Minutes of Spring 2010 Meeting of
Advisory Committee on Appellate Rules
April 8 and 9, 2010
Asheville, North Carolina

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 8, 2010, at 8:30 a.m. at the Inn on Biltmore in Asheville, North Carolina. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Peter T. Fay, Mr. James F. Bennett,[1] Ms. Maureen E. Mahoney, Dean Stephen R. McAllister, and Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Harris L Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Sutton welcomed the meeting participants and noted his regret that Judge Rosenthal, Justice Holland, and Professor Coquillette were unable to be present. He introduced the Committee's two new members, Judge Fay and Mr. Taranto. Judge Sutton observed that Judge Fay had served previously on the Appellate Rules Committee, and that the Committee would benefit from his expertise. Judge Sutton recalled that he had worked with Mr. Taranto before Judge Sutton was appointed to the bench and noted that he would be an excellent addition to the Committee.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rabiej, Mr. Ishida, Mr. Barr, and the AO staff for their expert work in preparing for the meeting, and he thanked Ms. Leary and the FJC for their skilled research support.

II. Approval of Minutes of November 2009 Meeting

A motion was made and seconded to approve the minutes of the Committee's November 2009 meeting. The motion passed by voice vote without dissent.

III. Report on January 2010 Meeting of Standing Committee

Judge Sutton reported on the Standing Committee's discussions at its January 2010 meeting. He noted that he had described to the Standing Committee aspects of the Appellate

[1] Mr. Bennett missed a portion of the meeting due to a court obligation.

Rules Committee's ongoing work. In particular, he had discussed the pending proposal to amend Appellate Rules 4 and 40 and to consider proposing legislation to amend 28 U.S.C. § 2107, and he had described the proposal to amend Appellate Rules 13 and 14 to account for permissive interlocutory appeals from the Tax Court.

Judge Sutton noted that the Standing Committee had spent part of the meeting discussing the implications of the Supreme Court's decisions in *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), for pleading standards. Mr. Rabiej observed that bills are pending in both Houses of Congress that would respond to *Twombly* and *Iqbal*, though the two bills would take different approaches. The House bill would reinstate the "no set of facts" language from *Conley v. Gibson*, 355 U.S. 41 (1957), whereas a draft bill under consideration in the Senate apparently would turn the clock back to the state of pleading jurisprudence as it existed on the day before the Supreme Court decided *Twombly*. Mr. Rabiej noted that both bills would retain the possibility that the pleading standard adopted in the legislation could subsequently be altered through the rulemaking process. Mr. Rabiej reported that statistics gathered by the AO thus far do not indicate that *Iqbal* and *Twombly* have produced a large change in pleading practice, but these data are limited and the AO has asked the FJC to study the question further. Mr. Rabiej observed that the upcoming 2010 Civil Litigation Conference organized by the Civil Rules Committee – which will take place in May at Duke University Law School – will shed light on relevant issues, such as the possibility that some types of lawsuits involve asymmetric information. The 2010 Conference will include the presentation of empirical data; for example, one project focuses on obtaining litigation defense cost information from some 10 to 20 major companies.

Judge Sutton reported that the Standing Committee had also heard presentations from a panel of law school deans concerning the future of legal education.

IV. Other Information Items

The Reporter noted that several amendments to the Appellate Rules had taken effect on December 1, 2009, including the time-computation amendments and new Appellate Rule 12.1 concerning indicative rulings. She observed that several more Appellate Rules amendments are currently on track to take effect on December 1, 2010, if the Supreme Court approves them and Congress takes no contrary action; these pending amendments would affect Appellate Rule 1(b) (by defining the term "state" for purposes of the Appellate Rules), Appellate Rule 4 (by making a technical amendment to conform to the restyled Civil Rules), Appellate Rule 29 (to impose the new authorship and funding disclosure requirement) and Appellate Form 4 (to conform to privacy requirements).

V. Action Items

a. For final approval

i. Item No. 03-09 (FRAP 4(a)(1)(B) & 40(a)(1) – treatment of U.S. officer or employee sued in individual capacity)

Judge Sutton invited Mr. Letter to introduce this item, which originally stemmed from a proposal by the DOJ. Mr. Letter explained that the proposal arises from the need to clarify the operation of Appellate Rules 4(a)(1)(B) and 40(a)(1). Those rules provide all parties with extra time in cases where the parties include the United States, a federal agency, or a federal officer. The amendments are designed to make clear that the extra time applies in cases where the only federal party is a federal employee, and also in cases where the only federal party is a federal officer or employee sued in his or her individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf. Under the current rules, because the application of the longer time periods in such cases is not entirely clear, the DOJ attorneys follow the practice of complying with the shorter time periods – with the result that the federal government is not receiving the benefit of the longer periods in those cases. Mr. Letter observed that the number of affected cases is relatively small, because in many cases one of the parties fits clearly within the existing terms ("United States or its officer or agency"); nonetheless, the issue is an important one in the cases where it arises. The proposals to amend Rules 4 and 40 were first developed prior to the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). After *Bowles*, participants in the Rule 4 discussions came to believe that the best way to clarify the Appellate Rule 4 period would be to do so in tandem with a proposed legislative change to 28 U.S.C. § 2107. Mr. Letter reported that he has received authorization from the DOJ to pursue such a legislative amendment.

Turning to the details of the Rule 4 and 40 language as originally published for comment, Mr. Letter reported that the DOJ feels that the language should be altered so as to refer explicitly to "current or former" United States officers or employees. Mr. Letter and his colleagues within the DOJ considered possible alternatives to the proposed reference to "an act or omission occurring in connection with duties performed on the United States' behalf," but they concluded that this language – which tracks the language in Civil Rules 4(i)(3) and 12(a)(3) – is preferable. Mr. Letter consulted a DOJ colleague who handles cases involving federal officers and employees and who reports that he has not encountered difficulties with the interpretation of those Civil Rules.

A judge member inquired whether there are any statutes that might supply relevant language. Mr. Letter noted 28 U.S.C. § 2679, which provides for certifications by the Attorney General "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." He pointed out, though, that such certifications do not occur in *Bivens* cases. An attorney member noted the difference in procedural posture between the situations in which Civil Rules 4(i)(3) and 12(a)(3) may be applied and the situations in which Appellate Rules 4 and 40 may be applied: these Appellate Rules will often become operative at a point in the litigation when there has already been a court finding regarding whether the relevant conduct was "in connection with" the defendant's federal

duties. Mr. Letter noted that it would not be a good idea to make the applicability of the longer periods in Rules 4 and 40 depend on what the plaintiff has alleged in the complaint. The attorney member responded that another alternative might be to use the term "allegedly."

Another attorney member observed that the purpose of the longer periods is to ensure that the United States has sufficient time for deliberation concerning litigation strategy – in particular, sufficient time for the Solicitor General to decide whether to take an appeal or to seek rehearing. This member suggested that it would make sense to tie the availability of the longer periods to whether the United States has actually decided to provide representation. That might be accomplished, he suggested, by language such as "... current or former United States officer or employee for whom the United States files the notice of appeal or is providing representation at the time of the entry of such judgment, order, or decree." A judge asked how the other parties to the litigation would know whether such a standard was met in cases where the government was paying for private counsel rather than providing the representation directly.

Mr. Letter expressed a desire to consult his colleagues at the DOJ concerning these suggested alternative formulations. A judge member asked whether the two formulations – something like the formulation in the published proposal, plus something that would refer to the United States' provision of representation – could be combined as alternative parts of the test. The Reporter noted that such a combined test might be somewhat similar to the test currently followed in the Ninth Circuit. Another member suggested, however, that he understood the provision-of-representation proposal as designed to exclude situations where the United States is paying for private counsel. By consensus, the Committee decided to return to this drafting question the following morning.

The next morning, the Committee took up the drafting question once again. Judge Sutton noted that members had raised good points about possible ambiguity in the proposal as published for comment. Mr. Letter suggested that the DOJ could be comfortable with a proposal that tied the availability of the longer period to the United States' decision to provide representation. Judge Sutton observed that it might be less than optimal for the Appellate Rules' language to diverge from the Civil Rules' language, but that the Committee Notes to Appellate Rules 4 and 40 could explain the reasons for the difference. By consensus, the Committee determined to continue its discussions of the proposed language by email circulation. Members also discussed whether the proposed changes in wording would require re-publication – a matter that was deferred to await a more definite decision on wording choice. Mr. Rabiej noted the need to coordinate the effective date of the proposed Rule 4 and 40 changes with the effective date of the proposed legislative amendment to Section 2107.

b. For publication

i. Item No. 08-AP-M (interlocutory appeals in tax cases)

Judge Sutton invited Ms. Mahoney to introduce this item, which concerns permissive interlocutory appeals from the Tax Court. Ms. Mahoney noted that Committee members had concluded that it would be worthwhile to amend Appellate Rules 13 and 14 to take account of

permissive interlocutory appeals under 26 U.S.C. § 7482(a)(2). She observed that the agenda materials contained an initial drafting proposal by the Reporter and an alternative proposal provided by Chief Judge Colvin and Judge Thornton of the Tax Court. The latter proposal also includes a proposed amendment to Appellate Rule 24 concerning applications to proceed in forma pauperis. Judge Sutton noted that in addition to obtaining input from the Tax Court and from the DOJ, he had spoken with the chair of the Tax Section of the American Bar Association, but that the latter had not yet been able to provide a sense of the views of Tax Section members.

Ms. Mahoney reviewed Chief Judge Colvin's two proposed alternatives for amending Appellate Rule 24. Those proposals stem from the observation that the current wording of Rule 24(b) treats the Tax Court in the same sentence as "an administrative agency, board, commission, or officer." Chief Judge Colvin explains that the Tax Court is a court of law that exercises judicial powers and is independent of the political branches, and he argues that Rule 24(b) should not group the Tax Court with executive agencies, boards, and the like. Chief Judge Colvin's preferred alternative would be to delete from Rule 24(b) any reference to the Tax Court; when taken together with the proposed global definition of "district court" and "district clerk" as including the Tax Court and its clerk, this change would lead those seeking to appeal in forma pauperis from the Tax Court to proceed under Rule 24(a) by first making their i.f.p. applications to the Tax Court. Chief Judge Colvin has indicated that the Tax Court is willing to serve as the first-line decision-maker on such i.f.p. applications. Chief Judge Colvin's second proposed alternative would be to retain the treatment of the Tax Court under Rule 24(b) but to re-style that Rule so that it is clear that the Tax Court is not lumped in with administrative agencies.

An attorney member expressed support for the second proposed Rule 24 alternative; he suggested that it seems appropriate for Rule 24(b) to address i.f.p. applications both for appeals covered in Title III (addressing appeals from the Tax Court) and for review petitions covered in Title IV (review of agency orders). A judge member asked whether it would be possible to approve the proposed changes to Rules 13 and 14 for publication while deferring consideration of the Rule 24 proposal. The attorney member noted, however, that adopting the proposed Rule 13 and 14 amendments – with a global definition of "district court" and "district clerk" to include the Tax Court and its clerk – might introduce ambiguity into Rule 24 by suggesting that i.f.p. applications by those seeking to appeal from the Tax Court were covered under both Rule 24(a) and Rule 24(b).

In the light of these considerations, the Committee determined by consensus to hold this item for further review of the Rule 24 question and to return to the matter at the fall meeting.

VI. Discussion Items

a. Item No. 07-AP-E (issues relating to *Bowles v. Russell*)

Judge Sutton invited the Reporter to introduce this item, which concerns the possible implications, for the Appellate Rules, of the Supreme Court's decision in *Bowles v. Russell*, 551 U.S. 205 (2007). The principal developments relating to this topic – since the Committee's last

meeting – came in cases that did not involve the Appellate Rules: *Union Pacific Railroad Co. v. Brotherhood of Locomotive Engineers and Trainmen*, 130 S. Ct. 584 (2009), and *Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237 (2010). Both decisions concerned statutory requirements unrelated to appeal deadlines, and both held that the requirement in question was non-jurisdictional. One can thus place both of these decisions within the line of cases, typified by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), that have held various statutory requirements not to be jurisdictional. In this sense, both decisions highlight the questions discussed by the Committee at the fall 2009 meeting concerning possible tensions between *Arbaugh* and *Bowles*.

The Reporter noted that the Court's two most recent decisions might be read as offering competing visions of the way in which to address the respective applicability of *Arbaugh* and *Bowles* when confronted with the contention that a statutory requirement is jurisdictional. In *Union Pacific*, Justice Ginsburg, writing for a unanimous Court, followed *Arbaugh* and distinguished *Bowles* on the ground that the latter "rel[ied] on a long line of this Court's decisions left undisturbed by Congress." In *Reed Elsevier*, Justice Thomas, writing for the majority, distinguished *Bowles* on a somewhat different ground – namely, "that context, including this Court's interpretation of similar provisions in many years past, is relevant to whether a statute ranks a requirement as jurisdictional." Justice Ginsburg, joined by two other Justices, wrote separately in *Reed Elsevier* to contest this mode of reconciling *Bowles* with *Arbaugh*; in Justice Ginsburg's view, a key factor that distinguished *Reed Elsevier* from *Bowles* was that the Supreme Court had never held the statutory provision at issue in *Reed Elsevier* to be jurisdictional. Justice Ginsburg, in other words, takes the view that *Arbaugh*'s clear-statement rule applies *unless* (as in *Bowles*) existing Supreme Court precedent requires otherwise.

Justice Ginsburg's approach is more rule-like, while the *Reed Elsevier* majority's multi-factor balancing test is more like a standard. However, in cases concerning statutory appeal deadlines, the two approaches are likely to yield the same results. These two most recent cases do not seem likely to change the trajectory of the caselaw on statutory appeal deadlines; it seems likely that courts will continue to hold that most (if not all) such deadlines are jurisdictional under *Bowles*.

Mr. Letter noted that the Third Circuit has before it a set of appeals that raise the question whether the deadlines for filing post-judgment motions (of the types that can toll the time to appeal under Appellate Rule 4(a)(4)) are jurisdictional or merely claim-processing rules. This question is already the subject of a circuit split.

A participant observed that the Supreme Court currently has before it a petition for certiorari raising the question whether *Bowles* renders jurisdictional the deadline set by 38 U.S.C. § 7266 for filing in the Court of Appeals for Veterans Claims a notice of appeal from a decision of the Board of Veterans' Appeals. The Federal Circuit, sitting en banc, held that Section 7266's deadline is jurisdictional and therefore not subject to equitable tolling.

b. Item No. 09-AP-B (definition of "state" and Indian tribes)

Judge Sutton invited Dean McAllister to present this item, which arises out of Daniel

Rey-Bear's suggestion concerning the treatment of federally recognized Native American tribes in connection with Appellate Rule 29 and some other Appellate Rules. Mr. Rey-Bear, commenting on proposed Rule 1(b), suggested that federally recognized Indian tribes be included within the Rule's definition of "state." At the Committee's fall 2009 meeting, participants decided that it would be useful to focus on Rule 29's amicus-filing provisions rather than on the possibility of globally defining "state" to include Native American tribes. As a point of comparison, participants discussed the U.S. Supreme Court's amicus rule, and Dean McAllister undertook to research the history of that rule, with a view to determining why it does not treat Native American tribes the same as states.

Dean McAllister reported that the Supreme Court's amicus-filing rule can be traced back to a rule adopted in 1939. The substance of the rule has not changed materially since 1939, but its numbering has changed and so has its language. Since 1939, the Supreme Court's rule has always permitted amicus filings, without Court leave or party consent, by federal, state, and local governments. Neither Native American tribes nor foreign governments have been included in that provision, and Dean McAllister was not able to find any evidence that the question of treating tribes the same as federal, state, or local governments has been raised in connection with the Supreme Court's rule. Native American tribes and foreign governments do sometimes file amicus briefs in the Supreme Court, and Dean McAllister has not come across evidence of any such briefs being rejected except on timeliness grounds.

Dean McAllister provided an enlightening historical overview of amicus practice before the Supreme Court. Amicus filings were relatively rare during the nineteenth century, but the United States did participate as an amicus in a number of nineteenth-century cases. States evidently appeared as amici in some cases during and after the Civil War. And Dean McAllister found an 1890 case involving the City of Oakland's participation as an amicus. Thus, Dean McAllister observed, by 1939 the Supreme Court had some familiarity with federal, state and local government amicus filings. By contrast, the first Supreme Court amicus filing that Dean McAllister could find by a Native American tribe was in 1938. Dean McAllister suggested that this evidence supports the view that the omission of Native American tribes from the Supreme Court's 1939 amicus rule may have been an accident of history that has been carried forward, since then, in the later iterations of the rule. Recounting the evolution of the Supreme Court's rule, Dean McAllister noted Justice Black's observation, in 1954, that the Court was too restrictive in its approach to amicus briefs. And Dean McAllister observed that Appellate Rule 29(a) is even less inclusive than Supreme Court Rule 37.4: the latter, but not the former, allows filings without party consent or court leave by municipalities.

Judge Sutton thanked Dean McAllister for his presentation and invited Ms. Leary to describe the results of her research on tribal amicus filings in the federal district courts and courts of appeals. The Committee had asked Ms. Leary to assess whether and how often Native American tribes seek leave to file amicus briefs and how often such requests are denied. To investigate this question, Ms. Leary and her colleagues at the FJC searched the CM/ECF database of the courts of appeals. The courts of appeals only began to go "live" with their CM/ECF systems recently: the earliest circuit went "live" in 2006, ten circuits had gone "live" by 2009, and all but the Federal Circuit had gone "live" as of March 2010. This limited the length of time for which court of appeals records could be searched; Ms. Leary's search

excluded the Second and Eleventh Circuits (which went live in January 2010) as well as the Federal Circuit, and the average length of time since the other circuits went "live" is only two and a half years.

Ms. Leary reported that relatively few Native American amicus briefs are filed with the consent of the parties; most such filings occur by court leave rather than party consent. Ms. Leary found 180 motions filed by Native American tribes seeking court permission to file an amicus brief. Of those, 157 were granted, 11 were denied, and 12 were not ruled on. A table compiled by Ms. Leary showed that this pattern – a relatively high percentage of motions granted and a relatively small percentage of motions denied – was consistent within each circuit as well as across the ten circuits. Most of the activity occurred in the Eighth, Ninth, and Tenth Circuits (which encompass the reservations of a large number of tribes). Of the eleven motions that were denied, two were denied as untimely, one was denied as moot, and one was denied because the filer was the plaintiff in another case scheduled for argument before the same panel on the same day; no reasons were stated for the denial of the other seven motions.

In addition to searching the records of the courts of appeals, the Committee also asked Ms. Leary to search the records of four federal district courts: the Eastern District of California, the District of Minnesota, the Eastern District of Oklahoma, and the Eastern District of Wisconsin. Ms. Leary's search of those districts found no relevant motions in the latter three districts. In the Eastern District of California, Ms. Leary found five motions – three that were granted and two that were not ruled on. She then expanded her search to encompass all districts within the Ninth Circuit. That expanded search yielded 49 motions by Native American tribes seeking permission to file an amicus brief, of which 42 were granted, four were denied, and three were not ruled on.

Judge Sutton thanked Ms. Leary for her careful and helpful research. The Reporter recounted the results of her search for tribal-court amicus-filing provisions. At the fall 2009 meeting, it was suggested that it might be useful to investigate whether tribal court systems have rules concerning amicus filings and, if so, how those rules treat amicus filings by government litigants. The Reporter sought to focus this inquiry on tribes with relatively large court systems. As a very rough proxy for this, the Reporter compiled a list of the 20 largest federally recognized tribes (measuring size by reservation and trust land population according to the census data), and also included three additional tribes in the courts of which a 2002 survey by the Bureau of Justice Statistics reported at least 3,000 civil cases or 3,000 criminal cases filed during a calendar year. A research assistant then searched the Internet for relevant provisions in the law of these 23 tribes. She found only six relevant tribal-law provisions: two rules that require court permission for amicus filings, two rules that require either court permission or party consent, and two rules that address amicus filings but do not make clear the standards for such filings. She did not find any rules that address whether governments other than the tribe in question are exempt from the general amicus-filing requirements. The Reporter suggested that the absence of such findings is not surprising: In the light of the U.S. Supreme Court's decisions narrowing the reach of tribal-court subject matter jurisdiction, tribal courts are less likely to hear cases that directly implicate the interests of another government than are either federal courts or state courts.

As a point of comparison, the Reporter also looked at state-court amicus-filing provisions. She found that many state-court rules require court permission for amicus filings. Some state-court rules require either court permission or party consent. A handful of state-court rules appear to permit amicus filings without either court permission or party consent. Sixteen states have a court rule that exempts certain types of government entities from applicable amicus-filing requirements; of those exemptions, sixteen treat the relevant state specially, six treat municipalities specially, four treat the United States specially, and two or three treat other states specially. Though only a small number of state provisions explicitly authorize special treatment for filings by the federal government in state courts, it is possible that such filings are already separately authorized by 28 U.S.C. § 517. That statute provides that "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States." Though this statute has rarely been cited by state courts, it could be argued to authorize amicus filings by the federal government in state court proceedings.

Focusing on the eight instances in which the Ninth Circuit had denied a Native American tribe leave to file an amicus brief, Mr. Letter asked whether it was possible that those denials occurred because the motions for leave to file were untimely. Ms. Leary stated that that was possible. An attorney member wondered whether the scope of Supreme Court Rule 37.4 matters a great deal, given that it is very rare, nowadays, for the Supreme Court to deny leave to file an amicus brief.

Another attorney member suggested that it would be useful to solicit the views of the Eighth, Ninth, and Tenth Circuits. Given the concentration of tribal amicus activity in those circuits, an appellate judge member wondered whether any concerns about such filings could be accommodated by means of local circuit rules. Another appellate judge member stated that he did not recall ever turning down a Native American tribe's request to file an amicus brief; this judge agreed with the suggestion that it might be better to address the issue by local circuit rule.

Mr. Letter reported that colleagues within the DOJ believe that the tribal-amicus question merits government-to-government consultation with the federally recognized Native American tribes. A November 5, 2009 Presidential Memorandum for the heads of executive departments and agencies noted the federal government's special relationship with Indian tribal governments, and directed federal agencies – pursuant to Executive Order 13175 of November 6, 2000 – to "engag[e] in regular and meaningful consultation and collaboration with tribal officials in the development of Federal policies that have tribal implications." The DOJ would be glad to facilitate a government-to-government consultation process with the tribes concerning the amicus-filing issue. Some Committee members questioned, though, whether the executive branch policy of consultation could practicably be transposed to the context of the rulemaking process.

Returning to the merits of the issue, an appellate judge member suggested that Ms. Leary's findings could be argued to cut in more than one direction. Another member responded that the fact that the courts of appeals usually grant motions by tribes to file amicus briefs should not be dispositive; in this member's view, the question is one of according the tribes the same

dignity accorded to states. This member also observed that there are many more municipalities than Native American tribes in the United States; given that Supreme Court Rule 37.4 permits municipal amici to file without party consent or court leave, he suggested, adopting a similar approach to tribal amici would not overburden the courts. He argued that if Native American tribes do not need a rule permitting them to file amicus briefs without party consent or court leave, neither do states, cities or the federal government. An attorney member agreed that according tribes equal dignity provides the best argument in favor of amending Rule 29; but this member suggested that the Appellate Rules Committee might wish to follow the Supreme Court's lead on this issue. Mr. Letter responded that the Supreme Court would, of course, have an opportunity to consider the merits of any proposed amendment to Rule 29(a) during the approval process.

An attorney member suggested that if Rule 29(a) is expanded to encompass Native American tribes, the revised rule should also encompass foreign and municipal government amici. Mr. Letter stated that the DOJ does not have a position concerning whether municipal governments should be added to the list in Rule 29(a), and he noted that court of appeals judges might have different preferences on that point than the Supreme Court does. With respect to foreign governments, Mr. Letter noted that there is a question of reciprocity. Foreign countries vary in their approaches to requests by the United States to appear as an amicus in their courts; some permit such amicus appearances, some require intervention, and some instead provide for a filing by the host government on the United States' behalf. Having a provision in the Appellate Rules permitting amicus filings by foreign governments without party consent or court leave, Mr. Letter suggested, could sometimes be helpful in persuading foreign courts to permit filings by the United States.

It was noted that with the upcoming adoption of new Appellate Rule 29(c)(5) – which is on track to take effect December 1, 2010, assuming approval by the Supreme Court and no contrary action by Congress – Rule 29 will impose a new authorship and funding disclosure requirement but will exempt from that new requirement the entities that are entitled under Rule 29(a) to file their amicus brief without court leave or party consent. An attorney member noted the likelihood that the disclosure requirement may actually be useful to some entities that might be amicus filers; an entity that is being pressured by a party to make an amicus filing can respond that the amicus would have to pay for the filing itself or disclose that someone else paid for it. This member suggested that – with respect to the disclosure question – it might make sense to wait and see how new Rule 29(c)(5) works when it takes effect. Another member, though, responded that failing to include tribes within the categories listed in Rule 29(a) will subject tribes to a new requirement once new Rule 29(c)(5) becomes effective. He questioned why the disclosure requirement should apply to tribes when it does not apply to states; states, he observed, have sometimes received help from others in writing amicus briefs, and they have not been (and will not be) required to disclose such help in connection with their amicus filings.

An appellate judge member asked whether any treaties with Native American tribes might bear on the amicus-filing question. The Reporter stated that she is not aware of any treaty provisions specifically addressing the issue. Because treaty-making between the United States and Native American tribes ended in 1871, at a time when tribes were not in the habit of making amicus filings in the courts, it would have been unlikely that any treaty would speak to this

particular issue. However, there may be more general provisions that might bear on the question, as might the federal government's general trust responsibility to the tribes.

An appellate judge suggested that some judges on the courts of appeals have expressed skepticism about the value of amicus briefs; such judges might prefer to have more control over amicus filings. It is important, this member stressed, to find out what the judges would prefer. Supreme Court Rule 37.4, the member suggested, is more puzzling than Appellate Rule 29(a), because the former includes towns but not Native American tribes; Mr. Letter agreed with this point.

An appellate judge member suggested that the Committee should consult with the Supreme Court, with a view to following the Supreme Court's lead on this issue; another appellate judge member agreed with this suggestion. By consensus, it was decided that the Committee should consult further with the Supreme Court. In addition, Judge Sutton undertook to write to the Chief Judges of the Eighth, Ninth and Tenth Circuits; he will share with them Ms. Leary's research, and ask for their views on the question of whether a provision on this topic should be adopted either in the Appellate Rules or in local circuit rules. A member noted that the issue extends beyond those three circuits; there are tribes that are located within other circuits, and the question of amicus filings by foreign nations applies to all the circuits. An appellate judge member responded that the Eighth, Ninth and Tenth Circuits are the ones that seem likely to be most affected by a rule treating amicus filings by Native American tribes. Another appellate judge member agreed, stating that the Committee should focus on tribal amicus filings rather than amicus filings by foreign governments. Mr. Letter reiterated that before the Committee takes any final action on this item, the DOJ would strongly prefer that consultation occur with the Native American tribes.

VII. Additional Old Business and New Business

a. Item No. 09-AP-D (implications of *Mohawk Industries, Inc. v. Carpenter*)

Judge Sutton invited the Reporter to introduce this item, which arises from John Kester's suggestion that the Committee consider the implications of *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009). In *Mohawk Industries*, 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 collateral order doctrine, instituted by *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949), treats a non-final order as a final judgment – for purposes of taking an appeal under 28 U.S.C. § 1291 – if three requirements are met: the order must be conclusive, must resolve important questions completely separate from the merits, and must render such important questions effectively unreviewable on appeal from the ultimate final judgment. In *Mohawk Industries*, the Court held that the attempted appeal from the attorney-client privilege ruling failed to meet the third of these requirements. The Court expressed doubt as to the benefits of permitting such rulings to come within the collateral order doctrine, and expressed concern as to the burdens such a course would impose on the courts of appeals. The Court also

noted the difficulty of line-drawing in this area, observing that it would be hard to distinguish rulings on attorney-client privilege disputes from rulings concerning other sorts of sensitive information. In the opinion's concluding section – which was joined by all members of the Court – Justice Sotomayor stressed that any further consideration of the petitioner's arguments for expanded appellate review of attorney-client privilege rulings should take place within the rulemaking process.

In considering possible rulemaking responses to *Mohawk Industries*, the Committee confronts a range of options, from an approach that focuses on attorney-client privilege rulings to one that attempts a broader rationalization of the areas currently covered (or not covered) by the collateral order doctrine.

A rulemaking response that focuses on attorney-client privilege would raise a number of questions: Does the unavailability of collateral-order immediate review for privilege rulings affect the incentives for attorney-client communications? Even if that is not the case, does the unavailability of such review afford undue settlement leverage to a party who obtains a ruling that the opposing side's information is non-privileged and discoverable? If immediate review of such rulings were made generally available, how many appeals would be taken? Would wealthy litigants take such appeals in order to impose cost and delay on their opponents? Would such appeals interfere with the trial judge's management of the case? Would they unduly increase the appellate courts' workload?

An approach that focuses on attorney-client privilege rulings would raise boundary issues – how and why should one distinguish attorney-client privilege rulings from other types of privilege rulings? From other discovery-related rulings? Should one, instead, attempt a broader review of the collateral order doctrine – one that could encompass, for example, an attempt to rationalize interlocutory review of qualified-immunity rulings?

An appellate judge member suggested that the rulemaking process might provide a very useful venue for looking into questions of this nature. Mr. Letter wondered whether the *Mohawk Industries* Court's reference to the rulemaking process was intended as a signal that the Committee should consider changes in this area. An attorney member observed that the rulemaking process affords opportunities that are unavailable to the Court when deciding cases. For example, the rulemakers, if they were to decide to permit immediate appeals from privilege rulings, could calibrate the mechanism by requiring permission from either the district court, the court of appeals, or both; 28 U.S.C. § 1292(b) and Civil Rule 23(f) provide possible models in this regard. This member noted the importance of the question, observing that if privileged material is mistakenly disclosed, that disclosure can have a huge monetary impact on the disclosing party. Another attorney member later added that a rulemaking discussion could include the possibility of procedures for expediting any immediate appeal from a privilege ruling. This member also noted that it would be worthwhile to consider and address the possibility that creating an avenue for immediate appeals from privilege rulings could open the way for an argument that a party that fails to take such an immediate appeal has waived its rights to contest the ruling later.

Another attorney member suggested that in some instances the availability (or not) of

immediate appellate review for privilege rulings might actually affect a client's privilege-related decision-making. In this member's experience with parallel civil litigation and administrative proceedings, he carefully advises the client concerning the decision whether to waive the privilege and the scope of that waiver. The unavailability of immediate appellate review, he said, could affect the advice he would given in such situations concerning the optimal scope of any waiver. This member stated that the question is worth the Committee's consideration, both because the Supreme Court noted the possibility of rulemaking and because of the question's importance to lawyers and clients.

An appellate judge stated that he reads the *Mohawk Industries* opinion as suggesting that the Court is not happy with the current state of the collateral order doctrine. There are thorny issues, under current law, with respect to collateral-order appeals from qualified-immunity rulings. The judge stated that immediate review may be justified in some instances but that such review can be quite burdensome for the courts of appeals, and he questioned whether it is worthwhile to afford immediate appellate review of all such rulings, including those concerning the immunity of police officers and lower-level government officials. He suggested that a provision requiring the court of appeals' permission for such immediate appeals – akin to Civil Rule 23(f) – could work well. Another member agreed with the observation that the law concerning qualified immunity is messy. An attorney member wondered how often immediate appeals from qualified immunity rulings succeed.

Mr. Letter suggested that the Committee should focus its attention, as an initial matter, on the question of privilege rulings. With respect to such rulings, it is important to account for the differing circumstances in which they may arise. In criminal cases, for instance, there is a need for speed and it would not necessarily be appropriate to permit an immediate appeal in that context.

An appellate judge member said that he believes that immediate appellate review can be important in order to protect attorney-client privilege. Another appellate judge observed that there is varying caselaw on whether the collateral order doctrine encompasses appeals from remands to administrative agencies.

Mr. Rabiej noted that at the time that Congress enacted 28 U.S.C. § 2072(c), which authorizes the rulemakers to define a decision as final for purposes of appeal, and 28 U.S.C. § 1292(e), which authorizes the rulemakers to provide for interlocutory appeals, it had been assumed that suggestions for such rulemaking would originate in the Civil Rules Committee or the Criminal Rules Committee. An attorney member observed that the Civil and Criminal Rules Committees are likely to be interested in the question of appellate review of privilege rulings. Judge Sutton noted that the Civil / Appellate Subcommittee might look into the matter.

The discussion of the varied caselaw concerning the collateral order doctrine led the Committee to consider the more general question of the Committee's process for identifying areas of study. Judge Sutton suggested that it might be useful for the Committee to adopt a process for identifying, and periodically reviewing, rule-based circuit splits. Mr. Rabiej noted that the Committees have not employed such a practice in the past. He suggested that circuit splits may concern controversial issues. Mr. McCabe stated that there has been a presumption

against altering the rules. An attorney member asked whether the United States Sentencing Commission employs a similar procedure. Another attorney member observed that the Supreme Court can resolve a circuit split more quickly than the rulemaking process can. One member noted that U.S. Law Week lists various circuit splits, and another member observed that one could monitor petitions for certiorari that refer to the Appellate Rules.

b. Item No. 09-AP-C (Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules)

Judge Sutton invited the Reporter to update the Committee on the Bankruptcy Rules Committee's project to revise Part VIII of the Bankruptcy Rules. Part VIII contains the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel. These rules were originally modeled on the Appellate Rules, but they have not always been updated to reflect changes to the Appellate Rules over time. The current review is designed to consider amendments that clarify the Part VIII rules and make certain other improvements, while also taking account of new developments such as the prevalence of electronic filing.

The Bankruptcy Rules Committee committed this review, in the first instance, to its Subcommittee on Privacy, Public Access, and Appeals. The Subcommittee held an open meeting in Boston on September 30, 2009, and is continuing its deliberations by conference call this spring. The resulting proposals will be published for comment, at the earliest, in summer 2011. It appears likely that the Committee will be asked to comment on the draft during fall 2010 and/or spring 2011. A number of the project's features – such as its treatment of electronic filing – are of interest to the Appellate Rules Committee. Moreover, close coordination between the two committees is important with respect to instances where the Bankruptcy and Appellate Rules interlock – in particular, with respect to the rules governing direct permissive appeals under 28 U.S.C. § 158(d)(2).

Judge Sutton noted that members should let him know if they are particularly interested in working on issues relating to electronic filing. This topic led to a more general discussion of electronic filing. An appellate judge member noted that he reads briefs on his Kindle. Mr. McCabe observed that electronic filing issues implicate all the rules committees, and that all the advisory committees should coordinate their efforts in this area.

c. Item No. 10-AP-A (premature notices of appeal)

Judge Sutton invited the Reporter to introduce this issue, which concerns the treatment of premature notices of appeal in civil cases. Shortly after the Committee's fall 2009 meeting, the Supreme Court denied certiorari in *CHF Industries, Inc. v. Park B. Smith, Inc.*, 130 S. Ct. 622 (2009), which presented a question concerning the treatment under Appellate Rule 4(a)(2) of a notice of appeal filed from an order disposing of fewer than all the claims in the case.

The caselaw concerning premature notices of appeal is complicated by at least two features. First, there is the"cumulative finality" doctrine, under which some courts have held that a notice of appeal filed after an order disposing of some claims or issues but before another order or orders disposing of the remaining claims or issues relates forward to effect an appeal after the disposition of all remaining claims or issues. This doctrine was first enunciated prior to the 1979 promulgation of Appellate Rule 4(a)(2), and there currently exists a division among the circuits concerning whether the cumulative finality doctrine – as a principle separate from Rule 4(a)(2) – survives the adoption of that Rule and the Supreme Court's decision in *FirsTier Mortgage Co. v. Investors Mortgage Insurance Co.*, 498 U.S. 269 (1991). Second, there is the Supreme Court's decision in *FirsTier*, which then-Judge Roberts characterized as "leav[ing] a vast middle ground of uncertainty" concerning the circumstances under which relation forward is proper under Rule 4(a)(2).

The pre-1979 cumulative finality doctrine is exemplified by the Fifth Circuit's decision in *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228 (5th Cir. 1973). In *Jetco*, one defendant's motion to dismiss was granted, after which the plaintiff filed a notice of appeal. Months later, the rest of the case was disposed of. The court of appeals refused to dismiss the appeal, holding that the two orders, viewed together, ended the litigation. The courts of appeals are divided on the question of whether Rule 4(a)(2), as interpreted in *FirsTier*, displaces the older cumulative finality doctrine; the Fifth Circuit says yes, but the Third Circuit disagrees.

The pathmarking case interpreting Rule 4(a)(2) is the Court's 1991 *FirsTier* decision. In *FirsTier*, the notice of appeal was filed after the court's announcement from the bench that it would grant summary judgment, but before the parties had submitted the proposed findings and conclusions requested by the court. The Court did not decide whether the bench ruling was final. Rather, it held that the notice of appeal related forward under Rule 4(a)(2). The rule's purpose, the Court stated, is to protect a litigant who files a notice of appeal from a decision that he reasonably believes to be a final judgment. But the rule is not designed to protect one who files a notice of appeal from a clearly interlocutory decision – for example, a discovery ruling or a Rule 11 sanction – because it would not be reasonable to believe that such a decision constituted a final judgment.

Questions of Rule 4(a)(2)'s application cover a spectrum of scenarios. At one end of the spectrum are instances where the notice of appeal is filed after the court has announced its decision but before proposed findings have been submitted. This was the pattern at issue in *FirsTier*, and the Court held that the notice related forward.

Moving along the spectrum, one finds instances where the notice of appeal was filed after

the announcement of a decision that was contingent on a future event, but before the occurrence of that event. An example is a decision dismissing a complaint but granting leave to re-plead within a certain time period. Various circuits have found that the notice of appeal related forward under such circumstances, and this conclusion is supported by cases that were cited with approval in the 1979 Committee Note to Rule 4(a)(2). However, in *Strasburg v. State Bar of Wisconsin*, 1 F.3d 468 (7th Cir. 1993), the Seventh Circuit found that the notice of appeal did not relate forward for two reasons: first, because dismissal of the complaint was conditional (the district court had granted the plaintiffs a time period within which to re-file the complaint and serve certain defendants), and second, because the district court had told the appellants that their notice of appeal was a "nullity."

At a further point along the spectrum, one finds instances where the notice of appeal was filed prior to the district court's provision of a certification of the relevant order for immediate appeal under Civil Rule 54(b). Some seven circuits have found relation forward in such circumstances, but the Eleventh Circuit has disagreed.

A still further point on the spectrum concerns instances where the court disposes of fewer than all claims or parties, after which a notice of appeal is filed, after which the court disposes of the remaining claims and parties. This was the pattern presented by the *CHF Industries* case. Some nine circuits have found relation forward under these circumstances. But one of those circuits – the Seventh Circuit – has disparate caselaw on the question. And the Eighth Circuit has adopted the opposite view.

The caselaw varies somewhat subtly on questions that concern instances where the notice of appeal is filed after an order that determines liability but leaves the amount of damages or interest undetermined. Another pattern arises when a party files a notice of appeal from a magistrate judge's findings and conclusions before those findings and conclusions have been reviewed by the district court; the Fifth and Ninth Circuits have found no relation forward in such cases, while the Second Circuit has disagreed. But the Second Circuit case appears to have been driven by its particular facts: the appellant was pro se and the magistrate judge's disposition was misleadingly entered as a "judgment." Moving still further along the spectrum, most cases are in accord that relation forward does not occur when a notice of appeal is filed after entry of a clearly interlocutory order that would not qualify for certification under Civil Rule 54(b); but there is one Tenth Circuit decision to the contrary.

In assessing the state of the doctrine, the Reporter suggested, it might be useful to consider several factors. Is the doctrine in tension with the final judgment rule? Does it offend the doctrine stated in *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982), that only one court – trial or appellate – should have control of a case at a given time? Does the doctrine avoid setting traps for unsophisticated litigants? Is the doctrine fair to the appellee?

An appellate judge member asked how well the doctrine accords with the text of Appellate Rule 4(a)(2). The *FirsTier* decision, he suggested, is easier to understand than the Rule. An attorney member asked whether the doctrine leads to confusion for the appellate clerks' offices. An appellate judge member noted that if a clerk is in doubt about a question of relation forward, the clerk would consult a judge. An attorney member observed that it is

important for the rules concerning notices of appeal to be clear.

Judge Sutton agreed that ambiguity is undesirable in a rule that concerns appeal timing. He noted that this item ties in with other projects that the Committee is currently considering, such as the manufactured-finality doctrine. He suggested that at the fall 2010 meeting the Committee should further consider possible amendments to Rule 4(a)(2). An attorney member asked what policy preferences such a proposed amendment should seek to further; this member noted that the Committee will need to make judgments concerning whether the various fact patterns warrant relation forward. One participant suggested, for example, that it might be reasonable to permit relation forward when a notice of appeal is filed from a Rule 11 sanctions order. Another attorney member wondered whether one way to amend Rule 4(a)(2) would be to insert "appealable if entered" – so that Rule 4(a)(2) would read: "A notice of appeal filed after the court announces a decision or order that would be appealable if entered – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." The Reporter noted that this wording would change current practice in a number of circuits.

d. Item No. 10-AP-B (statement of the case)

Judge Sutton introduced this item, which concerns the provisions in Appellate Rule 28 that direct the appellant to provide separate statements of the case and of the facts. As a point of comparison, Supreme Court Rule 24 does not require such separate statements; rather, Supreme Court Rule 24(g) requires "[a] concise statement of the case, setting out the facts material to the consideration of the questions presented, with appropriate references to the joint appendix, *e.g.*, App. 12, or to the record, *e.g.*, Record 12." Judge Sutton observed that the Supreme Court's approach makes more sense: It seems intuitively more sensible to permit the appellant to weave the two statements together and present the relevant events in chronological order.

Mr. Letter suggested that it would make sense to change Rule 28 unless judges really do want separate statements of the case and the facts. An attorney member agreed, noting that it is difficult to tell, under the current rule, where one should describe the decisions below. Attorneys end up adding parts not called for by the rules. This member suggested that the approach to this question should be nationally uniform. Another member agreed that he has always found the separate requirements awkward; he has assumed that judges want the statement of the case to set forth the basic procedural posture of the appeal – for instance, that the appeal is from the grant of summary judgment.

Another attorney member, however, offered a different view. He has not found the separate requirements problematic. In the statement of the case he denotes the basic orders that the appellate court is being asked to review – for example, in a patent case on appeal to the Federal Circuit, one might state that the appeal concerns a verdict of invalidity and a verdict of non-infringement. Clarity on these points can be useful, he suggested, and it is not necessarily provided by the information that advocates include in the jurisdictional statement. He argued that it is useful to know what ruling the appellant is challenging before one starts reading the facts; and requiring the statement of the case before the statement of the facts may help discipline counsel's presentation of the facts. He concluded by noting that the key question is

what judges would prefer.

An appellate judge member said that he looks to the statement of the case for basic information on what the case is about – such as a statement that the appeal is from the grant of summary judgment dismissing a wrongful termination claim. Another appellate judge member stated that he prefers the statement of the case to be one simple paragraph. Judge Sutton noted that the problem arises because Rule 28(a)(6) requires not merely statements of the nature of the case and the disposition below but also a description of "the course of proceedings" below. Mr. Letter agreed that this aspect of Rule 28(a)(6) prompts inexperienced lawyers to include too much detail.

An appellate judge member noted that he finds the statement of the issues presented for review (required by Rule 28(a)(5)) to be very helpful. Mr. Letter said that it would be useful for that statement of issues to include a few sentences setting forth what the case is about. He suggested that it might be worthwhile to re-write Rules 28(a)(5), (6) and (7). Judge Sutton observed that it makes sense to have a paragraph that sets out the ruling that is being challenged; but he noted that no participant had defended current Rule 28(a)(6)'s reference to the "course of proceedings."

Judge Sutton suggested that a two to three page introduction can be a useful way to frame the brief. Mr. Letter noted that some U.S. Attorney's offices take this approach, but that practices vary by district. An attorney member observed that inviting too much in the way of an introduction might tempt those commenting on a draft brief to advocate the inclusion of too many issues "up front." An advocate might worry, he suggested, that omitting any issue from such an introduction downplays that issue. Judge Sutton observed that there is no need for the Rules to require an introduction.

An appellate judge member stated that the briefs his court receives are generally well-written and helpful, and that the summary of argument helps the judges to focus their reading. It was observed that with respect to the contents of the brief, as with the question of double-sided printing of briefs, judges will have many different views. A member suggested deleting "course of proceedings" from Rule 28(a)(6).

Judge Sutton suggested that it would be useful to consult the American Bar Association's Council of Appellate Lawyers on these questions. An attorney member suggested that the Committee also consult the American Academy of Appellate Lawyers. Judge Sutton stated that he would write to these two groups to solicit their views.

e. Item No. 10-AP-C (reply brief word limits)

Judge Sutton invited the Reporter to introduce this item, which arises from the Supreme Court's decision, effective February 2010, to revise Supreme Court Rule 33 to lower the word limit for reply briefs on the merits from 7,500 words to 6,000 words. A question was raised whether that change provides a reason to alter Appellate Rule 32's length limits. Ever since their adoption, the Appellate Rules have followed a pattern of setting the permitted length of reply

briefs at half the permitted length of principal briefs. From 1980 to 2007, the Supreme Court's rules set the ratio of the page limits for reply and principal briefs at 40 %. In 2007, the Court published for comment a proposal to switch from page limits to word limits. Some who commented on that proposal complained that the reply brief limits were too tight. Ultimately, the Court decided in 2007 to increase the ratio to 50 %, so that reply briefs were limited to 7,500 words. The Supreme Court's February 2010 change merely restores the prior 40 % ratio. That change does not, the Reporter suggested, necessarily warrant a change in the Appellate Rules' length limits. The real question is whether lawyers and judges desire to change those limits.

An attorney member stated that there are reasons for the difference between Supreme Court Rule 33's 40 % ratio and Appellate Rule 32's 50 % ratio. In appeals to the court of appeals, this member argued, an appellee is more likely to present alternative grounds for affirmance which may require a lengthier reply brief. An appellate judge member stated that shorter reply briefs are better but that he is not complaining about the current rule. Another appellate judge member noted that a litigant can move for leave to exceed Rule 32's length limits. The attorney member responded that it is best to design the rule to accommodate the general run of cases, because motion practice is not a good way to mitigate the effects of an overly stringent length limit. Another attorney member pointed out that the timetable for reply briefs is short, which would make it difficult to move for leave to file an over-length reply brief. Mr. Letter, by contrast, noted that most reply briefs seem too long to him – though he conceded that sometimes the extra length is necessitated by the appellee's decision to raise alternative grounds for affirmance. He questioned why the appellant should be allowed 50 % more words than the appellee.

The latter observation led an attorney member to note the undesirable results that can occur when an insubstantial cross-appeal permits the cross-appellant extra brief length. Mr. Letter noted that the Committee had considered this critique of Appellate Rule 28.1. The Committee had considered imposing separate word limits for the briefs' discussions of the appeal and the cross-appeal, but had rejected the idea as impracticable – a view with which the appellate clerks had agreed. It had been noted, as well, that a judge who is bothered by the use of the extra length to brief issues unrelated to the cross-appeal can take the advocate to task over this at oral argument. An attorney member observed that such a prospect can help to deter the misuse of the extra length.

A motion was made to remove Item No. 10-AP-C from the Committee's agenda. The motion was seconded and passed by voice vote without opposition.

VIII. Schedule Date and Location of Fall 2010 Meeting

The Committee's fall 2010 meeting will be held on October 7 and 8, 2010, in Boston, Massachusetts.

IX. Adjournment

The Committee adjourned at 10:00 a.m. on April 9, 2010.

Respectfully submitted,

Catherine T. Struve
Reporter