordered or otherwise authorized the documents to be filed under seal. 8. Signatures.... 9. Entry Onto the Docket; Official Court Record. 9.1. The electronic transmission of a document, together with transmission of the NDA from the court, in accordance with the policies, procedures, and rules adopted by the court, constitutes the filing of the document under the Federal Rules of Appellate Procedure and constitutes the entry of that document onto the official docket of the court maintained by the clerk pursuant to Fed. R. App. P. 45(b)(1). All orders, decrees, notices, opinions and judgments of the court will be filed and maintained by the ECF system and constitute entry on the docket kept by the clerk for purposes of Rules 36 and 45(b)(1) and (c) of the Federal Rules of Appellate Procedure. 9.2. The electronic version of filed documents, whether filed electronically in the first instance or received by the clerk in paper format and subsequently scanned into electronic format, constitutes the official record

	in the case. Later modification of a filed document or docket entry is not permitted except as authorized by the court. A document submitted electronically is deemed to have been filed on the date and at the time indicated in the system-generated NDA. .... 10. Service of Documents. 10.1. A certificate of service is required for all documents, and registered attorneys must comply with Fed. R. App. P. 25 when filing electronically. The ECF system will automatically generate and send by e-mail an NDA to all registered attorneys participating in any case. This notice constitutes service on those registered attorneys. Registration for electronic filing by the ECF system constitutes consent to service through the NDA. Independent service, either by paper or otherwise, need not be made on any registered attorney. Pro se litigants and attorneys who are not registered for electronic filing must be served by the filing party through the conventional means of service set forth in Fed. R. App. P. 25. The Notice of Docket Activity generated by the ECF system does not replace the certificate of service required by Fed. R. App. P. 25. 10.2. Except as may be otherwise provided by local rule or order of the court, all orders, opinions, judgments and other court-issued documents in cases maintained in the ECF system will be filed electronically, which filing will constitute entry on the docket maintained by the clerk under Fed. R. App. P. 36 and 45(b). Any order, opinion, judgment, or other court-issued document filed electronically without the signature of the judge, clerk, or authorized deputy clerk has the same effect as if the judge or clerk had signed a paper copy of the filing. 11. Access to Documents..... 12. Privacy Protection and Redactions.... 13. Filing Deadlines; Technical Failures. 13.1. Filing documents electronically does not in any way alter any filing deadlines. Where a specific time of day deadline is set by court order or stipulation, the electronic filing must be completed by that time. An electronically filed document is deemed filed upon completion of the transmission and issuance by the court's system of an NDA. .... 14. Training....
Seventh Circuit Rule 25	(a) All documents must be filed and served electronically. (b) Subsection (a) does not apply to documents submitted by unrepresented litigants who are not themselves lawyers. Nor may documents be served electronically on unrepresented parties who are not lawyers. Filing by, and service on, these unrepresented litigants must be accomplished by paper copies in compliance with national and circuit rules other than this Rule 25. (c) Any party may request by motion an exemption from this rule. The motion, which need not be filed or served electronically, must provide a good reason. A motion for exemption must be filed at least seven days

	before the brief, petition, or other document is due. (d) Electronic filing is accomplished via the court's website, www.ca7.uscourts.gov. The procedures for filing are specified on the website, and paper copies of the procedures may be obtained from the Clerk. Paper copies of documents are required (and will be accepted) only to the extent provided in these e-filing procedures.
Seventh Circuit Electronic Case Filing Procedures	(a) Scope of Electronic Filing. (1) .... Participation is mandatory for attorneys practicing in this court. (2) Except as otherwise prescribed by local rule or order, all cases are assigned to the court's electronic filing system. (3) Except as otherwise prescribed by local rule or court order, all briefs, appendices, motions, petitions for rehearing, and other documents filed in any case with the court by an Attorney Filing User registered as set forth under Circuit Rules/Electronic Case Filing (ECF) procedures, must be filed electronically using the electronic filing system. ... (b) Eligibility, Registration, Passwords. (1) Attorneys who intend to practice in this court, including those regularly admitted or admitted pro hac vice to the bar of the court and attorneys authorized to represent the United States without being admitted to the bar of this court, must register as Attorney Filing Users of the court's electronic filing system. .... (3) Registration as an Attorney Filing User constitutes consent to electronic service of all documents as provided in these ECF Procedures and the Federal Rules of Appellate Procedure. .... (c) Implications of Electronic Filing. (1) Electronic transmission of a document to the electronic filing system consistent with these procedures, together with the transmission of a Notice of Docket Activity from the court, constitutes filing of the document under the Federal Rules of Appellate Procedure and the local rules of this court, and constitutes entry of the document on the docket kept by the Clerk under Fed. R. App. P. 36 and 45(b). ... (4) When a document has been filed electronically, the official record is the electronic document stored by the court, and the filing party is bound by the document as filed. Except in the case of documents first filed in paper form and subsequently submitted electronically under these procedures, a document filed electronically is deemed filed at the date and time stated on the Notice of Docket Activity from the court. Filing must be completed before midnight, Central Time, to be considered timely filed, unless otherwise ordered by the court. (d) Service of Documents by Electronic Means. (1) The Notice of Docket Activity that is generated by the court's electronic filing system constitutes service of the filed document on all Attorney Filing

	Users. Parties who are not Attorney Filing Users must be served with a copy of any document filed electronically in accordance with the Federal Rules of Appellate Procedure and the local rules. If the document is not available electronically, the filer must use an alternative method of service. (2) The Notice of Docket Activity generated by the court's electronic filing system does not replace the certificate of service required by Fed. R. App. P. 25. (e) Entry of Court-Issued Documents. (1) Except as otherwise provided by local rule or court order, all orders, decrees, judgments, and proceedings of the court relating to cases filed and maintained in the CM/ECF system will be filed in accordance with these procedures, which will constitute entry on the docket kept by the Clerk under Fed. R. App. P. 36 and 45(b). (2) Any order or other court-issued document filed electronically without the original signature of a judge or authorized court personnel has the same force and effect as if a judge or the Clerk had signed a paper copy of the order. (3) Orders also may be issued as “text-only” entries on the docket, without an attached document. Such orders are official and binding. (f) Attachments and Exhibits to Motions and Original Proceedings..... (g) Sealed Documents. (1) A motion to file documents under seal must be filed electronically unless prohibited by law, local rule, or court order. (2) Proposed sealed materials must be filed electronically by following the directions provided with the electronic filing system. Failure to follow these directions will result in public disclosure of sensitive material. Attorney Filing Users are responsible for ensuring that sealed materials are filed appropriately. (3) If the court grants the motion, the order of the court authorizing the filing of documents under seal may be filed electronically unless prohibited by law. (4) Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court. If filed traditionally, a paper copy of the authorizing order must be attached to the documents under seal and delivered to the Clerk. (h) Briefs, Appendices and Petitions for Rehearing. (1) A brief, appendix and petition for rehearing (and any answer filed thereto) will be considered timely once it is submitted to the court's electronic filing system. It will be considered filed on the court's docket only after a review for compliance with applicable rules, acceptance by the Clerk, and issuance of a Notice of Docket Activity. .... (i) Signatures.... (j) Notice of Court Orders and Judgments. (1) Immediately upon the entry of an order or judgment in a case assigned to the electronic filing system, the Clerk will electronically transmit a

	Notice of Docket Activity to Attorney Filing Users in the case. (2) Electronic transmission of the Notice of Docket Activity constitutes the notice and service of the opinion or order required by Fed. R. App. P. 36(b) and 45(c). (3) The Clerk must give notice in paper form to a person who has not consented to electronic service in accordance with the Federal Rules of Appellate Procedure. (k) Technical Failures. .... (l) Public Access.... (m) Hyperlinks....
Eighth Circuit Rule 25A(a)	(a) Electronic Filing. Use of the CM/ECF system is mandatory for all attorneys, unless they are granted an exemption, and is voluntary for all pro se litigants proceeding without counsel. Registration is required to obtain a password and login for use of the electronic filing system. Attorneys and pro se litigants may register to use the system through the federal courts' PACER system..... A form to obtain an exemption is available from the court's website. Exemptions may be granted for good cause, and the clerk is authorized to determine when to grant an exemption and whether to permit a non-exempt attorney to file a document in paper format. A filing in electronic format constitutes the official record in the appeal. Except as otherwise provided in these rules, filers should not submit paper copies of any document filed through the CM/ECF system.....
Eighth Circuit Rule 25A(b)	(b) Documents That Must Be Filed Electronically. The following documents must be filed electronically: * Forms A & B (8th Cir. Rule 3B); * Appearance Forms; * Corporate Disclosure Statements (FRAP 26.1); * Applications to Grant or Modify Certificates of Appealability (FRAP 22b); * Motions, Responses to Motions and Replies (FRAP 27); * Record on Appeal Notices (FRAP 30 and 8th Cir. R. 30A); * Status Reports Required by the Court's Orders; * Briefs filed by CM/ECF filers (8th Cir. R. 28A) * Addendums to briefs filed by CM/ECF filers (8th Cir. R. 28A) * Citations of Supplemental Authorities (FRAP 28(j)); * Petitions for Panel Rehearing or Rehearing En Banc (FRAP 35 and 40) and Responses as Requested by the Court; * Bills of Costs (FRAP 39) and Motions for Attorneys' Fees; * Correspondence Directed to the Clerk of the Court; and * Other documents as directed by the Clerk or the Court.
Eighth Circuit Rule 25A(c)	(c) Documents That Cannot Be Filed Electronically. * Documents initiating proceedings under Federal Rules of Appellate Procedure 5, 15, or 21 or petitions for review filed in the first instance in the court of appeals cannot be filed electronically and must be filed with the clerk in paper format. Only the clerk's office can initiate a new case. * Appendices and other record materials must be filed in paper format in

	accordance with the provisions of Federal Rules of Appellate Procedure 10 and 30 and Eighth Circuit Rule 30A. * Criminal Justice Act vouchers and attachments must be filed in paper format.
Eighth Circuit Rule 25A(d)	(d) Service. A Certificate of Service is required for all filings, and filers must comply with the provisions of Federal Rule of Appellate Procedure 25 and Eighth Circuit Rule 25A(a) when they file electronically. CM/ECF will generate a Notice of Docket Activity when any document is filed. This notice represents service of the document on parties who are registered participants in the CM/ECF system or who have provided the clerk with their email address. An attorney's or party's registration for electronic filing constitutes consent to service through the Notice of Docket Activity. With the exception of merits briefs as set out in 8th Cir. R. 28A(c), the filing party is not required to serve a paper or electronic copy of any electronically-filed pleading or document on any party receiving electronic notice. Filing parties must serve paper copies of pleadings or documents on parties not receiving electronic notices. In such instances, the filing party must comply with the paper service requirements of Federal Rule of Appellate Procedure 25. The filing party may determine the names and addresses of parties not participating in CM/ECF from the Notice of Docket Activity they receive when they complete a docketing transaction. Sample Certificates of Service may be downloaded from the “Forms” Section of the court's website.
Eighth Circuit Rule 25A(e)	(e) Completion of the Electronic Appellate Case File. In the event the clerk receives a document in paper format, the clerk will scan the document and attach it to the public docket sheet available on PACER. The clerk will attach an electronic copy of the brief to the public docket sheet available on PACER. All documents initiating original proceedings in petitions for review or in cases under FRAP 5, 15, and 21 will be scanned and placed on the docket. Joint and Separate Appendices prepared pursuant to FRAP 30 and 8th Cir. R. 30A(b) will not be scanned and attached to the docket sheet. District court original files and transcripts and agency records used as the record on appeal will not be scanned and attached to the public docket sheet available on PACER.
Eighth Circuit Rule 25A(f)	(f) Filing Deadlines and Technical Requirements. Electronic filing is permitted at all times, except when the system is temporarily unavailable due to routine or emergency maintenance. An electronic filing completed at any time before midnight Central Time will be entered on the docket as of that date. The court's electronic case filing system determines the date and time a filing is completed. A filing is timely only if accomplished in accordance with deadlines set by an applicable order, rule or statute. Should technical failure prevent timely electronic filing of any document, the filing party may seek relief from the court. ...
Eighth Circuit	(g) Sealed Documents. Sealed documents must only be filed in paper format. Motions for permission to file a document under seal must also be

Rule 25A(g)	filed in paper format. The motion should state whether the filing party believes the motion to seal may be made publically available on PACER or should remain sealed.
Eighth Circuit Rule 25A(j)	(j) Effect of Failure to Comply With This Rule. The clerk will contact any non-exempt attorney who submits a covered document in paper format and will bring the rule to the attorney's attention. In the event a nonexempt attorney continues to submit documents in paper format after receiving notice of the rule, the clerk is authorized to strike the filings or take other actions deemed necessary to enforce the rule.
Eighth Circuit Rule 25A(k)	(k) Electronic Noticing. The clerk's office will use the CM/ECF system to provide notice to all registered participants in a case. The clerk will serve a paper copy of the notice on any attorney granted an exemption and on pro se litigants not registered to use the system.
Eighth Circuit Rule 25B	(a) General Provisions. Pro se litigants who are not registered users of the CM/ECF system may use CM/ECF to serve their pleadings on registered users of the system. When the case is docketed, the clerk will provide the pro se litigant with a listing of the parties to the case which will show whether a party can be served electronically by the clerk or must be served by mail by the pro se litigant. If a party to the appeal is a registered CM/ECF user or is represented by a registered user, the clerk will perform service on the party pursuant to the provisions of these rules, and the pro se litigant is not required to serve a paper copy of the pleading on the registered user. If a party to the appeal is not a registered user or is not represented by a registered user, the pro se litigant must serve a paper copy of the document on the party in accordance with the provisions of FRAP 25 at the same time he files the document with the clerk. (b) Duties of the Clerk and Service on Parties to the Appeal. When a pro se litigant files a paper document with the clerk's office, the clerk will scan the document into the CM/ECF system and create a docket entry for the pleading showing its filing date. The clerk will then provide every registered user with an electronic Notice of Docket Activity. This electronic Notice of Docket Activity will constitute service of the document on the registered user for purposes of FRAP 26, and the date of the electronic Notice of Docket Activity will serve as the date of service for purposes of FRAP 26(c). Response or reply times for non-registered users who receive their service by mail will be calculated in accordance with the provisions of FRAP 26(c). (c) Pro Se Certificate of Service. Every document filed by a pro se litigant shall include a certificate of service which provides the date the party mailed the document to the clerk, together with the names of any parties or attorneys the pro se party served by mail. A sample pro se certificate of service can be found at Appendix B to these rules. (d) Clerk to Provide Copy of Notice of Docket Activity. The clerk will provide the pro se filer with a paper copy of the Notice of Docket Activity showing the date the document was filed and the names of the persons the clerk served electronically.

Eighth Circuit Rule 28A(a)	(a) Briefs Filed by Registered CM/ECF Users. Briefs filed by attorneys and other registered CM/ECF users must be submitted for filing using the CM/ECF system by the date set forth in the court's briefing schedule. Upon receipt of the brief, the clerk will review the brief and determine whether it complies with the applicable Federal Rules of Appellate Procedure and Eighth Circuit Local Rules. If the brief complies with the rules, the clerk will file it and will send all parties a notice that the brief has been filed; registered CM/ECF users will receive their notice through an electronic Notice of Docket Activity, while attorneys and litigants who are not registered users will receive their notice by mail. Attorneys exempt from CM/ECF use must submit their briefs through email to an account which the clerk's office will provide them. The clerk's office will follow the procedures set out in these rules for reviewing and filing these briefs. Upon receipt of notice that the electronic version of the brief has been accepted for filing, the attorney must comply with the other procedures concerning service and submitting the required number of paper copies.
Eighth Circuit Rule 28A(c)	(c) Briefs Filed by Pro Se Litigants. Pro se litigants shall submit 1 paper copy of their merits briefs by the date set forth in the court's briefing schedule. No additional paper copies are required. The clerk will review the brief for compliance with the rules. If the brief is accepted for filing, the clerk will file the brief, scan it into the CM/ECF system and attach it to the docket. The clerk will then serve a Notice of Docket Activity on the registered users of CM/ECF showing that the brief has been filed. This electronic notice will constitute service of the brief on these parties. The clerk will notify the pro se litigant that the brief has been accepted for filing by sending the litigant a paper notice by mail.
Eighth Circuit IOP I.C.1.b	b. CM/ECF Information and Links. The Eighth Circuit is a CM/ECF court, and electronic filing is mandatory for attorneys and voluntary for pro se filers. Attorneys who cannot participate may seek an exemption..... Eighth Circuit Rule 25A contains a list of documents which must be filed electronically. A separate list of documents which cannot be filed electronically is also provided. In general, most case-related pleadings (Appearance Forms, Motions, Corporate Disclosure Statements, Notices Concerning the Record, Merits Briefs, Petitions for Rehearing and Rehearing En Banc, etc.) must be submitted electronically. A case cannot be opened by a filer, and petitions for review and other original actions must be filed in paper format. Briefs are filed in both electronic and paper format. See 8th Cir. R. 28A. Records on appeal in attorney-handled civil cases are filed in paper format. Please refer to the cited rules for additional filing information. The clerk's office staff can also assist filers in using the filing system.... Participation in the CM/ECF process is treated as consent to electronic noticing and electronic service of all documents and orders. Participants in the system receive an electronic Notice of Docket Activity when a document is filed by a party and when the court takes a public action in the

	case. The court also uses the system to serve pro se documents on counsel after a pleading in filed, scanned and attached to the docket. See 8th Cir. R. 25B. The Notice of Docket Activity contains a link to the document, order or opinion....
Ninth Circuit Rule 25-2	All communications to the Court shall be in writing unless otherwise permitted by these rules. All communications to the Court shall comply with FRAP 32 and shall be filed electronically unless (1) counsel has been granted an exemption from electronic filing under FRAP 25(a)(2)(D); (2) the filer is a pro se party; or (3) the document is excluded from the electronic filing requirement by the Court's orders and/or rules.....
Ninth Circuit Rule 25-5(a)	(a) Participation. All attorneys and court reporters are required to submit all filings electronically using the Court's Appellate Electronic Case Files ("ECF") system unless the Court grants a request to be exempted from the requirement.... Use of the Appellate ECF system is voluntary for all parties proceeding without counsel....
Ninth Circuit Rule 25-5(b)	(b) Documents Excluded From Electronic Filing Requirement. (1) Documents to be maintained under seal and motions and notices seeking leave to file a document under seal under Circuit Rule 27-13 must be submitted in paper format unless the entire case is maintained under seal; and (2) Excerpts of record under Circuit Rules 13-2, 17-1, 22-6, 30-1, and 32-4 must be submitted in paper format. (This subsection is modified by the provisional announcement found at www.ca9.uscourts.gov/excerpts.)*
Ninth Circuit Rule 25-5(c)	(c) Documents That May Be Submitted Either Electronically or in Paper Format. (1) Petitions for review of agency orders under FRAP 15(a) and Circuit Rule 15-1; (2) Applications for enforcement of agency orders under FRAP 15(b) and Circuit Rule 15-1; (3) Petitions for permission to appeal under FRAP 5 and Circuit Rule 5-2; (4) Petitions for writs of mandamus or prohibition under FRAP 21 and Circuit Rule 21-1; and (5) Applications for leave to file second or successive petitions under 28 U.S.C. § 2254 or motions under 28 U.S.C. § 2255 and Circuit Rule 22-3. [See also Ninth Circuit Rules 5-2., 15-1, 15-4, 21-2, 21-4, and 22-3]
Ninth Circuit Rule 25-5(d)	(d) Deadlines. (1) When Permitted. Electronic filing is permitted at any time other than when precluded by system maintenance. Filings will be processed by the Court during the Court's business hours. (2) Timeliness. An electronic filing successfully completed by 11:59 p.m. Pacific Time will be entered on the Court's docket as of that date. The Court's Appellate ECF system determines the date and time a filing is completed. If technical failure prevents timely electronic filing of any

	document, the filing party shall preserve documentation of the failure and seek appropriate relief from the Court.
Ninth Circuit Rule 25-5(g)	(g) Service. All filings require a certificate of service. A sample certificate may be found on the Court's website. When a document is submitted electronically, the Appellate ECF system will automatically notify the other parties and counsel registered for electronic filing of the submission; no service of paper copies upon other parties and counsel registered for electronic filing is necessary. Registration for the Appellate ECF system constitutes consent to electronic service. If a counsel has successfully applied for an exemption from the electronic filing requirement, that counsel must serve paper copies consistent with the applicable provisions of FRAP 25(c)(1); other parties to the litigation must serve the exempt counsel in that fashion.
Ninth Circuit Rule 25-5(h)	(h) Court-Issued Documents. Except as otherwise provided by these rules or court order, electronically filed and distributed orders, decrees, and judgments constitute entry on the docket under FRAP 36 and 45(b). Orders also may be issued as "text-only" entries on the docket without an attached document. Such orders are official and binding.
Ninth Circuit Rule 27-13(a)	(a) Procedures. Sealed documents, notifications under subsection (b) and motions under subsection (c) of this rule must be filed in paper format unless the entire case is maintained under seal.
Tenth Circuit Rule 25.3	As authorized by Fed. R. App. P. 25(a)(2)(D), the court has converted to *mandatory* electronic case filing (ECF) for all counsel of record. All pleadings filed electronically shall be submitted in compliance with the procedures adopted by the court and set forth in the CM/ECF User Manual at Section II. Consistent with Rule 25(a)(2)(D), any party may move to be exempt from electronic filing requirements....
Tenth Circuit Rule 25.4	In accordance with Fed. R. App. P. 25(c)(2), filers may use the court's ECF system to serve pleadings (please see www.ca10.uscourts.gov to view the court's CM/ECF User Manual regarding electronic filing--in particular, please see section II(D) for information regarding service requirements). Filers must, however, continue to include a certificate of service with all papers and materials submitted, and shall identify in the certificate the method of service used. The filer is responsible for making service in another manner on persons entitled to notice who are not electronic filers in the case.
Tenth Circuit Rule 31.5	Parties (or an amicus) must provide the court with 7 hard copies of all briefs filed. This requirement is in addition to the court's ECF (Electronic Case Filing) requirements. In addition, a party (or amicus) must provide a copy of all submissions to each unrepresented party and all counsel for each separately represented party. Service may be provided electronically through the court's ECF system to attorneys and pro se filers who have received permission to file electronically and who are registered ECF users....
10th Cir.	[Explains that docketing statements are to be filed via CM/ECF.]

Form 1. Docketing Statement Instructions and Form	
Tenth Circuit CM/ECF Manual Section II.A	A. Scope of Electronic Filing. 1. ... Filing in the CM/ECF System became mandatory for all counsel on June 1, 2009. 2. Persons Covered. All attorneys filing documents in the Tenth Circuit must file electronically using CM/ECF (regardless of when the case was opened initially) unless counsel applies for, and the Court grants, an exemption for good cause shown in a particular case. Motions seeking an exemption may come in paper form. See Fed. R. App. P. 25(a)(2)(D). Pro se litigants may continue to file documents conventionally (i.e., in hard copy form). A pro se litigant may, however, request permission to file documents electronically in an individual appeal or proceeding.... If approved, the pro se litigant will be authorized to file via ECF in that matter only. 3. Exceptions to ECF Filing. All pleadings and other documents filed by counsel must be filed electronically in native PDF format except: a. Effective October 1, 2012, case initiating documents for original proceedings may be submitted via ECF (see ECF Users Manual Section VIII for specifics on how to submit). Materials falling into this category include appeals, petitions for review, petitions for permission to appeal and original writs. Submission of such case initiating documents via ECF is not mandatory at this time, however. Alternatively, these pleadings may be submitted in paper format or emailed to the Clerk at 10th_Circuit_Clerk@ca10. uscourts.gov..... [A]ny accompanying appendices or addendums to case initiating documents may not be submitted via ECF or emailed to the clerk- they must be filed in paper form only within 2 business days of submission of the accompanying pleading via ECF (see section b immediately below). In addition please note that submission of case initiating documents via ECF does not exempt the filing party from serving the documents via conventional methods. See Manual Section II D 4. b. Appendices and addendums filed pursuant to Federal Rules of Appellate Procedure 10 and 30 and 10th Circuit Local Rules 9.2(B), 10, and 30 must be filed in paper format only, and must be received in the office of the Clerk within 2 business days of submission of the accompanying pleading or brief via ECF. c. CJA vouchers are a hybrid..... d. ... Counsel seeking to submit attachments so large they cannot be filed via ECF must submit a motion prior to submission seeking exemption from the electronic filing requirements and justifying the need to submit attachments of this size.
Tenth	B. Eligibility, Registration, Passwords.

Circuit CM/ECF Manual Section II.B	1. Attorneys. Attorneys who are members in good standing of the Tenth Circuit Bar and who intend to practice in this Court must register as filing users of the Court's CM/ECF System.... 2. Pro Se Litigants. Pro se litigants are not required to file documents electronically and generally do not file via ECF. However, should a pro se party wish to file electronically, he/she may (in fact, must) file a motion requesting permission to do so..... If granted, the pro se litigant will be directed to register with PACER as a pro se appellate filer and will be permitted to submit documents via ECF in that case only. The Court will terminate the pro se litigant's filing user status upon the termination of the case or termination of the litigant's pro se status. 3. Registration Constitutes Consent to Electronic Service. Completion of the appellate filer registration on PACER constitutes consent to electronic service of documents via CM/ECF. 4. Passwords..... 5. Revoking E-Filing Privileges. The Court may revoke a filer's privileges for good cause.
Tenth Circuit CM/ECF Manual Section II.C	C. Consequences of Electronic Filing. 1. Filing Complete at Date and Time Stated on Notice of Docket Activity. Electronic transmission of a document to CM/ECF, together with the transmission of the Notice of Docket Activity from the Court, constitutes filing of the document unless the pleading is subsequently cited as deficient under the Federal Rules of Appellate Procedure and/or local rules of the court, or unless hard copy follow-up is required (please see this Manual at Part II, Section A, paragraph 3 with regard to these requirements--hard copies are required for briefs, addenda, appendices and petitions for rehearing but not for other pleadings). Electronic filing must be completed before midnight, Mountain Standard Time, as shown on the Notice of Docket Activity, to be considered timely filed on the day it is due. 2. Electronic Document Is Official Record.....
Tenth Circuit CM/ECF Manual Section II.D	D. Service of Documents by Electronic Means. 1. Service of Documents. The Notice of Docket Activity generated by the CM/ECF System constitutes evidence of service of the filed document on participants registered to receive materials electronically. It is the responsibility of the Filer to confirm that service is effected. If a party to the case is not registered to receive service via NDA, the Filer must serve that party in another appropriate manner-either via hard copy or email. See 10th Cir. R. 25.4. 2. Preparing the Certificate of Service. A certificate of service must be attached as the final page to all documents filed with the Court, in accordance with Fed. R. App. P. 25(d)(1). 3. Conventional Service Required for Those Not Registered as Filing Users: As noted, participants in a case not served through CM/ECF must be served conventionally. To determine whether case participants are registered to receive ECF service, and to confirm how service should be effected on each party, please

	use the “Service Method Report” available within CM/ECF under the Reports menu option. If an attorney's “ECF Filing Status” is active, he/she may be served via ECF; if not registered, service must be completed via other methods (e-mail, postal mail, etc.) 4. Conventional Service Required for Paper Filings. Documents filed in paper form must be served conventionally. For example: a. Case Initiating Documents: Regardless of whether case initiating documents are submitted to the court via ECF or are filed in paper form, or via email (in PDF format), with the Clerk, copies must be served via conventional methods in paper form or via email. b. Appendix: File two copies with the court in paper form with the Court and serve copies in paper form. 5. Three Days Added to Prescribed Period if Service Was by Electronic Means. Under Fed. R. App. P. 26(c), when a party is required or permitted to act within a prescribed period after a paper is served, three calendar days are added unless the paper is delivered on the date of service. Please note that under this rule, a paper that is served electronically is not treated as delivered on the date of service.
Tenth Circuit CM/ECF Manual Section II.E	E. Entry of Court-Issued Documents. Court orders, opinions, judgments, and all other documents are filed on the docket electronically and are forwarded to the parties electronically (via a Notice of Docket Activity). The court makes exceptions if the participant does not have an email address. In that case, the relevant Order or Opinion, etc., will be forwarded in hard copy via regular postal mail.
Tenth Circuit CM/ECF Manual Section II.G	G. Filing Sealed Documents (Including Filing a Motion to Seal a Document). After logging into CM/ECF and entering your appeal number, select the “Sealed Briefs and Motions” category. These events were specifically designed to allow for submission of sealed pleadings and briefs. You may file a sealed motion, response, or brief in this manner. Failure to select the “Sealed Briefs and Motions” category will result in your pleading being filed as a public document. Counsel are responsible for ensuring that sealed materials are filed using these events. In addition, please note that if you are submitting a motion to seal materials simultaneously with the sealed materials themselves, you should use these events. That is the case even if the motion to seal is not submitted as sealed. You may file the sealed materials as an attachment to the “sealed motion filed” docket event.
Eleventh Circuit Rule 25-3	(a) Electronic Filing and Service. It is mandatory that all counsel of record use the court's Electronic Case Files (ECF) system. Documents must be filed and served electronically by counsel in accordance with the procedures adopted by the court and set forth in the Eleventh Circuit Guide to Electronic Filing.... (b) Exemption. Upon motion and a showing of good cause, the court may exempt an attorney from the electronic filing requirements and authorize filing and service by means other than the use of the ECF system. The motion, which need not be filed or served electronically, must be filed at least 14 days before the brief, petition, or other document is due. Also see

	11th Cir. R. 31-5.
Eleventh Circuit General Order 38	In October 2011, the Court approved General Order 37 authorizing counsel voluntarily to file documents electronically in cases using the Court's Electronic Case Files ("ECF") system. Counsel's voluntary participation in the ECF system has worked well, and the Court now determines that electronic filing should be mandatory for all counsel. Effective 1 April 2013, counsel are required to file documents electronically in appeals pending on that date and in appeals docketed in this Court on or after that date, following the procedures set out in the "Eleventh Circuit Guide to Electronic Filing" ("the Guide"). Reasonable exceptions to the requirement will be allowed, upon motion and a showing of good cause.....
Eleventh Circuit Guide to Electronic Filing Section 2.1	2.1. Unless an attorney is granted an exemption, an attorney must register to file and serve documents electronically using the ECF system.
Eleventh Circuit Guide to Electronic Filing Section 4	4. Electronic Filing/Exceptions 4.1. Except as otherwise required by circuit rule, this Guide, or by order of the Court, all documents submitted by attorneys in cases filed with the Eleventh Circuit must be filed electronically, using the Electronic Case Files ("ECF") system. The circuit rules and this Guide govern electronic filings. ... 4.5. The following documents are exempted from the electronic filing requirement and are to be filed in paper format: (1) Any document filed by a party who is not represented by counsel; (2) A petition for permission to appeal under FRAP 5; (3) A petition for review of an agency order under FRAP 15; (4) A petition for a writ of mandamus, writ of prohibition, or other extraordinary writ under FRAP 21; (5) Any other document initiating an original action in the court of appeals; (6) An application for leave to file a second or successive habeas corpus petition or motion to vacate, set aside or correct sentence; (7) A document filed under seal or requested to be filed under seal; and (8) A voucher and associated documents pertaining to a claim for compensation and reimbursement of expenses when representation is provided under the Criminal Justice Act or Addendum Five. 4.6. No unrepresented party (except an attorney appearing in a particular case as a pro se party) may file electronically; unrepresented parties must submit documents in paper format. The clerk will scan such documents into the ECF system, and the electronic version scanned in by the clerk will constitute the official record of the Court as reflected on its docket. The clerk may divide an oversized pro se document into separate volumes for purposes of scanning.

Eleventh Circuit Guide to Electronic Filing Section 5	5. Entry on the Docket/Official Court Record 5.1. The electronic transmission of a document, together with transmission of the NDA from the Court, in accordance with the policies and procedures adopted by the Court, constitutes the filing of the document under the Federal Rules of Appellate Procedure and constitutes the entry of that document onto the official docket of the Court maintained by the clerk pursuant to FRAP 45(b)(1). .... 5.3. ... A document submitted electronically is deemed to have been filed on the date and at the time indicated in the system-generated NDA. .... 5.5. Except as otherwise provided by circuit rule or Court order, all orders, decrees, judgments, and proceedings of the Court relating to cases filed and maintained in the ECF system will be filed in accordance with the circuit rules and this Guide and will constitute entry on the docket kept by the clerk and service on parties under FRAP 36, 45(b)(1), and 45(c). Any order or other court-issued document filed electronically without the original signature of a judge or authorized Court personnel has the same force and effect as if the judge or clerk had signed a paper copy of the order.
Eleventh Circuit Guide to Electronic Filing Section 6	6. Filing Deadlines/Technical Failure 6.1. Filing documents electronically does not in any way alter any filing deadlines. When a specific time of day deadline is set by Court order or stipulation, the electronic filing must be completed by that time. Otherwise, electronic filing must be completed by 11:59 p.m. Eastern Time to be considered timely filed that day. An electronically filed document is deemed filed upon completion of the transmission and issuance of an NDA. 6.2. The uploading of an incorrect document, or the filing of a document in the wrong case, does not constitute compliance with filing deadlines. In the event that an Attorney Filer uploads an incorrect document, or files a document in the wrong case, the clerk will send the Attorney Filer notice of the error. If the Attorney Filer corrects the error within 5 days of the clerk's notice, a motion to file the document out of time is not required. Otherwise, the Attorney Filer must also electronically file in the case a motion to file the document out of time. .... 6.4. An Attorney Filer whose filing is untimely as the result of a technical failure may seek appropriate relief from the Court. ....
Eleventh Circuit Guide to Electronic Filing Section 7	7. Service of Documents 7.1. Registration to use the ECF system constitutes consent to receive electronic service of all documents as provided by the Federal Rules of Appellate Procedure and the circuit rules, as well as to receive electronic notice of correspondence, orders, and opinions issued by the Court. 7.2. A certificate of service is required for all documents, and an Attorney Filer must comply with FRAP 25 when filing electronically. The ECF system will automatically generate and send by e-mail an NDA to all Attorney Filers participating in the case. This notice constitutes service on

	those Attorney Filers. Independent service, either by paper or otherwise, need not be made on any Attorney Filer. The NDA generated by the ECF system does not replace the certificate of service required by FRAP 25. In other words, a document filed electronically by an Attorney Filer must still contain a certificate of service conforming to the requirements of FRAP 25. 7.3. Pro se litigants and attorneys who are exempt from electronic filing must be served by the filing party through the conventional means of service set forth in FRAP 25. 7.4. Except as may otherwise be provided by circuit rule or Court order, all orders, opinions, judgments, and other Court-issued documents in cases maintained in the ECF system will be filed and served on Attorney Filers electronically.
Eleventh Circuit Guide to Electronic Filing Section 9	9. Documents Under Seal 9.1. A motion to file documents under seal may be filed electronically unless prohibited by law, circuit rule, or Court order. Do not attach to the motion the sealed documents or documents requested to be sealed. Documents requested to be sealed must be submitted in paper format in a sealed envelope, and must be received by the clerk within 10 days of filing the motion. The face of the envelope containing such documents must contain a conspicuous notation that it contains "DOCUMENTS UNDER SEAL", or substantially similar language. 9.2. Documents filed under seal in the court from which an appeal is taken will continue to be filed under seal on appeal to this Court.
Federal Circuit Rule 25	(a) Electronic Filing. As authorized by Fed. R. App. P. 25(a)(2)(D) and (c)(2), the court requires electronic filing of documents and authorizes electronic service of documents, with certain exceptions, as explained in the court's "Administrative Order Regarding Electronic Case Filing." (b) Facsimile Filing or E-Mail Filing. (1) Parties who are Otherwise Required to use Electronic Filing. If a party would otherwise be required to file a document electronically, a motion may be filed by facsimile transmission or e-mail transmission only if the case has not yet been docketed by this court. The certificate of service must state that a copy has been served on all parties by facsimile transmission or by e-mail, as the case may be, and that the required number of paper copies of the motion has been mailed or shipped for delivery to the clerk and the parties on the next business day. See also Fed. Cir. R. 8. A party filing a document by facsimile or e-mail transmission under this provision must first call the clerk's office in advance to receive permission to do so. No other document may be filed by facsimile transmission or e-mail transmission. (2) Parties who are not Required to use Electronic Filing. If the filing party is not required to file documents electronically in a particular case pursuant to the court's "Administrative Order Regarding Electronic Case Filing," then the party may file a motion, response to a motion, reply to a response, or letter by submitting paper copies in accordance with Fed. Cir. R. 8 or by facsimile transmission. If the party elects to file such documents by

	facsimile transmission, the certificate of service must state that a copy has been served on all parties by facsimile transmission, that all parties have been notified of such facsimile transmission by telephone or e-mail, and that the required number of paper copies has been mailed or shipped for delivery to the clerk and the parties on the next business day. No other document may be filed by facsimile transmission.
Federal Circuit Rule ECF-1	ECF-1. Scope of Electronic Filing System Except as otherwise prescribed by Circuit rule or order of the court, cases designated by the court will be assigned to the court's CM/ECF system. Case initiating documents, including petitions for permission to appeal, petitions for review or notices of appeal from agency action, and petitions for writ of mandamus and other original proceedings in this court, must be filed in paper form. Except as otherwise prescribed by Circuit rule or court order, all briefs, appendices, motions, petitions for rehearing, and other documents filed in cases assigned to the CM/ECF system, must be filed electronically using the CM/ECF system by a filer registered in accordance with ECF-2.
Federal Circuit Rule ECF-2	ECF-2. Registration as an ECF Filer; Passwords; Consent to Service (A) Attorneys who appear before this court must register for the court's CM/ECF system.... (B) A party to a pending case who is not represented by an attorney will not be permitted to register as an ECF filer. ... (D) Registration as an ECF filer constitutes consent to electronic service of all documents as provided in the Federal Rules of Appellate Procedure and the rules of this court. See Federal Circuit Rule 25(c). ....
Federal Circuit Rule ECF-5	ECF-5. Consequences of Electronic Filing (A) The Docket. Documents shall be deemed filed under the Federal Rules of Appellate Procedure and the Federal Circuit Rules of Practice and shall be deemed entered on the docket maintained by the clerk under Federal Rules of Appellate Procedure 36 and 45(b) when the document is filed with the CM/ECF system in accordance with this order and the court has transmitted back to the ECF filer a Notice of Docket Activity (NDA). .... A document submitted electronically is deemed to have been filed on the date and at the time indicated in the system-generated NDA. .... (B) Time of Filing. A document filed electronically is deemed filed on the date and at the time stated on the Notice of Docket Activity from the court. Unless a time for filing is specified by court order, filing must be completed before midnight Eastern Time to be considered timely filed that day. Where a specific time of day deadline is set by court order or stipulation, the electronic filing must be completed by that time. When documents are filed and served electronically on non-business days, timeliness of filing and calculation of responsive deadlines, if any, will

	begin on the next business day. See Federal Rule of Appellate Procedure 26 and Federal Circuit Rule 26. (C) Technical or System Failures. .... (D) Rejection or Correction by the Clerk.....
Federal Circuit Rule ECF-6	ECF-6. Service of Documents by Electronic Means (A) Notice of Docket Activity. The Notice of Docket Activity that is generated by the court's CM/ECF system constitutes service of the filed document on all parties represented by attorneys who have registered for the CM/ECF system. Independent service, either by paper or otherwise, need not be made on any registered ECF filer. (B) Certificate of Service. A certificate of service is required for all documents, and registered ECF filers must comply with Federal Rule of Appellate Procedure 25 and Federal Circuit Rule 25 when filing electronically. The Notice of Docket Activity does not replace the certificate of service required by the rules. (C) Parties Not Represented. Parties not represented by counsel and other parties who are not registered for electronic service through CM/ECF must be served with a paper copy of any document filed electronically through alternate means of service set forth in Rule 25. (D) Confidential Documents. If a document (such as a sealed document or a confidential version of document filed in both public and confidential versions) cannot be served electronically, the filer must serve the document by alternate method in accordance with the Federal Rules of Appellate Procedure and the court's local rules. Also see ECF-8 and ECF-9. (E) Electronic Filing on Non-Business Days. When documents are filed and served electronically on non-business days, timeliness of filing and calculation of responsive deadlines, if any, will begin on the next business day. See Federal Rule of Appellate Procedure 26 and Federal Circuit Rule 26. (F) Undeliverable Emails. Service of a filing to an invalid email address constitutes valid service if the individual has failed to timely provide a current address. All ECF users must maintain accurate contact information through the PACER Service Center which in turn updates the court. In situations where the attorney is not registered or is exempt from electronic filing, contact information should be provided to the clerk's office pursuant to Federal Circuit Rule 46.
Federal Circuit Rule ECF-8	ECF-8. Exceptions to Requirements for Electronic Filing and Service Except for documents listed below, or unless the court directs otherwise, documents filed by an ECF filer in accordance with this order are not to be submitted to the court in paper form. .... (A) Pro Se Parties. A party proceeding pro se must file documents with the court in paper form pursuant to the Federal Rules of Appellate Procedure, the Federal Circuit Rules of Practice, and the Federal Circuit's Guide for Pro Se Petitioners and Appellants. The clerk will convert paper filings into PDF

	and file them in the ECF system. The version scanned or converted by the clerk will constitute the appeal record of the court as reflected on its docket. A party proceeding pro se must serve documents in paper form on opposing parties unless the parties have agreed in writing to electronic service between themselves. Counsel must serve all documents to pro se parties in paper form unless the parties have agreed in writing to electronic service between themselves. The court will serve all court-issued documents to pro se parties in paper form using conventional methods. (B) Petitions for Review and Notices of Appeal. Petitions for review and notices of appeal filed pursuant to Federal Rule of Appellate Procedure 15 shall be submitted to the court in paper form. All other subsequent filings in the case shall be made using ECF. (C) Writs and Other Original Proceedings. Petitions for permission to appeal and petitions for writ of mandamus or prohibition filed pursuant to Federal Rules of Appellate Procedure 5 and 21, respectively, including any accompanying documents, shall be submitted to the court in paper form. An original and three copies shall be submitted, along with an electronic version on CD-ROM. All other subsequent filings in the case shall be made using ECF. (D) Motions. 1) Motions Pursuant to Rules 8 and 18. Motions for stay and emergency relief pursuant to Federal Rules of Appellate Procedure 8 and 18, including any accompanying documents, shall be submitted to the court in paper form only for cases which are not yet opened in ECF.... All other subsequent filings in the case shall be made using ECF. 2) A motion to file documents under seal or to seal an entire case file may be filed electronically unless prohibited by law, local rule, or court order. If the court grants the motion, the order authorizing the filing of documents under seal may be filed electronically unless prohibited by law. 3) A motion for exemption from the court's ECF requirements may be submitted in paper form in original and three copies. (E) Sealed Cases. For a case in which the entire docket is sealed from public view, counsel shall serve paper copies of all documents and file with the court an original and three copies in paper. Documents in sealed cases shall be submitted to the court in a sealed envelope containing on its face a conspicuous notation that it contains “DOCUMENTS UNDER SEAL,” or substantially similar language, and shall have attached to the envelope a paper copy of the order authorizing the filing of the documents under seal. (F) Sealed Documents. For individual sealed documents in cases which are not sealed, counsel shall serve paper copies of the sealed documents and file with the court an original and three copies in paper. Sealed documents shall be submitted to the court in a sealed envelope containing on its face a conspicuous notation that it contains “DOCUMENTS UNDER SEAL,” or substantially similar language, and shall have attached to the envelope a paper copy of the order authorizing the filing of the documents under seal.

	Also see ECF-9 for electronic filing and service of documents prepared in nonconfidential and confidential versions. (G) Complaints of Attorney Misconduct. Documents relating to complaints of attorney misconduct shall be filed in paper form .... (H) Other Documents. Exhibits, attachments, or appendices that are not in a format that readily permits electronic filing such as those which are illegible when scanned or which, because of their odd shape, are unable to be scanned into electronic format, may be filed in paper form without leave of court. Documents filed pursuant to this section must be served by an alternate method of service authorized by Rule 25. .... In addition to service and filing of paper copies under this section, counsel must file electronically a Notice of Paper Filing. The notice must specify why the document qualifies for an exception under this rule. The Notice of Paper Filing must be filed in ECF simultaneously with the transmittal of the paper documents by alternate method. (I) Exceptions to Electronic Filing. These exceptions to electronic filing do not apply to documents exceeding the allowable electronic file size authorized by the court. Documents exceeding file size limits may not be filed in alternate form except by leave of court. See ECF-7.
Federal Circuit Rule ECF-9	ECF-9. Confidential and Nonconfidential Versions of Filings (A) Confidential and Nonconfidential Versions. When confidential and nonconfidential versions of documents are filed pursuant to the Federal Circuit Rules of Practice, the nonconfidential version must be filed in ECF using the standard ECF entry and the confidential material must be filed in ECF using a separate entry designated by the court specifically for non-public documents (such as, for example, BRIEF/APPENDIX TENDERED CONFIDENTIAL for briefs and appendices or CONFIDENTIAL DOCUMENT SUBMITTED for all other documents). This separate entry for confidential briefs and documents automatically limits access to the electronic document to the court only. (B) Service of Confidential Documents. Confidential versions of documents filed using the required ECF entry will not be electronically served on other parties by the CM/ECF system. Electronic versions of confidential documents must be served by alternate method in accordance with the Federal Rules of Appellate Procedure and the Federal Circuit Rules. (C) Electronic Access to Confidential Versions. Electronic access to confidential versions of documents is restricted to the court only.
Federal Circuit Rule ECF-11	ECF-11. Entry of Court-Issued Documents (A) Except as otherwise provided by local rule or Court order, all orders, opinions, judgments, and other court-issued documents in cases filed and maintained in the CM/ECF system will be released electronically in accordance with these rules. Such release will constitute entry on the docket kept by the clerk under Federal Rules of Appellate Procedure 36 and 45(b). Electronic transmission of the Notice of Docket Activity to registered ECF

	users constitutes the notice and service required by the Federal Rules of Appellate Procedure. (B) Any order, opinion, judgment or other court-issued document released electronically without the original signature of a judge, clerk, or authorized court representative shall have the same force and effect as if signed. (C) The clerk must give notice in paper form to a person who has not consented to electronic service in accordance with the Federal Rules of Appellate Procedure.
Federal Circuit Rule ECF-13	ECF-13. Exemption From Electronic Filing Upon motion and a showing of good cause, the court may exempt a party from the electronic filing requirements and authorize filing by means other than use of the CM/ECF system.

Appendix B: Matters omitted from Appendix A

The following are items that I omitted from Appendix A because they seemed less central to the matters treated in this memo.

- Appendix / record excerpts: Third Circuit Local Appellate Rules 30.1, 30.3; Fourth Circuit Rule 30(b); Fifth Circuit Rule 30.1; Sixth Circuit Rule 30; Sixth Circuit Guide to Electronic Filing Part 5; Ninth Circuit Rules 17-1.3 and 30-1; Eleventh Circuit Rules 30-1(d) and 30-3; Eleventh Circuit Guide to Electronic Filing Section 11; Eleventh Circuit General Order 39; Federal Circuit Rule ECF-10(C)

- Attachments, addenda & exhibits: First Circuit CM/ECF Rule 6; Third Circuit Local Appellate Rules 28.1(c), 113.6; Fourth Circuit Rule 25(a)(6); Fifth Circuit Rule 25.2.7; Sixth Circuit Rule 10(b); Sixth Circuit Rule 28(c); Seventh Circuit Electronic Case Filing Procedures Part (f); Eighth Circuit Rule 28A(g)(5); Ninth Circuit Rule 27-14; Tenth Circuit CM/ECF Manual Section II.F

- Costs: Third Circuit Local Appellate Rules 39.3(a) & (b); Sixth Circuit Rule 39(a)

- Court review of electronically-filed version of brief: First Circuit Rule 31(a)(1); Eighth Circuit IOP III.I.1

- Court-issued documents, electronic treatment of: Third Circuit Local Appellate Rule 113.10; Fourth Circuit Rule 25(a)(5); Fifth Circuit Rule 25.2.6

- Electronic copies when e-filing is not used: Second Circuit Rule 25.2; Fifth Circuit Rule 31.1; Eleventh Circuit Rule 31-5

- Format of e-filed papers: DC Circuit ECF-5(B); Third Circuit Local Appellate Rule 32.1(d); Fifth Circuit Rules 25.2.1 & 25.2.4; Seventh Circuit Electronic Case Filing Procedures (c)(3); Eighth Circuit Rule 25A(f); Eighth Circuit Rule 28A(h); Ninth Circuit Rule 25-5(e); Eleventh Circuit Guide to Electronic Filing Sections 4.2 and 4.3; Federal Circuit Rule ECF-7

- Hyperlinks: DC Circuit ECF-10; First Circuit CM/ECF Rule 13; Third Circuit Local Appellate Rules 28.3(c) and 113.13; Fourth Circuit Rule 25(a)(12); Fifth Circuit Rule 25.2.14; Seventh Circuit Electronic Case Filing Procedures Part (m)

- Paper copies: DC Circuit ECF-6; Fourth Circuit Rule 31(d); Seventh Circuit Electronic Case Filing Procedures Parts (a)(4) and (h)(2); Eighth Circuit Rule 28A(d); Eleventh Circuit Guide to Electronic Filing Section 10; Federal Circuit Rule ECF-10

- Privacy: DC Circuit ECF-9; First Circuit CM/ECF Rule 12; Third Circuit Local Appellate Rule 113.12; Fifth Circuit Rule 25.2.13; Sixth Circuit Guide to Electronic Filing Part 12; Seventh Circuit Electronic Case Filing Procedures Part

(l); Eighth Circuit Rules 25A(h) & (i); Eighth Circuit Notice to Counsel Concerning the Posting of Appellate Briefs on the Internet; Eighth Circuit Notice to Counsel in Criminal Cases Concerning the Posting of Appellate Briefs on the Internet; Tenth Circuit CM/ECF Manual Sections II.I & II.K; Eleventh Circuit Rule 25-5; Eleventh Circuit Guide to Electronic Filing Section 12; Federal Circuit Rule ECF-12

- Record, electronic: First Circuit Rule 11.0(b); Third Circuit Local Appellate Rule 11.0; Fifth Circuit Rule 10.2; Sixth Circuit Rule 11(a); Sixth Circuit Guide to Electronic Filing Part 5; Eighth Circuit Rule 30A(a)(2); Eighth Circuit App. III. Plan to Expedite Criminal Appeals, Part III.A.1.b; Ninth Circuit Rules 11-4.4 and 11-6.1; Tenth Circuit Rules 3.2, 11.3, 11.4, and 17.2; Eleventh Circuit Rule 11-2; Eleventh Circuit General Order 39

- Retention requirements: DC Circuit ECF-4; First Circuit CM/ECF Rule 8; Third Circuit Local Appellate Rule 113.8; Fourth Circuit Rule 25(a)(8); Fifth Circuit Rule 25.2.9

- Sealed documents [n.b.: some provisions relating to sealing are included in Appendix A]: Fourth Circuit provisions on Sealed & Confidential Materials

- Signatures: DC Circuit ECF-3; First Circuit CM/ECF Rule 9; Third Circuit Local Appellate Rules 28.4, 46.4, and 113.9; Fourth Circuit Rule 25(a)(9); Fifth Circuit Rule 25.2.10; Sixth Circuit Rule 25(d); Sixth Circuit Guide to Electronic Filing Part 8; Seventh Circuit Electronic Case Filing Procedures Part (i); Ninth Circuit Rule 25-5(f); Tenth Circuit Rule 46.5; Tenth Circuit CM/ECF Manual Section II.H; Eleventh Circuit Guide to Electronic Filing Section 3; Federal Circuit Rules ECF-3 and ECF-4

- Technical failures, remedy for: DC Circuit ECF-5(D); First Circuit CM/ECF Rule 11; Third Circuit Local Appellate Rule 113.11; Fourth Circuit Rule 25(a)(11); Fifth Circuit Rule 25.2.12; Sixth Circuit Rule 25(g); Sixth Circuit Guide to Electronic Filing Part 13.2; Seventh Circuit Electronic Case Filing Procedures Part (k); Ninth Circuit Rule 25-5(a); Tenth Circuit CM/ECF Manual Section II.J; Eleventh Circuit Guide to Electronic Filing Section 6.4; Federal Circuit Rule ECF-5(C)

THIS PAGE INTENTIONALLY BLANK

TAB 6B

THIS PAGE INTENTIONALLY BLANK

E-Rules Amendments

Introduction

The Standing Committee has appointed a subcommittee, chaired by Judge Chagares and reported by Professor Capra, to examine the ways in which the several sets of rules might be amended to reflect the accelerating dominance of electronic means of communication. Joint consideration will enhance the deliberations of each advisory committee. It also will enhance the effort to adopt common answers to common questions, commonly expressed. At the same time, it is recognized that each advisory committee should examine the ways in which each particular set of rules addresses different circumstances that may warrant departures from the common model.

Two common issues have already been addressed extensively. Proposals to eliminate the "3 added days" for reacting after service by electronic means were published for comment in August, 2014. The Civil Rule proposal would amend Rule 6(d). The question of electronic signatures was addressed by a proposed amendment of Bankruptcy Rule 5005(a)(3) that was published in 2013. That proposal encountered significant criticism and was withdrawn. The question of electronic signatures remains open, but there are no proposals to be considered now.

Other issues common to several sets of rules remain. Professor Capra thinks it would be helpful to begin with consideration of the Civil Rules on three topics: Mandatory electronic filing; mandatory electronic service of materials that follow the summons and complaint or similar compulsory process; and a rule providing that, with identified exceptions, anything that can be done by paper may be done electronically. These common issues are addressed in that order. Amendments of Rule 5 are provided to illustrate mandatory e-filing and mandatory e-service. These topics seem ready for consideration. Drafts also are provided to illustrate general permission to substitute electrons for paper, but with a recommendation that the Civil Rules include too many potential exceptions to warrant further consideration now.

The Civil Rules include many provisions that might benefit from adjustments to reflect the general progress of e-activity in substituting for paper activity. An earlier memorandum describing these possibilities is carried forward below. Some of the proposals seem potentially useful, but none of them seems to call for urgent action. Any that seem worthy after Committee deliberation could be included as a package with the e-filing and e-service proposals. Timing will likely depend on the pace of deliberations by the joint subcommittee and the other advisory committees.

Issues Common Across the Sets of Rules

Electronic Filing

Rule 5(d)(3) now depends on local rules to establish electronic filing. Local rules that require e-filing must allow "reasonable exceptions." It may be that there is no need for change. A survey by the Administrative Office found that 92 districts have adopted local e-filing rules. The AO study found wide variations in the exceptions; notes on the local rules are attached as an appendix. The notes suggest that there may be good reasons to provide different exceptions in different districts.

But it may be that the time has come to move at least part way toward a uniform national e-filing practice. The AO study reports that 85 districts have adopted mandatory e-filing as the default. Present Rule 5(d)(3) begins by providing that a court may, by local rule, allow papers to be filed by electronic means. The next-to-last sentence, however, provides that "a local rule may require electronic filing only if reasonable exceptions are allowed." The illustrative sketch of a revised Rule 5(d)(3) set out below begins with a mandate for e-filing, but requires exceptions for good cause and allows additional exceptions by local rule. This draft reflects the belief that it is not yet time to attempt to adopt more definite exceptions in the national rule, leaving the question to ongoing development in local rules.

(d) FILING. * * *

(3) *Electronic Filing, Signing, or Verification.* ~~A court may, by local rule, allow papers to be filed~~ All filings must be made, signed, or verified by electronic means that are consistent with any technical standards established by the Judicial Conference of the United States. Paper filing must be allowed for good cause, and may be allowed for other reasons by local rule.[1] ~~A local rule may require electronic filing only if~~

[1] The Committee Note could illustrate circumstances that suggest good cause for exemption, but that may be dangerous.

Alternative drafting has been suggested, to come closer to the current Appellate Rule 25 (a)(2)(D): "A local rule may require filing by electronic means only if reasonable exceptions are allowed." In the format suggested for Civil Rule 5, this might become "and a local rule may provide other reasonable exceptions."

It would be possible to carry forward the present provision that recognizes local rule provisions that specify the form of e-filing. The suggested text does not expressly preclude that. Do we want to call attention to the prospect, or should we rely on uniform adoption of the NextGen system?

~~reasonable exceptions are allowed.~~

Pro se litigants might be exempted by rule text. The AO study shows that some local rules actually exclude pro se litigants from the opportunity to file electronically. Many local rules require a pro se litigant to get permission to e-file; one requires pro se litigants to e-file after filing a paper complaint; and two (there is at least a third) allow pro se prisoners to e-file through special programs with their prisons. On balance it seems better to leave development of these practices to local rules.

Service After Initial Process

Rule 5 now provides for service by electronic means, but only with the consent of the person served. There seems to be general agreement that a party should not be able to deny other parties the convenience of service by electronic means. Local rules in many districts effectively coerce consent now by requiring e-filing and including consent to e-service in the conditions for signing up for e-filing. At the same time, it seems likely that some exceptions should be allowed. The structure of this draft includes one big exemption. Consent of the person served is no longer required for e-service, but e-service is not required. The draft only provides that a paper "is served" by electronic means; it does not abrogate any of the alternative methods of service recognized in Rule 5(b)(2)(A) through (D) and (F). That is important, particularly when physical paper is filed with the court. Many local rules, for example, provide for filing social security records in paper form; even if they are eventually converted to pdf, service should not have to await the conversion. (It is possible to draft the rule to require e-service of anything that is e-filed, subject to whatever exemptions are adopted. Since many things are served that have not been filed, the drafting might become a bit tricky.)

Another obvious possibility would be to exempt pro se parties, but reflection suggests that it may not be wise to adopt a blanket national rule exemption. Some courts are experimenting with plans that include pro se litigants in e-filing and e-service systems.

Various possibilities appear for specific exemptions. This draft, however, follows the approach of the mandatory e-filing draft. Exemptions are allow for good cause or by local rule:

(b) Service: How Made. * * *
(2) *Service in General.* A paper is served under this rule by: * * *
(E) sending it by electronic means – unless ~~if~~ the person ~~consented in writing~~ shows good cause to be exempted from such service or is exempted from

> electronic service by local rule[2] — in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served;

Certificate of Service. It seems convenient to supplement this illustration with a revision of Rule 5(d)(1) that responds to a question raised by the Committee on Court Administration and Case Management. In line with their preference, the rule would be amended to allow a notice of electronic filing to be a certificate of service. That seems a good idea. But there may be subtle complications. It does not work to provide simply that a certificate of service or a notice of electronic filing must be filed — the notice is already in the court's system. It could work to provide that the notice is a substitute for the certificate:

(d) FILING.

> **(1)** *Required Filings; Certificate of Service*. Any paper after the complaint that is required to be served—~~—~~ ~~together with a certificate of service —~~ must be filed within a reasonable time after service; a certificate of service also must be filed for every party that was not served by means that provide[d] [generate[d]] a notice of electronic filing. * * *

The notice of electronic filing serves as a certificate of service only on the assumption that a local rule says that e-filing accomplishes service.[3] An alternative might escape the perils of this assumption:

> a certificate of service also must be filed, but a notice of electronic filing is a certificate of service on any party served through the court's transmission facilities.

---

[2] Although e-filing and e-service predominate today, some means of exemption should be recognized apart from the alternatives that inhere in the alternative means of service authorized by present 5(b)(2).

At least two possible additions to rule text might be considered. One would allow a person to elect to refuse to be served by electronic means by filing the refusal at the time of the person's first appearance in the action. That may give inappropriate power to thwart efficient service by others. Another possibility would be to provide one specific illustration of good cause — the person has no [known? valid?] address for electronic service.

[3] New Mexico Local Rule 5.1 provides that "Electronic filing constitutes service for purposes of" Rule 5.

Contemplating these alternatives suggested a further question. Rule 5(d)(1) says only that a certificate of service must be filed. It does not say whether the certificate also must be served on all parties. Rule 5(a)(1), "Service: When Required," provides uncertain guidance — subparagraph (E) requires service of "A written notice, appearance, demand, or offer of judgment, *or any similar paper*." The prospect of infinite regress looms, but does not seem a serious problem — no one is likely to demand that a party serve on all other parties certificates of serving the first certificates, and so on.

So what is it? Is there a uniform understanding that can be relied on in drafting for the notice of electronic filing?

Or is there some prospect of confusion? Rule 5(d)(1) was added in 1991. Before that, certificates of service were required only by local rules, but most courts had the local rules. The Committee Note explained: "Having such information on file may be useful for many purposes, including proof of service if an issue arises concerning the effectiveness of the service." That statement looks only to having the certificate on file, and that is all the rule text has required. One treatise treatment of Rule 5(a)(1) sheds little light. See 4B, Wright & Miller, Federal Practice & Procedure: Civil §§ 1143, 1150 (3d ed. 2002 & 2013 Supp.).

Requiring service of the certificate of service could have at least two advantages. One is to provide a second-chance notice that cures any failure of the first service. Another is to reassure all parties that all other parties indeed were served.

On the other hand, the potential advantages might seem outweighed by the sheer bother of requiring a second round of service — the certificate — whenever anything needs to be served. The waste may seem particularly unseemly in a two-party case. Or in a case with multiple parties, but only one attorney per "side."

E-service raises this question because of the prospect that some cases will involve some parties subject to e-service and others who are not. Although the notice of electronic filing seems an adequate certificate of service that need not be served on those who participate in e-service, should the e-serving party be required to serve either a certificate or a print-out of the notice on parties served by other means? If it is determined that service of the certificate or notice should be required, and that present practice may not be well-settled or well-known, Rule 5(a)(1)(E) could be amended to include "certificate of service or notice of electronic filing." The Note could observe that service of the notice of electronic filing would be automatically accomplished as to parties participating in e-service under a rule that equates the notice with service, while a copy of the notice or a certificate of e-service must be served on parties

served by other means.

Generic "e=p[aper]" Provision

The ascendancy of electronic delivery raises the question whether to adopt a general provision recognizing electronic action whenever the same action could be accomplished by physical paper. There is a strong temptation to adopt a rule stating that whatever may be done by paper may be done electronically. The drafts described above pretty much do that for filing and service after the initial summons and complaint. What remains unresolved is whether to generalize beyond that.

A generic draft has been provided by the Subcommittee, recognizing that it may require adaptation to the circumstances established by any particular set of rules. This draft is direct:

Rule X. Information in Electronic Form and Action by Electronic Means

(a) INFORMATION IN ELECTRONIC FORM. In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.

(b) ACTION BY ELECTRONIC MEANS. In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

The brackets leave open the opportunity to "otherwise provide," apparently by writing an explicit exception — likely with a cross-reference — into each rule that does not seem suitable for an electronic substitute for paper.

The brackets referring to Judicial Conference standards reflect present provisions — in the Civil Rules, Rule 5(d)(3). One question to be explored is whether parties frequently transmit papers directly, without passing through the court system. Many discovery materials, for example, are never filed with the court. If transmission is accomplished without using the court's system, and the parties are agreeable to using their own methods, it may be inappropriate to require adherence to Judicial Conference standards.

Alternative drafting is possible.[4] The following

[4] A limited example is provided by Local Rule 5.1 in the Northern, Eastern, and Western Districts of Oklahoma: "Any paper filed electornically constitutes a written paper for purposes of applying these rules and the Federal Rules of Civil

illustration is only an alternative, not a preferred alternative. One shortcoming is that the list of acts beginning with "delivering" is long enough to be annoying, but almost certainly incomplete.

Rule 5. Serving and Filing Pleadings and Other Papers

(a) *Electronic filing and transmission.* Electronic filing or transmission satisfies a rule [that provides] for delivering, entering, filing, issuing, producing, sending, or serving if [it][the filing or transmission]

(1) satisfies the requirements of form applied to a physical writing;[5] and

(2) is transmitted by authorized means.

However drafted, a general rule equating electrons with paper presents the perennial problem of balancing need and potential benefit against uncertainty and risk. Apart from filing and service, which are addressed directly by the proposals set out above, what benefits will accrue to addressing which needs for explicit permission to substitute electrons for paper? What are the countervailing risks of failing to identify each of the circumstances that should be made exceptions?

The potential benefits of a general rule equating electronic communication with communication by more tangible means could be significant. The opportunities for uncertainty are illustrated by the appendix that sets out examples of Civil Rules vocabulary that may seem ambiguous in this context. Some of the terms that obviously but ambiguously imply paper include affidavit, certificate, copy, declaration, document (remember that Rule 34 seems to distinguish electronically stored information from "documents," and was deliberately intended to make the distinction), minute, newspaper, papers, publish, record, sign (Rule 5(d)(3) seems to take care of this for things that are filed, but the rules provide for signing things that are not filed), transcript, warrant, writ, and writing (written, in writing).

Examining every appearance of the ambiguous words, and others like them, will be a challenging task. But it could be done. The purpose would be to decide whether, in each instance, electrons are an acceptable — or encouraged — substitute for paper. If there are

---

Procedure."

[5] This choice of words provides a good illustration of the risks that inhere in attempting to draft a rule. It was only later rereading that suggested grave difficulties — to allow an electronic transmission that satisfies the requirements of form applied to a physical writing could upset the elaborate provisions in Rule 34 that govern the form for producing electronically stored information.

only a few exceptions, they could be made in either of two ways. The general rule could, as the Subcommittee draft, refer generally to exceptions that would be identified in each rule. Or the exceptions could be enumerated in the general rule. Given the likelihood that readers of any particular rule may fail to heed the general rule, it seems likely that the better course is to adhere to the "unless otherwise provided" approach in the general rule, spelling out the exceptions in each rule.

More important questions will be raised by the effort to decide which rules should be made exceptions. Prominent examples are provided by service of the initial summons and complaint, Rule 4; service of "process" under Rule 4.1; service of a summons and third-party complaint, Rule 14; service of summons and process in Supplemental Rule B attachment and garnishment; service of a warrant to arrest under Supplemental Rule C and D (and the territorial limits on service in Rule E(3)); and service of an arrest warrant in a civil forfeiture action under Supplemental Rule G. It may be too early to rely on e-service in some or all of these settings. But if that is generally right, still an outright exemption may not do. Rule 4 incorporates state grounds of personal jurisdiction. If the state practice allows service by mail, and is interpreted to allow service by e-mail, should the federal courts be precluded from adopting the state practice? A broadly worded exemption of Rule 4 from the general rule that equates e-mail with postal mail would not do, at least not without careful thought.

A less prominent but more recent example is provided by service of a subpoena. After serious discussions, it was decided not to provide for service by mail in framing the revised Rule 45 that took effect on December 1, 2013. Of course the discussion can be reopened — some courts are now ruling that the Post Office can make service by delivering a copy of the subpoena, see Ott v. City of Milwaukee, 682 F.3d 552 (7th Cir.2012)(Wood, J.). But it is often wise to postpone reconsideration of a recent deliberate decision, at least for a while.

It is difficult to guess at the number of more obscure examples that may arise. Supplemental Rule B(2)(b) provides for any form of mail requiring a return receipt: do e-mail systems count? Should they — many institutional systems do not provide for the equivalent of a return receipt, and systems that do may be short-circuited. Some rules provide for notice in a "newspaper." "Publish" may be linked to this. "Stenographically reported," Rule 80? A stipulation "signed by all parties who have appeared"? Rule 32(c) directs that a party provide a transcript of any deposition testimony the party offers, but allows nontranscript form "as well" and mandates nontranscript form in some circumstances. Can a "writ" be in e-form? Written findings or questions in Rule 49 verdicts? Written notice of an application for a default judgment if the defaulter has "appeared" by means that do not provide an e-address?

So the question: recognizing that there may be real value in

a rule that generally equates electronic communication with paper, equivalence is not likely to be desirable in all branches of the Civil Rules. Defining the appropriate exceptions will require much careful work. The question is whether the task of identifying the exceptions can produce such sound results as to repay the effort and risk of error. One further element of the answer may appear if the other sets of rules adopt a general provision equating electronic messages with paper. The absence of such a provision from the Civil Rules might support arguments against recognizing e-messages by inference from the comparison.

All of these complications suggest that it is not yet time to go forward with a proposal that equates e-action with paper action. Exceptions are necessary, and it will be difficult to identify the exceptions.

Issues Peculiar to the Civil Rules

The Subcommittee project prompts a review of the Civil Rules to determine whether to recommend revisions that may not prompt parallel revisions in other sets of rules. A number of possibilities are described below. It will be helpful to have comments on the need to pursue them.

Rule 4(a)(1), (2); (b): These suggestions come from Laura Briggs. The idea is that the clerk and attorneys can save time if the clerk can sign and seal a summons electronically. This happens now, but may not comport with the rule text:

Rule 4. Summons

(a) CONTENTS; AMENDMENTS.

(1) *Contents.* A summons must: * * *

(F) be signed by the clerk, either physically or electronically; and

(G) bear the court's seal, either physically or electronically.[6] * * *

(b) ISSUANCE. On or after filing the complaint, the plaintiff may present a summons to the clerk for signature and seal. If the summons is properly completed, the clerk must sign, seal, and issue it to the plaintiff for service on the defendant. When issued on paper, a ~~A~~ summons — or a copy of a summons that is addressed to multiple defendants — must be issued for each defendant to be served [with a paper summons].

[6] Of course drafting variations are possible: "be signed [in writing] [physically] or electronically by the clerk"; "bear the court's [physical][written] or electronic seal."

This form assumes that paper service is required. It is implicit that the plaintiff may present the summons to the clerk electronically, and that the clerk may sign, seal, and return the electronic version of the summons to the plaintiff. The plaintiff then prints out the summons. But if the plaintiff brings paper to the clerk, the clerk must issue a paper summons for each defendant to be served. At least some courts are already signing and sealing by electronic means.

Rule 7.1: Rule 7.1 requires a nongovernmental corporate party to "file 2 copies of a disclosure statement." Memory suggests that the purpose of requiring two copies was to have one for the judge. (Appellate Rule 26.1 was amended in 1994 to require 3 copies if the statement is filed before the principal brief; the Committee Note observed that there is no need for copies otherwise because the statement is included in each copy of the brief.) Notice to the judge is now accomplished by the ECF system, or should be. This suggests an amendment:

Rule 7.1. Disclosure Statement

(a) WHO MUST FILE; CONTENTS. A nongovernmental corporate party must file ~~2 copies of~~ a disclosure statement * * *.

Rule 11(a): As noted above, a proposed revision of Bankruptcy Rule 5005(a)(3) addressing electronic signatures was published for comment in 2103 and later withdrawn.

Rule 11(a) could be a good location for a general electronic signature provision, whether in competition with Rule 5(d)(3) or as a replacement. Rule 11 requires that a "pleading, written motion, and other paper" be signed. Instead of focusing on filing, as Rule 5(d)(3) does, Rule 11 would provide a more general requirement. A simple version would be:

Rule 11. Signing Pleadings, Motions, and other Papers; * * *

(a) SIGNATURE. Every pleading, written motion, and other paper [document?] must be signed — [physically] [in writing?][or electronically —] by at least * * *."

This version may be too simple when it comes to a paper that must be signed by someone other than the person filing it. That problem has stymied the Bankruptcy Rules Committee for the moment; it may be wise to await their further deliberations, if any.

Rule 33: Rule 33 now calls for written interrogatories, to "be answered separately and fully in writing under oath." The answers and objections, moreover, must be signed. It has been several years since outside suggestions have been made that Rule 33 should provide for submitting interrogatories in e-form, with provision for providing answers by filling in the same e-file. Are we there yet? Some doubts have been expressed. Perhaps it is enough for now

to rely on the inventiveness of litigants — explicit or tacit consent to e-exchanges should be acceptable.

Rule 71.1(c)(5): Rule 71.1(c)(5) requires the plaintiff in an eminent domain action to give at least one copy of the complaint to the clerk for the defendants' use, "and additional copies at the request of the clerk or a defendant." Rule 71.1(d) requires the plaintiff to deliver to the clerk "joint or several notices directed to the named defendants." Additional notices must be delivered when the plaintiff adds defendants. (d)(3) calls for personal service of the notice, without a copy of the complaint, on each defendant (with exceptions). Rule 71.1(f) directs that notice of filing an amended pleading, but not the pleading, be served. At least one additional copy of the amendment must be filed with the clerk, with more at the request of the clerk, in parallel with the requirement of copies in 71.1(c)(5). All of these copies seem an unnecessary nuisance if the complaint is e-filed and the complaint and amended pleadings are not served anyway. We should find out, presumably from the Department of Justice, whether it is enough to carry forward the requirement that the notice and answer be served.[7] All parties would have access to the court file to get the complaint and amended pleadings. (It also might be enlightening to see whether it would make better sense to require that service of notice under Rule 71(d) be supplemented by at least an e-mail link to the complaint on file with the court.)

Rule 72(b)(1):

> * * * The magistrate judge must enter a recommended disposition, including, if appropriate, proposed findings of fact. The clerk must promptly ~~mail~~ serve a copy ~~to~~ on each party.
>
> Self-explanatory. This is existing practice.

Rule 79(a)(2),(3): Rule 79(a)(2) and (3) refer to docketing requirements for papers. If we do not manage a generic resolution of this problem, here too "documents" might be substituted, still subject to the uneasiness generated by the Rule 34 distinction between documents and electronically stored information.

Rule 79(b):

> **(b)** CIVIL JUDGMENTS AND ORDERS. The clerk must keep a copy of every final judgment and appealable order; of every order affecting title to or a lien on real or personal property; and of any other order that the court directs to be kept. The clerk must keep these, either physically or electronically, in the form and manner prescribed by the Director of the Administrative

[7] A limited informal inquiry suggests that there is no need for multiple "copies."

Office of the United States Courts with the approval of the Judicial Conference of the United States.

The purpose of this suggestion seems plain. But why is it not enough to ask the Director to approve electronic form and win approval of the Judicial Conference?

Rule 79(c):

(c) INDEXES; CALENDARS. Under the court's direction, the clerk must:

(1) keep indexes of the docket and of the judgments ~~and orders~~ described in Rule 79(b); * * *

The basic question is whether the clerk should be directed to keep an index of orders, or whether an index of judgments should suffice. The argument is that orders can be found electronically within a case, and a quick search can be made for all judgments issued within a particular date range. This might be a bit tricky. Rule 79(b), quoted above, requires the clerk to keep a copy of every "appealable order," every order affecting title or a lien on property, and any other order the court directs to be kept. Rule 79(a)(2)(C) directs that all orders be marked with the file number and entered chronologically on the docket. Just to make matters more complicated, Rule 54(a) provides that "'Judgment'" as used in these rules includes * * * any order from which an appeal lies." Those orders still would be covered by the proposed Rule 79(c)(1), and the clerk still would be left to guess which orders may be appealable. One common example of uncertainty would be the collateral-order appealability of an order denying a motion for summary judgment on official-immunity grounds.

CM/ECF Issues

Two CM/ECF issues raised by the Committee on Court Administration and Case Management are noted above. One deals with preserving "wet" signature originals of things filed electronically, a matter left after withdrawal of proposed Bankruptcy Rule 5005(a)(3). The other is addressed in the draft of Civil Rule 5(d)(1) that would allow a notice of electronic filing to be a certificate of service.

Other CACM Issues

CACM and the rules committees have been asked to consider the possibility that a district judge could use videoconferencing to preside at a bench trial physically occurring in a courtroom in another district. For the Civil Rules, this question implicates at least Rule 43(a) and Rule 77(b). Rule 43(a) allows testimony "in open court by contemporaneous transmission from a different location," but only "[f]or good cause in compelling circumstances and with appropriate safeguards." Rule 77(d) provides that "no hearing — other than one ex parte — may be conducted outside the district unless all the affected parties consent." This question

seems to be on hold for now.

Appendix 1: Notes on Exemptions in Local e-Filing Rules

These notes identify several categories of exemptions provided in local e-filing rules. Some of the exemptions are widely embraced. Some are provided by only a few courts. There are good reasons to believe that it would be unwise to incorporate many or most of them in a national rule that mandates e-filing. Some depend on local conditions. Examples are exemptions for lawyers in areas that do not have access to highspeed internet services, or, in one court, a rule that makes e-filing mandatory for all attorneys admitted to practice in the district on or after January 1, 2008. Other exemptions reflect technology restraints that may disappear with time; adopting them in a national rule could mean that the national rule must be revisited are regular intervals, and revised almost as often. Still others may reflect the capacities of clerks offices to deal with physical filings. And, as always, it may be possible to learn from the experience of different courts with different rules.

Exclusion presents questions different from exemption. Many courts exclude all pro se litigants from e-filing. The exclusion may be narrower, applying only to pro se prisoners. The exclusion may be qualified by allowing e-filing by a pro se litigant who demonstrates willingness and capacity to do it. There has been enough success with e-filings by pro se parties that it may be better to leave this matter to local rules. Who knows? It even may be that local circumstances differ — a state prison system, for example, may be set up in ways that make e-filing easy for computer-literate inmates, while the system in another state may not provide reliable access to the internet.

The most common exemption is available on court order. Often standards are set, looking for hardship or good cause. That general idea may be made more specific, providing an exemption when e-filing is "impracticable," or in "exceptional circumstances," or for exceptional circumstances "including technical failure." At least one court requires notice of manual filing "to the court" if an exemption is invoked. Some courts also contemplate that a particular attorney may seek a blanket exemption for all cases without having to seek a specific exemption in each case.

The persons authorized to grant exemptions under these general standards vary. Often it is "the court." It may be the assigned judge, a district or magistrate judge, or a "judicial officer." The local rule in the Southern District of Alabama allows the clerk’s office to "deviate" in specific cases. This is an issue that might be addressed in a national rule. It is tempting to believe that the clerk, or a court administrator, could carry much of the burden of authorizing case-specific objections. But the workloads shouldered by such officials may vary from court to court. And different judges may have different degrees of attachment to e-records; even

if physical filings are converted to e-files in the court system, there may be a lag that the judge would prefer to avoid. On the other hand, it might not be inconsistent with a national rule authorizing exemptions by the clerk to allow departures when directed by a judge. In a different direction, it may be wondered whether clerks would always welcome the authority to grant exemptions — the dynamics of relations between a clerk's office and attorneys may be significantly different from the forces that encourage attorneys to be reasonable when seeking action by a judge.

Some of the boxes in the AO spreadsheet suggest that exemptions are provided in separate local rules, or in various administrative orders, including orders that specifically govern e-filing. There well may be exemptions in addition to those described here.

A common category of exemptions contemplate cases that include extensive written materials that do not also exist in e-form. Social security cases are often noted; that exemption is likely to make sense until social security records are routinely provided in e-form. Similar exemptions apply to administrative records, state-court records, state-court records in habeas cases, or administrative records in ERISA cases. At least one court exempts records for bankruptcy appeals (somewhat surprising, given that the bankruptcy courts led the way to electronic dockets). Compare the District of New Jersey, which requires e-files of all documents filed in state court before removal. Here too, there may be local differences. Some state courts may be well advanced in electronic case management, while others lag.

Like exemptions apply to exhibits or to documents that are impractical to convert, that will be illegible if scanned, or that "cannot" be converted.

Many courts allow — or may even require — a paper complaint, perhaps in addition to an e-filing. (Some local rules expressly direct that a case be opened on the court's system.) This approach may be extended to any filing that adds or changes the parties or claims.

Sealed records are another common exemption. Qui tam filings are exempted as a narrower category of sealed matters. Related exemptions apply for documents submitted for in camera review, or documents to support an ex parte application.

Magistrate judge consents are exempted by a few local rules.

Closely related rules may be noted. The Northern and Southern Districts of Iowa, channeling Rule 5(d)(4), direct that the clerk will not refuse to accept a document for filing, but add that the court may strike it or order that it not be filed.

New Mexico Local Rule 5.1 provides that electronic filing constitutes service for purposes of Rule 5.

The three districts in Oklahoma have a general statement that e=paper.

All of this may suggest that the safe approach in a national rule that mandates e-filing would be to provide for exemptions (1) for good cause, and (2) by local rule. Any more detailed list could go astray, now or in the reasonably near-term future.

Appendix 2: Vocabulary

The common question is how far various words imply physical paper, and how strong is each implication. Many of these words could be read to authorize action by electronic means. Most of them were used long before anyone was thinking about the question.

Listing these words does not imply that we should attempt to define them one-by-one. Nor does it imply that we should pursue some more global solution. It may be too early to attempt that. Or there may be no real need — sensible administration of rules written before the onslaught of e-information systems may adapt to new circumstances faster and better than formal amendments could do. The provisions in Rule 5 for electronic service and filing are a beginning. They can be expanded. Rule 5(b), for example, could provide that anything can be served electronically, and that there is no need to provide a physical paper of anything that has been served electronically. Rule 5(d) is already close to electronic filing for documents and papers, but does not reach things that are not filed. And it prohibits filing discovery requests and responses until they are used in the proceeding. (Supplemental Rule F(8) allows a party to a limitation-of-liability proceeding to "question or controvert any claim without filing an objection thereto.")

affidavit: appears throughout the rules. ("Declaration" is used in Rule 56 to reflect 28 U.S.C. § 1746; the sense of "writing" in § 1746 probably is limited to physical embodiments.)

agree: parties can agree to a mode of sale in civil asset forfeiture proceedings, Supplemental Rule G(7)(b)(iii). Compare consent and stipulate.

appear: Rule 16(f)(1)(A) authorizes sanctions if a party or attorney "fails to appear" at a Rule 16 conference. How about Skype? Text messaging? (Presumably a court can authorize this; should the rules speak to it?)

appearance: The concept of "appearance" is more complex than "appear." E-acts often should count as an appearance for such purposes as timing a scheduling order, Rule 16(b)(2); signing a stipulation of dismissal, Rule 41(a)(1)(A)(ii); or a notice of an application for default judgment, Rule 55(b)(2).

certificate: e.g., "certificate of service," Rule 5(d)(1).
"Certification" is required before submitting some discovery motions. E.g., Rule 26(c), 37(a)(1), 37(d)(1)(B).

certify: As compared to the potential physical implications of "certificate," "certify" seems to direct an act. Why not acting by electronic means?

civil docket: Rule 79(a)(1) takes care of this — the form and manner are prescribed by the Director of the Administrative Office and approved by the Judicial Conference. E-dockets can be established without changing the Rule.

confer: Rule 26(f) requires the parties to confer. The original face-to-face requirement was deleted by amendment. Telephone will do. Surely Skype will do. Texting? E-mail by contemporary exchange?

consent: Rule 53(a)(1)(A) provides that a special master may perform duties "consented to by the parties." How does this differ from agree, or stipulate, in the world of e-communication? (See "written consent," Rule 15(a)(2).)

copy: E.g., Rule 44 on proving an official record.
Rule 26(b)(5)(B), and a parallel provision in Rule 45, direct that on notice of a claim of privilege or work-product protection for materials produced in discovery, the receiving party must return, sequester, or destroy the specified information and any copies. Surely e-copies are included.

deliver[ing]: E.g. Rule 4(e)(2)(C). E-mail could be seen to deliver the summons and complaint. It does not seem likely the rule would be read this way.

document: This is a longstanding issue. In the first round of amendments to address e-files, a deliberate choice was made to partially separate "electronically stored information" from "document" in Rule 34. And it also was decided not to couple "electronically stored information" with "document" at every appearance of "document" in other rules. The seeming implication may be that "document" standing alone does not include electronically stored information. But it is possible to read Rule 34(a)(1)(A) to include electronically stored information in the definition of "document." Discovery extends to "any designated documents or electronically stored information — including * * * other data or data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form." That reading seems better; the question is whether it should be made explicit, a simple drafting task: "any designated documents ~~or electronically stored information~~ — including electronically stored information, writings, drawings * * *."
Without attempting a complete list, Rule 26(a)(3)(A)(iii) requires pretrial disclosure of "each document or other exhibit"

the party may present at trial.

Rule 26(b)(5)(A) requires a privilege log that describes the "documents" not produced or disclosed.

Rule 30(f)(2)(A) addresses only "documents * * * produced for inspection during a deposition," and in (B) provides for attaching "the originals" to the deposition.

Rule 34(b)(2)(E) directs that a party "produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request." Why not ESI?? Will requests for ESI come to be made and negotiated in terms of key-word searches, predictive coding strategies, and the like that automatically sort responses by the categories in the request?

Rule 36 includes requests to admit "the genuineness of any described documents." Surely ESI should be included.

Rule 58 is an eccentric entry in this list. It requires entry of judgment "in a separate document." The tie to Appellate Rule 4 is direct and sensitive.

Rule 70(a) empowers a court to direct an appointed person "to deliver a deed or other document." (Think of electronic systems for recording security interests.)

enter: "The magistrate judge must enter a recommended disposition * * *." Rule 72(b)(1). Surely this can be done within the court's electronic system?

examination (physical or mental): Medical practice is moving toward on-line diagnosis. But it is likely too early to think of this for Rule 35.

exhibit: Rule 10(c): "A copy of a written instrument that is an exhibit to a pleading is a part of the pleading for all purposes."

file: Appears continually. Rule 5(d)(3) may be broad enough to cover all variations. We should be sure.

hearing: E.g., Rule 32(a)(1) on use of a deposition "at a hearing or trial." Telephone "hearings" seem common. At least when the court can dispense with any hearing, can other modes of e-communication be used, at least if simultaneous?

inform: The court must inform the parties of proposed instructions, Rule 51(b)(1).

leaving: E.g., Rule 4(e)(2)(B). Unlike "deliver," this carries a significant hint of physical paper. So Rule 5(b)(2)(B).

mailing: The means of serving papers after the summons and complaint include "mailing it to the person's last known address." Rule 5(b)(2)(C). Given the juxtaposition with e-service in (b)(2)(E), this likely does not mean e-mail. But what of other rules? Rule 15(c)(2), for example, provides for relation back of an amended pleading "if, during the stated period, process was delivered or mailed to" the United States Attorney, etc.

Supplemental Rule B(2)(b) provides for "any form of mail requiring a return receipt." Can e-mail "receipts" be made equally reliable?

make: With variations, appears throughout the rules. E.g., Rule 7(b)(1): "A request for a court order must be made by motion." Rule 12(b): a motion "must be made." The meaning for e-acts may depend on context. Rule 26(a)(1)(C), for example, sets the time to "make" initial disclosures. E-disclosures should be perfectly acceptable, subject to the interplay between 26(a)(4), which requires all disclosures to be "in writing" unless the court orders otherwise, and Rule 5(d)(3).

minute: How's this for an exotic one? Supplemental Rule E(5)(b) provides for a general bond to stay execution of process against a vessel in all pending actions. The bond "shall be indorsed by the clerk with a minute of the actions wherein process is so stayed."

newspaper: For notice of condemnation by eminent domain, Rule 71.1(3)(B), and notice of limitation-of-liability proceedings, Supplemental Rule F(4).

notice: "filing a notice of dismissal," Rule 41(a)(1)(A)(i).

offer: Rule 68(a) provides for serving an offer of judgment. Is paper implied?

paper: Is it enough that Rule 5(d)(3) provides: "A paper filed electronically in compliance with a local rule is a written paper for purposes of these rules"?

What of papers that are served, not filed? Rule 65.1 – a surety on a bond given to the court appoints the court clerk as its agent for service of "any papers * * *." Presumably the clerk files the papers when served; does that authorize electronic service?

preserved: The order appointing a master must state "the nature of the materials to be preserved and filed." E-preservation?

produce: Rule 34 provides a request "to produce" documents. It clearly addresses the form for producing ESI. It seems likely that production of paper documents often is made by converting to an electronic format.

publish: May be linked to newspaper, see Rule 71.1(d)(3)(B). Service by publication is subject to statutory provisions in proceedings to cancel citizenship certificates, Rule 81(a)(3). Published notice is required in civil asset forfeiture proceedings, Supplemental Rule G(4); publication on an official government forfeiture site can satisfy the requirement.

record: When used in general references to the court record, e.g.,

Rule 60(a), it may be safe to rely on external definitions of what constitutes the court's record. So of the direction in Rule 73(a) that "A record must be made in accordance with 28 U.S.C. § 636(c)(5)" in a trial by consent before a magistrate judge.

record: official record: E.g., Rule 44 on proving an official record.

record: on the record: A party must object to jury instructions "on the record," Rule 51 (c)(1). Findings of fact and conclusions of law in a bench trial may be stated on the record.

seal: One question seems to involve only technology. E-files can be sealed.

"Seal" also appears in a different sense. Rule 30(f)(1) requires the officer to presides at a deposition to "seal the deposition in an envelope or package." That seems to require producing a physical recording — tape, disc, flash drive. Is this antique if the parties are content to have the record delivered electronically?

send: Does "send" embrace e-sending? Some rules elaborate in ways that may carry a stronger implication than "send" alone. Supplemental Rule G(4)(b)(iii)(A), for example, provides that notice of a civil forfeiture action "must be sent by means reasonably calculated to reach the potential claimant." The implication is bolstered by (b)(iv), providing that notice is sent on the date when it is sent by electronic mail.

serve: Rule 4.1, for example, simply provides that process other than a summons or a Rule 45 subpoena must be served by specified means. Does "serve" imply physical delivery? Probably.

Rule 71.1(f) provides for service of an amended pleading on "every affected party who has not appeared."

sign: Rule 5(d)(3) allows papers to be signed by electronic means. Does this dispense with any occasion for generating and signing a paper?

Rule 26(g)(2) and (3) specify consequences for failing to sign a disclosure, request, response, or objection, and for signing without substantial justification. Many of these things are not filed, so Rule 5(d)(3) does not cover them. The same holds for Rule 30(e)(1)(B), signing a statement of changes in a deposition transcript or recording.

Answers to interrogatories must be "signed." Same 5(d)(3) omission.

The clerk may deliver to a party a subpoena, "signed but otherwise in blank," Rule 45(a).

More generally, other rules require the clerk to "sign." E.g., Rule 58(b)(1) on entering judgment.

stenographically reported: Rule 80. Compare Rule 26(a)(3)(A)(ii), directing pretrial disclosure of witnesses whose testimony will be presented by deposition "and, if not taken stenographically, a transcript of the pertinent parts of the deposition."

stipulate: Stipulate and stipulation appear frequently. Occasionally signing may be specified – Rule 41(a)(1)(A)(ii): "a stipulation of dismissal signed by all parties who have appeared."

submit: This seems to cover e-action. For example, Rule 11(b) provides that an attorney or party certifies several things "by filing, submitting, or later advocating" a pleading, written motion, or other paper.

transcript: Rule 32(c) calls for a transcript of any deposition testimony offered at trial, and allows non-transcript form "as well."

verify: Rule 5(d)(3) authorizes local rules allowing "papers to be filed, signed, or verified by electronic means." Verification does not appear frequently in the rules. See, e.g., Rules 23.1(b), 27, 65(b)(1)(A); Supplemental Rules B(1)(a), C(2)(a), C(6)(b), G(2)(a)

warrant: For arrest, Supplemental Rules C(3)(a), D, E(9)(b), G(3)(b)(i), etc.

writ: E.g., "writ of execution," Rule 69(a)(1); "every * * * writ issued," Rule 79(a)(3).

writing, written, in writing: Rule 5(d)(3) provides that a paper filed electronically in compliance with a local rule "is a written paper for purposes of these rules." How far does this extend to other settings? Rule 5(a)(1)(C), (D), and (E) require service of a written motion or a written notice, etc. Variations of writing appear regularly throughout the rules.

"written consent": Rule 15(a)(2).

"in writing": Rule 26(e)(1)(A) excuses the duty to supplement discovery responses if the new information was made known to other parties "in writing." This was drafted in 1991 or 1992. Surely e-mail notice or the like should do, even though there is no filing and no occasion to invoke Rule 5(d)(3).

"reasonable written notice": Rule 30(b)(1). Rule 5(d)(3) includes "depositions" in the list of "discovery requests and responses" that must not be filed. So does this fall outside the (d)(3) provision treating filed e-things as written papers?

"Written questions" for a Rule 31 deposition?

"Written interrogatories" for Rule 33? See "obvious issues."

"Written request to admit" for Rule 36.

"Written demand" for jury trial, Rule 38(b).

"pleading or other writing": notice of an issue of foreign law, Rule 44.1.

"written objection" to a subpoena

Rule 49 provides for special verdicts with written findings, submitting written questions, and submitting written forms. It provides for "written questions" to supplement a general verdict. When jurors get tablets or the like, will that do?

Rule 51 calls for written requests for jury instructions.

Rule 55(b)(2) provides "written notice" of an application for default judgment.

"certifies in writing," Rule 65(b)(1)(B).

THIS PAGE INTENTIONALLY BLANK

TAB 7

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

DATE: October 3, 2014

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Communications with judges of the courts of appeals

A circuit judge recently suggested that the Committee consider whether the Appellate Rules should be amended to state that Rule 29 establishes the exclusive means by which a non-litigant may communicate to the court his or her views on a pending case, and that a non-litigant must not attempt to contact judges of the court directly (by email or otherwise).

Direct contacts with judges of the court of appeals by *litigants' counsel* might occur in certain rare emergencies.[1] A notable example involves requests for stays of execution.[2] Even in such emergencies, though, some circuits channel communications

[1] Fourth Circuit Rule 27(e) provides in part:

> Ordinarily, counsel shall present all motions to the clerk for presentation to the Court. Application to a single judge should be made only in exceptional circumstances where action by a panel would be impractical due to the requirements of time. In such exceptional circumstances, counsel shall attempt to notify the clerk's office that application is being made directly to a single judge, and copies of all papers presented to the judge shall be presented to the clerk as soon as practical for filing.

Cf. 28 U.S.C. § 452 ("All courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders."); *Casalduc v. Diaz*, 117 F.2d 915, 917 (1st Cir. 1941) (suggesting that similar "courts always open" language in Civil Rule 77(a) would authorize emergency filing of a notice of appeal by "seek[ing] out the clerk or deputy clerk, or perhaps the [district] judge ... , and deliver[ing] the notice to him out of hours").

[2] *See, e.g.*, Third Circuit Local Appellate Rule 111.4(c) ("If time does not permit the filing of a motion or application [for stay of execution] in person, by mail, or electronically, counsel may communicate with the clerk or a single judge of this court and thereafter must file the motion with the clerk in writing as promptly as possible."); Ninth Circuit Rule 22-2(e) ("If a motion for a stay of execution is presented to a judge of this court not on the death penalty panel rather than to the Clerk of the Court of Appeals, that judge shall refer the motion to the Clerk, unless the execution is imminent," but if execution is imminent and the panel has not decided the stay request, the judge "may issue a temporary stay" and then shall so notify the clerk and panel).

through the clerk's office.[3] And two circuits have local provisions directing parties, more generally, not to contact individual judges.[4]

While there may occasionally be legitimate reasons for a party to contact an individual judge to seek emergency relief, it is hard to envision circumstances that would justify a non-litigant in making a direct contact with an individual appellate judge to express views about a pending case. Such ex parte contacts would implicate Canon 3(A)(4) of the Code of Conduct for United States Judges, which provides that – subject to exceptions not relevant here – "a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers." Under this Canon, "[i]f a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested."

Despite the difficulties that would thus be occasioned by a nonparty's direct communication to a judge concerning a case, most circuits do not appear to have local provisions specifying that such communications are inappropriate. Based on a quick (and admittedly non-exhaustive) search of local circuit provisions, only one circuit has a local provision that is broad enough to address communications by non-parties. Federal Circuit Rule 45(d) provides: "Communication with the Court. All correspondence and telephone calls about cases and motions and all press inquiries must be directed to the clerk." Admittedly, other circuits may attempt to communicate the same idea through less formal means, such as the contact information posted on the court website. For example, the Seventh Circuit's web page on "Contact Information" makes clear that all inquiries (including efforts to contact a judge's chambers by phone) should be directed to the Clerk's Office.[5]

The initial question for the Committee would seem to be whether the inappropriateness of third-party contacts with individual judges concerning a pending matter is best communicated by a provision in the national Rules or by other means, such as a notice on the court's website.

---

[3] *See* Fifth Circuit Rule 8.4 ("Emergency motions or applications [in death penalty cases], whether addressed to the court or to an individual judge, must be filed with the clerk rather than with an individual judge."); Sixth Circuit Rule 22(c)(4) ("Counsel with an emergency motion or application [in a death penalty case] must file it with the clerk rather than with an individual judge."); Eleventh Circuit Rule 27-1(b)(4) ("An emergency motion, whether addressed to the court or an individual judge, ordinarily should be filed with the clerk and not with an individual judge.").

[4] Ninth Circuit Rule 25-2 provides in part that "[p]arties and counsel shall not submit filings directly to any particular judge." The Fifth Circuit's Practitioner's Guide states: "The clerk's office is the custodian of the court's records and papers. To ensure we are aware of all matters and unless otherwise directed, all communications with the court must be made through the clerk's office."

[5] See http://www.ca7.uscourts.gov/contact.htm (last visited October 2, 2014).