ADVISORY COMMITTEE
ON
APPELLATE RULES

Philadelphia, PA
September 27, 2012

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Agenda for Fall 2012 Meeting of
Advisory Committee on Appellate Rules
September 27, 2012
Philadelphia, PA

I. Introductions

II. Approval of Minutes of April 2012 Meeting

III. Report on June 2012 Meeting of Standing Committee

IV. Other Preliminary Information Items

- A. Status of proposed amendments to Rules 13, 14, 24, 28, and 28.1 and Form 4
- B. Publication for comment of proposed amendment to Rule 6
- C. Letter to Chief Judges concerning Item No. 09-AP-B (FRAP 29 and federally recognized Indian tribes)

V. Discussion Items

- A. Item No. 10-AP-I (redactions in briefs)
- B. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)
- C. Item Nos. 08-AP-A, 11-AP-C, and 11-AP-D (possible changes in light of electronic filing and service)
- D. Item No. 08-AP-H (manufactured finality)

VI. Additional Old Business and New Business

- A. Item No. 12-AP-B (Form 4's directive regarding institutional-account statements)
- B. Item No. 12-AP-C (FRAP 28 – pinpoint citations)
- C. Item No. 12-AP-D (Civil Rule 62 and FRAP 8 – appeal bonds)
- D. Item No. 12-AP-E (FRAP 35 – length limits for petitions for rehearing en banc)
- E. Item No. 12-AP-F (FRAP 42 and class action appeals)

VII. Further Information Items *(N.B.: These items are purely informational and will be addressed at the meeting only if a member wishes to discuss them)*

A. Overview of recent petitions for certiorari relating to the Appellate Rules

B. Update on FRAP-related circuit splits

C. Second Edition of FJC Study on Case Management Procedures in the Federal Courts of Appeals

VIII. Adjournment

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Jeffrey S. Sutton Chair	C	Sixth Circuit	Member: Chair:	2005 2009	---- 2012
Amy Coney Barrett	ACAD	Indiana		2010	2013
Michael A. Chagares	C	Third Circuit		2011	2014
Robert Michael Dow, Jr.	D	Ilinois (Northern)		2010	2013
Allison Eid	JUST	Colorado		2010	2013
Peter T. Fay	C	Eleventh Circuit		2009	2012
Neal K. Katyal	ESQ	Washington, DC		2011	2014
Kevin C. Newsom	ESQ	Alabama		2011	2014
Richard G. Taranto	ESQ	Washington, DC		2009	2012
Donald B. Verrilli, Jr.*	DOJ	Washington, DC		----	Open
Catherine T. Struve Reporter	ACAD	Pennsylvania		2006	Open
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* Ex-officio

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TAB 1A

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Advisory Committee on Appellate Rules
Table of Agenda Items — August 2012

FRAP Item	Proposal	Source	Current Status
05-01	Amend FRAP 21 & 27(c) to conform to Justice for All Act of 2004.	Advisory Committee	Discussed and retained on agenda 04/05; awaiting proposal from Department of Justice Discussed and retained on agenda 04/06; Department of Justice will monitor practice under the Act
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
07-AP-H	Consider issues raised by Warren v. American Bankers Insurance of Florida, 2007 WL 3151884 (10th Cir. 2007), concerning the operation of the separate document rule.	Appellate Rules Committee	Discussed and retained on agenda 04/08 Discussed and retained on agenda 11/08
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
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
08-AP-G	Consider substantive and style changes to FRAP Form 4	Appellate Rules Committee	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 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12

FRAP Item	Proposal	Source	Current Status
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
08-AP-J	Consider FRAP implications of conflict screening	Committee on Codes of Conduct	Discussed and retained on agenda 11/08
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
08-AP-M	Consider FRAP implications of interlocutory appeals in tax cases	Reporter	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 Draft approved 10/10 for submission to Standing Committee Approved for publication by Standing Committee 01/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12
08-AP-N	Amend FRAP 5 to allow parties to submit an appendix of key documents from the record along with petitions and answers	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09
08-AP-P	Amend FRAP 32 to change from double line-spacing to 1.5 line-spacing for briefs	Peder K. Batalden, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09
08-AP-Q	Consider amending FRAP 10(b) to permit the use of digital audio recordings in place of written transcripts	Hon. Michael M. Baylson	Discussed and retained on agenda 04/09 Discussed and retained on agenda 10/10
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

FRAP Item	Proposal	Source	Current Status
09-AP-A	Consider amending FRAP 26.1 (corporate disclosure) and the corresponding requirement in FRAP 29(c)	ABA Council of Appellate Lawyers	Discussed and retained on agenda 04/09
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
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
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
10-AP-B	Consider FRAP 28's treatment of statements of the case and of the facts	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Draft approved 04/11 for submission to Standing Committee Approved for publication by Standing Committee 06/11 Published for comment 08/11 Draft approved 04/12 for submission to Standing Committee Approved by Standing Committee 06/12
10-AP-D	Consider factors to be taken into account when taxing costs under FRAP 39	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10

FRAP Item	Proposal	Source	Current Status
10-AP-I	Consider issues raised by redactions in appellate briefs	Paul Alan Levy, Esq.	Discussed and retained on agenda 04/11 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Awaiting initial discussion
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11
11-AP-E	Consider amendment to FRAP 4(b)	Roger I. Roots, Esq.	Discussed and retained on agenda 04/12
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Awaiting initial discussion
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)	Awaiting initial discussion
12-AP-C	Consider amending Rule 28(e) to require pinpoint citations to the appendix or record throughout briefs	Steven Finell, Esq., on behalf of the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division	Awaiting initial discussion
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Awaiting initial discussion
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Awaiting initial discussion
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Awaiting initial discussion

TAB 1B

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Minutes of Spring 2012 Meeting of
Advisory Committee on Appellate Rules
April 12, 2012
Washington, D.C.

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 12, 2012, at 9:00 a.m. at the Administrative Office of the United States Courts in Washington, D.C. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Neal K. Katyal, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Staff Director and Senior Counselor to the Attorney General, and Mr. H. Thomas Byron III, Civil Division, U.S. Department of Justice ("DOJ"), were present representing the Solicitor General. Also present were Ralph W. Johnson III, Counsel to Senator Chuck Grassley (the Ranking Member of the Senate Judiciary Committee); Judge Jeremy Fogel, Director of the Federal Judicial Center ("FJC"); Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Julie Wilson, Attorney Advisor in the AO; Mr. Leonard Green, liaison from the appellate clerks; Ms. Marie Leary from the FJC; Holly Sellers, Attorney Advisor in the AO; Julie Yap, Supreme Court Fellow assigned to the AO; Milena Sanchez de Boado, Supreme Court Fellow assigned to the FJC; Michael Duggan, Supreme Court Fellow assigned to the Supreme Court; Judge Fausto Martin de Sanctis, a Visiting Foreign Judicial Fellow at the FJC; and Dr. Roger I. Roots. Professor Daniel R. Coquillette, Reporter for the Standing Committee, participated by telephone.

Judge Sutton welcomed the meeting participants. He introduced one of the Committee's new members, Professor Katyal, who replaces former Committee member Maureen Mahoney. Professor Katyal served as Acting Solicitor General of the United States, and now is both a partner at Hogan Lovells and a professor at Georgetown University. Judge Sutton also informed the Committee that Mr. Letter – long an indispensable member of the Committee – has been promoted to Appellate Staff Director of the Civil Division of the DOJ, and is also serving as Senior Counselor to the Attorney General. Mr. Letter introduced Mr. Byron – his colleague from the Appellate Staff of the Civil Division of the DOJ – who has long experience working on matters relating to the Appellate Rules Committee's agenda, and who was a classmate of Justice Eid.

During the meeting, Judge Sutton thanked Mr. McCabe, Mr. Rose, Mr. Robinson, and the

AO staff for their preparations for and participation in the meeting.

II. Approval of Minutes of October 2011 Meeting

A motion was made and seconded to approve the minutes of the Committee's October 2011 meeting. The motion passed by voice vote without dissent.

III. Report on January 2012 Meeting of Standing Committee

Judge Sutton summarized relevant events at the Standing Committee's January 2012 meeting. The meeting included a very interesting panel presentation on class actions. Also at the meeting, Judge Kravitz appointed Judge Gorsuch to chair a Subcommittee that will consider the choice of language in the national Rules to describe activities relating to electronic filing and service; Professor Struve will serve as the subcommittee's reporter. It seems likely that the Subcommittee will consider, among other things, the language that the Appellate Rules Committee proposes for Appellate Rule 6's treatment of the record in bankruptcy appeals.

Judge Sutton noted that, on December 1, 2011, the amendments to Appellate Rules 4 and 40 and to 28 U.S.C. § 2107 took effect. He observed that Mr. Johnson's work on the amendment to Section 2107 was invaluable. The process of amending Section 2107 was challenging because Congress's agenda was so full.

IV. Action Items

A. For final approval

1. Item No. 08-AP-G (FRAP Form 4)

Judge Sutton invited the Reporter to introduce this item, which concerns proposed amendments to Form 4 (relating to applications to proceed in forma pauperis ("IFP")). The proposed amendments will remove the current Form's requirement that the applicant provide detailed information concerning the applicant's expenditures for legal and other services in connection with the case. In addition, the amendments make technical changes to incorporate amendments that were approved by the Judicial Conference in fall 1997 but were not transmitted to Congress. During the public comment period, the Committee received only one comment on Form 4. This comment – from the National Association of Criminal Defense Lawyers ("NACDL") – focused on an aspect of the technical changes approved in fall 1997. The current Form 4 directs "prisoner[s]" to attach an institutional account statement to their IFP applications. The proposed amendment, as published, would specify that this requirement applies only to prisoners who are "seeking to appeal a judgment in a civil action or proceeding"; this more specific language tracks the wording in 28 U.S.C. § 1915(a)(2) (a provision added to Section 1915 by the Prison Litigation Reform Act ("PLRA")). NACDL suggests that Form 4 should further specify that the requirement of the institutional-account statement applies to prisoners "seeking to appeal a judgment in a civil action or proceeding (not including a decision in a

habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)."

The Reporter observed that the premise of NACDL's suggestion appears to be accurate, though there are a few doctrinal complexities. Caselaw in all twelve of the relevant circuits states that the PLRA's provisions concerning IFP litigation do not apply to state-prisoner habeas petitions under 28 U.S.C. § 2254. Seven circuits have, likewise, held the PLRA's IFP provisions inapplicable to federal-prisoner proceedings under 28 U.S.C. § 2255. Similarly, holdings in five circuits and dicta in two other circuits state that the PLRA's IFP provisions do not apply to habeas proceedings under 28 U.S.C. § 2241. An additional issue concerns how to categorize mandamus petitions arising in connection with habeas or Section 2255 proceedings. Caselaw in some circuits provides that the applicability of the PLRA's IFP provisions to mandamus petitions depends on whether the underlying proceeding is one to which those provisions would apply, but some cases suggest other possible approaches.

The Reporter stated that the caselaw refusing to apply the PLRA's IFP provisions to habeas and Section 2255 proceedings advances persuasive arguments for that refusal. Applying those provisions to such proceedings would run counter to the tradition of access to court for habeas petitioners. Moreover, the PLRA was directed toward suits challenging prison conditions, and habeas suits are not generally the proper vehicle for such challenges. And the Antiterrorism and Effective Death Penalty Act ("AEDPA"), enacted within days of the PLRA, addresses habeas and Section 2255 litigation (and specifically addresses the issue of successive petitions).

The Reporter suggested that though the doctrinal premise of NACDL's suggestion appears sound, there are reasons to consider the proposal further before deciding whether to adopt it. The change proposed by NACDL might itself cause confusion for some applicants. For example, if an IFP applicant (erroneously or not) styled a challenge to prison conditions as a habeas petition, NACDL's proposed language would suggest to that applicant that he or she need not provide an institutional-account statement – yet that suggestion would likely be inaccurate. Admittedly, a litigant's confusion as to the nature of his or her suit is likely to have been dispelled by the trial judge prior to the time that the litigant attempts to take an appeal. But it bears noting that some district courts use a form – promulgated by the AO – that tracks Form 4 quite closely. In addition, the Supreme Court's rules direct the use of Form 4 in connection with applications to proceed IFP in the Supreme Court. Accordingly, the Reporter suggested that the Committee approve the amendments to Form 4 as published and add NACDL's suggestion to the Committee's agenda as a new item.

An appellate judge member noted that the relevant language of Form 4 as reflected in the published amendments had been fully considered in the rulemaking process in 1997. A motion was made to approve the amendments as published and to place NACDL's suggestion on the study agenda. The motion was seconded and passed by voice vote without dissent.

2. Item No. 08-AP-M (FRAP 13, 14, and 24 / tax appeals)

Judge Sutton invited the Reporter to present this item, which concerns certain amendments relating to appeals in tax cases. The proposed amendments to Rules 13 and 14 will update those Rules to take account of permissive interlocutory appeals from the United States Tax Court under 26 U.S.C. § 7482(a)(2). Those amendments were developed in consultation with the Tax Court and the DOJ's Tax Division. In the course of those discussions, the Tax Court proposed a further amendment to Rule 24 (concerning applications to proceed IFP); that amendment revises Rule 24(b) to reflect the Tax Court's status as a court rather than an agency.

No comments were received on these proposed amendments. The Reporter suggested that the Committee approve them as published. A motion was made and seconded to approve the amendments to Rules 13, 14, and 24 as published. The motion passed by voice vote without dissent.

3. Item No. 10-AP-B (FRAP 28 & 28.1 / statement of the case)

Judge Sutton introduced this item, which concerns proposed amendments to Rule 28's list of the required contents of briefs (as well as a conforming amendment to Rule 28.1 concerning cross-appeals). During the comment period, only two commenters argued that the amendments should be abandoned; the other commenters agreed with the general purpose of the amendments. Judge Sutton noted that it makes sense to amend the rules so that briefs can present matters chronologically. However, some commenters expressed concern that the removal of some of Rule 28(a)(6)'s current language might be taken to suggest that the matters referred to in the deleted language can no longer be included in the brief.

Judge Sutton observed that the agenda materials proffered three options for the Committee's consideration. One approach would augment the Committee Note to address the commenters' concerns. Another approach would revise the amendment to the Rule text. And a third approach would simply revert to a different option previously considered by the Committee – namely, reversing the order of current Rules 28(a)(6) and 28(a)(7). That third approach has some appeal, but on the other hand there is much to recommend an approach that would bring Rule 28 into closer parallel with the Supreme Court's analogous rule. Lawyers have not had trouble understanding the requirements of the Supreme Court's rule. Judge Sutton recalled that a former attorney member of the Committee had argued in favor of keeping the Rule text relatively spare, in order to preserve flexibility for lawyers in drafting briefs. He observed that some of the specificity that commentators had proposed for the Rule text might be counterproductive; for example, a requirement that the brief specify the key facts giving rise to the claim would not make sense in the context of an appeal that concerns a purely procedural issue. Judge Sutton noted that Judge Newman had expressed the view that no amendment was needed, and also that Judge Newman had pointed out that judges and clerks want a place in the brief, with a heading, where they can quickly look to identify the rulings that are being appealed.

An attorney member observed that there are two different sorts of lawyers to consider; experienced appellate lawyers prefer flexibility, and for them, a simpler rule is better. Less-experienced lawyers may need a provision that spells things out. This member recalled that

Professor Coquillette had stated that matters of substance should not be addressed in the Notes. Mr. Letter agreed that if the Committee wishes to specify more detail, that detail should go in the Rule text rather than the Note. Some lawyers handle appeals only occasionally; and rules pamphlets usually do not include Committee Notes. Mr. Letter reiterated that it is important for briefs to be helpful to judges, and he noted that he has heard judges complain that briefs are not meeting this standard. He asked what the judge members of the Committee thought. An appellate judge member stated that he did not share Judge Newman's concern, and that he favored approving the proposal as published. Another appellate judge member agreed that the proposal should be approved as published; in his view, statements of the case under the existing Rule 28 are not helpful.

Judge Sutton asked whether it is inappropriate for a Committee Note to explain the intent of the amendment in the context of the prior rule – for example by explaining that the removal of a specific textual reference to a certain component is not meant to outlaw inclusion of that component. An attorney member questioned what aspects of the proposed augmented Committee Note would be substantive. The one change that he could see as possibly substantive would be the removal of a reference to the "course of proceedings"; the other changes seemed more like reordering and clarifying the present rule. He asked whether omission of any reference to procedural history might cause briefs to omit something that is important for understanding; but he noted that it would be almost impossible to indicate the "rulings presented for review" without discussing the relevant procedural history.

Turning to specific drafting issues, an attorney member questioned whether it is really appropriate to use the term "concise" in the proposed provision that combines the former Rules 28(a)(6) and 28(a)(7). He suggested deleting "concise." Judge Sutton observed that there is little risk that briefs will end up being too short, but he agreed that the use of the term "concise," coupled with the removal of references to specific components in a brief, might lead to an overly minimalist approach. An appellate judge member disagreed, predicting that there is no risk of undue minimalism in briefs; another appellate judge member concurred in this view. A participant asked whether the inclusion of the word "concise" in amended Rule 28(a)(6) would suggest – by negative implication – that other portions of the brief need not be concise. Members responded that similar words are employed in a number of the subsections of Rule 28(a).

The attorney member also stated that he understood a commentator's concern about the published rule's use of the term "relevant" as centering on the fact that the published language refers to "*the* facts relevant to the issues submitted for review" – that is to say, the use of the word "the" might cause a reader to conclude that facts not mentioned in the statement may not be relied upon in the brief. He noted, on the other hand, that such an argument is not strong and that similar language appears in the Supreme Court's rule.

With respect to the question of procedural history, participants recalled that the Committee's motivation for proposing to delete Rule 28(a)(6)'s reference to "the course of proceedings" had been a concern that briefs discuss the procedural history in inordinate detail.

Judge Sutton asked whether this concern could be addressed by referring, in the Rule text, to "the relevant procedural history." An appellate judge member stressed that procedural history is important, but only as to the issues presented in the appeal. Judge Sutton agreed with a member's earlier observation that lawyers are likely to mention the procedural history when describing the rulings presented for review.

Judge Sutton asked for Committee members' views on the published proposal's use of the term "identifying" in the phrase "identifying the rulings presented for review." Would it be better to say "describing the rulings presented for review"? An appellate judge member stated that "identifying" was useful because it is likely to prompt a more concise description.

Judge Sutton asked Professor Coquillette for his views on the proposed augmented Committee Note. Professor Coquillette stated that he was concerned by the inclusion of detail in that version of the Committee Note, because some lawyers use rule books that do not include Notes. The Standing Committee prefers to avoid placing in the Committee Note anything that actually changes the operation of the Rule. A member asked whether the augmented Note changed the operation of the Rule or whether it merely directed readers not to draw a negative inference based on the changes made to the Rule. Professor Coquillette responded that the augmented Note language fell in a gray area and was not an obvious abuse of the Note. An attorney member stated that Professor Coquillette's guidance made him wary of placing in a Note something that could be placed in the Rule text. Judge Sutton asked whether the Note can be used, not to modify the Rule text, but rather to address a possible negative inference that might be drawn by a reader who was comparing the amended Rule text to the previous version of the Rule. Professor Coquillette responded that that could be a valid use of a Note.

An attorney member suggested that the question of whether the Rule should mention procedural history was potentially significant; by contrast, he suggested, the Rule need not mention the nature of the case because the components of the brief (e.g., the statement of the issues) will make clear the nature of the case. This member noted that the Committee cannot predict how lawyers will respond to the deletion, from Rule 28(a)(6), of the reference to "the course of proceedings." He suggested that it might be useful to include a phrase such as "any procedural history necessary to understand the posture of the appeal or the issues submitted for review." He asked whether participants could think of a more concise substitute for that language. Judge Sutton responded that his concern about that language would not solely relate to its unwieldiness; he would also be concerned that the language could lead brief-writers to be over-inclusive. However, he added that he did not feel strongly about this, and that the main goals of the amendments, in his view, were to provide that the statements of the case and the facts could proceed in chronological order and to give flexibility to lawyers in drafting their briefs. He asked participants whether they would suggest adding language to the proposed Rule text. Mr. Byron asked whether one might add to the Rule a reference to "relevant" procedural history and leave the detailed explanation to the Committee Note. An appellate judge member suggested that "necessary" is a more limiting word than "relevant." Judge Sutton observed that the proposed Rule would continue to use the word "concise" to modify "statement of the case."

Judge Sutton suggested that there appeared to be an emerging consensus that the best way to address the commentators' concerns was to augment the Committee Note, but that it would be useful to amend the Rule text to refer to the relevant (or necessary) procedural history.

The Committee returned to this item after lunch; during lunch, the Reporter produced a revised draft that reflected the Committee's discussions prior to lunch. The revised draft would amend Rule 28(a)(6) to refer to "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." A member suggested a conforming change to the Committee Note. A motion was made to approve the revised draft (as circulated at the meeting), subject to the change to the Committee Note. The motion was seconded and passed by voice vote without dissent.

B. For publication: Item No. 09-AP-C (FRAP 6 / direct bankruptcy appeals) and Item No. 08-AP-L (FRAP 6(b)(2)(A) / *Sorensen* issue)

Judge Sutton invited the Reporter to introduce these items, which concern proposed amendments to Appellate Rule 6 concerning bankruptcy appeals. The Reporter observed that the proposed amendments to Rule 6 have been developed jointly with the Bankruptcy Rules Committee, in the context of that Committee's discussions of proposed revisions to Part VIII of the Bankruptcy Rules. As part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 ("BAPCPA"), Congress created an avenue for direct permissive appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). Initially those appeals were governed by interim procedures contained within BAPCPA, but some of those procedures have subsequently been displaced by an amendment to the Bankruptcy Rules, and it now seems worthwhile to amend Appellate Rule 6 to address the topic.

The Reporter noted that the Committee had already discussed the proposed amendments to Rule 6 in some detail at its fall 2011 meeting. She observed that several aspects of the proposed amendments seemed uncontroversial. The proposals would amend Rule 6's title, slightly restyle the Rule, update cross-references within the Rule, account for new Appellate Rule 12.1 (concerning indicative rulings), remove an ambiguity in Rule 6(b)(2), and add a new Rule 6(c) concerning permissive direct appeals. The Reporter observed that the draft Part VIII rules were included in the Committee's agenda materials and predicted that the Bankruptcy Rules Committee would welcome any suggestions that Appellate Rules Committee members might have on the Part VIII draft.

The Reporter suggested that one of the most significant decisions still facing the Committee was whether to attempt to tackle, in the proposed amendments to Rule 6, the question of the terminology that should describe the treatment of a record that is in electronic form. The Rule 6 draft presented to the Committee in fall 2011 had attempted to account for the shift to electronic records by using the term "transmit" (instead of "forward" or "send") to refer to the treatment of both electronic and paper records and using the term "send" to refer to the treatment of paper records. Members had quickly noted flaws in this approach, and the discussion during

and after the fall 2011 meeting had focused on the possibility of using either the term "furnish" or the term "provide."

The Committee's spring agenda materials presented two versions of the proposed amendments to Rule 6. The first version showed the terms "furnish" and "provide" as bracketed alternatives in each place where the Rule discussed the provision of the record to the court of appeals. If this alternative were to be adopted, the Committee would face further choices concerning whether to specify in the text of Rule 6(b) what acts constitute "furnishing" or "providing"; or whether to add in Rules 6(b) and 6(c) provisions inviting the courts of appeals to adopt local rules concerning the mode of provision of the record; or whether to place the detailed discussion of that issue in the Committee Note. The second alternative version made no attempt to update the terminology used to describe the treatment of the record, except where updating was absolutely necessary; this approach would leave for another day the question of the terminology that the Appellate Rules should employ to account for records (and other documents) in electronic form.

Judge Sutton recalled that, when the Committee discussed the question of word choice, it had focused on the fact that a record could be provided to the court of appeals in paper form, or as one or more electronic records, or in the form of links that enable a user to access the record in electronic form; the difficulty arose concerning the choice of a term that would encompass the third of these possibilities. Judge Sutton noted that the Appellate Rules Committee has commenced a project concerning possible amendments to the Appellate Rules, generally, in the light of the shift to electronic filing; but that project may not proceed as quickly as the proposed amendments to Appellate Rule 6. He observed that even when the shift to electronic filing is complete, the courts will still need to handle paper filings by some litigants. Professor Coquillette predicted that the Standing Committee would need to undertake a project, involving all the advisory committees, concerning the implications of the shift to electronic filing. Because technology is developing so rapidly, that will require some serious study and coordination.

Returning to the question of terminology, Judge Sutton stated that he did not think either "furnish" or "provide" fully addressed the question that had been troubling the Committee. An attorney member stated that he was indifferent as between "furnish" and "provide"; in his view, the key was to include a sentence defining the meaning of the term that was chosen. An appellate judge suggested that "transmit" was a good choice.

After further discussion, Mr. Green suggested a different word choice: Rather than referring to the lower-court clerk's "furnishing" or "providing" the record to the court of appeals, the rule could direct the lower-court clerk to "make the record available" to the court of appeals, and could direct the circuit clerk to "obtain" the record. An attorney member agreed that Mr. Green's proposed language would address his concern about instances in which access to the record is provided by means of electronic links. Professor Coquillette observed that it would be better not to include Rule text that invites local rulemaking. Judge Sutton suggested that it could make sense to modify the first alternative shown in the agenda materials as suggested by Mr. Green. An attorney member agreed that that was a promising approach.

Next, the Reporter sought the Committee's views on a point previously discussed by the Committee at its fall 2011 meeting. Proposed Rule 6(b)(2), as amended, would provide that "[i]f a party intends to challenge the order disposing of [a tolling] motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then the party, in compliance with Rules 3(c) and 6(b)(1)(B), must file a notice of appeal or amended notice of appeal." The next sentence, as shown in the Committee's fall 2011 agenda materials, read: "The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion." At the fall 2011 meeting, the Committee discussed Professor Kimble's advice that "The notice or amended notice" in this second sentence should be replaced by "It." Some members believed that the longer formulation was clearer. After the fall meeting, Professor Kimble reviewed the Rule 6 draft and continued to maintain strongly that this was purely a question of style and that "It" was preferable. Thus, the Reporter asked the Committee to consider the issue once again.

A participant asked whether the issue could be addressed by using the formulation "That notice ..."; but the Reporter responded that referring only to a "notice" might cause confusion by omitting reference to an amended notice. Mr. Letter observed that the concern over confusion arises because a reader might wonder whether "It" referred to the notice (or amended notice) of appeal or to the order disposing of the tolling motion. The Reporter agreed that this accurately described the concern. She noted that a litigant would have to be relatively confused in order to take "It" to refer to the order rather than the notice of appeal, but she observed that the Committee often worries (when drafting) about litigants who are easily confused. And she noted that such concerns are heightened with respect to provisions that concern potentially jurisdictional deadlines. A participant suggested that the problem under discussion arose because the proposed amendment adds a period in the midst of what previously had been a single sentence, and he wondered whether a solution could be found by removing the period and merging the two sentences into one. Another participant responded that the resulting single sentence would be quite complex. A member asked whether the problem could be avoided by revising the second sentence to use an active rather than passive formulation ("The party must file ..."); that would make it less likely that a reader would believe "it" referred to a court order. A participant stated that the difference in length between the longer and shorter formulations was small, and that if there is a nontrivial chance that the shorter formulation might confuse some readers, he favored the longer formulation. A district judge member observed that bankruptcy proceedings often involve pro se debtors, and that for those litigants it is best for the rules to be very specific. An attorney member stated that he favored the longer formulation; an appellate judge member agreed. Professor Coquillette observed that the question was whether the choice was substantive or purely one of style. The Reporter suggested that the district judge member's concern about access to courts for pro se debtors sounded like a substantive concern. A motion was made to retain the longer formulation on the ground that the difference was one of substance rather than style; the motion was seconded and passed by voice vote without opposition.

The Committee next turned to the text of proposed Rules 6(b)(2)(D) and 6(c)(2)(D). As shown in the agenda materials, those provisions direct the circuit clerk to note on the docket the fact that the lower-court clerk has furnished the record, and the provisions state that "The date

noted on the docket serves as the filing date of the record for purposes of [these Rules] [Rules 28.1(f), 30(b)(1), 31(a)(1), and 44]." Judge Sutton suggested that general wording was preferable in this instance. The Reporter asked whether that would counsel in favor of ending the relevant sentence after "the record" – or whether truncating the sentence in that way might lead to unanticipated effects if the revised Rule is taken to define the record's filing date for purposes of, for example, a local rule. On the other hand, a participant suggested that if the provision defines the filing date "for purposes of these Rules," this wording might lead readers to wonder whether that definition in Rule 6 modifies the treatment of the record's filing date under Rule 12(c) (which will continue to apply to non-bankruptcy appeals). The Reporter noted that if the Committee chose to truncate the sentence after "the record," it could seek input (during the comment period) on whether that would create problems in any area of practice; on the other hand, she observed, this would be a relatively detailed point on which to seek specific comment. A district judge member stated that he expected that the definition in Rule 6 could technically affect provisions in local rules, but he also stated that he did not think this would cause a problem because, in practice, the same definition would likely be used anyway. Judge Sutton suggested that it would make sense to truncate the sentence after "the record" for purposes of publication, and that it would be useful to solicit comment on that choice. For example, he suggested, it would be very useful to learn what bankruptcy clerks think about the question.

After lunch, the Committee considered a revised draft of the Rule 6 proposal – prepared and circulated during lunch – that incorporated the Committee's discussions during the morning session. An attorney member suggested some conforming changes to the Committee Note. Mr. Byron asked whether the proposal would be circulated to the Bankruptcy Rules Committee for its views; the Reporter stated that it would be circulated to the Bankruptcy Rules Committee and also to the Standing Committee's subcommittee that will consider questions of terminology relating to electronic filing. Mr. Robinson suggested a wording change to the revised Rule 6 draft; members concurred in the change.

A motion was made to approve the revised language circulated to the Committee members, with Mr. Robinson's change to the Rule text and with the revisions a member had suggested to the Committee Note. The motion was seconded and passed by voice vote without dissent.

V. Discussion Items

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

Judge Sutton invited Justice Eid to introduce this issue, which concerns a proposal that Appellate Rule 29 be revised to treat federally recognized Native American tribes the same as states for purpose of amicus filings.

Justice Eid reminded the Committee that this item came to the Committee at the suggestion of Daniel Rey-Bear, who asked the Committee to consider adding Indian tribes to the list of entities that can file amicus briefs as of right. The Committee received letters in support

of Mr. Rey-Bear's proposal from a number of groups. The Committee further benefited from a report by Ms. Leary, who examined the frequency of tribal amicus filings and the rate at which leave to file was granted. Ms. Leary found that most such filings occur in the Eighth, Ninth, and Tenth Circuits and that leave to file is typically granted. At the Committee's request, Judge Sutton wrote to the Chief Judges of those three circuits to ask for those circuits' views on the adoption of a local or national rule authorizing filings as of right by tribal amici. The three circuits' responses varied, with the Ninth Circuit expressing support for a national rule, the Tenth Circuit expressing a contrary view, and the Eighth Circuit evincing mixed views. More recently, Judge Sutton wrote to the Chief Judges of the remaining circuits to solicit their views on a possible rule change that would add both tribes and municipalities to the list of entities that can file amicus briefs as of right. Among the circuits that have thus far responded to that letter, the views have been mixed. The Eleventh Circuit appears ambivalent; the First Circuit is more supportive of the idea of authorizing amicus filings by tribes, but also expresses concern about the possible effects of the change on recusal issues (especially if municipalities are included along with tribes); the Seventh Circuit has not expressed a view and does not receive many amicus filings from tribes.

Justice Eid observed that in the Committee's previous discussions, participants have expressed varying views. Justice Eid favors the proposal and views it as a question of dignity for tribes. She noted that she had practiced in the field of federal Indian law, that she lives in a state where two large tribes are located, and that her husband practices federal Indian law. She observed that some participants in the discussion had asked whether the inclusion of tribes on the list of those who can file amicus briefs as of right would place the Committee on a slippery slope by leading to requests to include other types of entities. Participants had suggested, for example, that if the Rule is amended to treat tribes the same as states then the expanded category should include municipalities as well as tribes. Participants had also asked what, if anything, the addition of tribes to the list would suggest about tribal sovereignty generally. Justice Eid suggested that, at this point, the Committee may wish to consider whether it has done all the research that can be done on this issue. Perhaps the Committee could ask Judge Sutton to write to the circuits, summarizing the Committee's research and discussions and leaving the question, for the moment, to each circuit for treatment on a local basis.

Judge Sutton observed that one reason the Committee's discussions expanded to encompass municipalities as well as states was that the Supreme Court's rule authorizes amicus filings (without court permission or party consent) by municipalities but not tribes. He noted that, if municipalities as well as tribes were added to the list of entities that can make amicus filings as of right, the change would not correlate with sovereignty issues because municipalities are not sovereign. Thus far, he observed, there did not appear to be support for adding foreign governments to the list. He noted that, when the Standing Committee has previously discussed this item, participants expressed varying views. Among the responses that the Committee has received thus far from the circuits, a negative response has been received from the Tenth Circuit; and the First Circuit has expressed concern about recusal issues (though that concern arose more with respect to the possible inclusion of municipalities). An attorney member asked whether the Committee knows what, exactly, the recusal practices are in each circuit. Mr. Letter responded

that the practices vary from circuit to circuit, but that he can think of instances when a request to file an amicus brief has been denied because of a recusal issue, and other instances in which a judge has recused from a case because of an amicus filing.

Judge Sutton asked whether – as an interim approach – Committee members favored writing to the circuits to report on the Committee's discussions to date. The letter would explain that the Committee thinks the issue warrants serious consideration but that the Committee is not sure that now is the time to adopt a national rule change on this issue, and that the Committee plans to revisit the issue in five years. A member stated that this approach sounds right to him, and that he would be very concerned about proceeding with a national rule in the light of the possible recusal issues mentioned by the First Circuit. Mr. Letter noted that the DOJ urges that the Committee consult tribes for their views on this issue. The DOJ, he stated, favors the proposed national rule change for tribes but not for municipalities; the DOJ considers this to be an issue relating to sovereignty and believes that the change would not burden the courts because tribes' requests to file amicus briefs are usually granted. On the other hand, Mr. Letter observed, the Committee's discussions have raised some very real practical considerations. The DOJ would not oppose a proposal that would allow circuits to study the issue and adopt a local rule on the subject if they would like. An appellate judge member expressed support for the approach suggested by Judge Sutton; another appellate judge member agreed. Professor Coquillette observed that, in the past, other committees have dealt with some issues in a similar way.

Mr. Letter suggested that Judge Sutton's letter should note that there is substantial support, within the Committee, for the proposal. Judge Sutton suggested that the letter could say that all members of the Committee believe that the proposal implicates serious dignity issues and think that the proposal warrants serious consideration. Mr. Letter asked whether the letter should say that the Committee believes that the idea of a local rule on the subject is worthy of consideration. Judge Sutton responded that it would be problematic to set a precedent of urging circuits to adopt local rules. A district judge member predicted that a letter from Judge Sutton, representing the sense of the Committee, would usefully generate discussion in circuits where the judges have not previously considered the issue.

A motion was made in support of the proposal that Judge Sutton write to the Chief Judges of each circuit. The motion was seconded and passed by voice vote without opposition. Judge Sutton promised to circulate a draft letter to the Committee members for their feedback during the spring.

B. Item No. 10-AP-I (redactions in briefs)

Judge Sutton invited Judge Dow to report on this item, which concerns a proposal by Paul Levy of Public Citizen Litigation Group that the Committee consider questions relating to the sealing or redaction of appellate briefs. Judge Dow summarized the variety of approaches among the circuits. In some circuits there is a presumption that documents that were sealed below remain sealed on appeal. In the Seventh Circuit (and to some extent, apparently, the Third Circuit) there is a presumption that documents will be unsealed on appeal, so that a party must

file a motion if it wants to maintain sealing on appeal. The Federal Circuit and the D.C. Circuit direct the attorneys to review the sealed portions of the record and identify the portions that need not remain sealed on appeal.

Judge Dow observed that it may make sense to distinguish, for purposes of the treatment of sealing, between materials exchanged in discovery and materials that become part of the court record. It would be useful, he noted, to consult the circuit clerks in selected circuits – perhaps the Seventh Circuit, the D.C. Circuit, the Federal Circuit, and a circuit in which items sealed below presumptively remain sealed on appeal. He observed that evolutions in technology will affect these issues; relevant questions include, for example, how the Next Generation CM/ECF software will address sealing. He also noted that there may be differences in the approaches that one would adopt in civil and criminal cases. An overarching question, Judge Dow suggested, is whether a national rule would be appropriate, given that the circuits currently take at least three different approaches to sealing on appeal.

Judge Dow noted that Mr. Letter had volunteered to work with him and the Reporter on this project. Judge Sutton thanked Judge Dow for his work.

C. Item No. 11-AP-B (FRAP 28 / introductions in briefs)

Judge Sutton invited the Reporter to introduce this item, which concerns whether Rule 28 should be amended to mention the possibility of including introductions in briefs. This question dovetails with the Committee's earlier discussions – in connection with the pending proposal concerning the statement of the case – about the different constituencies that use the Rules. Experienced appellate litigators are well aware that they can include introductions in their briefs, and they do so to good effect. The question might be whether to amend the Rule to provide guidance for young lawyers or other lawyers with less appellate experience. A former Committee member had pointed out to the Committee that the proposed amendment concerning the statement of the case would make Rule 28(a)(6) flexible enough to permit a lawyer to include an introduction as part of the statement of the case. On the other hand, the flexibility provided by amended Rule 28(a)(6) would not serve the function of giving notice to less-experienced lawyers. Some participants in the discussion have questioned whether it would be practicable to provide guidance, in the Rule text, concerning the nature and function of the introduction. One possibility that had been floated – providing guidance in the Committee Note – would appear to run afoul of the principle, discussed earlier in the day, that Committee Notes should not be used for the purpose of providing advice to lawyers.

Judge Sutton observed that it would be hard to devise a rule that specifies what an introduction should do, and how to distinguish the introduction from the summary of argument. Professor Coquillette noted that traditionally, neither Rules nor Notes include advice for practitioners. An attorney member suggested that one would not necessarily wish to place the introduction within the statement of the case. On the other hand, if and when the proposed amendments to Rule 28(a)(6) take effect, that Rule will give lawyers flexibility in drafting the statement of the case – which diminishes the reasons to amend the Rules specifically to address

the topic of introductions. A member noted that a bad introduction is worse than no introduction.

Mr. Byron suggested that the Committee Note to the pending amendments to Rule 28(a) could be revised to include a discussion of introductions. The Note could state that an introduction is not prohibited under the Rules and can be included either as the first item in the brief or in the statement of the case. (Mr. Byron noted that in his own practice he has alternated between those two placements for the introduction, depending on the circumstances of the case.) Judge Sutton noted that the benefit of mentioning those considerations in the Note would be to inform lawyers about the topic; the risk would be that this information would encourage the inclusion of poorly written introductions. A participant observed that – because the Standing Committee has the ability to make changes to Committee Notes when proposed amendments are presented to it for approval – one could be confident that the language of the Committee Note would be reviewed by the Standing Committee.

An appellate judge member said that introductions are helpful but not indispensable. Another appellate judge member noted that if the Rules invited the inclusion of introductions, they might elicit introductions that are similar to arguments to a jury. A member suggested that it might be preferable to wait and see how practice develops under the pending amendments to Rule 28(a). An attorney member stated that he would oppose adding language to the Rule 28(a) Committee Note to mention introductions.

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

VI. Additional Old Business and New Business

A. Item No. 11-AP-E (FRAP 4(b) / criminal appeal deadlines)

Judge Sutton invited the Reporter to introduce this item, which concerned a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases. The Reporter suggested that it would be difficult to argue that the difference between the defendant's and the government's appeal time is unconstitutional. A more significant question is whether the current 14-day appeal time period poses a hardship for defendants. Another question arises from the fact that the appeal times in Rule 4 depend on the categorization of the appeal as civil or criminal; at the margins, there is the possibility that the differential in appeal times between civil and criminal cases could give rise to difficulties if there is uncertainty over how to categorize a particular appeal. A third question is whether there should be symmetry between the appeal times that apply to the opposing parties in a given type of case.

As to the question of hardship, the Reporter suggested a few considerations. Fourteen days is a short period, and it is shorter than the period for civil appeals. The notice of appeal is a simple document. In some cases there may be challenges involved in identifying colorable

issues for appeal, or difficult strategic questions where a defendant has received a lower sentence than he or she might receive if re-sentenced; but setting such instances aside, ordinarily the decision whether to appeal should not be a difficult one. Additionally, some safeguards exist. In cases where there is a difficulty the defendant can seek an extension of the time to appeal under Rule 4(b)(4). At sentencing, the district court must advise the defendant of his or her right to take an appeal, and if the defendant requests, the clerk will file the notice of appeal on the defendant's behalf. When an incarcerated defendant files the notice of appeal himself or herself, Rule 4(c)'s inmate-filing provision would apply. These features, the Reporter suggested, might alleviate possible hardships. But she noted her lack of experience in criminal law; those with such experience are better situated to assess this question.

With respect to the question of categorization, it turns out that, at the margins, there are some cases that may be difficult to categorize as civil or criminal. If a defendant errs by viewing the case as criminal when it is actually civil, then the harm would be that the defendant files a notice of appeal earlier than is actually necessary. A defendant who is aware of a difficult categorization question and is unsure whether the case counts as civil or criminal can protect himself or herself by filing within the deadline set by Rule 4(b). But a litigant who wrongly assumes that a case is civil when it is actually criminal could lose his or her appeal rights by filing too late. The Reporter observed that this concern had surfaced a decade ago, when the Committee last discussed a proposal to lengthen Rule 4(b)'s appeal deadline for criminal defendants.

As to the question of symmetry between litigants, the Reporter observed that there is an attraction to the idea that if one litigant receives additional time to appeal, their opponent should also have the benefit of the longer period. That principle is applied in Appellate Rule 4(a), which provides additional time to all litigants when one of the litigants is a United States government entity. Perhaps counterbalancing that, there are a number of asymmetries in criminal practice – such as asymmetries in discovery and asymmetries in rights to take an appeal.

The Reporter observed that if the Committee were to be interested in proceeding with this item, it would be important to consult the Criminal Rules Committee. Moreover, if one were to amend Rule 4(b) on grounds of symmetry, that might also raise a question about Civil Rule 12(a) (which provides federal government defendants with additional time to respond to the complaint).

A member stated that he was unpersuaded by the constitutional arguments and the arguments concerning symmetry. However, he suggested that it would be useful for the Committee to obtain data that would bear on the hardship argument. How often do criminal defendants fail to take an appeal, and why? For example, are appeals foregone for strategic reasons or are they forfeited due to lawyer incompetence? This member noted that there might be an alternative approach to protecting appeal rights; one could adopt a system in which the default is that there will be an appeal, and leave it up to the litigant to opt out if he or she does not wish to take an appeal.

Mr. Byron reported that he had discussed this item with Mr. Letter prior to the meeting; Mr. Letter had discussed the issue of hardship with a friend who is a federal public defender in the District of Columbia, who reported that in the experience of that office this typically is not a problem. Most criminal defendants who wish to file appeals tend to do so expeditiously. A district judge member stated that he would have no objection to a rule that gave criminal defendants 30 days to appeal. He observed, though, that all criminal defendants are represented by counsel unless they decide, after a waiver, that they don't want a lawyer. And by the time of sentencing, the defendant and the lawyer have already had time (often, a lot of time) to consider possible issues of trial error. So the only issues that would arise shortly before the appeal deadline would relate to possible sentencing error. And, as noted, the judge informs the defendant at sentencing concerning the right to take an appeal. In sum, this member stated, he did not see the 14-day appeal time period posing a problem in his district; but, he suggested, a 30-day appeal time period could be useful if the defendant needs to think through a tricky sentencing issue. On the other hand, he noted, the latter sort of difficulty can be addressed under the current rules if the judge grants a request to extend the appeal time.

An attorney member asked why it is important to require the defendant to decide within 14 days whether to appeal; what events, this member wondered, turn on the date on which the defendant's appeal time runs out? A district judge member queried whether the timing had any implications for speedy trial requirements. The attorney member asked whether the expiration of the time to appeal would have implications for the timing of a remand to custody, or whether there is any similar systemic interest in getting the defendant's punishment started sooner rather than later. The district judge member responded that he did not think so; he observed that the question of whether the defendant can stay out on bond after sentencing is governed by statute. He noted that in a given circuit, the timing of the notice of appeal might affect the appellate briefing schedule.

Mr. Byron observed that the DOJ has an interest in the speedy resolution of criminal cases. Even the government's appeal time period in criminal cases, he noted, is shorter than the government's appeal time period in civil cases. An attorney member asked why one would not adopt a system in which the 14-day appeal time period applied to both sides in criminal cases; the government could file protective notices of appeal and then withdraw the notices if it decided not to appeal. Another member responded that there would be serious costs to a system that required the government to file a notice of appeal before it had had time to fully consider whether it wished to take an appeal. This member observed that to the public, the government's filing of a notice of appeal is not treated as merely an administrative act; it would be counter-productive if the government either had to decide whether to appeal within a very short time period or else withdraw a protective notice of appeal that it had previously filed. The attorney member who raised the question about applying the 14-day period to both sides suggested that if the 14-day deadline would impose those sorts of costs on the government, it was worth considering whether that deadline imposes similar costs on the defendant. The other member responded that he viewed those costs as asymmetric; when a criminal defendant files a notice of appeal it does not trigger the same sorts of public, institutional concerns that arise when the government files a notice of appeal.

An appellate judge stated that, in his experience, defendants in the Eleventh Circuit are not denied the right to an appeal due to a late notice. If the defendant asked his lawyer to file the notice and the lawyer did not do so, then the court of appeals sends the case back to the district court for resentencing and the entry of a new judgment. He suggested that the Committee should be cautious about altering a time period that is so long-established.

Returning to the fact that the Committee had considered a similar proposal a decade earlier, Judge Sutton asked who had submitted the proposal on that earlier occasion. An attorney member asked what reasons had been given for the Committee's rejection of that prior proposal. Mr. Byron agreed to provide the Committee with the materials that Mr. Letter had submitted to the Committee in connection with that earlier discussion. The Reporter noted that she would locate the initial proposal that triggered the earlier discussion, and that she would update the Criminal Rules Committee Chair and Reporters concerning the Committee's discussion. By consensus, the Committee decided to retain this item on its study agenda. Judge Sutton thanked Dr. Roots for raising this issue with the Committee.

B. Other possible items for consideration by the Committee

Judge Sutton invited Committee members to suggest items for the Committee's consideration.

An attorney member suggested that it might be useful to clarify practice under Appellate Rule 8 and Civil Rule 62 concerning procedures for appeal bonds. The bonding process unfolds quickly and can be confusing. For example, Civil Rule 62(b) provides that "[o]n appropriate terms" the court may stay execution of a judgment pending disposition of a postjudgment motion, while Civil Rule 62(d) discusses the obtaining of a supersedeas bond to secure a stay of the judgment pending appeal. So there are two different episodes as to which security is an issue, and the would-be appellant will likely need to provide security both with respect to the time period when the postjudgment motions are pending and then also with respect to the time period of the appeal. Moreover, a would-be appellant, he observed, might not always get a bond; it might use a letter of credit, or let the other side hold a check, or pay the other side a sum of money. So the way that bonding occurs in practice will depend on what method is both cost-effective for the would-be appellant and satisfactory to the prospective appellee. Perhaps there is no reason to amend the Rules to reflect the variety of actual practices, but even an experienced practitioner can find the process opaque. An amendment to the Rules might bring greater order to this area of practice. The Reporter stated that she would consult Professor Cooper in order to determine when the Civil Rules Committee had last considered the question. The attorney member noted that in some state court systems the amount of the bond is specified by law (for example, a provision might set the bond at a certain percentage of the judgment); by contrast, he observed, in federal litigation no provision specifies the amount of the bond and thus the issue sometimes ends up getting litigated.

A member asked why Rule 35(b)(2) sets the length limit for a petition for rehearing en banc in pages rather than words. The Reporter undertook to investigate this question.

VII. Other Information Items

A. *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012)

Judge Sutton invited Mr. Newsom to introduce this item, which concerns the Supreme Court's recent decision in *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012). In this 8-1 decision, the Court held that 28 U.S.C. § 2253(c)(3)'s requirement that a certificate of appealability ("COA") indicate which issue or issues meet the statutory test for issuance of a COA is not a jurisdictional requirement. Thus, the COA's failure to include that specification did not deprive the court of appeals of jurisdiction.

Mr. Newsom reviewed for the Committee the structure of Section 2253(c). Section 2253(c)(1) provides that "[u]nless a circuit justice or judge issues a [COA], an appeal may not be taken to the court of appeals" in a habeas or Section 2255 proceeding. Everyone recognizes that this provision sets a jurisdictional requirement because it meets the clear statement test set out in *Arbaugh v. Y&H Corp.*, 546 U.S. 500 (2006). Section 2253(c)(2) states that the COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." That provision was not squarely at issue in *Gonzalez*. And then Section 2253(c)(3) states that the COA "shall indicate which specific issue or issues satisfy the showing required by" Section 2253(c)(2).

Mr. Gonzalez's federal habeas petition raised a Sixth Amendment issue. The district court denied the petition as untimely. Gonzalez sought a COA on both the timeliness issue and the underlying Sixth Amendment issue. A court of appeals judge granted the COA, mentioning timeliness but not the Sixth Amendment issue. The question was whether the COA's failure to mention the Sixth Amendment issue (as required by Section 2253(c)(3)) deprived the court of appeals of jurisdiction. The state first raised this issue in response to Gonzalez's petition for certiorari.

The Supreme Court – contrasting Section 2253(c)(3)'s wording with that of Section 2253(c)(1) – held that Section 2253(c)(3)'s requirement is mandatory but not jurisdictional. Justice Scalia, writing in dissent, argued that the relationship between Sections 2253(c)(3) and 2253(c)(1) was similar to the relationship between Appellate Rules 3 and 4. Rule 4 sets the deadline for filing the notice of appeal, and Rule 3 specifies the contents of the notice of appeal. In *Torres v. Oakland Scavenger Co.*, 487 U.S. 312 (1988), the Court held that Rule 3 – the content provision – was jurisdictional because of its relationship to Rule 4's jurisdictional deadline. In response, the Court stated that *Torres* presented a different question; in part, the Court observed that it had relied on the Committee Note to Rule 3.

One question raised by this case is whether the approach that the *Gonzalez* Court took to Section 2253(c) signals a retrenchment from the *Torres* rule. Another question is whether the *Gonzalez* Court's approach will affect the courts' views on whether Appellate Rule 4(a)(4)'s requirement of a "timely" tolling motion is jurisdictional.

B. D.C. Circuit Rule 35(a)

Judge Sutton invited the Reporter to introduce this topic, which was drawn to the Committee's attention by Mr. Letter. Mr. Letter pointed out that D.C. Circuit Rule 35(a) alters the time to seek rehearing. For criminal appeals, it lengthens the time from 14 days to 45 days, and for civil appeals in cases involving no federal parties, it lengthens the time from 14 to 30 days. Two other circuits also have rules that lengthen the time to seek rehearing to some extent. For appeals generally (other than civil appeals in cases involving federal parties), Eleventh Circuit Rule 35-2 lengthens the time period from 14 days to 21 days while Federal Circuit Rule 40(e) lengthens the time period from 14 days to 30 days. Perhaps these circuits feel that lengthening these deadlines will lead parties to be more judicious in their decision whether to seek rehearing; or perhaps these circuits prefer to avoid the need to resolve motions to extend the time to seek rehearing. At least two circuits (the Fourth and Fifth Circuits) have local rules that suggest a reluctance to extend the time to seek rehearing.

Mr. Byron explained that the DOJ has an interest in uniformity, because inter-circuit variations can pose pitfalls for those who practice in multiple circuits. A longer period for seeking rehearing would have the benefit of removing the need to seek extension of that period by motion. On the other hand, he said, the DOJ does not have a strong position on this issue and it defers to the views of judges and circuit clerks, who have to deal with these issues more directly. An appellate judge member observed that the Eleventh Circuit is willing to grant extension motions if there is a reason for the motion, and that the Eleventh Circuit's local rules include a provision stating that an attorney is not obligated to seek rehearing, and that lawyers should think before filing a petition for rehearing. Judge Sutton observed that some circuits might wish to expedite the time from the filing of an appeal to decision of the appeal. The Fourth and Eleventh Circuits, for example, are known to dispose of appeals swiftly. He asked whether the question of deadlines for seeking rehearing is one that implicates issues specific to local circuit culture, and he questioned whether judges would favor a rule that required national uniformity on this issue. An attorney member suggested that the question of time to disposition might not be affected by deadlines for seeking rehearing, because it depends on how one counts the time to disposition. Mr. Green observed that the usual calculus looks at the time when the case is finally disposed of after the disposition of any timely petition for rehearing. An appellate judge member suggested that there was no reason for the Committee to take action on the question of deadlines for seeking rehearing.

By consensus, the Committee decided not to add this item to its study agenda.

VIII. Date and Location of Fall 2012 Meeting

Judge Sutton reminded the Committee that it will next meet in Philadelphia, Pennsylvania on September 27 and 28, 2012.

IX. Adjournment

The Committee adjourned at 2:30 p.m. on April 12, 2012.

Respectfully submitted,

Catherine T. Struve
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE *Aug. 15, 2012*
Meeting of June 11-12, 2012
Washington, D.C.
Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 11 and 12, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole was unable to attend. The Department of Justice was represented throughout the meeting by Elizabeth J. Shapiro, Esquire, and at various points by Kathleen A. Felton, Esquire; H. Thomas Byron III, Esquire; Jonathan J. Wroblewski, Esquire; Ted Hirt, Esquire; and J. Christopher Kohn, Esquire.

Judge Jeremy D. Fogel, Director of the Federal Judicial Center, participated in the meeting, as did the committee's consultants – Professor Geoffrey C. Hazard, Jr.; Professor R. Joseph Kimble; and Joseph F. Spaniol, Jr., Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Chief, Rules Committee Support Office
Julie Wilson	Attorney, Rules Committee Support Office
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center

Also attending were Administrative Office attorneys James H. Wannamaker III, Bridget M. Healy, and Holly T. Sellers, and the judiciary's Supreme Court fellows.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, 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
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Kravitz reported that he would retire as committee chair on September 30, 2012, and the Chief Justice had nominated Judge Sutton to succeed him. He congratulated Judge Sutton and thanked the Chief Justice for making an excellent selection.

Judge Kravitz reported that the Supreme Court in April 2012 had adopted the proposed amendments to the bankruptcy and criminal rules recommended by the Conference at its September 2011 session. The changes will take effect by operation of law on December 1, 2011, unless Congress acts to reject, modify, or defer them.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Robinson reported that there had been no further significant legislative action related to electronic discovery since the committee's January 2012 meeting.

He said that the House Judiciary Committee had held a hearing on the Class Action Fairness Act, at which no calls were made either for an overhaul of FED. R. CIV. P. 23 (class actions) or for dramatic changes to the rule. One witness, though, criticized the continuing reliance on cy près in class actions.

Mr. Robinson said that there had been no recent action on legislation addressing sunshine in regulatory decrees and settlements. He suggested that legislative attention now seemed to focus more on the criminal rules. A hearing, he reported, had been held before the Senate Judiciary Committee in June 2012 addressing the obligations of prosecutors to disclose exculpatory materials to the defense. At the hearing Senator Murkowski summarized her legislation on the subject, introduced in the wake of the prosecution of the late Senator Stevens and the ultimate dismissal of the criminal case.

Mr. Robinson reported that Judge Raggi had submitted a letter in connection with the hearing, in which she set out in broad terms the extensive work of the Advisory Committee on Criminal Rules over the last decade on FED. R. CRIM. P. 16 (discovery and inspection in criminal cases). The letter, he said, had a 909-page attachment describing that work in detail. In addition, Carol Brook, the federal defender for the Northern District of Illinois and a member of the advisory committee, testified at the hearing. He added that the legislators and witnesses appeared to agree that there were problems with non-disclosure of *Brady* materials that should be addressed, but most concluded that the pending legislation did not offer the right solution to the problems.

He reported that Senator Leahy had introduced legislation underscoring the nation's obligations under article 36 of the Vienna Convention to provide consular notification when foreign nationals are arrested. The legislation, he said, had been added to a State Department appropriations bill. He pointed out that language had been removed from the bill that would have duplicated the substance of proposed amendments to FED. R. CRIM. P. 5 and 58. The committee report accompanying the bill, moreover, encouraged the ongoing work of the rules committees and the Uniform Law Commission in facilitating compliance with the Vienna Convention by federal, state, and local law-enforcement officials. Mr. Robinson thanked the Judicial Conference's Federal-State Jurisdiction Committee for monitoring the legislation and informing the Senate of the activities of the rules committees.

He reported that the House Judiciary Committee had favorably reported out legislation to require bankruptcy asbestos trusts to report claimant filing information to the bankruptcy courts on a quarterly basis. The substance of the legislation, he noted, had previously been proposed as an amendment to the bankruptcy rules, but was not adopted by the Advisory Committee on Bankruptcy Rules. He added that the legislation would continue to be monitored.

Mr. Robinson noted that Magistrate Judge Paul W. Grimm, a member of the Advisory Committee on Civil Rules, had testified at the Senate hearing on his nomination to a district judgeship on the U.S. District Court for the District of Maryland. In addition, a Senate vote was expected shortly to confirm the nomination of Justice Andrew D. Hurwitz, a recent alumnus of the Advisory Committee on Evidence Rules, to a judgeship on the U.S. Court of Appeals for the Ninth Circuit.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 5 and 6, 2012.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 8, 2012 (Agenda Item 7).

Amendments for Final Approval

FED. R. APP. P. 13, 14, 24(b)

Judge Sutton reported that 26 U.S.C. § 7482(a)(2), enacted in 1986, authorizes permissive interlocutory appeals from the United States Tax Court to the courts of appeals. The statute, however, has never been implemented, and the appellate rules currently do not distinguish between appeals of right from the Tax Court and interlocutory appeals from the court.

The proposed changes to FED. R. APP. P. 13 (review of a Tax Court decision) and FED. R. APP. P. 14 (applicability of other appellate rules to review of a Tax Court decision) would implement the statute and specify the procedures applicable in each type of appeal. The proposed change to FED. R. APP. P. 24(b) (leave to proceed in forma pauperis) would clarify the rule by recognizing that the Tax Court is not an administrative agency.

Judge Sutton reported that the advisory committee had consulted closely with the Tax Court and the Tax Division of the Department of Justice in developing the proposals. He added that no public comments had been received and no changes made in the proposals following publication.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. APP. P. 28 and 28.1(c)

Judge Sutton explained that the proposed change to FED. R. APP. P. 28(a) (appellant's brief) would revise the list of the required contents of an appellant's brief by combining paragraphs 28(a)(6) and 28(a)(7). Paragraph (a)(6) now requires a statement of the case, and (a)(7) a statement of the facts. The new, combined provision, numbered Rule 28(a)(6), would require "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." Conforming changes would be made in Rule 28(b), governing appellees' briefs, and Rule 28.1(c), governing briefs in cross-appeals.

Judge Sutton pointed out that most lawyers will choose to present the factual and procedural history of a case chronologically. The revised rule, though, gives them the flexibility to follow a different order. In addition, the committee note specifies that a statement of the case may include subheadings, particularly to highlight the rulings presented for review.

He reported that the proposed amendments had attracted six public comments, four of them favorable. Some comments expressed concern that deleting the current rule's reference to "the nature of the case, the course of proceedings, and the disposition below" might lead some to conclude that the procedural history of a case may no longer be included in the statement of the case. Therefore, after publication, the committee inserted into proposed Rule 28(a)(6)'s statement of the case the phrase "describing the relevant procedural history." The committee note was also modified to reflect the addition. He noted, too, that the Supreme Court's rule – which similarly requires a single, combined statement – appears to have worked well.

A member noted that a prominent judge had argued in favor of maintaining separate statements of the case and of the facts, predicting that combined statements will require judges to comb through a great deal of detail to find the key procedural steps in a case – the pertinent rulings made by the lower court. She suggested that the judge's concern might be addressed by requiring that the combined statement begin with the ruling below.

Judge Sutton said that the committee note contemplates that approach, emphasizing that lawyers are given flexibility in presenting their statements. Most, he said, will state the facts first and then the issues for review. He suggested that the judge would have been pleased with simply reversing the order of current paragraphs (a)(6) and (a)(7) to set out the statement of facts first, followed by the statement of the case. Professor Struve added that a circuit could have a local rule that specifies a particular order of subheadings.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FORM 4

Judge Sutton explained that Questions 10 and 11 on the current version of Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) require an IFP applicant to provide the details of all payments made to an attorney or other person for services in connection with the case. The questions, he said, ask for more information than needed to make an IFP determination. In addition, some have argued that the form's disclosures implicate the attorney-client privilege. But, he said, research shows that the payment information is very unlikely to be subject to the privilege. Sometimes, though, it might constitute protected work product.

The proposed amendments, he pointed out, combine the two questions into one. The new question asks broadly whether the applicant has spent, or will spend, any money for expenses or attorney fees in connection with the lawsuit – and if so, how much. Only one public comment was received, which proposed an additional modification to the form

to deal with the Prison Litigation Reform Act. The committee, he said, decided not to incorporate the suggestion into the current amendment, but to add the matter to its study agenda as a separate item.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 6

Professor Struve noted that the advisory committee was proposing several amendments to FED. R. APP. P. 6 (appeals in bankruptcy cases from a district court or bankruptcy appellate panel to a court of appeals). The modifications dovetail with the simultaneous amendments being proposed to Part VIII of the Federal Rules of Bankruptcy Procedure, which govern appeals from a bankruptcy court to a district court or bankruptcy appellate panel.

Revised FED. R. APP. P. 6 would update the rule's cross-references to the new, renumbered Part VIII bankruptcy rules. New subdivision 6(c) will govern permissive direct appeals from a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2), enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It specifies that the record on a direct appeal from a bankruptcy court will be governed by FED. R. BANKR. P. 8009 (record on appeal and sealed documents) and FED. R. BANKR. P. 8010 (completing and transmitting the record). New Rule 6(c) takes a different approach from Rule 6(b), where the record on appeal from a district court or bankruptcy appellate panel is essentially the record in the mid-level appeal to the district court or panel.

She noted that proposed new Bankruptcy Rule 8010(c) deals with electronic transfer of the record from the bankruptcy court. It specifies that the bankruptcy clerk must transmit to the clerk of the court where an appeal is pending "either the record or a notice that it is available electronically."

In the proposed amendments to FED. R. APP. P. 6(b)(2)(C), she said, the clerk of the district court or bankruptcy appellate panel must number the documents constituting the record and "promptly make it available." The amended appellate rule, she said, is very flexible and works well with the revised Part VIII bankruptcy rules. It allows the clerk to make the record available either in paper form or electronically.

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Items

Judge Sutton reported that he had sent a letter to each chief circuit judge explaining that the advisory committee, like the circuits themselves, was divided on the wisdom of amending FED. R. APP. P. 29 (amicus briefs) to treat federally recognized Native American tribes the same as states. The proposal would allow tribes to file amicus briefs as of right and exempt them from the rule's authorship-and-funding disclosure requirement. The committee, he said, had informed the chief judges that the issue warrants serious consideration, will be maintained on the committee's agenda, and will be revisited in five years.

He noted that the advisory committee had removed from its agenda an item providing for introductions in briefs. Many of the best practitioners, he said, currently include introductions in their briefs to lay out the key themes of their argument. The committee's proposed amendment to FED. R. APP. P. 28(a)(6), he said, was sufficiently flexible to permit inclusion of an introduction as part of a brief's statement of the case. Moreover, it would be difficult to specify how an introduction differs from the statement of the issues presented for review in FED. R. APP. P. 28(a)(5).

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 14, 2012 (Agenda Item 5).

Judge Wedoff noted that the advisory committee had 14 action items to present, six of them for final approval by the Judicial Conference and eight for publication. He suggested that the most important were the amendments dealing with the Supreme Court's decision in *Stern v. Marshall*, the revision of the Part VIII bankruptcy appellate rules, and the modernization of the bankruptcy forms.

Amendments for Final Approval

FED. R. BANKR. P. 1007(b)(7) and 5009(b) and 4004(c)(1)

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has required virtually all individual debtors to complete a personal course in financial management as a pre-condition for receiving a discharge. He noted that FED. R. BANKR. P. 1007(b)(7) (required schedules and statements) and 5009(b) (case closing) implement the statute by requiring individual debtors to file an official form (Official Form 23) certifying that they completed the course after filing their petition. FED. R. BANKR. P. 1007(c) imposes deadlines for filing the certification. In

Chapter 7 cases, for example, the debtor must file it within 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341.

If the debtor has not filed the form within 45 days after the first meeting of creditors, FED. R. BANKR. P. 5009(b) instructs the bankruptcy clerk to warn the debtor that the case will be closed without a discharge unless the certification is filed within Rule 1007's time limits. FED. R. BANKR. P. 4004(c) then specifies that the court may not grant a discharge if the debtor has not filed the certificate.

Judge Wedoff reported that the advisory committee recommended amending FED. R. BANKR. P. 1007(b) to allow the provider of the financial-management course to notify the court directly that the debtor has completed the course. This action would relieve the debtor of the obligation to file Official Form 23. FED. R. BANKR. P. 5009(b) would be amended to require the bankruptcy clerk to send the warning notice only if: (1) the debtor has not filed the certification; and (2) the course provider has not notified the court that the debtor has completed the course.

A conforming amendment to FED. R. BANKR. P. 4004(c)(1)(H) (grant of discharge) specifies that the court does not have to deny a discharge if the debtor has been relieved of the duty to file the certification. In addition, language improvements would be made in the rule. Paragraph (c)(1) currently instructs a court to grant a discharge promptly unless certain acts have occurred. The amendment reformulates the text to instruct the court affirmatively not to grant a discharge if those acts have occurred.

Section 524(m) of the Bankruptcy Code, added in 2005, specifies that when a debtor files a reaffirmation agreement, the court must determine whether the statutory presumption that the agreement is an undue hardship for the debtor has been rebutted, *i.e.,* by finding that the debtor is apparently able to make payments under the agreement. A judge needs to make that determination before a discharge is granted. Therefore, FED. R. BANKR. P. 4004(c)(1)(K) tells the court to delay the discharge until the judge considers the debtor's ability to make the payments.

The proposed amendment to FED. R. BANKR. P. 4004(c)(1)(K) would make it clear that the rule's prohibition on entering a discharge due to a presumption of undue hardship ends when the presumption expires or the court concludes a hearing on the presumption. As a result, there would be no delay if the judge has already ruled on the matter.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference. The proposed amendments to FED. R. BANKR. P. 4004(c)(1) were approved without publication.

FED. R. BANKR. P. 9006(d), 9013, and 9014

Judge Wedoff noted that FED. R. BANKR. P. 9006 is entitled "computing and extending time," but it also specifies the default time for filing motions and affidavits in response to motions. Unlike FED. R. CIV. P. 6 (computing and extending time; time for motion papers), the civil rules counterpart on which it is based, FED. R. BANKR. P. 9006 does not indicate by its title that it also addresses time periods for motions. Nor is it followed immediately by another rule that addresses the form of motions, as the civil rules do. FED. R. CIV. P. 7 (pleadings, motions, and other papers) specifies the pleadings allowed and the form of motions and other papers.

The advisory committee, he said, was proposing amendments to highlight Rule 9006(d). First, the rule's title would be expanded to add a reference to "time for motion papers." Second, cross-references to Rule 9006(d) would be added to both FED. R. BANKR. P. 9013 (form and service of motions) and FED. R. BANKR. P. 9014 (contested matters) to specify that motions must be filed "within the time determined under FED. R. BANKR. P. 9006(d)."

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

OFFICIAL FORM 7

Judge Wedoff explained that Official Form 7 (statement of financial affairs) is a lengthy form that details many of the debtor's financial transactions. It makes frequent references to "insiders." The current definition of "insider" on the form refers to any owner of 5% of more of the voting or equity securities of a corporate debtor. That definition, though, has no basis in bankruptcy law, and it is not clear why it was adopted. The advisory committee would replace it with the Bankruptcy Code's definition of "insider," which includes any "person in control" of a corporate debtor.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Final Approval Without Publication

OFFICIAL FORMS 9A-I and 21

Professor McKenzie noted that there are several variations of Official Form 9 (notice of a bankruptcy filing, meeting of creditors, and deadlines), based on the nature of the debtor and the chapter of the Bankruptcy Code under which a case is filed. Form 9 is directed at creditors, notifying them that a bankruptcy case has been filed and informing them of upcoming case events and what steps they need to take. The form includes identifying information about the debtor that allows recipients of the notice to determine whether they are in fact a creditor of the debtor. In the case of individual debtors, the identifying information includes the debtor's social security number.

Debtors are required to provide their social security numbers to the bankruptcy clerk on Official Form 21 (statement of social security number). That form is submitted separately and not included in the court's public electronic records. The social security number is revealed to creditors on their personal copies of Form 9 purely for identification purposes, but only a redacted version of Form 9 is included in the case file.

The Court Administration and Case Management Committee expressed concern that bankruptcy forms may be mistakenly filed with the courts in ways that publicly reveal debtors' private identifying information. In some cases, creditors may file a copy of their unredacted Form 9 with their proofs of claim without redacting the debtor's social security number. Debtors, moreover, may file Form 21 with other case papers, rather than submit it to the clerk separately.

Professor McKenzie explained that the advisory committee would add prominent warnings on both Form 9 and Form 21 alerting users that the forms should not be filed with the court in a way that makes them publicly available. He pointed out that the advisory committee had made two minor changes in the language of Form 21's warning after the agenda book had been distributed. A corrected version was circulated to the members.

Judge Wedoff reported that the Court Administration and Case Management Committee had suggested that the debtor's full social security number be eliminated entirely from the forms to prevent any problems of inadvertent disclosure. But, he said, the advisory committee was convinced that social security numbers are still needed for some creditors to be able to identify the debtors. The full number, for example, is essential for the Internal Revenue Service. He added, though, that the committee will revisit the matter if the situation changes in the future.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

OFFICIAL FORM 10

Professor McKenzie pointed out that the current version of Official Form 10 (proof of claim) contains a requirement at odds with FED. R. BANKR. P. 9010(c) (power of attorney). The form instructs an authorized agent of a creditor filing a proof of claim to attach to the claim a copy of its power of attorney, if any. Rule 9010(c) generally requires an agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. But it does not apply when an agent files a proof of claim. Therefore, Form 10 would be amended to delete the instruction to attach a power of attorney.

In addition, Form 10 would be amended to require additional documentation in certain cases. For claims based on an open-end or revolving consumer-credit agreement, the filer of the proof of claim will have to attach the information required by FED. R. BANKR. P. 3001(c)(3)(A) (proof of claim based on open-end or revolving consumer credit agreement), scheduled to take effect on December 1, 2012. If a claim is secured by the debtor's principal residence, the filer will have to attach the Mortgage Proof of Claim Attachment (Official Form 10, Attachment A), required as of December 1, 2011.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 1014(b)

Professor McKenzie explained that Rule 1014(b) (dismissal and change of venue) deals with the procedure when petitions involving the same debtor or related debtors are filed in different districts. The current rule specifies that, upon motion, the court in which the petition is filed first may determine the district or districts in which the cases will proceed. All other courts must stay proceedings in later-filed cases until the first court makes its venue determination, unless the first court orders otherwise. As a result, later cases are stayed by default while the venue question is pending before the first court.

The rule, he said, has been the subject of game playing because it allows an attorney who wants to stay all further proceedings to do so by filing a motion, or threatening to file a motion, in the first case. Therefore, the advisory committee proposal would change the default requirement to state that proceedings in later-filed cases are stayed only on express order of the first court. The change, he said, will prevent disruption of the other cases unless the judge in the first court determines affirmatively that a stay of a related case is needed while he or she makes the venue determination. In addition, the advisory committee made style changes in the rule.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7004(e)

Professor McKenzie reported that the proposed amendment to FED. R. BANKR. P. 7004(e) would reduce the amount of time that a summons remains valid after it is issued. Currently, a summons must be served within 14 days after issuance. The proposed amendment to Rule 7004(e) would reduce that time to seven days.

Under the civil rules, a defendant's time to respond to a summons and complaint (30 days) begins when the summons and complaint are actually served. Under the bankruptcy rules, however, the defendant's response time is calculated from the date that the summons is issued.

He noted that concern had been expressed that seven days may be too short a period to effect service. Nevertheless, he said, the advisory committee believed that the time is sufficient and will encourage prompt service after issuance of a summons. He added that bankruptcy service is relatively easy and may be effected anywhere in the United States by first-class mail. Moreover, the necessary paperwork is usually generated by computer.

He added that the bankruptcy system has a strong objective in favor of moving cases quickly. In addition, calculating the time for service from the date of issuance, rather than service, provides clarity because issuance is noted on the court's docket. Finally, he explained that the time for service had traditionally been 10 days in the bankruptcy rules, but was increased to 14 days as a result of the omnibus 2009 time-computation amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7008, 7012(b), 7016, 9027, and 9033(a)

Professor McKenzie reported that the advisory committee was recommending publishing proposed amendments to five bankruptcy rules to deal with the recent Supreme Court decision in *Stern v. Marshall,* 564 U.S. ___, 131 S.Ct. 2594 (2011). In *Stern,* the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's state common-law counterclaim against a creditor who filed a proof of claim against the bankruptcy estate. Even though the governing statute, 28 U.S.C. § 157(b), specifies that the counterclaim is a "core proceeding" that a bankruptcy judge may hear and determine with finality, the Court held that it was unconstitutional for Congress to assign final adjudicatory authority over the matter to a bankruptcy judge.

Professor McKenzie noted that the Federal Rules of Bankruptcy Procedure incorporate the statutory distinction between "core" and "non-core" proceedings and recognize that a bankruptcy judge's authority is much more limited in "non-core proceedings" than in "core proceedings." Under the current rules, a party filing a motion has to state whether the proceeding is "core" or "non-core," and a response must do the same.

Since *Stern,* however, a core proceeding under the statute may not be a "core proceeding" under the Constitution. Therefore, the advisory committee, he said, decided that it was necessary to remove the words "core" and "non-core" from the rules entirely.

Instead, the advisory committee would amend FED. R. BANKR. P. 7016 (pretrial procedures and formulating issues) to make clear that a bankruptcy judge must consider his or her authority to enter final orders and judgment in all adversary proceedings. The judge's decision, moreover, will be informed by the statements of the parties as to whether they consent to the judge's exercise of that authority. This broad approach, he said, will allow the law to continue to develop without having to change the rules again in the future.

Judge Wedoff reported that it is unclear since *Stern* whether a bankruptcy judge may enter a final judgment in a preference action or fraudulent conveyance action. He pointed out that under the proposed amendments, however, there will be no need to distinguish between core and non-core proceedings. Rather, the parties will only have to decide whether they consent to entry of final orders or judgment by the bankruptcy judge. The judge will then decide whether to: (1) hear and determine the proceeding; (2) hear it and issue proposed findings of fact and conclusions of law; or (3) take some other action.

A member commended the advisory committee for an elegant solution to a difficult problem. He suggested that the revised heading to revised Rule 9016 ("procedure") may be too limited.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 8001-8028

Judge Wedoff explained that the advisory committee's thorough revision of Part VIII of the Federal Rules of Bankruptcy Procedure – the bankruptcy appellate rules – was the result of a multi-year project to bring the rules into closer alignment with the Federal Rules of Appellate Procedure, to make the rules simpler and clearer, and to recognize that bankruptcy documents today are normally filed, served, and transmitted electronically, rather than in paper form.

He thanked Professor Gibson, emphasizing that she deserved enormous credit for having coordinated the huge revision project. He noted that she had immersed herself in all the details of appellate practice, had conducted considerable research, and had drafted a great many documents for the committee. He also thanked James Wannamaker and Bridget Healy, attorneys in the Bankruptcy Judges Division of the Administrative Office, for their dedication and professional assistance to the project. In addition, he expressed the committee's appreciation to Professor Struve, Professor Kimble, and Mr. Spaniol for their incisive and important contributions to the project, often made on very short notice.

He and Professor Gibson proceeded to describe each Part VIII rule not previously presented to the Standing Committee (Rules 8013-8028) and some additional changes made in the rules presented at the January 2012 meeting (Rules 8001-8011).

Fed. R. Bankr. P. 8001

Professor Gibson reported that since the January 2012 Standing Committee meeting, the advisory committee had made two additional changes in Rule 8001 (scope of Part VIII, definition of "BAP," and method of transmitting documents). The draft rule presented in January had included a general definition of the term "appellate court" to mean either the district court or the bankruptcy appellate panel – the court in which the first-level bankruptcy appeal is pending or will be taken. It did not, though, include the court of appeals.

It was suggested at the last meeting that the term is misleading because "appellate court" in common parlance generally refers to the court of appeals. As a result, she said, the advisory committee had eliminated the general definition. Each of the revised rules now refers specifically to the district court or the "BAP." Despite the objections of the style consultants, she added, the advisory committee decided to use the universally recognized abbreviation for a bankruptcy appellate panel and to define BAP in Rule 8001(b).

She said that there was a need to highlight a strong presumption in the revised rule in favor of electronic transmission of documents. Accordingly, revised Rule 8001(c) states specifically that a document must be sent electronically under the Part VIII rules, unless: (1) it is being sent by or to a pro se individual; or (2) a local court's rule permits or requires mailing or other means of delivery. She added that the advisory committee was comfortable with using the term "transmitting."

Fed. R. Bankr. P. 8007

Professor Gibson stated that Rule 8007 (stay pending appeal, bonds, and suspension of proceedings) had been restyled and subheadings added. In addition, the

advisory committee corrected the omission of a reference to the court of appeals in subdivision (c).

A member pointed out that under proposed Rule 8007(b), the showing required for making a motion for relief in the appellate court deals with two situations: (1) where moving first in the bankruptcy court would be impracticable; and (2) where the bankruptcy court has already ruled. But, he said, the Federal Rules of Appellate Procedure cover a third possibility – where a motion was filed below but not ruled on.

Judge Wedoff agreed to revise Rule 8007(b)(2)(B) to require the moving party to state whether the bankruptcy court has ruled on the motion, and, if so, what the reasons were for the ruling.

Fed. R. Bankr. P. 8009

Professor Gibson noted that proposed Rule 8009 (record on appeal and sealed documents) was incorporated by reference in the proposed new FED. R. APP. P. 6(c), which will govern permissive direct appeals from a bankruptcy court to a court of appeals.

Fed. R. Bankr. P. 8010

Professor Gibson reported that the advisory committee had made several changes in Rule 8010 (completing and transmitting the record) since the January 2012 meeting after conferring with clerks of the bankruptcy courts, the clerk of a bankruptcy appellate panel, and Administrative Office staff. She noted that bankruptcy courts generally use recording devices to take the record. If a transcript of a proceeding is ordered, it is produced for the court from the electronic record, usually by a contract service provider.

The rule requires the "reporter" to prepare and file the transcript with the bankruptcy clerk, but there is some question as to the identity of the reporter when a recording device is used. The advisory committee, she said, decided that the "reporter" should be defined in Rule 8010(a) as the person or service that the bankruptcy court designates to transcribe the recording.

In addition, the rule requires reporters to file all documents with the bankruptcy clerk. In the Federal Rules of Appellate Procedure, by contrast, reporters file certain documents in the appellate court and others in the district court. The reporter in a bankruptcy case, though, may not know where an appeal is pending.

Fed. R. Bankr. P. 8011

Professor Gibson reported that a minor typographical error had been corrected in Rule 8011 (filing, service, and signature) since the last Standing Committee meeting.

With regard to proof of service, a member questioned whether affidavits of service still serve a useful purpose in light of the universal use of CM/ECF in the federal courts. He noted that service in virtually all his civil cases is accomplished through CM/ECF, and there is no need to make the parties file an affidavit of service. He suggested that the Advisory Committee on Civil Rules consider removing the requirement of a certificate of service in the future.

Fed. R. Bankr. P. 8013

Professor Gibson noted that proposed Rule 8013 (motions and intervention) would change current bankruptcy practice. Currently, a person filing a motion or response may file a separate brief. The new rule, however, would not permit briefs to be filed in support of or in response to motions. Instead, it adopts the practice in FED. R. APP. P. 27 (motions), requiring that legal arguments be included in the motion or response.

She reported that proposed FED. R. BANKR. P. 8013(g) is a new provision for the bankruptcy rules. It is also not included in the Federal Rules of Appellate Procedure. It will authorize motions for intervention in an appeal pending in a district court or bankruptcy appellate panel. The party seeking to intervene must state in its motion why it did not intervene below.

Fed. R. Bankr. P. 8014

Professor Gibson explained that Rule 8014 (briefs) largely tracks the Federal Rules of Appellate Procedure and incorporates the proposed amendment to FED. R. APP. P. 28(a)(6) (briefs), which combines the statements of the case and of the facts into a single statement. (See pages 5 and 6 of these minutes.) In a change from current bankruptcy practice, revised Rule 8014 follows the Federal Rules of Appellate Procedure and requires inclusion of a summary of argument in the briefs. New Rule 8014(f) adopts the provision of FED. R. APP. P. 28(j) regarding the submission of supplemental authorities. Unlike the appellate rule, the proposed Rule 8014(f) proposes a definite time limit of seven days for any response, unless the court orders otherwise.

She emphasized that the advisory committee was attempting to make the bankruptcy rules as similar as practicable to the Federal Rules of Appellate Procedure to make it easier for the bar to handle double appeals, *i.e.,* an appeal first to a district court or bankruptcy appellate panel, and then to the court of appeals.

Fed. R. Bankr. P. 8015

Professor Gibson noted that Rule 8015 (form and length of briefs, appendices, and other papers) was modeled on FED. R. APP. P. 32 (form and length of briefs, appendices, and other papers). The new bankruptcy rule adopts the provisions of the appellate rule governing the length of briefs, but not those prescribing the colors for brief covers. She added that the change is likely to attract comments during the publication period because new Rule 8015(a)(7) reduces the length of principal and reply briefs currently permitted in the bankruptcy rules. To achieve consistency with FED. R. APP. P. 32(a)(7), it reduces the page limits for a principal brief from 50 pages to 30, and those for a reply brief from 25 to 15.

Fed. R. Bankr. P. 8016

Professor Gibson reported that Rule 8016 (cross-appeals) was new to bankruptcy and modeled on FED. R. APP. P. 28.1 (cross-appeals). A member noted, though, that proposed Rule 8016(e) does not exactly parallel the appellate rule. Moreover, it does not include a provision, similar to that in Rule 8018(a), allowing a district court or bankruptcy appellate panel by local rule or order to modify the rule's time limits.

Judge Wedoff suggested that it would be possible to incorporate the Rule 8018 language on local court modifications into Rule 8016. He added that Rules 8016 and 8018 should be internally consistent, even though there may be some differences between them and the counterpart appellate rules. A participant recommended making both the bankruptcy and appellate rules internally consistent and consistent with each other. The same provisions should apply in both sets of rules.

Another participant recommended not including any provision in the bankruptcy rules allowing a local court to extend the time limits of the national rules. He suggested that it will only encourage extensions.

Fed. R. Bankr. P. 8017

Professor Gibson reported that Rule 8017 (amicus briefs) was new to bankruptcy and was derived from FED. R. APP. P. 29 (amicus briefs). She pointed out that proposed Rule 8017(a) would allow a bankruptcy court on its own motion to request an amicus brief.

Fed. R. Bankr. P. 8018

Professor Gibson reported that Rule 8018 (serving and filing briefs) would continue the existing bankruptcy practice that allows an appellee to file a separate appendix. It differs from FED. R. APP. P. 30 (appendix to briefs), which requires all the

parties to file a single appendix. Rule 8018(a) lengthens the period for filing initial briefs from the current 14 days to 30. Since requests for extensions of time are very common, she said, it just makes sense to increase the deadline to 30 days.

Fed. R. Bankr. P. 8019

Professor Gibson noted that proposed Rule 8019 (oral argument) tracks FED. R. APP. P. 34(a)(1) (oral argument) and is more detailed than the current bankruptcy rule. Rule 8019(a) would alter the existing bankruptcy rule by: (1) authorizing the court to require the parties to submit a statement about the need for oral argument; and (2) permitting a statement to explain why oral argument is not needed, rather than only why it should be allowed. Rule 8019(f) gives the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or to postpone it.

Fed. R. Bankr. P. 8020

Professor Gibson reported that Rule 8020 (frivolous appeal and other misconduct) was derived from FED. R. APP. P. 38 (frivolous appeals, damages and costs) and FED. R. APP. P. 46(c) (attorney discipline). It applies to misconduct both by parties and attorneys.

Fed. R. Bankr. P. 8021

Professor Gibson noted that Rule 8021 (costs) would continue the existing bankruptcy practice that gives the bankruptcy clerk the entire responsibility for taxing costs on appeal. The practice under FED. R. APP. P. 39 (costs), on the other hand, involves both the court of appeals and the district court in taxing costs.

Rule 8021(b) was added to govern costs assessed against the United States. Derived from FED. R. APP. P. 39(b), it is not included in the current bankruptcy rules.

Fed. R. Bankr. P. 8022

Professor Gibson reported that Rule 8022 (motion for rehearing) would continue the current bankruptcy practice of requiring that a motion for rehearing be filed within 14 days after entry of judgment on appeal. It differs from FED. R. APP. P. 40(a)(1) (time to file a petition for rehearing), which gives parties 45 days to file a rehearing motion in any civil case in which the United States is a party. She added that the Department of Justice reported that it had no problem with the rule.

Fed. R. Bankr. P. 8023

Professor Gibson reported that proposed Rule 8023 (voluntary dismissal) deviates from both the existing bankruptcy rule and the Federal Rules of Appellate Procedure. It would provide for a voluntary dismissal only after an appeal is pending in the district court or bankruptcy appellate panel. Under the current rules, a case on appeal from a bankruptcy judge is not docketed in the district court or bankruptcy appellate panel until the record is transmitted, and an appeal may be voluntarily dismissed in the bankruptcy court prior to the docketing of the appeal. But under new Rules 8003 and 8004, the appeal will be docketed immediately after the notice of appeal is filed. The notice, moreover, will normally be transmitted electronically to the district court or bankruptcy appellate panel. The advisory committee, she said, concluded that it is very unlikely that an appeal will be voluntarily dismissed before it is docketed.

Fed. R. Bankr. P. 8024

Professor Gibson reported that Rule 8024 (clerk's duties on disposition of an appeal) contained virtually no changes, other than stylistic, from the current bankruptcy rule.

Fed. R. Bankr. P. 8025

Professor Gibson reported that Rule 8025 (stay of a district court or BAP judgment) contained only stylistic changes from the existing bankruptcy rule. She pointed out, though, that subdivision (c) was new. It specifies that if the district court or bankruptcy appellate panel affirms a bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree will be automatically stayed to the same extent as the stay of the appellate judgment.

Fed. R. Bankr. P. 8026

Professor Gibson reported that Rule 8026 (rules by circuit councils and district courts, and procedure when there is no controlling law) contained only stylistic changes from the current bankruptcy rule.

Fed. R. Bankr. P. 8027

Professor Gibson reported that Rule 8027 (notice of mediation procedure) was a new rule with no counterpart in the Federal Rules of Appellate Procedure. It provides that if a district court or bankruptcy appellate panel has a mediation procedure applicable to bankruptcy appeals, the clerk of the district court or the panel must notify the parties

promptly after the appeal is docketed whether the mediation procedure applies, what its requirements are, and how it affects the time for filing briefs in the appeal.

Fed. R. Bankr. P. 8028

Professor Gibson explained that Rule 8028 (suspension of rules in Part VIII) was derived from current FED. R. BANKR. P. 8019 (suspension of rules in Part VIII) and FED. R. APP. P. 2 (suspension of rules). It authorizes a district court, bankruptcy appellate panel, or court of appeals to suspend the requirements or provisions of the Part VIII rules, except for certain enumerated rules. The new rule expands the current list of rules that may not be suspended.

Professor Gibson reported that the current FED. R. BANKR. P. 8013 (disposition of appeal and weight accorded fact findings) would be eliminated. The first part of that rule specifies what a district court or bankruptcy appellate panel may do on an appeal, *i.e.,* affirm, modify, reverse, or remand. She noted that there is no similar provision in the Federal Rules of Appellate Procedure. The second part of the current rule specifies the weight that must be given to a bankruptcy judge's findings of fact. She explained that the provision is not needed because it is already covered by FED. R. CIV. P. 52 (findings and conclusions) and incorporated by FED. R. BANKR. P. 7052 (findings by the court).

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9023 and 9024

Judge Wedoff explained that FED. R. BANKR. P. 9023 (new trials and amendment of judgments) and FED. R. BANKR. P. 9024 (relief from a judgment or order) would be amended to add a cross-reference in each rule to the procedure set forth in proposed new Rule 8008, governing indicative rulings.

The committee without objection by voice vote approved the proposed amendments for publication.

MODERNIZATION OF THE OFFICIAL FORMS

Judge Wedoff explained that the bankruptcy process is driven in large measure by forms. Several of the current forms, however, are difficult to complete, especially for people unfamiliar with the bankruptcy system. In addition, the forms take little cognizance of electronic filing in the bankruptcy courts.

He explained that forms modernization has been a major, multi-year project of the advisory committee, working under the leadership of Judge Elizabeth L. Perris and in

close coordination with the Administrative Office and the Federal Judicial Center. The major goals of the project have been: (1) to improve the quality and clarity of the forms in order to elicit more complete and accurate information from debtors and creditors; and (2) to enhance the interface between the forms and modern technology, especially the "next generation" of CM/ECF currently under development.

He said that the advisory committee and the forms-project team had reached out extensively to users of the bankruptcy system to seek their input in redesign and testing of the forms. In addition, the committee had made an important policy decision at the outset to separate the forms used by individual debtors from those used by entities other than individuals.

He explained that the first nine forms, now presented for authority to publish, are a subset of the larger package of individual forms filed by debtors at the beginning of a case. He emphasized that the forms used by individuals need to be less technical in language because individuals are generally less sophisticated than other entities and may not have the assistance of experienced bankruptcy counsel. As a result, he said, the revised individual forms are written in more conversational language, have a more approachable format, and contain substantially more instructions.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff explained that debtors who cannot pay the filing fee have two options – either to ask the court for permission to pay the fee in installments (Form 3A) or to waive the fee (Form 3B). The latter option is available only to individuals whose combined family monthly income is less than 150% of the official poverty guideline last published by the Department of Health and Human Services.

In addition to major stylistic and formatting changes common to all the new forms, three minor substantive changes were made in Form 3B. First, the opening question asks for the size of the debtor's family, as listed on Schedule J. That information is currently required on Schedule I. Second, the income portion of the form was changed to specify that non-cash governmental assistance, such as food stamps or housing subsidies, will not count against the debtor as income in determining eligibility for a fee waiver. The information, though, will continue to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the new form eliminates the declaration and signature section for non-attorney bankruptcy petition preparers because the same declaration is already required on Official Form 19.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 6I and 6J

Judge Wedoff noted that some substantive changes had been made on Forms 6I (statement of the debtor's income) and 6J (statement of the debtor's expenses) to elicit more accurate and useful information from individual debtors. First, the debtor will have to provide more information on Forms 6I and 6J about non-traditional living arrangements, such as living with an unmarried partner or living and sharing expenses in a household with non-relatives. Form 6I asks for all financial contributions to the household. Second, Form 6J asks for separate information on dependents who live with the debtor, dependents who live separately, and other members of the household. Third, in Chapter 13 cases, Form 6J asks for the debtor's expenses at two different points in time – when the debtor files the bankruptcy petition and when the proposed Chapter 13 plan is confirmed. Fourth, a line has been added to the form setting out a calculation of the debtor's monthly net income.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 22A-1, 22A-2, 22B, 22C-1, and 22C-2

Judge Wedoff explained that Form 22, commonly referred to as the "means test" form, has five variations. It is used to determine a debtor's "current monthly income" under 11 U.S.C. § 101(10A) and, in Chapter 7 and Chapter 13 cases, to determine the debtor's income remaining after deducting certain specified expenses.

In Chapter 7 cases, the form is used to assess whether the debtor qualifies under the statute to file a petition under Chapter 7. In Chapter 13, cases, it determines how much the debtor is able to pay under the plan. Other than stylistic changes, no changes were made in the form's Chapter 11 version (Form 22B). But four changes would be made in the Chapter 7 and Chapter 13 versions.

First, the advisory committee separated both the Chapter 7 and Chapter 13 forms into two distinct forms each because debtors with income below the median of their state do not have to list their expenses. As a result, the vast majority of debtors will only have to fill out the income portion. Thus, all debtors will complete an income form (Form 22A-1 or 22C-1), but only some will have to file the expense form (Form 22A-2 or 22C-2).

Second, the revised forms modify the deduction for cell phone and internet expenses to reflect more accurately the Internal Revenue Service allowances incorporated by the Bankruptcy Code.

Third, line 60 on the current Chapter 13 form (Form 22C) will not be included in the new chapter 13 expense form (Form 22C-2)) because it is rarely used. It allows

debtors to list, but not deduct from income, "other necessary expense" items not included within the categories specified by IRS.

Fourth, Form 22C-2 reflects the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010). *Lanning* requires taking a "forward-looking approach" in calculating a Chapter 13 debtor's projected disposable income by considering changes in income or expenses that have occurred or are virtually certain to occur by the time the plan is confirmed. The changes may either increase or decrease the debtor's disposable income. Part 3 of Form 22C-2 will require the debtor to report those changes.

The committee without objection by voice vote approved the proposed forms for publication.

Information Items

FED. R. BANKR. P. 3007(a)

Judge Wedoff reported that proposed amendments to FED. R. BANKR. P. 3007(a) (objections to claims), published in August 2011, would have specified the time and manner of serving objections to claims. The rule currently requires that notice of an objection be provided at least 30 days "prior to the hearing" on the objection. The proposal would have authorized a negative notice procedure – requiring notice of an objection to be made at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing."

He noted that at its March 2012 meeting, the advisory committee decided to withdraw the proposed amendments temporarily and consider them as part of its project to draft a national Chapter 13 form plan.

OFFICIAL FORM 6C

Judge Wedoff reported that the advisory committee had decided not to proceed with amending Form 6C (property claimed as exempt) by adding a box to give debtors the option of declaring that the value of property claimed as exempt is the "full fair market value of the exempted property." The amendment, published in August 2011, was intended to reflect the Supreme Court's decision in *Schwab v. Reilly,* 560 U.S. ___, 130 S. Ct. 2652 (2010).

He said that representatives of the Chapter 7 and Chapter 13 trustee associations had objected to the change on the grounds that it would encourage debtors to claim the full market value of property even when the exemption is capped by statute at a specific dollar amount. They predicted that the revision would lead to gamesmanship and a

"plethora of objections." On the other hand, supporters of the amendment, including representatives of the consumer bankruptcy attorneys' association, disputed the prediction. They argued that it was consistent with *Schwab* and would be beneficial to debtors.

Judge Wedoff reported that the advisory committee decided not to proceed with the amendment because: (1) it is unnecessary since debtors already incorporate the *Schwab* language into the existing form; and (2) courts are divided on whether it is always improper for a debtor to claim as exempt the full fair market value of property when the exemption is capped at a specific dollar amount. The advisory committee decided, therefore, that any amendment to the form should await further case law development. It might also be considered as part of the forms modernization project.

OFFICIAL FORMS 22A AND 22C

Judge Wedoff reported that the advisory committee had decided to defer final approval of proposed amendments to Forms 22A and 22C (the means test forms) that would have: (1) reflected changes in the IRS standards on telecommunication expenses; and (2) changed the Chapter 13 version of the form to respond to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010).

He said that it would be better to avoid having the proposed amendments take effect in 2012, only to have substantially reformatted versions of the same forms take effect in 2013 as part of the forms modernization project. The proposed amendments, he added, had been incorporated into the first set of modernized forms to be published for comment in August 2012. (See pages 22-24 of these minutes.)

OFFICIAL FORM FOR CHAPTER 13 PLAN AND RELATED RULE AMENDMENTS

Judge Wedoff explained that the advisory committee was working on drafting a national form for Chapter 13 plans. He pointed out that a wide variety of local forms and model plans are currently used in the bankruptcy courts. They impose different requirements and distinctive features from district to district. The lack of a national form, he said, makes it difficult for lawyers who practice in several districts, and it adds transactional costs that are passed on to debtors.

He reported that a recent survey of the bankruptcy bench had established that a majority of chief bankruptcy judges support developing a national form plan. Therefore, he said, the advisory committee had established a working group that expects to have a draft ready soon for informal circulation and comment. He added that it became apparent during the course of the group's work that the effectiveness of a national form plan will

depend on making some simultaneous amendments to the bankruptcy rules to harmonize practice among the courts and clarify certain procedures.

MINI-CONFERENCE ON NEW MORTGAGE FORMS

Judge Wedoff reported that the advisory committee will hold a mini-conference in conjunction with its September 2012 meeting to discuss the effectiveness of the new mortgage-information disclosure forms that took effect on December 1, 2011.

ELECTRONIC SIGNATURES

Judge Wedoff noted that the advisory committee was considering the use of electronic signatures as part of its forms modernization project. In particular, it was focusing on whether, and under what circumstances, bankruptcy courts should accept for filing documents signed electronically without also requiring retention of a paper copy with an original signature. If retention of an original signature is required, moreover, who should maintain it? He noted that the committee was exploring a range of options and contemporary practices.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the forms modernization project had nearly completed its work on all the individual-debtor forms and had begun its work on revising the non-individual forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of May 8, 2012 (Agenda Item 4).

Amendments for Final Approval

FED. R. CIV. P. 45 and 37

Judge Campbell reported that the advisory committee had undertaken a multi-year project to revise Rule 45 (subpoenas) by simplifying the rule and addressing several problems brought to its attention. He noted that during the course of its study, the advisory committee came to appreciate that Rule 45 is an important workhorse in civil litigation that governs virtually all discovery involving non-parties and accomplishes several other important procedural purposes.

After reviewing the pertinent literature on the rule and canvassing the bar, the committee developed a list of 17 concerns that might potentially be addressed through rule amendments. The list was eventually boiled down to four proposed changes: (1) simplification of the rule; (2) transfer of subpoena-related motions; (3) trial subpoenas for distant parties and party witnesses; and (4) notice of service of documents-only subpoenas. A revised rule incorporating those changes was published for public comment in August 2011, and some minor modifications were made after publication. The revised rule, he said, was now ready for final approval by the Judicial Conference.

1. Simplification of the rule

He noted that the first category of proposed changes would simplify an overly complex rule. As Rule 45 is now written, he explained, a lawyer has to look in three different parts of the rule to determine where a subpoena may be issued, where it may be served, and where performance may be required.

First, Rule 45(a)(2) specifies which court may issue a subpoena. It may be a different court for trial, for deposition discovery, or for document discovery. Second, Rule 45(b)(2) specifies four different possibilities for the place where a subpoena may be served. It may be within the district, outside the district but within 100 miles of the place of compliance, anywhere in the state where the district sits if state law permits, or anywhere in the United States if federal law authorizes it. Third, Rule 45(c) imposes limits on the place of enforcement. A non-party, for example, cannot be required to travel more than 100 miles to comply with a subpoena, except to attend a trial. In that case, attendance may be anywhere in the state if the person does not have to incur "substantial expense" to travel. He said that it was the experience of all the judges on the advisory committee that even good lawyers get the various provisions of the rule wrong from time to time.

The advisory committee's proposed simplification addresses those problems and should eliminate most of the confusion. First, revised Rule 45(a)(2) specifies that the court that issues a subpoena is the court that presides over the case. There are no other possibilities. Second, Rule 45(b)(2) specifies that a subpoena may be served at any place in the United States. Third, Rule 45(c)(3) specifies where performance may be required. Essentially, it preserves the performance requirements of the current rule, but eliminates its reference to state law.

There is, he said, precedent in the rules for authorizing nationwide service. Rule 45(b)(2)(D), he noted, currently authorizes service in another state if there is a federal statute that authorizes it. In addition, the Federal Rules of Criminal Procedure authorize nationwide service (FED. R. CRIM. P. 17)(e)).

Professor Marcus said that the public comments on simplification of the rule were very favorable, and some offered suggestions for additional clarification. As a result, the

committee made some changes in the committee note, dealing with depositions of party witnesses and subpoenas for remote testimony. In essence, though, the changes made after publication were very minor.

Professor Marcus pointed out that under the committee's proposal, as published, Rule 45(c)(2) would have left it essentially to the parties to designate the place for production of Rule 34 discovery materials. It provided that a subpoena could command production "at a place reasonably convenient for the person who is commanded to produce." But, he explained, that simplification did not work and could lead to mischief. Accordingly, the committee revised Rule 45(c)(2) to specify that a subpoena may command production "at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." That formulation essentially preserves the current arrangements, but states them more clearly.

2. Transfer of subpoena-related motions

Judge Campbell explained that the modified rule, like the current rule, specifies that a party receiving a subpoena typically has to litigate the enforceability of the subpoena in the court in the district where the performance is required. The producing party, thus, enjoys the convenience of having its dispute handled locally and does not have to travel to a different part of the country to litigate.

Rule 45, however, does not currently allow the court where production is required to transfer a dispute back to the court having jurisdiction over the case. Yet, there are certain situations in which the court in the district of performance should be allowed to refer a dispute to the judge presiding over the case. There is, he said, a split in the case law on the matter, and some courts in fact transfer disputes. The current rule, though, does not authorize the practice expressly.

The proposed new Rule 45(f) would resolve the matter and explicitly allow certain disputes to be resolved by the judge presiding over the case. It would allow the local court to transfer the case either on the consent of the person subject to the subpoena or if the court finds "exceptional circumstances." He reported that some public comments questioned whether exceptional circumstances was the appropriate standard for authorizing a transfer, but the advisory committee ultimately concluded unanimously that it was.

The proposed amendment to FED. R. CIV. P. 37 (failure to make disclosures or cooperate in discovery) would conform that rule to the proposed amendments to Rule 45(f). A new second sentence in Rule 37(b)(1) deals with contempt of orders entered after a transfer. It provides that failure to comply with a transferee court's deposition-related order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending..

Professor Marcus pointed out that the August 2011 publication had highlighted the new transfer provision and expressly invited comment on two questions: (1) whether consent of the parties should be required in addition to consent by the person served with the subpoena; and (2) whether "exceptional circumstances" should be the standard for transfer if the non-party does not consent. Considerable public comment argued that it was inappropriate to require party consent. As long as the recipient of the subpoenas consents to the transfer, the parties should have no veto over the matter. The advisory committee, he said, revised the rule to remove the party-consent feature.

With regard to the appropriate standard for authorizing a transfer in the absence of consent, considerable public support was voiced for a more flexible, less demanding standard. But formulating an appropriate lesser standard, while still protecting the primary interests of the producing party, had been very challenging. The advisory committee and its discovery subcommittee discussed the matter at considerable length and decided to retain the exceptional circumstances standard, but add some clarifying language to the committee note. The note was recast to state that if the local non-party served with a subpoena does not consent to a transfer, the court's prime concern should be to avoid imposing burdens on that person. In some circumstances, though, a transfer may be warranted to avoid disrupting the issuing court's management of the underlying litigation. In short, transfer is appropriate only if those case-management interests outweigh the interests of the producing party in obtaining local resolution of the dispute.

A member praised the work of the advisory committee and said that the proposed changes were long overdue. He noted that few rules of procedure are used more often, yet are harder to work with, than Rule 45. Nevertheless, he said, the "exceptional circumstances" standard may be too high. It may underestimate the needs of a judge presiding over a big, hotly disputed civil case to have flexibility in controlling the case. It may also underestimate how easy it is today to conduct hearings and resolve disputes by telephone or video-conference. He noted that when subpoena disputes arise, it is common for the judge in the district of compliance to call the judge having jurisdiction over the underlying case to discuss the matter.

In addition, he said, the language in the committee note stating that transfers should be "truly rare" events is much too restrictive. It tells judges, in essence, that transfers should almost never occur. He added that a more generous standard is warranted, and "good cause" should be considered as a substitute. He recommended combining a good cause standard with an appropriate explanation in the committee note to give judges the flexibility they need to decide what is best in each case.

Judge Campbell explained that some public comments had suggested a good cause standard, and the advisory committee considered them carefully. But it ultimately concluded that it had to err in favor of protecting third parties who receive subpoenas and

sparing them from assuming undue burdens and hiring counsel in other parts of the country. The exceptional circumstances standard, he said, will afford them more protection than the good cause standard.

He said that the committee was concerned that if the rule were to contain a "good cause" standard, many busy district judges faced with subpoena disputes in out-of-district cases would be readily inclined to transfer them routinely to the issuing court. The rule, he said, should make those busy district judges pause and carefully balance the reasons for a transfer against the burdens imposed on the subject of the subpoena. In essence, he explained, the committee concluded that it was essential to have a higher threshold than mere good cause.

Professor Marcus added that it is very difficult to achieve just the right balance in the rule. It is, he said, particularly difficult to draft a standard that falls somewhere between "exceptional circumstances," which is very difficult to satisfy, and "good cause," which is quite easy to satisfy. He added that the comments from the ABA Section on Litigation were very supportive of retaining the exceptional circumstances standard in order to protect non-party witnesses.

A member argued in favor of retaining the exceptional circumstances standard, and emphasized that it was important to resolve the current conflict in the law and explicitly authorize transfers in appropriate, limited circumstances. She added that the rule should be designed for the average civil case, not the exceptional case. The great majority of subpoena disputes, she said, involve local issues and should be resolved locally. As a practical matter, a good cause standard would lead to excessive transfers.

A participant spoke in favor of the good cause standard, but recommended that if the exceptional circumstances standard were retained, the committee note should be toned down and revised to eliminate the current language stating that transfers should be "truly rare." In addition, it would be useful to refer in the note to the difference between the average case with a local third party and complex litigation in which the lawyers hotly dispute every aspect of a case, including the subpoenas. He added that not all subpoenaed persons are in fact uninvolved, uninterested third parties. Often, the subpoenaed person, although not a party to the case, may well have a direct financial interest in the litigation.

A member agreed that the word "truly" should be eliminated from the note, but supported the advisory committee's decision to retain the exceptional circumstances standard. A member recommended resolving the matter by eliminating the second sentence in the third paragraph of the portion of the committee note dealing with Rule 45(f). As revised, it would read: "In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are presented."

A member expressed concern about the language added to the committee note after publication regarding the issuance of subpoenas to require testimony from a remote location. He suggested that the committee should consider amending Rule 45(c)(1) itself to clarify that it applies both to attendance at trial and testimony by contemporary transmission from a different location under Rule 43(a).

3. Trial subpoenas for distant parties and party officers

Judge Campbell explained that the third change in the rule resolves the split in the case law in the wake of *In re Vioxx Products Liability Litigation,* 438 F. Supp. 2d 664 (E.D. La. 2006). The district court in that case read Rule 45 as permitting a subpoena to compel a party officer to testify at a trial at a distant location. Other courts, though, have ruled that parties cannot be compelled to travel long distances from outside the state to attend trial because they have not been served with subpoenas within the state, as required by Rule 45(b)(2).

The advisory committee, he said, was of the view that *Vioxx* misread Rule 45, in part because the current rule is overly complex. The proposed amendments, he said, would overrule the *Vioxx* line of cases and confirm that party officers can only be compelled to testify at trial within the geographical limits that apply to all witnesses. He noted that the committee had highlighted the matter when it published the rule by including in the publication an alternative draft text that would have codified the *Vioxx* approach.

The public comments, he said, were split, with no consensus emerging for either position. The advisory committee decided ultimately that it should not change the original intent of a rule that has worked well for decades. Professor Marcus added that the committee's concern was that if the rule were amended to codify *Vioxx,* subpoenas could be used to exert undue pressures on a party and its officers. Moreover, there are alternate ways of dealing with the problems of obtaining testimony from party witnesses, including the use of remote testimony under Rule 43(a).

4. Notice of service of documents-only subpoenas

Judge Campbell explained that the current Rule 45 requires parties to notice other parties that they are serving a subpoena. But the provision is hidden as the last sentence of Rule 45(b)(1), and many lawyers are unaware of it. The advisory committee proposal, he said, relocates the provision to a more prominent place as a separate new paragraph 45(a)(4), entitled "notice to other parties before service." In addition, the revised rule requires that a copy of the subpoena be attached to the notice.

Judge Campbell said that the advisory committee realized that many other reasonable notice provisions might have been added to the rule. For example, it could have required that: notice be given a specific number of days in advance of service of the subpoena; additional notice be given if the subpoena is modified by agreement; notice be given when documents are received; and copies of documents be provided by the receiving party to the other parties in the litigation. The rule could also have specified the sanctions for non-compliance with the notice requirements.

The advisory committee, however, concluded that those provisions, though sensible, should not be included because the primary purpose of the amendments is to get parties to give notice of subpoenas. Just accomplishing that objective should resolve most of the current problems. The remaining issues can generally be worked out if lawyers are left to their own devices to consult with opposing counsel to obtain copies of whatever documents they need. The committee, he said, was concerned about the length and complexity of the current rule and did not want to add to that length and complexity by dictating additional details. He added, though, that the committee could return to the rule in the future if problems persist.

Professor Marcus said that many competing suggestions had been received for additional provisions. He added that, at the urging of the Department of Justice, the committee had made a change in the rule following publication to restore the words "before trial" to the notice provision. It also added in Rule 45(c)(4) the word "pretrial" before "inspection of premises."

Judge Campbell noted that the advisory committee had considered whether the time limit in current Rule 45(c) for serving objections to subpoenas was too short, but decided not to change it. He added that the matter rarely results in litigation, as courts allow extensions of time when appropriate. He agreed to a member's suggestion that language in lines 43 and 44 of the committee note be deleted. It had suggested that parties may ask that additional notice requirements be included in a court's scheduling order.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Information Items

PRESERVATION AND SPOLIATION

Judge Campbell reported that one of the panels at the committee's 2010 Duke Law School conference had urged the committee to approve a detailed civil rule specifying when an obligation to preserve information for litigation is triggered, the scope of that obligation, the number of custodians who should preserve information, and

the sanctions to be imposed for various levels of culpability. After the conference, Judge Kravitz, then chair of the advisory committee, tasked the committee's discovery subcommittee with following up on the recommendations.

The subcommittee began its work in September 2010 by asking the Federal Judicial Center to study the frequency and nature of sanctions litigation in the district courts. The Center's research found that litigation is rare, as only 209 spoliation motions had been filed in more than 130,000 civil cases studied, only about half of which involved electronic discovery. The subcommittee also studied a large number of federal and state laws that impose various preservation obligations.

The subcommittee, he said, then drafted three possible rules to address preservation. The first was a very detailed rule that provided specific directives and attempted to prescribe which events trigger a duty to preserve, what the scope of the preservation duty is, and what sanctions may be imposed for a failure to preserve. The committee, however, found it exceedingly difficult to draft a detailed rule that could be applied across all the broad variety of potential cases and give any meaningful certainty to the parties.

The second rule also addressed the triggering events for preservation, the scope of retention obligations, and sanctions for violations, but it did so in a much more general way. Essentially it provided broad directions to behave reasonably and preserve information in reasonable anticipation of litigation.

The third rule focused just on sanctions under Rule 37 in order to promote national uniformity and constraint in imposing sanctions. Currently, there is substantial dispute among the circuits on what level of culpability gives rise to sanctions for failure to preserve. The prevailing standards now range from mere negligence to wilfulness or bad faith.

The third rule specified that a court may order curative or remedial measures without finding culpability. Imposition of sanctions of the kind listed in Rule 37(b), on the other hand, would require wilfulness or bad faith. The proposed rule identified the factors that a court should consider in assessing the need for sanctions. Those factors, moreover, should also provide helpful guidance to parties at the time they are considering their preservation decisions.

Judge Campbell said that the three draft rules had been discussed with about 25 very knowledgeable people at the committee's September 2011 mini-conference in Dallas. A wide range of views was expressed, but no consensus emerged. Many written comments were received by the committee and posted on the judiciary's website. They embrace a full range of proposals. Some groups argued that there is an urgent need for a very detailed rule on preservation and spoliation with bright-line standards. One, for

example, suggested that a duty to preserve should only be triggered by the actual commencement of litigation. Others contended that no rule is needed at all, as the common law should continue its development. The Department of Justice, he said, took the position that it is premature to write a rule on these subjects.

The subject area, he said, continues to be very dynamic. In April 2012, the RAND Corporation completed a study of large corporations, documenting that they spend millions of dollars in trying to comply with preservation obligations. About 73% of the costs are spent on lawyers reviewing materials and 27% on the preservation of information itself. A recent in-house study by the Department of Justice generally corroborated the conclusion of the Federal Judicial Center that spoliation disputes in court are rare. Another recent study, by Professor William Hubbard, found that the problem arises only in a small percentage of cases, but when it does it can be extraordinarily expensive.

Judge Campbell pointed out that the Seventh Circuit was conducting a pilot program on electronic discovery and preservation that emphasizes the need for the parties to cooperate and discuss preservation early in the litigation. The pilot, he said, was entering its third phase and producing a good deal of helpful information. The Southern District of New York recently launched a complex-case pilot program that also includes preservation as an element. The Federal Circuit promulgated clear guidelines on discovery of electronically stored information and has placed some important limits on discovery in patent cases. A Sedona Conference working group has been working for months on a consensus rule for the committee's consideration. The group, he noted, had not yet reached consensus on potential rule amendments. Finally, he said, the case law continues to evolve, as trial judges are taking imaginative steps to deal with preservation problems and restrain unnecessary costs.

Judge Campbell reported that the advisory committee was still leaning towards a sanctions-only rule, rather than a rule that tries to define trigger and scope. Nevertheless, the subcommittee was still absorbing and discussing the many sources of information coming before it. He suggested that the subcommittee may have a more concrete draft available for the advisory committee's consideration at its November 2012 meeting.

He noted that the advisory committee was aware that some are frustrated with the pace of the project. But, he said, the delay in producing a rule has not been for lack of effort. Rather, the issues are particularly difficult, and the views expressed to the subcommittee have been very far apart. He noted that even if the committee were to approve a rule at its next meeting, it could not take effect before December 2015.

He reported that in December 2011, the House Judiciary Subcommittee on the Constitution had held a hearing on the costs and burdens of civil discovery. The proceedings included substantial discussion on electronic discovery issues. The basic

message from the majority was that preservation obligations and electronic discovery cost corporations substantial money and are a drain on innovation and jobs. He pointed out that the witnesses testified that the federal rules process works well, and the rules committees should continue their efforts to solve the current problems. After the hearings, the subcommittee chair wrote a letter urging the advisory committee to approve a strong rule. The subcommittee minority, though, followed with a letter asking the committee to proceed slowly and let the common law work its course.

Professor Marcus pointed out that the advisory committee had not resolved two critical policy questions and invited input on them from the members. First, he said, a decision must be made on whether a new rule should be confined just to electronic discovery or apply to all discoverable information. Second, in light of the strikingly divergent views expressed to the committee on the subject, a basic decision must be made on how urgently a new rule is needed and how aggressive it should be.

A member argued that national uniformity is very important because preservation practices and litigation holds cost parties a great deal of money. The precise contents of the new rule may not be clear at this point, but the advisory committee should continue to proceed deliberately and carefully study the various pilot projects underway in the courts. Eventually, however, it needs to produce a national rule. A participant added that the primary risk of moving too slowly is that courts will develop their own local rules and become attached to them, making it more difficult to impose a uniform national rule.

A participant pointed out that efforts have been made, without much result so far, to prod the corporate community into developing a series of best practices to deal with preservation of information. Corporations, he said, need to balance their legitimate need to get rid of information in the normal course of business against the competing need to preserve certain information in anticipation of eventual litigation. There is, he said, reluctance on the part of corporate management even to consider the matter, but there may be some movement in that direction in the future.

He suggested that a sanctions-only rule is appropriate. It would also be desirable, he said, to include a more emphatic emphasis in Rules 16 and 26 on getting the parties and the judge to address preservation obligations more directly at the outset of a case.

A member expressed great appreciation for the advisory committee's work and agreed with its inclination to pursue a narrow rule that focuses just on Rule 37 sanctions. He emphasized that the Rules Enabling Act restricts the rules committees' authority to matters of procedure only. Preservation duties, though, generally go beyond procedure and simply cannot be fixed by a rule.

Moreover, he said, the committee cannot the preservation problems because most litigation is conducted in the state courts, not the federal courts. He suggested that the

more the committee sticks to procedure and avoids matters of substantive conduct, the more likely the states will follow its lead. A member added that there is an important opportunity for the committee to achieve greater national uniformity by working with the state courts. If the committee produces a good rule, he said, effective complementary state-court rules could be promoted with the support and encouragement of the Conference of Chief Justices.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell pointed out that it is difficult to speak about preservation without considering more broadly what information should be permitted in the discovery process, especially electronically stored information. He reported that the advisory committee had established a separate subcommittee, chaired by Judge John G. Koeltl, to evaluate the many helpful ideas for discovery reform raised at the Duke conference and to recommend which should be proposed as rule amendments. Eventually, he said, the advisory committee will marry the work of the Duke Conference subcommittee with that of the discovery subcommittee on spoliation because the two are closely related.

He reported that Professor Cooper had produced very helpful and thought-provoking drafts of several potential rule amendments to implement the Duke recommendations. The proposals, he explained, can be categorized as falling into three sets of proposed changes.

The first set of proposals was designed to promote early and active case management. They include: reducing the time for service of a complaint from 120 days to 60; reducing the time for holding a scheduling conference from 120 days to 60 or 45; requiring judges to actually hold a scheduling conference in person or by telephone; no longer allowing local court rules to exempt cases from the initial case-management requirements; requiring parties to hold a conference with the court before filing discovery motions; and allowing written discovery to be sought before the Rule 26(f) conference is held, but providing that requests do not have to be answered until after the case-management conference. The latter provision would let the parties know what discovery is contemplated when they meet with the judge to discuss a discovery schedule. Those and other ideas were designed to get the courts more actively involved in the management of cases and at an earlier stage.

Judge Campbell noted that the second category of possible changes was designed to curtail the discovery process and make it more efficient. One set of proposals would take the concept of proportionality and move it into Rule 26(b)((1)'s definition of discoverable information. It is already there by cross-reference in the last sentence of that provision, but the proposals would make it more prominent. In essence, the revised definition would define discoverable information as relevant, non-privileged information that is proportional to the reasonable needs of the case.

In addition, he said, the subcommittee was considering limiting discovery requests by lowering presumptive numbers and time limits, such as reducing the number of depositions from 10 to 5, the time of depositions from 7 hours to 4, and the number of interrogatories from 25 to 15, and by imposing caps of 25 requests for production and 25 requests for admissions. Although courts may alter them, just reducing the presumptive limits may reduce the amount of discovery that occurs and change the prevailing ethic that lawyers must seek discovery of everything.

Another proposal, he noted, would require parties objecting to a request for production to specify in their objection whether they are withholding documents. A responding party electing to produce copies of electronically stored information, rather than permitting inspection, would have to complete the production no later than the inspection date in the discovery request. Rule 26(g) would be amended to require the attorney of record to sign a discovery response to attest that the response is not evasive. Another proposal would defer contention interrogatories and requests to admit until after the close of all other discovery. The subcommittee, he said, was also considering cost-shifting provisions and may make cost shifting a more prominent part of discovery. All these changes are designed to streamline the discovery process and reduce the expenses complained about at the Duke conference.

Judge Campbell reported that a third category of proposals was designed to emphasize cooperation among the attorneys. One amendment would make cooperation an integral part of Rule 1. The rule, thus, might specify that the civil rules are to be construed and used to secure the just, speedy, and inexpensive determination of cases, and the parties should cooperate to achieve these ends.

Judge Campbell said that the advisory committee will study these drafts at its November 2012 meeting. It will likely marry them with the proposed rule on preservation to produce a package of rule amendments to make litigation more efficient. Professor Cooper added that it would be very beneficial for the Standing Committee members to review the proposed drafts carefully and point out any flaws and make additional suggestions that the advisory committee might consider.

A member praised the comprehensive and impressive efforts of the committee. She noted, though, that several corporate counsel had expressed concern about giving proportionality a more prominent place in the rules. They fear that it would give attorneys an excuse to litigate more discovery disputes.

A participant pointed out that the objective of fostering cooperation among the parties is excellent, but specifying a cooperation requirement in the text of the rules is troublesome. Cooperation inevitably is entwined with attorney conduct, an area on the edge of the Rules Enabling Act that may impinge on the role of the states in regulating attorney conduct.

Another participant suggested that consideration be given to appointing special masters to handle discovery in complex cases because busy judges often do not have the time to devote undivided attention to overseeing discovery. Some way would have to be found to pay for masters, but at least in large corporate cases, the parties may be able to work it out. He also recommended reducing the presumptive limit for expert-witness depositions to 4 hours.

A member commended the advisory committee for undertaking the discovery project. He suggested that anything the committee can do to limit the number of discovery requests and reduce discovery time periods, at least in the average case, will be beneficial. He also commended the proposed modest recommendations on cost-shifting and proportionality. He urged the committee to carry on the work and move as quickly as possible.

His only reservation, he said, concerned adding a cooperation requirement to the rules. The concept, he said, was fine, but it may conflict with an attorney's ethical duty to pursue a client's interests zealously. He asked how much lawyers can be reasonably expected to cooperate in discovery when they are not expected to cooperate very much in other areas. The adversarial process, he said, is a highly valued attribute of the legal system, and the committee should avoid intruding into the states' authority over attorney conduct.

Members noted that some states have imposed effective, stricter limits on depositions that led lawyers to reassess how long they really need to take a deposition. A member added that depositions of expert witnesses have been eliminated completely in his state. It was noted that the original intent of Rule 26(a)(2)'s report requirement was to reduce the length of depositions of expert witnesses or even to eliminate them in many cases. That benefit, however, has not been realized.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Iqbal v. Ashcroft,* 556 U.S. 662 (2009). There is, he said, no sense that the lower courts have unified around a single, identifiable pleadings standard for civil cases, but there is also no sense of a crisis or emergency. The committee, he said, was essentially biding its time and did not plan to move forward quickly. It has several potential proposals on the table, including directly revising the pleading standards in FED. R. CIV. P. 8 (general rules of pleading), addressing pleading indirectly through Rule 12(e) motions for a more definite statement, or integrating pleading more closely with discovery, particularly in cases where there is an asymmetry of information.

Dr. Cecil reported that the Federal Judicial Center had begun pilot work on its new study of all case-dispositive motions in the district courts. The study, he said, will be different from earlier studies because it will take a more comprehensive, holistic look at all Rule 12 motions and summary judgment issues and explore whether there are any tradeoffs, such as whether an increase in motions to dismiss has led to a reduction in motions for summary judgment. In addition, the Center is collaborating closely with several civil procedure scholars and hopes to reach a consensus with them about what is actually going on in the courts regarding dispositive motions. The study, he said, will be launched in September 2012 with the help of law professors and students in several schools.

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FED. R. CIV. P. 84 AND FORMS

Judge Campbell reported that the advisory committee was examining FED. R. CIV. P. 84 (forms), which states that the forms appended to the rules "suffice" and illustrate the simplicity and brevity that the rules contemplate. He explained that many of the forms are outdated, and some are legally inadequate.

Professor Cooper pointed out that the Standing Committee had appointed an ad hoc forms subcommittee, chaired by Judge Gene E. K. Pratter of the civil committee, to review now the advisory committees develop and approve forms. The subcommittee, he said, made two basic observations: (1) in practice, the civil, criminal, bankruptcy, and appellate forms are used in widely divergent ways; and (2) the process for generating and approving forms differs substantially among the advisory committees.

The civil and appellate forms, for example, adhere to the full Rules Enabling Act process, including publication, approval by the Judicial Conference and the Supreme Court, and submission to Congress. The bankruptcy rules, on the other hand, follow the process partly, only up through approval by the Judicial Conference. At the other extreme, the criminal rules have no forms at all. Instead, the Administrative Office drafts the criminal forms, sometimes in consultation with the criminal advisory committee. He said that the subcommittee ultimately concluded that there is no overriding need for the advisory committees to adopt a uniform approach.

Professor Cooper explained that the civil advisory committee was now in the second phase of the forms project and was focusing on what to do specifically with the civil forms. He noted that the project had received an impetus from the Supreme Court's *Twombly* and *Iqbal* decisions on pleading requirements and from the widely held perception that the illustrative civil complaint forms are legally insufficient. There is, he said, a clear tension between the simplicity of those forms and the pleading requirements announced in the Supreme Court decisions.

He noted that the advisory committee was considering several different options. One would be just to eliminate the pleading forms. An alternate would be to develop a set of new, enhanced pleading forms for each category of civil cases consistent with *Twombly* and *Iqbal*. There was, though, no enthusiasm in the committee for that approach. Going further, the committee could consider getting back into the forms business full-bore and spend substantial amounts of time on improving and maintaining all the forms. At the other extreme, the committee could eliminate all the forms and allow the Administrative Office to generate the forms, with appropriate committee consultation.

CLASS ACTIONS AND RULE 23 SUBCOMMITTEE

Judge Campbell reported that the advisory committee had appointed a Rule 23 subcommittee to consider several topics involving class-action litigation and whether certain amendments to the class-action rule were appropriate.

Professor Marcus said that the subcommittee had begun its work and was examining a variety of controversial issues that have emerged as a result of several Supreme Court decisions in the past couple of years, recent litigation developments, and experience under the Class Action Fairness Act. Among the topics being considered are: (1) the relationship between considering the merits of a case and determining class action certification, particularly with regard to the predominance of common questions; (2) the viability of issues classes under Rule 23(c)(4); (3) monetary relief in a Rule 23 (b)(2) class action; (4) specifying settlement criteria in the rule; and (5) revising Rule 23 to address the Supreme Court's announcement in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fairness and adequacy of a settlement are no substitute for full-dress consideration of predominance.

Professor Marcus noted that the list of issues continues to evolve and many were discussed at the panel discussion during the Standing Committee's January 2012 meeting. He pointed out that the project to consider appropriate revisions to Rule 23 will take time, since several topics are controversial and will pose drafting difficulties.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of May 17, 2012 (Agenda Item 8).

Amendment for Final Approval

FED. R. CRIM. P. 11(b)

Judge Raggi reported that the proposed amendment to FED. R. CRIM. P. 11(b)(1) (pleas) would add a new subsection (o) to the colloquy that a court must conduct before accepting a defendant's guilty plea. It would require a judge to advise defendants who are not United States citizens that they may face immigration consequences if they plead guilty.

She noted that at every stage of the advisory committee's deliberations, a minority of members questioned whether it is wise or necessary to add further requirements to the already lengthy Rule 11 plea colloquy. Moreover, the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2012), addressed the duty of defense counsel, not the duty of courts, to provide information on immigration consequences to the defendant. Nevertheless, a majority of the advisory committee concluded that immigration is qualitatively different from other collateral consequences that may flow from a conviction. Moreover, a large number of criminal defendants in the federal courts are aliens who are affected by immigration consequences.

The committee, she said, recognized the importance of not allowing Rule 11(b) to become such a laundry list of every possible consequence of a guilty plea that the most critical factors bearing on the voluntariness of a plea do not get lost, *i.e.*, knowledge of the important constitutional rights that the defendant is waiving. She added that the only change made after publication was a modest change in the committee note.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5(d) and 58(b)

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 5(d) (initial appearance) and FED. R. CRIM. P. 58(b)(2) (initial appearance in a misdemeanor) dealt with advising detained foreign nationals that they may have their home country's consulate notified of their arrest.

The amendments had been approved by the Judicial Conference in September 2011, but returned by the Supreme Court in April 2012. The advisory committee then discussed possible concerns that the Court may have had, such as that the possibility that the language of the amendments could be construed to intrude on executive discretion or

confer personal rights on a defendant. She suggested that there may have been concern over the proposed language in Rule 5(d)(1)(F), which specified that a detained non-citizen be advised that an attorney for the government or law-enforcement officer will do either of two things: (1) notify a consular office of the defendant's country, or (2) make any other consular notification required by treaty or international agreement.

She suggested that use of the word "will" might have been seen as potentially tying the hands of the executive in conducting foreign affairs. In addition, despite language in the committee note that the rule did not create any individual rights that a defendant may enforce in a federal court, the rule might have been seen as taking a step in that direction,

After the rule was returned by the Court, the advisory committee went back to the drawing board and produced a revised draft of the amendments. As revised, the first part provides that the defendant must be told only that if in custody, he or she "may request" that an attorney for the government or law-enforcement officer notify a consular office. It does not guarantee that the notification will in fact be made. The second part of the amendments was not changed. It specifies that even without the defendant's request, consultation notification may be required by a treaty or other international agreement.

Judge Raggi pointed out that the primary concern in revising the amendments was to assuage any concerns that the Supreme Court may have had with the amendments as originally presented. She noted that the Department of Justice had been consulting closely with the Department of State, which is very eager to have a rule as an additional demonstration to the international community of the nation's compliance with its treaty obligations.

A member noted that the Vienna Convention only requires notification of a consular office if a defendant requests it. She said that the Supreme Court might have found the original language of proposed Rule 5(d)(1)(F)(i) too strong in stating that the government will notify a consular office if the defendant requests. But the new language in Rule 5(d)(1)(F)(ii) may go too far in the other direction by requiring notification without the defendant's request if required by a treaty or international agreement.

Ms. Felton explained that several bilateral treaties, separate from the Vienna Convention, require notification regardless of the defendant's request. She added that the Departments of Justice and State had proposed the amendments to Rules 5 and 58 primarily as additional, back-up insurance that consular notification will in fact be made.

The main thrust of the amendments, she said, was to inform defendants of their option to request consular notification. In the vast majority of cases, however, the notification will already have been made by a law-enforcement officer or government attorney at the time of arrest. That is what the Vienna Convention contemplates. The

proposed amendments, which apply at initial appearance proceedings, will help catch any cases that may have slipped through the cracks.

Judge Raggi noted that this factor was part of the discussion on whether a rule is needed at all because there are no court obligations under the Convention and treaties. The rule, essentially, is a belt-and-suspenders provision designed to cover the rare cases when a defendant has not been advised properly. It only states that a defendant may request notification, and that is as far as it can go. If were to imply that the notice will in fact be given, which is what some treaties actually require, there would be concern that the rule itself was creating an enforceable individual right in the defendant.

Professor Beale added that the revised amendments were acceptable to the Departments of Justice and State. They may be more acceptable to the Supreme Court because they do not in any way tie the hands of the executive and avoid creating any individual rights or remedies. A member noted that the last part of the committee notes makes that point explicitly.

Judge Raggi pointed out that it was up to the Standing Committee to decide whether to republish the rule. Although the changes made after the return from the Supreme Court simply clarify the intent of the amendments, the advisory committee had reason to think that they were different enough to warrant publishing the rule again for further comment.

The committee unanimously by voice vote approved the proposed amendments for republication.

Information Items

FED. R. CRIM. P. 12 and 34

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 12 (pleadings and pretrial motions) and the conforming amendment to FED. R. CRIM. P. 34 (arresting judgment) deal with motions that have to be made before trial and the consequences of an untimely motion. The amendments, she said, had been prompted by a proposal by the Department of Justice to include motions objecting to a defect in the indictment in the list of motions that must be made before trial.

The proposal, she said, had now come to the Standing Committee for the third time. The last draft was published for public comment in August 2011. It generated many thoughtful comments, which led the advisory committee to make some additional changes. It is expected that the ad hoc subcommittee reviewing the rule will present a final draft to the advisory committee in October 2012, and it may be presented to the Standing Committee for final approval in January 2013.

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee had received a letter from the Attorney General in October 2011 recommending that FED. R. CRIM. P. 6(e) (grand jury secrecy) be amended to establish procedures for disclosing historically significant grand jury materials. She noted that applications to release historic grand jury materials had been presented to the district courts on rare occasions, and the courts had resolved them by reference to their inherent supervisory authority over the grand jury.

The Department of Justice, however, questioned whether that inherent authority existed in light of Rule 6(e)'s clear prohibition on disclosure of grand jury materials. Instead, it recommended that disclosure should be permitted, but only under procedures and standards established in the rule itself. The Department submitted a very thoughtful memo and proposed rule amendments that would: (1) allow district courts to permit disclosure of grand jury materials of historical significance in appropriate circumstances and subject to required procedures; and (2) provide a specific point in time at which it is presumed that materials may be released.

She noted that a subcommittee, chaired by Judge John F. Keenan, had examined the proposal and consulted with several very knowledgeable people on the matter. In addition, the advisory committee reporters prepared a research memorandum on the history of Rule 6(e), the relationship between the court and the grand jury and case law precedents on the inherent authority of a judge to disclose grand jury material. After examining the research and discussing the proposal, all members of the subcommittee, other than the Department of Justice representatives, recommended that the proposed amendment not be pursued.

The full advisory committee concurred in the recommendation and concluded that in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority. Therefore, there is no need for a rule on the subject.

Judge Raggi added that she had received a letter from the Archivist of the United States strongly supporting the Department of Justice proposal. She spoke with him at length about the matter and explained that it would be a radical change to go from a presumption of absolute secrecy, which is how grand juries have always operated, to a presumption that grand jury materials should be presumed open after a certain number of years. A change of that magnitude, she said, would have to be accomplished through legislation, rather than a rule change. She noted that the archivist has a natural, institutional inclination towards eventually releasing historical archived documents and might consider supporting a legislative change.

FED. R. CRIM. P. 16

Judge Raggi reported that a suggestion had been received from a district judge to amend FED. R. CRIM. P. 16(a) (government's disclosure) to require pretrial disclosure of all the defendant's prior statements. There was, however, a strong consensus on the advisory committee that there are no real problems in criminal practice that warrant making the change. The committee, accordingly, decided not to pursue an amendment.

Judge Raggi reported that the Senate Judiciary Committee was considering legislation addressing the government's obligations to disclose exculpatory materials under *Brady* and *Giglio*. The committee had asked the judiciary for comments and a witness at the hearings. She said that she had decided not to testify but wrote to the committee to document the work of the advisory committee and the Standing Committee on the subject over the last decade. Attached to the letter were 900 pages of the public materials that the committee had produced.

She explained in the letter that the advisory committee had tried to write a rule that would codify all the government's disclosure obligations under case law and statute, but concluded that it could not produce a rule that fully captures the obligations across the wide range of federal criminal cases. In addition, she said, her letter alluded to a Federal Judicial Center survey of federal judges showing, among other things, that judges see non-disclosure as a problem that only arises infrequently. Although the advisory committee decided not to pursue a rule change, she added, the subject is being addressed in revisions to the *Bench Book for U.S. District Court Judges*. She noted that the Federal Judicial Center's Bench Book Committee was close to completing that work.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of May 3, 2012 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Amendments for Final Approval

FED. R. EVID. 803(10)

Judge Fitzwater reported that the proposed amendment to FED. R. EVID. 803(10) (hearsay exception for the absence of a public record) was needed to address a constitutional infirmity as a result of the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). It raised the concern that "testimonial" evidence is being allowed when a certificate that a public record does not exist is introduced in

evidence without the presence of the official who prepared the certificate. The proposed amendment would create a notice-and-demand procedure that lets the prosecution give written notice of its intention to use the information. Unless the defendant objects and demands that the witness be produced, the certificate may be introduced.

The proposed procedure, he said, had been approved in *Melendez-Diaz*. The advisory committee received two comments on the amendment, one of which endorsed it and the other approved it in principle with some comments.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater reported that FED. R. EVID. 801(d) (declarant-witness's prior statement) specifies that certain prior statements are not hearsay. Under Rule 801(d)((1)(B), the proponent of testimony may introduce a prior consistent statement for its truth, *i.e*. to be admitted substantively, but not for another rehabilitative purpose, such as faulty recollection.

He said that two problems have been cited with the way the rule is now written. First, the prior consistent statement of the witness is of little or no use for credibility unless the jury actually believes the testimony to be true anyway. The jury instruction, moreover, is very difficult for jurors to follow, as it asks them to distinguish between prior consistent statements admissible for the truth and those that are not. Second, the distinction has little, if any, practical effect because the proponent of the testimony has already testified in the presence of the trier of fact.

The proposed amendment would allow a prior consistent statement to be admitted substantively if it otherwise rehabilitates the witness' credibility.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. EVID. 803(6)-(8)

Judge Fitzwater noted that FED. R. EVID. 803(6), (7), and (8) are the hearsay exceptions, respectively, for business records, the absence of business records, and public records. When the admissibility requirements of the rule are met, the evidence is admitted as an exception to the hearsay rule unless the source, method, or circumstances indicate a lack of trustworthiness.

During the restyling of the rules, he said, a question arose as to who has the burden on the issue of lack of trustworthiness. By far the vast majority of court decisions have held that the burden is on the opponent of the evidence, not the proponent. But a few decisions have placed the burden on the proponent. Since the case law was not unanimous, the advisory committee decided that it could not clarify the matter as part of the restyling project because a change would constitute a matter of substance.

Although the ambiguity was not resolved during the restyling project, the Standing Committee suggested that the advisory committee revisit the rule. The advisory committee initially was of the view that no further action was needed until it was informed that the State of Texas, during its own restyling project, had looked at the restyled federal rules and concluded that FED. R. EVID. 803(6)-(8) had placed the burden on the proponent of the evidence. This, clearly, was not the advisory committee's intention. At that point, it decided to make a change in the rules to make it clear that the burden is on the opponent of the evidence.

At members' suggestions, minor changes were made in the proposed committee notes. Line 34 of the note to Rule 806(8) was corrected to conform to the text of the rule, and an additional sentence was added to the second paragraph of the note to Rule 806(6).

The committee without objection by voice vote approved the proposed amendments for publication.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Judge Fitzwater noted that the advisory committee's next meeting will be held on October 4 and 5, 2012, in Charleston, South Carolina. A symposium on Rule 502 will be held in conjunction with the meeting, with judges, litigators, and academics in attendance. There is concern, he said, that Rule 502 (limitations on waiver of attorney-client privilege and work product) is not being used as widely as it should be as a means of reducing litigation costs. He noted that Professor Marcus will be one of the speakers at the program, and he invited the members of the Standing Committee to attend.

REPORT OF THE E-FILING SUBCOMMITTEE

Judge Gorsuch noted that the ad hoc committee, which he chaired, was comprised of representatives from all the advisory committees. It was convened to consider appropriate terminology that the rules might use to describe activities that previously had only involved paper documents but now are often processed electronically. Although the

impetus for the subcommittee's formation arose in connection with the appropriate terminology to use in the pending amendments to Part VII of the bankruptcy rules and FED. R. APP. P. 6, the subcommittee took a comprehensive look at all the federal rules. Professor Struve served as the subcommittee reporter, and Ms. Kuperman compiled a comprehensive list of all the terms used in each set of federal rules to describe the treatment of the record and other materials that may be either in paper or electronic form.

He noted that the subcommittee had identified four possibilities for defining its work and listed them from the most aggressive to the least. First, he said, it could conduct a major review of all the federal rules in order to achieve uniformity in terminology across all the rules. That major project would be conducted along the lines of the recent restyling efforts. Second, the subcommittee could compile a glossary of preferred terms. Third, it could serve as a screen for all future rule amendments, and advisory committees would have to run their proposals through the subcommittee. And fourth, the subcommittee could simply make itself available for assistance at the request of the advisory committees.

He reported that the subcommittee opted for the last alternative, largely because the others would all take a great deal of time and effort. Moreover, it recognized that technology is changing so rapidly that it may not be timely to undertake a more aggressive approach at this juncture. At some point in the future, though, terminology will have to be addressed more comprehensively. He added that the most valuable result of the subcommittee's work was to make the reporters cognizant of the extraordinary number of synonyms currently in use in the rules and to encourage them to coordinate with each other on terminology.

INTERIM ASSESSMENT OF THE JUDICIARY'S STRATEGIC PLAN

Judge Kravitz noted that he would work with the advisory committees to prepare a response to Judge Charles R. Breyer, the Judicial Planning Coordinator, on the committee's progress in implementing the *Strategic Plan for the Federal Judiciary.*

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 3 and 4, 2013 in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe,
Secretary

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

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

CHAIRS OF ADVISORY COMMITTEES

JEFFREY S. SUTTON
APPELLATE RULES

EUGENE R. WEDOFF
BANKRUPTCY RULES

DAVID G. CAMPBELL
CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

May 29, 2012

The Honorable Sandra L. Lynch
Chief Judge
United States Court of Appeals
for the First Circuit
John Joseph Moakley
U.S. Courthouse
1 Courthouse Way, Room 8710
Boston, Massachusetts 02210

Dear Chief Judge Lynch:

In my capacity as the Chair of the Advisory Committee on the Federal Rules of Appellate Procedure, I write (1) to thank you for your input about a proposal to amend Appellate Rule 29(a) to permit Indian Tribes and municipalities to file amicus curiae briefs without consent of the parties or leave of court, and (2) to tell you what we did with the proposal.

First, thank you. We received formal responses from nearly every circuit in the country, and all of the responses (informal and formal) informed our deliberations. The responses covered the gamut—from opposition to indifference to encouragement—and all of them gave us food for thought.

Second, our resolution of the issue reflects this range of views. We have decided to take no action for now but to revisit the issue in five years.

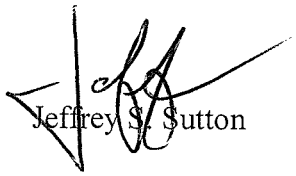
From the outset, this proposal has implicated two competing strands of thought. On the one hand, it seems strange to give the Federal Government and the States a right to file amicus briefs without permission under Rule 29(a) but to deny the same privilege to cities and federally recognized Tribes. The validity of laws enacted by all four entities is put at issue in federal lawsuits, and all four entities may have a useful public perspective on other issues litigated by private parties in federal court. All of this may explain why the Rules of the United States Supreme Court allow cities to file amicus briefs without leave of court. To the extent Rule 29(a) is designed to respect the dignity of two sovereigns (the States and National Government), it is unclear why the dignity of another sovereign, if a unique sovereign (the Tribes), should not also be reflected in the Federal Rules of Appellate Procedure and perhaps the Supreme Court Rules.

On the other hand, no court of appeals has used its local rulemaking powers to permit either group to file amicus briefs without permission. A study by the Federal Judicial Center of amicus brief requests filed by Tribes over the last several years shows that they were rarely denied. And in response to our survey, several circuits opposed the idea of creating a national rule for amicus filings by Tribes and cities at this point. One circuit also raised the possibility that a national rule in this area might create recusal issues, particularly for circuits with relatively few judges.

The committee has been considering this proposal since 2009. We usually act more quickly than that. The length of our deliberations shows that the committee thought the proposal was a serious one. Yet in view of the range of reactions to the proposal by the circuits and the reality that, so far as we can tell, cities and Tribes who wish to file an amicus brief routinely are allowed to do so, the committee believes that it makes sense to show restraint in nationalizing the issue. Until now, no one to our knowledge has urged the Advisory Committee on the Federal Rules of Appellate Procedure or any individual circuit court to pass a rule permitting amicus briefs to be filed by Tribes or cities without consent. In response to our inquiry, at least one circuit indicated that, in the absence of a national rule, some members of the court might favor addressing this issue through a local rule. Time, we anticipate, may bring to light further strengths or weaknesses of this proposal, and as a result we plan to take it up again in five years.

Thank you for your assistance.

Sincerely,



Jeffrey S. Sutton

JSS:jmf

cc: The Honorable Mark R. Kravitz
Professor Daniel R. Coquillette
Professor Catherine T. Struve

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TAB 3A

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MEMORANDUM

DATE: August 2, 2012

TO: Judge Robert Michael Dow, Jr.
Douglas N. Letter

FROM: Catherine T. Struve

RE: Item No. 10-AP-I (sealing and redaction on appeal)

This memo summarizes the status of our inquiries concerning Item No. 10-AP-I and the questions that we intend to research in preparation for the Appellate Rules Committee's September 2012 meeting.

Item No. 10-AP-I, which concerns questions raised by the sealing or redaction of appellate filings, arose from a suggestion by Paul Alan Levy – an attorney at Public Citizen Litigation Group – that redaction of appellate briefs creates problems for would-be filers of amicus briefs. However, sealing on appeal raises questions beyond those that concern amici. And the relevant issues connect with topics that have been discussed by the Civil Rules Committee and by other Judicial Conference Committees.

The Committee began its review of this topic by surveying the approaches currently taken in local circuit provisions. As a point of reference, I enclose the memo compiled on this topic in summer 2011.[1] If one focuses on the treatment on appeal of materials that were sealed in the court below, at least three different approaches can be seen in the local circuit provisions. One approach is that taken by the D.C. Circuit and Federal Circuit; these circuits require the litigants – at the outset of the appeal – to review the record, mutually agree on whether some or all sealed portions can be unsealed, and present that agreement to the court or agency below. Some other circuits appear to operate on the assumption that materials that were sealed in the district court presumptively remain sealed on appeal. A third approach is that taken by the Seventh Circuit (and in some instances by the Third Circuit); this approach provides a grace period during which matters sealed below remain sealed on appeal, but mandates that those matters are unsealed (to the extent they appear in the record on appeal) if no motion is made within the grace period to maintain the seal on appeal.

[1] I have updated Part III of the memo to reflect a few changes in local circuit provisions during the past year. In the enclosed spreadsheet listing local circuit provisions, yellow cells denote provisions that have been added to the spreadsheet (or modified) since August 2011.

We agreed that it would be very useful to obtain input from the Circuit Clerks in at least one of the circuits that takes each of the approaches noted above. Questions on which input would be very helpful include:

- Should there be a national rule governing sealing on appeal?
    - A national rule would carry the benefits of uniformity, but – in the light of the circuits' current divergent approaches – would likely require that at least some of the circuits alter their approaches.
- If there were to be a national rule, what approach should it take?
    - Should it, for example, adopt one of the approaches noted above?
- If there are to be strictures on the continued sealing (on appeal) of matters sealed below, another question is who should review the question of sealing at the time of the appeal.
    - One possibility is to put the onus on the parties to review the continued appropriateness of any sealing orders.
    - Another possibility would be to place this burden on the lower court, for example by providing that the filing of a notice of appeal triggered a duty for the judge to review any sealing orders.
    - A third possibility would be to require the parties to an appeal to make a motion if they desire the sealing to continue on appeal.
- If a rule were to be adopted, should it differentiate between civil and criminal cases?
- What impact, if any, will the Next Generation of CM/ECF have in this area?
    - Our understanding is that the next iteration of the CM/ECF system will accommodate a sealed as well as a non-sealed level of filing and will include a system for "lodging" submissions with the court without actually filing them. I will inquire further with the Administrative Office about the details of these developments.
- What do clerks, judges, and practitioners think about the approach to sealed appellate filings taken in proposed Bankruptcy Rule 8009(f)?
    - That rule, which will be published for comment this August, provides:
    - "SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In doing so, a party must

identify it without revealing confidential or secret information, but the bankruptcy clerk must not transmit it to the clerk of the court where the appeal is pending as part of the record. Instead, a party must file a motion with the court where the appeal is pending to accept the document under seal. If the motion is granted, the movant must notify the bankruptcy court of the ruling, and the bankruptcy clerk must promptly transmit the sealed document to the clerk of the court where the appeal is pending."

- Proposed Bankruptcy Rule 8009(f), if adopted, will govern procedure in appeals from bankruptcy courts to district courts and bankruptcy appellate panels.

- In addition, by virtue of proposed Appellate Rule 6(c), Rule 8009(f) would also govern the treatment of the record in connection with direct permissive appeals from bankruptcy courts to the courts of appeals under 28 U.S.C. § 158(d)(2). To that extent, the procedure outlined in proposed Rule 8009(f) would displace any contrary practices currently employed in the courts of appeals.

Encl.

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TAB 3B

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MEMORANDUM

DATE: August 9, 2011 (revised August 27, 2011; Part III updated August 2, 2012)

TO: Judge Robert Michael Dow, Jr.

FROM: Catherine T. Struve

RE: Item No. 10-AP-I

This memo reviews factors that may be relevant to the Appellate Rules Committee's consideration of options for addressing the question of redaction and sealing of appellate briefs. The question grows out of an inquiry by Paul Alan Levy of Public Citizen Litigation Group, who identifies a practice of unjustified sealing or redaction; Mr. Levy notes that often no one moves to unseal the briefs, and that even if such a motion is made and granted, the unsealing may come too late to inform the drafting efforts of would-be amici.

Part I of this memo briefly summarizes Mr. Levy's suggestion and the discussion at the Appellate Rules Committee's spring 2011 meeting. Part II sketches an overview of the Judicial Conference Committee projects and the existing rule- and statute-based sealing requirements that may bear on the question of sealing appellate briefs. Part III surveys relevant local circuit provisions. Part IV discusses options for drafting an Appellate Rule on the subject.

I. Genesis of this agenda item

The project arises from an inquiry by Paul Alan Levy, an attorney at Public Citizen Litigation Group:

> Has the advisory committee on appellate rules looked at the problem of redactions in appellate briefs (and Joint Appendices) that are based on consensual district court orders that allow either side to stamp discovery materials as confidential? Then the parties get up to the Court of Appeals and file heavily redacted papers without the slightest effort to justify the decision that concealment of particular items meets the high standard for non-disclosure of arguments, and factual materials, filed in support of dispositive proceedings.
>
> Two problems result -- in cases of great public importance, the ability of others to participate amicus curiae is reduced because even if the parties eventually unredact, that likely comes too late for meaningful briefing by amici in light of the actual record. And many cases no doubt slide by because nobody files a motion to unseal. It used to be we could count on the media bar to file these

motions, but the media are so pressed economically they p[ic]k their shots much more carefully. Methinks we need a better system.

The Appellate Rules Committee discussed Mr. Levy's suggestion at its April 2011 meeting.[1] Participants in the discussion noted the connections between this issue and the Civil Rules Committee's longstanding discussion of protective orders under Civil Rule 26(c). It was agreed that any action on Mr. Levy's suggestion would require coordination with both the Civil and Criminal Rules Committees. The approaches taken by the D.C. Circuit and Seventh Circuit were suggested as possible models for an Appellate Rule dealing with sealed or redacted briefs. Another alternative was also mentioned – namely, a requirement that the district court review any sealing orders at the time it closes a case.[2] Later in the meeting, during the joint discussion with the Bankruptcy Rules Committee, it was noted that the proposed draft of Part VIII of the Bankruptcy Rules (dealing largely with appeals from bankruptcy courts to district courts or Bankruptcy Appellate Panels (BAPs)) includes a proposed Rule 8009(f) that addresses sealing on appeal.[3] Participants in the joint discussion noted the importance of drafting any sealing rule so that it can accommodate future changes in the CM/ECF architecture.

II. Connections to other projects involving Judicial Conference committees and to specific statutory or rule-based frameworks for sealing information

As the Appellate Rules Committee has already noted, the question of sealing or redacting briefs on appeal connects to a number of recent or ongoing discussions by Judicial Conference committees. The question also implicates a number of existing rule- or statute-based frameworks for sealing information. This part surveys those inter-connected topics. The overview provided here illustrates the need for coordination of future efforts with other relevant

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[1] I enclose excerpts of the relevant portions of the draft minutes.

[2] Presumably such a requirement, if it were adopted, would be added to the Civil and/or Criminal Rules rather than to the Appellate Rules.

[3] In the March 2011 draft of the proposed Part VIII rules, proposed Rule 8009(f) reads as follows:

> SEALED DOCUMENTS. A document placed under seal by the bankruptcy court may be designated as part of the record on appeal. In designating a sealed document, a party shall identify it without revealing confidential or secret information. The bankruptcy clerk shall not transmit a sealed document to the clerk of the appellate court [*i.e.*, district court or BAP] as part of the transmission of the record. Instead, a party seeking to present a sealed document to the appellate court as part of the record on appeal shall file a motion with the appellate court to accept the document under seal. If the motion is granted, the movant shall notify the bankruptcy court of the ruling, and the bankruptcy clerk shall promptly transmit the sealed document to the clerk of the appellate court.

committees.

Part II.A summarizes the findings and recommendations of the Sealed Cases Subcommittee, which considered issues relating to entirely sealed cases. Part II.B discusses the national privacy rules (which took effect in 2007) and corresponding local circuit provisions. Part II.C discusses the recommendations of the Privacy Subcommittee that was convened to review the functioning of the privacy rules. Part II.D notes that CACM appears to endorse some but not all of the recent recommendations by the Sealed Case and Privacy Subcommittees. Part II.E turns to the Civil Rules Committee's consideration of protective orders under Civil Rule 26(c). Part II.F discusses features of criminal cases that may produce sealing issues, including grand jury proceedings; sealed indictments; plea or cooperation agreements; and cases involving juvenile defendants. Part II.G sketches a list of other areas in which a statutory provision may require sealing on appeal.

A. The Sealed Cases Subcommittee

The Sealed Cases Subcommittee was established to examine and make recommendations concerning the practice of sealing entire cases.[4] The Subcommittee's work was informed by an FJC study of sealed cases;[5] the study, like the Subcommittee's work generally, focused only on entirely sealed cases.[6] The FJC study indicated that sealing an entire case is relatively rare and that "the great majority of those sealed cases are sealed because a statute or rule requires it or for another valid reason."[7] However, the study also revealed "that some sealing orders that were proper when entered remain in place after the reason for sealing has expired, and that a small proportion of sealed cases were sealed on grounds that raised questions."[8]

Although the Subcommittee's focus on completely sealed cases means that its

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[4] The Subcommittee included a judge from each Rules Committee, a judge from the Committee on Court Administration and Case Management (CACM), and a Department of Justice (DOJ) representative.

[5] *See* TIM REAGAN & GEORGE CORT, FEDERAL JUDICIAL CENTER, SEALED CASES IN FEDERAL COURTS (2009). For an excellent general overview of common law and constitutional doctrines concerning the public's right of access to judicial records and proceedings, see ROBERT TIMOTHY REAGAN, SEALING COURT RECORDS AND PROCEEDINGS: A POCKET GUIDE 2-5 (Federal Judicial Center 2010).

[6] *See id*. at 1.

[7] Sealed Cases Subcommittee for the Judicial Conference Committee on Rules of Practice and Procedure, Report on Sealing Cases, Agenda E-19 (Appendix E), Rules 2-3 (2010), http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/jc09-2010/2010-09-Appendix-E.pdf.

[8] *Id*. at 3.

recommendations are not directly relevant to the question of redactions in appellate briefs, the recommendations are worth reproducing here because they provide a useful model for possible approaches to the latter question,[9] and because implementation of some of the recommendations might also provide an opportunity for improving the treatment of sealed or redacted appellate briefs:

> The Subcommittee recommends that CACM consider recommending that the JCUS adopt a policy statement concerning sealing. That policy statement would recognize that an entire case is properly sealed only when consistent with the following criteria:
>
> > 1. Sealing the entire case is required by statute or rule or justified by a showing of extraordinary circumstances and the absence of narrower feasible and effective alternatives, such as sealing discrete documents or redacting information, so that sealing an entire case is a last resort;
> >
> > 2. A judicial officer makes or promptly reviews the decision to seal a case; and
> >
> > 3. The seal is lifted when the reason for sealing has ended.
>
> The recommended steps to promote compliance with these criteria include the following:
>
> > 1. judicial education to ensure that judges are fully aware of the established criteria for proper sealing of entire cases (as opposed to sealing specific documents within a case), including the specific showing required, the need to consider available alternatives, and the need to memorialize the findings justifying sealing in the record;
> >
> > 2. judicial and clerks' office education to ensure that both judges and

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[9] Judge Hartz – the Subcommittee's Chair – provided helpful comments on Mr. Levy's suggestion. He noted that the Subcommittee dealt only with entirely sealed cases, not redaction or sealing of particular documents. But he observed that some of the Subcommittee's proposals – such as requiring judicial review of clerks' sealing decisions and sealing as little as necessary – would be relevant in the context of individual filings as well. He pointed out that in the court of appeals judges are usually not assigned to a case until the filing of the answering brief; and the assigned panel will be best equipped to evaluate redactions and resolve any redaction or sealing questions once it has fully reviewed the merits. As he summed it up, "[t]he trick is to get judges involved without creating too great a burden. Perhaps the standard should be that matters are unredacted or unsealed when submitted to the appellate court unless good cause is shown in a pleading to the court. "

clerks are aware that sealing an entire case must be a judicial decision, and that if a clerk or designee has sealed a case temporarily a judge will promptly review and decide whether the seal should continue;

3. study by CACM and other appropriate committees to identify clearer and more detailed standards for determining when a clerk or a judge's designee may seal a matter temporarily pending approval by a judicial officer and to establish procedures for ensuring prompt review by a judge;

4. judicial education to ensure that judges are aware of the need to limit the duration of sealing orders and the various ways to do so, such as by stating in the order a date when it will expire unless the party seeking the seal moves for its continued application and shows good cause, or stating in the order a date when the court will review the order to decide whether it should remain in place;

5. study by CACM and other appropriate committees into whether and how CM/ECF might be programmed to generate notices to courts or parties that a sealing order must be reviewed after a certain amount of time has passed;

6. study by CACM and other appropriate committees to determine whether and how CM/ECF might be programmed to generate periodic reports of sealed cases to facilitate more effective and efficient review; and

7. consideration by CACM or other appropriate committees of local administrative measures that courts could adopt to improve the handling of requests for sealing.[10]

B. Existing rules concerning privacy

In 2007, the national rules were amended to include privacy provisions in compliance with the E-Government Act of 2002.[11] As a result, the national rules currently provide a framework for redaction and sealing to the extent that filings contain information covered by the

[10] Sealed Cases Subcommittee Report, *supra* note 7, at 3-4.

[11] *See* E-Government Act of 2002, Pub. L. No. 107 347, § 205(c)(3), 116 Stat. 2899 (2002) (requiring the adoption of rules "to protect the privacy and security concerns relating to electronic filing of documents" in federal court).

rules' privacy provisions.[12] Appellate Rule 25(a)(5) serves to incorporate by reference the provisions of the privacy rule that applied in the proceeding below:

> An appeal in a case whose privacy protection was governed by Federal Rule of Bankruptcy Procedure 9037, Federal Rule of Civil Procedure 5.2, or Federal Rule of Criminal Procedure 49.1 is governed by the same rule on appeal. In all other proceedings, privacy protection is governed by Federal Rule of Civil Procedure 5.2, except that Federal Rule of Criminal Procedure 49.1 governs when an extraordinary writ is sought in a criminal case.

The rules applicable below, in turn, provide a framework for both redaction and sealing. With specified exceptions,[13] they require parties to redact social security numbers, taxpayer IDs, birth dates, minors' names, financial account numbers, and (in criminal cases) home addresses.[14] As an alternative to redaction, parties can seek a court order permitting a sealed filing (subject to the court's prerogative to later unseal the filing or order a redacted filing).[15]

Ten circuits have adopted local provisions that relate to the privacy requirements now set out in the national rules.[16]

C. Recent report by the Privacy Subcommittee

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[12] There is one respect in which the privacy rules treat matters beyond the listed categories of information: The rules provide that "For good cause, the court may by order in a case: (1) require redaction of additional information; or (2) limit or prohibit a nonparty's remote electronic access to a document filed with the court." Civil Rule 5.2(e). See also Criminal Rule 49.1(e); Bankruptcy Rule 9037(d). But these provisions do not treat the question of the procedure for seeking to make a filing under seal or a redacted filing when the reasons for the redaction are reasons other than the specific privacy issues listed in the privacy rules.

[13] See Bankruptcy Rule 9037(b); Civil Rule 5.2(b); Criminal Rule 49.1(b).

[14] See Bankruptcy Rule 9037(a); Civil Rule 5.2(a); Criminal Rule 49.1(a).

[15] See Bankruptcy Rule 9037(c); Civil Rule 5.2(d); Criminal Rule 49.1(d).

[16] *See* D.C. Cir. App. IV ECF-9; D.C. Cir. Handbook II.C.5; 1st Cir. Notice of Adoption of Amendment to Local R. 30.0 (2009); 1st Cir. CM/ECF R. 12; 3d Cir. R. 113.12; 4th Cir. R. 25(c)(3)(C); 4th Cir. CM/ECF R. 12; 4th Cir. I.O.P. 34.3 (reminding counsel not to discuss private information during oral argument); 4th Cir. App. IV (providing for redaction of transcripts); 5th Cir. R. 25.2.13; 6th Cir. R. 25(g); 6th Cir. Guide to Electronic Filing 12; 8th Cir. R. 25A(h); 9th Cir. Advisory Committee Note to Rule 25-5; 10th Cir. R. 25.5; 10th Cir. General Orders IV & V; 11th Cir. R. 25-5 (defining "minor" and listing additional information – not specified in national privacy rules – that could also be redacted).

Once some time had passed after the adoption of the new privacy rules, the Privacy Subcommittee was reconstituted in order to review and report on the rules' operation. The Subcommittee included a member from each rules Advisory Committee as well as members from CACM.[17] The Subcommittee's work focused on four major topics: the privacy rules' implementation; possible changes to the privacy rules; privacy issues in criminal proceedings; and redactions in court transcripts. Among other efforts to gather relevant information, the Subcommittee held a day-long conference at Fordham Law School in April 2010.[18] The Subcommittee set forth its findings and recommendations in a December 2010 report:

> 1. The Privacy Rules are in place and are generally being implemented effectively by courts and parties.
>
> 2. To ensure continued effective implementation, every other year the FJC should undertake a random review of court filings for unredacted personal identifier information.
>
> 3. Also to ensure continued effective implementation of the Privacy Rules, the courts should continue to educate their own staffs and members of the bar about (a) redaction obligations under the Privacy Rules, (b) steps that can be taken to minimize the appearance of private identifier information in court filings and transcripts, and (c) the need to secure a court order under Fed. R. Civ. P. 5.2(e) or its counterparts before redacting any information beyond that specifically identified in the Privacy Rules.
>
> 4. The AO should monitor technological developments and make courts and litigants aware of software that would make it easier to search documents, transcripts, and court records for unredacted personal identifier information.
>
> 5. At present, no best practice can be identified to support a uniform national rule with respect to making plea and cooperation agreements publicly available. District courts should, however, be encouraged to continue discussing their different approaches, and the Standing Committee might request CACM to monitor these approaches to see if, at some future time, a best practice emerges warranting a uniform rule.

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[17] *See* Operation of the Federal Privacy Rules: A Report to the Judicial Conference Standing Committee on the Rules of Practice and Procedure by the Subcommittee on Privacy, December, 2010 ("Privacy Subcommittee Report"), available at www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/ST03-2011.pdf, at 2.

[18] The conference transcript was published in the Fordham Law Review. *See* Judicial Conference Privacy Subcommittee, *Conference on Privacy and Internet Access to Court Files*, 79 FORDHAM L. REV. 1 (2010).

6. To the extent district courts seal plea or cooperation agreements, consideration might be given, where appropriate, to a "sunset provision" providing for their expiration unless sealing is extended after further review and order of the court.

7. There is no need to amend the Privacy Rules either to expand or to contract the type of information subject to redaction.

8. The exemption for Social Security cases should be retained in its current form.

9. The exemption for immigration cases should be retained in its current form. Nevertheless, this exemption should be subject to future review in light of possible changes in technology and case volumes that could ease the burden of redaction. Such review should also consider whether the exemption might be narrowed to particular types of immigration cases.

The report discussed each of these areas in detail. Its discussion of the plea and cooperation agreement questions is of particular interest here. The report observed that access to such agreements varies by district, with four approaches identifiable:

- Full electronic access to plea and cooperation agreements, except when sealed on a case-by-case basis.

- No remote electronic access to plea or cooperation agreements, but with such agreements fully available at the courthouse unless sealed in an individual case.

- Full electronic access to plea agreements, but with a separate sealed document filed in every case indicating whether or not the defendant has entered into a cooperation agreement.

- No public access to plea or cooperation agreements either electronically or at the courthouse, because these documents are not made part of the case file.[19]

The report observed that no consensus has emerged concerning a single best practice for handling plea or cooperation agreements. But, as noted above, the report did offer a suggestion that any sealing order have a built-in sunset provision:

> [T]he rationale for limiting public access to such agreements – cooperator safety – does not necessarily support the permanent sealing of most cooperation agreements, much less plea agreements. Courts limiting access to such

[19] Privacy Subcommittee Report, *supra* note 17, at 13.

agreements might consider whether it is appropriate to include a "sunset" provision that allows sealing orders within a time prescribed either automatically for every case or specifically in individual cases with further sealing dependent on a court determination of a continued need.[20]

D. CACM's recent consideration of privacy and sealing issues

The Judicial Conference Committee on Court Administration and Case Management (CACM) has reviewed the recent reports by the Privacy Subcommittee and the Sealed Cases Subcommittee, and has provided to the Rules Committees a draft of its report to the Judicial Conference concerning those topics. I enclose a copy of the draft report (it may, of course, have changed since the time it was circulated). The draft indicates that CACM endorses the idea of judicial education concerning privacy issues; expresses concern about the Privacy Subcommittee's proposal that courts consider including a sunset provision when ordering sealing of plea and cooperation agreements; endorses the Sealed Cases Subcommittee's proposals concerning the sealing of civil cases; and is referring to its own privacy subcommittee the question of sealing entire criminal cases.

E. The Civil Rules Committee's consideration of protective orders

The Civil Rules Committee has long had on its agenda an item relating to Civil Rule 26(c)'s treatment of protective orders. Periodically, bills are introduced in Congress that would restrict the use of protective orders with respect to discovery material and the enforcement of secrecy provisions in settlement agreements.[21] The Civil Rules Committee's discussions have been informed by a study performed by the Federal Judicial Center in the mid-1990s,[22] and more recently by Andrea Kuperman's comprehensive study of circuit caselaw governing protective

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[20] *Id.* at 15.

[21] *See, e.g.*, Sunshine in Litigation Act, H.R. 592, 112th Cong. (2011) (restricting the use of protective orders and the enforcement of certain secrecy provisions in settlements "[i]n any civil action in which the pleadings state facts that are relevant to the protection of public health or safety"); S. REP. NO. 112-045, at 2 (2011) (stating that S. 623, the "Sunshine in Litigation Act of 2011," would "require[] judges, in cases pleading facts relevant to public health and safety, to consider the public's interest in disclosure of health and safety information before issuing a protective order or an order to seal court records or a settlement agreement"); *id.* at 15 ("The Sunshine in Litigation Act was first introduced by Senator Kohl in the 103rd Congress ....").

[22] *See* ELIZABETH C. WIGGINS ET AL., FEDERAL JUDICIAL CENTER, PROTECTIVE ORDER ACTIVITY IN THREE FEDERAL JUDICIAL DISTRICTS: REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996).

orders and sealing of court filings.[23] As Andrea observes, "[c]ourts differentiate the standard for sealing documents filed with the court, which usually is much more exacting than the showing required for entering a protective order limiting the dissemination of discovery materials. In analyzing requests to seal court documents, courts emphasize the presumption of public access to judicial records and often require compelling reasons in order to seal court documents."[24] The Civil Rules Committee's spring 2010 meeting included a discussion of the possible benefits and costs of considering proposed amendments to Civil Rule 26(c)'s treatment of protective orders. I enclose a copy of the relevant excerpt of the minutes, because it gives a very useful overview of the competing considerations that led the Committee to maintain this item on its agenda without, at the moment, moving forward on it.

F. Sealing on appeal in criminal matters

From the court of appeals decisions, available on Westlaw, that discuss sealing on appeal, it is evident that a large percentage of the appeals that involve sealed or redacted briefs are criminal matters. Several reasons can be inferred.[25] Appeals may require discussion of sealed

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[23] *See* Andrea Kuperman, Case Law on Entering Protective Orders, Entering Sealing Orders, and Modifying Protective Orders (updated July 2010), available at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Publications.aspx.

[24] *Id*. at 1.

[25] As revised effective March 2008, the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files, available at www.uscourts.gov/RulesAndPolicies/JudiciaryPrivacyPolicy/March2008RevisedPolicy.aspx, provides:

> The following documents in a criminal case shall not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access:
>
> - unexecuted summonses or warrants of any kind (e.g., search warrants, arrest warrants);
> - pretrial bail or presentence investigation reports;
> - statements of reasons in the judgment of conviction;
> - juvenile records;
> - documents containing identifying information about jurors or potential jurors;
> - financial affidavits filed in seeking representation pursuant to the Criminal Justice Act;
> - ex parte requests for authorization of investigative, expert or other services pursuant to the Criminal Justice Act; and
> - sealed documents (e.g., motions for downward departure for substantial

plea or cooperation agreements. Sentencing appeals typically involve consideration of presentence reports. Specific sealing requirements may apply in particular types of criminal proceedings: grand jury proceedings; cases where the indictment is sealed; cases where the defendant is a juvenile; cases involving a child victim or witness; and cases involving classified information.

Criminal Rule 6(e)(6) provides that "[r]ecords, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury." Unsurprisingly, court of appeals decisions (available on Westlaw) that discuss sealing in connection with appeals relating to grand jury proceedings uniformly note that filings have been sealed in order to maintain the required secrecy.[26]

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assistance, plea agreements indicating cooperation or victim statements).

[26] See In Re Grand Jury Investigation, 352 F. App'x 805, 806 n.1 (4th Cir. 2009) ("The documents and briefs in this case have been filed under seal to protect the secrecy of the ongoing grand jury investigation."); In re Grand Jury Subpoena # 06-1, 274 F. App'x 306, 308 n.1 (4th Cir. 2008) ("All documents and briefs in this case have been filed under seal to protect the secrecy of the grand jury proceedings. We therefore refer to the parties by generic names to avoid disclosing their identities."); In re Grand Jury Investigation, 445 F.3d 266, 275 (3d Cir. 2006) ("We are hampered in articulating the basis for our conclusion by the need to keep the evidentiary support confidential because much of the relevant information that was before the District Court is sealed as it pertains to the ongoing investigation of the grand jury. Moreover, the parties' briefs have been sealed. We are therefore comfortable to discuss only such facts as the Assistant U.S. Attorney disclosed in his argument in open court before us."); In re Grand Jury Subpoena No.2002r02810(163), No.2005-01 to John Doe, 176 F. App'x 72, 73 n.1 (11th Cir. 2006) ("Because this appeal involves proceedings before a grand jury, and the briefs and record on appeal are under seal, we use a pseudonym to preserve anonymity."); In re Grand Jury Subpoena, 419 F.3d 329, 332 n.1 (5th Cir. 2005) ("Because this appeal involves stayed proceedings before a grand jury and the briefs and record on appeal are under seal, we employ pseudonyms."); In re Grand Jury Proceedings #5 Empanelled January 28, 2004, 401 F.3d 247, 249 n.1 (4th Cir. 2005) ("All documents and briefs in this case have been filed under seal to protect the secrecy of ongoing grand jury proceedings. Accordingly, we dispense with a recitation of the facts. We include any facts necessary to our analysis as appropriate."); John Doe Co. v. United States, 350 F.3d 299, 300 n.1 (2d Cir. 2003) ("This appeal arises out of an ongoing grand jury investigation. No indictments have been issued. All proceedings have been conducted in closed courtrooms, and the record and briefs are under seal. To preserve the secrecy of the grand jury proceedings, we use pseudonyms and discuss the facts circumspectly."); In re Keeper of Records (Grand Jury Subpoena Addressed to XYZ Corp.), 348 F.3d 16, 19 (1st Cir. 2003) ("Consistent with the secrecy that typically attaches to grand jury matters ... these appeals have gone forward under an order sealing the briefs, the parties' proffers, and other pertinent portions of the record. To preserve that confidentiality, we use fictitious names for all affected parties and

Criminal Rule 6(e)(4) provides that "[t]he magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons." In a single-defendant case, it might be unlikely for an appeal to make its way to the court of appeals before any seal on the indictment has been lifted. But it is possible to imagine a multi-defendant case in which an appeal involving one defendant entails discussion of an indictment that has been sealed as to another defendant.[27]

Statutory confidentiality requirements apply in cases involving juvenile defendants, victims, or witnesses. Court filings "that disclose the name of or any other information concerning" a child under age 18 who is "a victim of a crime of physical abuse, sexual abuse, or exploitation; or ... a witness to a crime" against a third party "shall be filed under seal without necessity of obtaining a court order."[28] Records in juvenile delinquency proceedings are statutorily restricted.[29]

Obviously, classified information is subject to sealing in criminal proceedings as in civil

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furnish only such background facts as are necessary to provide ambiance."); In re Grand Jury Subpoena, 274 F.3d 563, 568 (1st Cir. 2001) (noting order sealing proceeding, briefs, and parties' proffers, and use of pseudonyms); In re Grand Jury Subpoena, 97 F.3d 1090, 1095 (8th Cir. 1996) ("We direct [the Office of Independent Counsel], working with our Clerk of Court, to substitute for our current sealed file a public file, redacted to exclude portions of the record that disclose substantive grand jury proceedings, supplemented by a filing under seal that contains all redacted portions of the briefs and record on appeal. After an unsealed public file has been created in this fashion, counsel for McDougal may challenge by motion OIC's decision as to the portions of our file which should remain under seal.").

[27] *See* REAGAN & CORT, *supra* note 5, at 18 ("In a multi-defendant case, it is possible to seal the prosecution against one defendant while the prosecution against another defendant is not sealed.").

[28] 18 U.S.C. §§ 3509(a)(2) & (d)(2). The statute requires the filer to provide the court with both a redacted and an unredacted copy. *See id*. § 3509(d)(2).

[29] *See* 18 U.S.C. § 5038(c) ("During the course of any juvenile delinquency proceeding, all information and records relating to the proceeding, which are obtained or prepared in the discharge of an official duty by an employee of the court or an employee of any other governmental agency, shall not be disclosed directly or indirectly to anyone other than the judge, counsel for the juvenile and the Government, or others entitled under this section to receive juvenile records.").

proceedings.[30] The FJC's study of completely sealed cases indicates that warrant, wiretap, and pen register applications are frequently sealed at the trial court level;[31] it is unclear how often those applications would produce appeals at a time when the record was still under seal.[32]

G. Other statutory sources of sealing requirements[33]

Some statutory sealing requirements plainly will apply to proceedings in the courts of appeals. Special statutory sealing requirements govern appeals to the D.C. Circuit from the

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[30] *See* Classified Information Procedures Act § 9(a), 18 U.S.C. App. 3 (2006) (providing that the Chief Justice "shall prescribe rules establishing procedures for the protection against unauthorized disclosure of any classified information in the custody of the United States district courts, courts of appeal, or Supreme Court"); Security Procedures Established Pursuant to Public Law 96-456, 94 Stat. 2025, By the Chief Justice of the United States for the Protection of Classified Information (Feb. 12, 1981), set forth as a note following 18 U.S.C. App. 3 § 9.

[31] *See* REAGAN & CORT, *supra* note 5, at 31.

[32] 18 U.S.C. § 3123(d)(1) provides that "[a]n order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that ... the order be sealed until otherwise ordered by the court." *See also* In re Sealing and Non-Disclosure of Pen/Trap/2703(d) Orders, 562 F. Supp.2d 876, 895 (S.D.Tex. 2008) ("As a rule, sealing and non-disclosure of electronic surveillance orders must be neither permanent nor, what amounts to the same thing, indefinite. Such restrictions on speech and public access are presumptively justified while the investigation is ongoing, but that justification has an expiration date.").

[33] The discussion in this section is greatly indebted to Andrea Kuperman (then Andrea Thomson)'s excellent December 10, 2007, memo on "Statutes Requiring or Permitting Sealing," available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Memorandum_on_Statutes_Requiring_or_Permitting_Sealing.pdf. Some statutes listed in the Thomson memo are omitted here because it seems clear that their sealing provisions would have no application on appeal (see for example 28 U.S.C. § 657(b), requiring rules to ensure that certain arbitration awards "shall not be made known to any judge who might be assigned to the case until the district court has entered final judgment in the action or the action has otherwise terminated"). Others are omitted because it seems clear that appeals involving their sealing provisions would not go to a federal circuit court of appeals (for example, provisions concerning the Foreign Intelligence Surveillance Court fall within this category).

The Thomson memo also lists statutes that authorize, rather than require, sealing orders. The relevance of such statutes may be worth considering as the project concerning sealed appellate briefs moves forward. For the moment, I omit discussion of these statutes because it seems most urgent to consider the implications of statutes that *require* sealing.

Alien Terrorist Removal Court.[34] Other such requirements govern appeals regarding discovery of classified information in civil actions involving claims of material support to terrorist organizations.[35] Disputes over national security letters may well make their way from the district court to the court of appeals, and the statutory sealing requirements seem equally applicable on appeal.[36] In appeals from the Court of International Trade to the Federal Circuit concerning antidumping duty disputes, statutory sealing applies to certain confidential foreign government records.[37] Where a court permits access to confidential cockpit and surface vehicle recordings

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[34] *See* 8 U.S.C. §§ 1533, 1535. *See also* D.C. Cir. R. 47.6 (addressing treatment of classified information in appeals from Alien Terrorist Removal Court).

[35] *See* 18 U.S.C.A. § 2339B(f)(1)(C).

[36] The recipient of a national security letter may petition in federal district court "for an order modifying or setting aside the request." 18 U.S.C. § 3511(a). 18 U.S.C. § 3511(d) provides:

> In all proceedings under this section, subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent an unauthorized disclosure of a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947. Petitions, filings, records, orders, and subpoenas must also be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a request for records, a report, or other information made to any person or entity under section 2709(b) of this title, section 626(a) or (b) or 627(a) of the Fair Credit Reporting Act, section 1114(a)(5)(A) of the Right to Financial Privacy Act, or section 802(a) of the National Security Act of 1947.

The Second Circuit has narrowly construed and partially invalidated certain parts of Section 3511(b). *See* John Doe, Inc. v. Mukasey, 549 F.3d 861, 883 (2d Cir. 2008). However, questions of statutorily-required sealing survive *Doe*. *See, e.g.*, Doe v. Holder, 703 F. Supp.2d 313, 318 (S.D.N.Y. 2010) (ordering that the federal government defendants "are hereby permitted to enforce the nondisclosure provisions of 18 U.S.C. § 2709(c) and 18 U.S.C. § 3511(b) as applied to parties of the NSL Attachment with the exception of the disclosures authorized herein").

[37] *See* 19 U.S.C. § 1516a(a) (authorizing actions in Court of International Trade for review of certain countervailing duty and antidumping duty determinations); *id*. § 1516a(b)(2)(B) ("The confidential or privileged status accorded to any documents, comments, or information shall be preserved in any action under this section. Notwithstanding the preceding sentence, the court may examine, in camera, the confidential or privileged material, and may disclose such material under such terms and conditions as it may order."); 28 U.S.C. § 2635(b)(2) (providing that "any document, comment, or information that is accorded confidential

and transcripts in the possession of the National Transportation Safety Board, the applicable statute mandates the imposition of a protective order[38] and permits the recording's or transcript's use in a judicial proceeding only if the relevant matters are placed under seal.[39]

As to other statutory sealing requirements, it would be necessary to learn more about practice under the relevant statutory scheme in order to discern whether their sealing provisions would be relevant on appeal. Would an occasion for appeal in a qui tam case be likely to arise while the matter was still under statutorily-required seal?[40] When a statutory provision requires sealing of a district court order "until the person against whom the order is directed has an opportunity to contest such order,"[41] would that sealing ever persist long enough to be relevant

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or privileged status by the Government agency whose action is being contested" shall be transmitted under seal and that "[t]he confidential or privileged status of such material shall be preserved in the civil action, but the court may examine the confidential or privileged material in camera and may make such material available under such terms and conditions as the court may order"); Fed. Cir. R. 11(d) (exempting cases "arising under 19 U.S.C. § 1516a" from Rule 11(d)'s requirement that parties to an appeal "promptly review the record to determine whether protected portions need to remain protected on appeal"). *See also* 19 U.S.C. § 1677f(c)(2) (authorizing applications "to the United States Customs Court for an order directing the administering authority or the Commission to make ... available" certain business or proprietary information presented to it during a proceeding); 28 U.S.C. § 2635(c) (providing that in such actions "the administering authority or the Commission shall transmit under seal to the clerk of the Court of International Trade ... the confidential information involved" and that "[t]he confidential status of such information shall be preserved in the civil action, but the court may examine the confidential information in camera and may make such information available under a protective order consistent with [Section 1677f(c)(2)]"); *id*. § 2635(d) (setting similar confidentiality requirement "[i]n any other civil action in the Court of International Trade in which judicial review is to proceed upon the basis of the record made before an agency").

[38] *See* 49 U.S.C. § 1154(a)(4)(A).

[39] *See id.* § 1154(a)(4)(B).

[40] *See* 31 U.S.C. § 3730(b)(2) (providing that False Claims Act qui tam complaints "shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders"); *id*. § 3730(b)(3) ("The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2)."). *See also* REAGAN & CORT, *supra* note 5, at 30 (stating that due to the extension provision, "many False Claims Act cases remain sealed several years after filing while the government continues to investigate").

[41] *See* 15 U.S.C. § 1116(d)(1)(A) (providing that in certain cases concerning counterfeit marks "the court may, upon ex parte application, grant an order ... providing for the seizure of" certain goods, marks and records); *id*. § 1116(d)(8) ("An order under this subsection, together

on appeal?

III. Existing local circuit rules and practices

The enclosed spreadsheet sets out the text of local circuit provisions that relate to sealed filings in the courts of appeals.[42] Such provisions may address when a motion is required in order to justify sealing of appellate filings; may set various requirements designed to limit the extent of sealing; may address serving and filing or other logistical matters concerning sealed materials; may cover certain issues specific to criminal cases; and may address specialized matters that are likely to arise only rarely.

More than half the circuits have local provisions that either state or imply that materials sealed in the court below presumptively remain sealed on appeal.[43] But the Seventh Circuit

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with the supporting documents, shall be sealed until the person against whom the order is directed has an opportunity to contest such order, except that any person against whom such order is issued shall have access to such order and supporting documents after the seizure has been carried out.").

[42] The spreadsheet has been updated as of August 2, 2012. Yellow cells denote items changed or added (in the spreadsheet) since August 2011.

The spreadsheet omits provisions that relate solely to attorney disciplinary or grievance proceedings or judicial conduct or disability proceedings.

[43] Circuits whose local provisions make this explicit are the D.C., First, Second, Fourth, Sixth, Ninth, Eleventh, and Federal Circuits. *See* D.C. Cir. R. 47.1(a); D.C. Cir. Handbook III.K; How to Appeal a Civil Case to the United States Court of Appeals for the Second Circuit: Documents under Seal, available at http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/How_to_appeal/Civil_case/Documents_under_seal.htm (last visited Aug. 2, 2012); 4th Cir. R. 25(c)(1)(A); 6th Cir. R. 25(j); 6th Cir. I.O.P. 11(d); Committee Note to 9th Cir. R. 27-13; 11th Cir. General Order 37 ¶ 9.2; Fed. Cir. R. 11(c); and Fed. Cir. R. 17(e). *See also* 2d Cir. R. 25.1(a)(1)(E). Also, the Third Circuit's rules provide that certain materials in criminal cases presumptively remain sealed on appeal. *See* 3d Cir. Local App. R. 106.1(c)(1).

Circuits whose rules imply that matters sealed below are presumptively sealed on appeal are the First and Tenth Circuits. *See* 1st Cir. R. 11.0(c)(2) ("In order to seal in the court of appeals materials not already sealed in the district court or agency (e.g., a brief or unsealed portion of the record), a motion to seal must be filed in paper form in the court of appeals; parties cannot seal otherwise public documents merely by agreement or by labeling them 'sealed.'"); 10th Cir. R. 11.3(D); 10th Cir. R. 11.4. The First Circuit's rules are not entirely straightforward on this matter, because they require a motion if a party wishes to file a supplemental, sealed appendix. *See* 1st Cir. R. 30.0(g).

takes a different approach – it provides a grace period during which matters sealed below remain sealed on appeal, but only to provide an opportunity for a motion to be made in the court of appeals to maintain the sealing on appeal.[44] The Third Circuit follows a similar delay-and-motion framework in civil appeals[45] and also – with respect to certain types of documents – in criminal appeals.[46] Even if the record below presumptively remains sealed on appeal, the filing of a sealed or redacted brief can pose distinct questions. Several circuits have provisions that state or imply that a motion is required in order to file a sealed or redacted brief,[47] and caselaw in

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Third Local Appellate Rule 30.3(b) provides in part that "[r]ecords sealed in the district court and not unsealed by order of the court must be not be included in the paper appendix" – which might be taken to suggest a presumption of maintaining the lower court's seal on appeal. However, as noted in footnotes 45 and 46 and the accompanying text, that suggestion would be misleading in the context of civil appeals and is only partially accurate in the context of criminal appeals.

[44] *See* 7th Cir. IOP 10. This provision makes an exception where sealing is required by statute or rule. *See id.* 10(a).

[45] *See* 3d Cir. L. App. R. 106.1(c)(2) & accompanying Committee Comment.

[46] *See* 3d Cir. Local Appellate R. 106.1(c)(1) (setting grace period and requiring motion for continued sealing in criminal appeals of "documents other than grand jury materials, presentence reports, statements of reasons for the sentence, or other documents required to be sealed by statute or rule").

[47] Circuits with provisions that clearly indicate a motion is required are the First, Second, Third, Sixth, and Seventh. *See* 1st Cir. R. 11.0(c)(2); *id.* R. 28.1; How to Appeal a Civil Case to the United States Court of Appeals for the Second Circuit: Documents under Seal, available at http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/How_to_appeal/Civil_case/Documents_under_seal.htm (last visited Aug. 2, 2012) ("A party wishing to file a paper under seal with the Court of Appeals must make a written motion."); 3d Cir. Local App. R. 106.1(a) ("With the exception of matters relating to grand jury investigations, filing of documents under seal without prior court approval is discouraged. If a party believes a portion of a brief or other document merits treatment under seal, the party must file a motion setting forth with particularity the reasons why sealing is deemed necessary."); 6th Cir. R. 28(g); 7th Cir. IOP 10(a).

Circuits with provisions that suggest as much are the Fourth, Ninth, and Tenth. *See* 4th Cir. R. 25(c)(2) (observing that requests to seal record are ordinarily presented to lower court, but stating that "[a] motion to seal may be filed with the Court of Appeals when: ... (iii) additional material filed for the first time on appeal warrants sealing"); Fourth Circuit Memorandum on Sealed or Confidential Materials ("If counsel believes it is necessary to seal the entire case or document and that it is not possible to create a public, redacted version of filings, counsel may file a motion to seal the entire case or document."); 9th Cir. R. 27-13(c) ("A motion to seal may be made on any grounds permitted by law. Any motion to file a brief, excerpts of

other circuits evidences the fact that litigants have filed such motions.[48] A couple of circuits have provisions stating the principle – likely also a matter of practice in other circuits – that a motion is required to file under seal record materials that were not sealed below.[49]

Even where the presumption of continued sealing on appeal is express or implicit in the local provisions, the circuits also have adopted provisions that appear designed to control the extent of sealing in appellate filings. The D.C. and Federal Circuits direct the parties to review the record for parts that need not be sealed on appeal, to seek other litigants' agreement on that

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record, or other material under seal shall be filed simultaneously with the relevant document, which may be filed provisionally under seal."); 10th Cir. General Order II.D (discussing mechanics for filing sealed motions, responses, or briefs and stating that "Parties seeking to submit a motion to seal materials simultaneously with the materials should use these events even if the motion is not submitted as sealed.").

[48] *See, e.g.*, United States v. Bolden, No. 10–60587, 2011 WL 1758728, at *1 (5th Cir. May 6, 2011) (unpublished per curiam opinion) ("Bolden's motion to file his reply brief and record excerpts under seal is GRANTED."); United States v. Carlson, 613 F.3d 813, 821 (8th Cir. 2010) ("[W]e grant the pending motion to seal Appellee's brief."); United States v. Thomas, 332 F. App'x 216, 217 (5th Cir. Sept. 10, 2009) (unpublished opinion) ("The motion for leave to file the Anders brief under seal is GRANTED."); United States v. Vargas, 243 F. App'x 456, 458 (11th Cir. June 15, 2007) (unpublished opinion) ("we DENY Vargas's motion to seal his reply brief."); United States v. Mongelli, 2 F.3d 29, 30 n.1 (2d Cir. 1993) ("Appellants have requested that all papers in this appeal be sealed. The government asks for unsealing of its brief and the continued sealing of the appendices.... We unseal the government's brief but allow all other papers to be sealed....").

In discussing a litigant's failure to file such a motion, the Second Circuit in one recent case implied an understanding that a motion was called for:

> Peabody sought to file his brief and the parties' joint appendix under seal. However, Peabody has not submitted a motion seeking leave to file documents under seal in this Court, and we have not issued any order to that effect. Peabody may believe that he has authority to file documents under seal based upon the stipulated protective order entered by the District Court. To the extent that such an order has any bearing on proceedings in this Court, we will deem those documents unsealed to the extent we discuss their contents in this order."

Peabody v. Weider Publications, Inc., 260 F. App'x 380, 381 n.1 (2d Cir. Jan. 16, 2008) (unpublished opinion).

[49] *See* 4th Cir. R. 25(c)(2); 6th Cir. R. 30(f)(5).

conclusion, and to present that agreement to the court below.[50] The D.C., Ninth, and Federal Circuit local rules include provisions addressing motions to unseal filings on appeal.[51] Provisions in three circuits set time periods after which continued sealing is subject to review;[52] apart from local rules provisions, cases can be found in which the court's merits opinion directs the parties to demonstrate a continued need for sealing.[53] The First and Third Circuits specify that sealing an entire brief is disfavored.[54] The Federal Circuit warns litigants to be prepared to justify any redactions at oral argument,[55] and recently sanctioned counsel for improper

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[50] *See* D.C. Cir. R. 47.1(b); D.C. Cir. Handbook III.K; Fed. Cir. R. 11(d); Fed. Cir. R. 17(d). The Federal Circuit rules seek to give this directive teeth by requiring each party to file a certificate of compliance.

[51] *See* D.C. Cir. R. 47.1(c); D.C. Cir. Handbook VIII.H; 9th Cir. R. 27-13(d); Fed. Cir. R. 11(e); Fed. Cir. R. 17(e).

[52] *See* D.C. Cir. R. 47.1(f)(1) (unless nature of materials obviously requires continued sealing, at the time of disposition of the appeal the parties will be ordered to show cause why sealed matter should not be unsealed); *id*. R. 47(f)(2) (propriety of sealing will be re-reviewed after 20 years); *id*. R. 47.1(f)(3) (court can reconsider sealing sua sponte at any time); D.C. Cir. Handbook XIII.A.5; 3d Cir. Local App. R. 106.1(c)(2) (default period of five years when materials are sealed in civil cases); *id*. Committee Comment ("The archiving center will not accept sealed documents, which presents storage problems for the court."); Fed. Cir. R. 27(m)(3) ("After 5 years following the end of all proceedings in the court, the parties may be directed to show cause why confidential motion papers (except those protected by statute) should not be made available to the public."); *id*. R. 28(d)(3) (same with respect to briefs); *id*. R. 30(h)(3) (same with respect to appendices). *See also* 4th Cir. R. 25(c)(2) (requiring a motion to seal to "state the period of time the party seeks to have the material maintained under seal").

[53] *See, e.g.*, United States v. Burns, No. 10–6083, 2011 WL 1366891, at *3 (10th Cir. Apr. 12, 2011) (unpublished opinion) ("The appellate briefs in this case will be unsealed 20 days from the date that this Order and Judgment is filed unless one of the parties moves to seal or redact one or more briefs, stating specific reasons necessitating sealing or redaction. Such a motion may be provisionally sealed."); Kontonotas v. Hygrosol Pharm. Corp., Nos. 10–1869, 10–2085, 2011 WL 1505264, at *4 n.5 (3d Cir. April 21, 2011) (unpublished opinion) ("The parties should specifically identify which parts of the record need to remain under seal, and why. If they fail to do so or absent a showing of good cause ... the Court will direct that the record be unsealed.").

[54] *See* 1st Cir. R. 11.0(c)(3) (suggesting that litigant ask to file supplemental sealed brief); 3d Cir. Local App. R. 106.1(a) (same).

[55] *See* Practice Note to Fed. Cir. R. 28; Practice Note to Fed. Cir. R. 34.

redactions.[56]

A number of local provisions deal with the mechanics of filing and service when materials are sealed on appeal. Such provisions may exempt sealed filings from electronic filing requirements[57] and/or they may provide that electronic filings of sealed documents are to be made separately using special procedures.[58] They may contemplate the filing of two sets of

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[56] *See* In re Violation of Rule 28(D), 635 F.3d 1352, 1354 (Fed. Cir. 2011) (sanctioning counsel "for the extensive use of improper confidentiality markings in the briefs ... contrary to Rule 28(d) of the Federal Circuit Rules"). The court noted "a strong presumption in favor of a common law right of public access to court proceedings," *id.* at 1356, and observed that under Civil Rule 26(c), the party seeking a protective order has the burden to show good cause, *see id.* at 1357. The court found "[i]mplicit in [Federal Circuit Rule 28(d)] a requirement that the district court protective order comply with Rule 26 of the Federal Rules of Civil Procedure." *Id.* at 1358. The designations in the case at hand, the court held, were improper because they inappropriately included much of the legal argument:

> The marking as confidential of legal argument concerning the propriety of a decision by the court is generally inappropriate given the strong presumption of public access to court proceedings and records. Rule 26(c)(1)(G) is limited to commercial information that has competitive significance. The marking of legal argument as confidential under Rule 26(c)(1)(G) cannot be justified unless the argument discloses facts or figures of genuine competitive or commercial significance.

Id. at 1360. Finding the violation "severe," the court imposed a $ 1,000 sanction on counsel under Appellate Rule 46(c). *Id.* at 1361.

[57] See D.C. Cir. App. IV, ECF-8; D.C. Cir. Handbook III.K; 1st Cir. R. 11.0(c); 1st Cir. CM/ECF R. 1; *id.* R. 7; 2d Cir. R. 25.1(j); 3d Cir. Local App. R. 113.7 (motion to file under seal may be e-filed, but the sealed documents themselves may be filed in paper form); 6th Cir. R. 25(b)(8); *id*. R. 25(j)(1) (motion and order regarding sealing may be e-filed); 6th Cir. Guide to Electronic Filing 3.2 & 7; 8th Cir. R. 25A(g) (paper filings for both sealed documents and motions to file under seal); 9th Cir. R. 25-5(b) (same); 9th Cir. R. 27-13(a) (same); 11th Cir General Order 37.

Fifth Circuit Rule 25.2.8 notes the question: "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.... Documents ordered placed under seal may be filed traditionally in paper or electronically, as authorized by the court." *See also* 5th Cir. ECF Filing Standards, Part C(1).

[58] *See* 3d Cir. Local App. R. 30.3(b) & (c) (providing for separate electronic filing of sealed documents); 3d Cir. Local App. R. 113.7 Comment ("The court's electronic filing system is capable of accepting sealed documents electronically from filing users, either directly into a

briefs, redacted and unredacted.[59] They may also provide for the filing of a supplemental appendix containing sealed material.[60] The D.C. Circuit specifies that its drop box may not be used for sealed filings.[61]

Local provisions may also address other logistical questions that relate to sealing. Courts may require special markings to denote sealed documents;[62] may require an accompanying certificate;[63] and/or may require the litigant to highlight in a brief's statement of facts that portions of the record are sealed. Three circuits warn counsel not to disclose sealed material during oral argument.[64] Six circuits discuss public access to court filings.[65] Two circuits

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sealed case in which the attorney is a participant or as a sealed filing in an otherwise unsealed case."); 4th Cir. R. 25(c)(3)(E) (use of special entry when e-filing sealed briefs and other documents); Electronic Case Filing Procedures, Part (g), available at http://www.ca7.uscourts.gov/ecf/ECFprocedures.htm (last visited Aug. 2, 2012) (requiring motions to seal and proposed sealed documents to be filed electronically using special procedures); 10th Cir. General Order II.D.

[59] *See* D.C. Cir. R. 47.1(d) (addressing number of copies and noting that both sets must comply with length limits); D.C. Cir. Handbook IX.A.10; 4th Cir. R. 25(c)(3) (addressing number of copies); *id.* R. 30(b)(4)(C) (number of copies of sealed appendix); *id.* R. 31(d)(3) (number of copies of sealed briefs); Fed. Cir. R. 27(m)(1) (motions); *id*. R. 28(d)(1) (briefs; addressing number of copies); *id*. R. 28 Practice Note (warning against improper redactions); *id*. R. 35(c) (petitions for rehearing; addressing number of copies).

[60] *See* D.C. Cir. R. 47.1(e); D.C. Cir. Handbook IX.B.7; 1st Cir. R. 11.0(d)(1); 1st Cir. R. 30.0(g) (requiring a motion when such an appendix is to be filed); 3d Cir. Local App. R. 30.3(b); *id*. R. 106.1(a); 4th Cir. R. 25(c)(3); 6th Cir. R. 30(f)(5); 10th Cir. R. 30.1(C)(4); Fed. Cir. R. 30(h)(1).

[61] *See* D.C. Cir. Handbook II.C.2.

[62] *See, e.g.*, 4th Cir. R. 25(c)(3)(D); 6th Cir. R. 25(j)(1); 6th Cir. Guide to Electronic Filing 7; 9th Cir. R. 27-13(b); Fed. Cir. R. 27(m)(1) (motions); *id.* Rule 28(d)(1) (briefs).

[63] *See* 4th Cir. R. 25(c)(1) (requiring certificate that, inter alia, identifies any relevant protective orders); 9th Cir. R. 27-13(b) (requiring separate "notification setting forth the reasons the sealing is required").

[64] *See* 1st Cir. R. 11.0(d)(2); Third Circuit Local Appellate Rule 106.1(a); Fourth Circuit IOP 34.3.

[65] *See* 3d Cir. Local App. R. 113.1 ("Public documents, except those filed under seal, may be viewed at the clerk's office."); 4th Cir. R. 25(c)(3)(H); 6th Cir. Guide to Electronic Filing 11.1 ("Access to all documents maintained electronically, except those filed under seal, is

prohibit the use of hyperlinks to sealed documents.[66] Two circuits have provisions that address the effect on appellate costs of filing sealed materials.[67] Courts appear to vary with respect to the identity of the decisionmaker – clerk, single judge, or panel – who provisionally or finally determines questions of sealing.[68] The Federal Circuit has a provision addressing requests that it sit in camera and/or seal its record.[69]

The circuits' local provisions reflect the likelihood that a large proportion of sealing issues arises in criminal matters. Twelve circuits have provisions that address the sealing of the presentence report or other matters that relate to sentencing.[70] Three circuits have provisions that address sealing of grand jury materials.[71] The D.C. Circuit Handbook directs that *Anders* briefs

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available to any person through the PACER system."); 10th Circuit CM/ECF User's Manual II.K; 11th Cir. General Order 37; Fed. Cir. R. 27(m)(3) (confidential motion papers not available to public); *id.* Rule 28(d)(3) (same with respect to briefs); *id*. Rule 30(h)(3) (same with respect to appendices).

[66] *See* 1st Cir. CM/ECF Rule 13; 3d Cir. Local App. R. 28.3(c); *id*. R. 30.1(c); *id*. R. 113.13.

[67] *See* D.C. Cir. R. 39(d); Practice Note to Fed. Cir. R. 39; Fed. Cir. Form 23.

[68] *See* 3d Cir. IOP 10.5.2 (sealing and unsealing usually referred to single judge); 9th Cir. General Orders Appendix A: Disposition of Motions by the Clerk ("deputized court staff" are authorized "to grant an unopposed motion to file a document under seal when the document was maintained under seal below, the seal is required by law or filing under seal is necessary to preserve the provisions of a protective order entered below"; such orders "are subject to reconsideration pursuant to Circuit Rule 27-10").

[69] *See* Fed. Cir. R. 47.8.

[70] *See* D.C. Cir. R. 47.2(b)(5); 1st Cir. R. 28.0(c); Notice of Adoption of Amendment to [First Circuit] Local Rule 30.0 (2009); 1st Cir. CM/ECF R. 1; How to Appeal a Criminal Case to the United States Court of Appeals for the Second Circuit: Pre-sentence Investigation Report (PSR), available at http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/How_to_appeal/Criminal_case/Presentence_investigation_report.htm (last visited Aug. 2, 2012); 3d Cir. Local App. R. 30.3(c); *id*. R. 106.1(a); *id*. R. 106.1(c)(1); 4th Cir. R. 25(c)(3)(A); *id.* R. 30(b); 4th Cir. IOP 34.3; 5th Cir. R. 47.10.3; 6th Cir. IOP 11(b); 7th Cir. R. 10(f); 8th Cir. R. 25A(h); 9th Cir. R. 30-1.10; 10th Cir. R. 11.3(E); *id.* Rule 30.1(C)(4); 11th Cir. Electronic Records on Appeal Program Components (A)(5).

[71] *See* D.C. Cir. R. 47.1; D.C. Cir. Handbook IX.A.10, IX.B.7 & XIII.A.5; 3d Cir. Local App. R. 30.3(c); id. Rule 106.1; 9th Cir. Advisory Committee Note to Rule 3-5.

be filed under seal.[72]

The Eleventh Circuit specifies a variety of possible remedies (including sealing or redaction) for filings that contain ad hominem invective or intrude on privacy interests or legally protected interests.[73] The Seventh Circuit has a provision requiring pseudonymous litigants to disclose their true identity in a sealed filing.[74] Despite the rarity of appeals involving entirely sealed cases,[75] two circuits have provisions that refer to the practice.[76]

IV. Possibilities for addressing redaction and sealing on appeal

There are a number of factors that complicate the choices for drafting a rule concerning sealing or redaction of appellate briefs. In drafting such a rule, it seems advisable to take account of related projects involving other Judicial Conference committees. The rule should be drafted so as not to interfere with the operation of existing statute- or rule-based sealing requirements. In addition, the rule presumably should not seek to alter the substantive standards governing when sealing is appropriate, but instead should address procedures for the application of such standards. The rule might be drafted trans-substantively, but it might instead target only certain types of cases (e.g., only civil cases). The rule might track an existing model; the Seventh and D.C. Circuit models, for example, offer possible approaches. Presumably, the rule would cover only certain basic questions about sealing on appeal, leaving to local provisions the treatment of subsidiary logistical questions.

Part IV.A notes that it will be advisable to assess the need for a national rule on sealed appellate filings (and to consider the extent to which a rule change might be more appropriate in the appellate context than in the district court). Part IV.B observes that it is necessary to consider the scope of a proposed national rule and to assure that the rule fits with existing statute- and rule-based sealing requirements. Part IV.C sketches some of the principal

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[72] D.C. Cir. Handbook VI.D.2.

[73] *See* 11th Cir. R. 25-6.

[74] *See* 7th Cir. R. 26.1(b).

[75] *See* REAGAN & CORT, *supra* note 5, at 28 ("Approximately 0.13% of the appeals filed in 2006 were sealed when we looked at them in 2008. When a district court case is sealed, the clerk's office for a court of appeals usually will automatically seal an appeal. Approximately two-thirds of the sealed appeals in our study involved grand jury matters, juvenile defendants, or cooperating defendants.").

[76] *See* 1st Cir. CM/ECF Rule 7 ("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."); Fed. Cir. Form 7 (Appeal Information Sheet that asks "Is this matter under seal?").

approaches that a rule change might adopt. Part IV.D notes examples of additional matters that a national rule might address. Part IV.E closes by briefly considering possible alternatives to adoption of a national rule.

A. Assessing the need for a national rule

In considering Mr. Levy's suggestion, the Committee will presumably wish to examine the scope of the problem that he identifies. Though a thorough study would be labor-intensive, the caselaw supplies anecdotal support for the proposition that parties at least sometimes over-reach in seeking to seal or redact their appellate filings.[77]

The Civil Rules Committee's long-running discussion of protective orders under Civil Rule 26(c) sheds light on considerations that may be relevant in civil appeals. The Civil Rules Committee has noted that the courts require good cause in order to grant a protective order, and that they apply a more demanding test than good cause in order to seal documents filed with the court in support of or opposition to a request for a ruling on the merits. A view has emerged in the Civil Rules Committee's discussions that courts are generally applying these standards correctly, such that amendments to Rule 26(c) would mainly serve to codify best practices rather than to alter the applicable standards. Despite the recurrent introduction of bills to legislatively amend Rule 26(c), the Committee has thus far not proceeded with amendments to the rule.

Should the fact that the Civil Rules Committee is not at this point proposing to amend Civil Rule 26(c) weigh against the proposal to address sealed appellate filings in the Appellate Rules? Obviously, it will be important to consult the Civil Rules Committee for its thoughts on this question. One possible reason for considering amendments to the Appellate Rules (even though no amendment to Civil Rule 26(c) is under consideration) is that, in the context of appeals, the question of sealed merits-related filings moves from the periphery to center stage. Much of the discussion concerning Civil Rule 26(c) has centered on the application of protective orders to materials that are never filed with the court. Participants in the Civil Rules Committee discussions have noted that the standards concerning protective orders governing discovery materials generally (i.e., apart from court filings) should be applied with sensitivity to the need to encourage compliance with discovery obligations and with consciousness of the expenses involved in reviewing discovery material. By contrast, in the context of appeals, any redaction or sealing by definition occurs in the context of a filing that is submitted in support of, or opposition to, a request for judicial action – that is to say, in the context where a heightened

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[77] In addition to *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1354 (Fed. Cir. 2011) (discussed in note 56, *supra*), see for example *Campbell v. PricewaterhouseCoopers, LLP*, 642 F.3d 820, 822 n.1 (9th Cir. 2011) ("We are mindful of PwC's interest in protecting its proprietary business information. However, the sealed documents contain extensive non-confidential information, despite the protective order's exhortation that '[w]here possible, only Confidential or Highly Confidential portions ... shall be lodged under seal.'").

showing of cause for secrecy is required.[78] Another factor that may distinguish appellate from trial-level proceedings is that amici are more likely to be interested in filing briefs on appeal than they are in filing briefs in the district court. One might argue, as well, that amicus participation at the appellate level – where the resulting decision may have precedential effect – may sometimes be more important than it is at the district court level.

B. General considerations: scope and relation to existing sealing requirements

Scope of proposed rule. An initial question is whether to draft a rule that covers all appellate proceedings or whether to focus the rule on a subset of those proceedings.

Mr. Levy did not suggest a specialized rule, but it is interesting to note that the example he cited was a civil case. Many instances of sealing on appeal appear to arise in criminal cases, but it is not clear whether it is common for would-be amici to seek access to sealed filings in criminal appeals. In addition, as Part II noted, there are distinctive sensitivities concerning sealing in criminal cases – for example, with respect to grand jury proceedings, or plea or cooperation agreements, or presentence reports. Although the national rules generally take a trans-substantive approach to procedure when possible, the Appellate Rules already distinguish between civil and criminal appeals in some respects (*e.g.*, Rule 4's treatment of appeal time periods).

On the other hand, with the exception of local provisions that treat specially grand jury proceedings or presentence reports or the like, the circuits' local provisions on sealed filings generally apply equally to both civil and criminal appeals. (A counter-example is the Third Circuit, which requires a motion for leave to make sealed filings in civil appeals but does not impose a similar requirement across the board in criminal appeals.)

If the proposed rule will require a motion for leave to file documents under seal in both civil and criminal cases, it is worth considering whether to exempt certain categories of appeal, or certain categories of documents, from the requirement of a motion. For example, it might make sense to exempt appeals involving grand jury proceedings from the motion requirement.

Existing statute- and rule-based sealing requirements. As noted in Part II, statutes and rules specify certain sealing or redaction requirements. Presumably, any national rule concerning sealing and redaction of appellate filings should be drafted so as to leave intact those pre-existing provisions. One possible model is the Seventh Circuit's IOP 10, which states in part:

Except to the extent portions of the record are required to be sealed by statute

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[78] *Cf.* Union Oil Co. of California v. Leavell, 220 F.3d 562, 568 (7th Cir. 2000) ("What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records.").

(e.g., 18 U.S.C. § 3509(d)) or a rule of procedure (e.g., Fed. R. Crim. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed." Seventh Circuit IOP 10(a). A provision requiring a motion for leave to file a redacted brief might also be drafted to dovetail with the privacy rules – for example by specifying that redactions pursuant to Appellate Rule 25(a)(5) must be made as a matter of course and do not require a motion for leave.

C. Alternative models for a national rule on sealing appellate filings

The Seventh Circuit model (requiring a motion). As noted during the spring meeting, one possible way of addressing Mr. Levy's concern is to adopt in the Appellate Rules the approach taken by the Seventh Circuit (and by the Third Circuit with respect to civil appeals). Under this approach, an Appellate Rule could provide a grace period during which matters sealed below remain sealed on appeal, but could mandate that those matters are unsealed (to the extent they appear in the record on appeal) if no motion is made within the grace period to maintain the seal on appeal.

The D.C. and Federal Circuit model (duty of party review). Another possibility, as noted at the spring meeting, is to require the litigants – at the outset of the appeal – to review the record, mutually agree on whether some or all sealed portions can be unsealed, and present that agreement to the court or agency below. This is the approach taken by the D.C. and Federal Circuits. The provision could be bolstered by a requirement that the parties certify their compliance to the court of appeals.

Imposing a duty of district court review. Another option suggested at the spring meeting would be to suggest to the Civil and/or Criminal Rules Committees that district judges be required to review any sealing orders at the time they close a case. This would have the benefit of directing sealing decisions to the judge who knows the case best. On the other hand, as a way of addressing Mr. Levy's concern, this approach seems over-inclusive for two reasons: first, because it would impose a duty with respect to all cases, not just those in which there is an appeal; and second, because it would require the district court to review all aspects of the sealed record below, rather than only the portions cited or otherwise disclosed in appellate briefs or appendices. At the same time, this approach seems under-inclusive because it would only address appeals from final judgments, not interlocutory appeals.

Creating a framework for motions to unseal. A different approach would be to add to the Appellate Rules a provision that creates a framework for motions to unseal. Such a provision, by acknowledging the propriety of third-party motions to unseal appellate filings, could encourage such motions. And such a provision could remove uncertainty over the applicable procedure for such motions in circuits whose local provisions do not currently discuss them. However, such a provision would likely not address two of the difficulties cited by Mr. Levy – namely, the fact that third parties often lack the resources to make such motions, and the fact that even when such

a motion is granted the unsealing comes too late for the amicus to take account of the newly-unsealed material in drafting the amicus brief. The latter problem might be addressed by providing for extensions of the briefing schedule when unsealing comes too late to permit adequate time for briefing by an amicus – but such extensions could undesirably slow down the briefing process.

Penalizing unwarranted redactions in appellate briefs. A different approach might rely on the threat of sanctions to deter lawyers from making unwarranted redactions in their briefs. Such sanctions would likely only be imposed in extreme cases; *In re Violation of Rule 28(D)*, 635 F.3d 1352 (Fed. Cir. 2011), provides an example. One advantage would be that sanctions could be addressed after the court of appeals has resolved the merits of the appeal – i.e., at a time when the merits panel has become familiar with the case. But whether this would suffice to address the general problem, and whether it would do so without causing other problems, is not clear.

D. Additional matters that a national rule might address

If a national rule were to address the topic of sealed appellate filings, it might be worthwhile to consider whether it should cover matters other than those directly relevant to Mr. Levy's concerns. Here are a couple of examples:

Designating the decisionmaker. It is not clear that courts take a uniform approach to the question of who should resolve questions concerning sealing of appellate filings. Some courts may delegate such decisions, in the first instance, to the clerk or to a staff attorney.[79] Assuming that clerks' or staff attorneys' decisions are reviewed by a judicial officer, there remains a further question concerning *which* judicial officer conducts that review. Some courts might prefer to refer sealing questions to the court below – at least if the questions arise early in the appellate process. Some courts might refer the question to a single appellate judge or to a motions panel. Other courts might prefer to impose a provisional seal and reserve the question for the merits panel.

It might be worth considering whether a national rule should address at least the first of these questions, by providing that sealing decisions by clerks or staff attorneys should be subject to review by a judicial officer. (The Sealed Cases Subcommittee's recommendations provide support for this approach.)

Limiting duration of sealing orders. Support can be found for the idea of including time limits in sealing orders. As noted in Part III, some local provisions already do so, although their

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[79] In their study of completely sealed cases, the FJC found that "[i]n general, sealing motions are decided by motions judges or merits panels, depending upon when the motion is filed. But one court authorized a staff attorney to decide a motion to seal." REAGAN & CORT, *supra* note 5, at 29.

time limits are long ones. The Sealed Cases Subcommittee and Privacy Subcommittee have expressed support for the idea of sunset provisions; on the other hand, CACM has expressed doubts as to their use in the context of sealing cooperation and plea agreements.

E. Alternatives to a rule amendment

It may be worthwhile to consider the extent to which concerns over sealed appellate filings could be addressed by actions short of a national rule amendment.

Judicial and clerk education. The Sealed Cases Subcommittee has recommended the use of educational efforts to raise awareness of issues relating to completely sealed cases. It is possible that similar efforts could help courts to rein in excesses in sealing and redaction of appellate briefs.

CM/ECF architecture. Changes to the CM/ECF system might ameliorate some concerns regarding sealing. For example, as the Sealed Cases Subcommittee has suggested, CM/ECF might be modified to generate periodic reminders for the review of existing sealing orders.

V. Conclusion

The Committee will have a number of choices to make in considering a possible national rule on sealed appellate filings – concerning the rule's scope, its interaction with statutory and rule-based sealing requirements, its mechanism for restraining inappropriate sealing and redaction, and its treatment of other issues. In considering such a rule proposal, it will be important to consult with other Judicial Conference committees that have dealt or are dealing with related issues.

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Circuit	Cite	Comments
DC	Rule 39(d)	Costs of Producing Separate Briefs and Appendices Where Record is Sealed. The costs under Circuit Rule 47.1 of preparing 2 sets of briefs, and/or 2 segments of appendices, may be assessed if such costs are otherwise allowable.
DC	Rule 47.1(a)	Case with Record Under Seal. Any portion of the record that was placed under seal in the district court or before an agency remains under seal in this court unless otherwise ordered. Parties and their counsel are responsible for assuring that materials under seal remain under seal and are not publicly disclosed.
DC	Rule 47.1(b)	Agreement to Unseal. In any case in which the record in the district court or before an agency is under seal in whole or in part and a notice of appeal or petition for review has been filed, each party must promptly review the record to determine whether any portions of the record under seal need to remain under seal on appeal. If a party determines that some portion should be unsealed, that party must seek an agreement on the unsealing. Such agreement must be presented promptly to the district court or agency for its consideration and issuance of an appropriate order.
DC	Rule 47.1(c)	Motion to Unseal. A party or any other interested person may move at any time to unseal any portion of the record in this court, including confidential briefs or appendices filed under this rule. On appeals from the district court, the motion will ordinarily be referred to the district court, and, if necessary, the record remanded for that purpose, but the court may, when the interests of justice require, decide that motion, and, if unsealing is ordered, remand the record for unsealing. Unless otherwise ordered, the pendency of a motion under this rule will not delay the filing of any brief under any scheduling order.
DC	Rule 47.1(d)	Briefs Containing Material Under Seal. (1) Two Sets of Briefs. If a party deems it necessary to refer in a brief to material under seal, 2 sets of briefs must be filed which are identical except for references to sealed materials. One set of briefs must bear the legend "Under Seal" on the cover, and each page containing sealed material must bear the legend "Under Seal" at the top of the page. The second set of briefs must bear the legend "Public Copy--Sealed Material Deleted" on the cover, and each page from which material under seal has been deleted must bear a legend stating "Material Under Seal Deleted" at the top of the page. The party must file the original and 6 copies of the sealed brief and the original and 14 copies of the public brief. Both sets of briefs must comply with the remainder of these rules, including Circuit Rule 32(a) on length of briefs. (2) Service. Each party must be served with 2 copies of the public brief and 2 copies of the brief under seal, if the party is entitled to receive the material under seal. See, e.g., Fed. R. Crim. P. 6(e). (3) Non-availability to the Public. Briefs filed with the court under seal are available only to authorized court personnel and will not be made available to the public.

DC	Rule 47.1(e)	Appendices Containing Matters Under Seal. (1) Sealed Supplement to the Appendix; Number of Copies. If a party deems it necessary to include material under seal in an appendix, the appendix must be filed in 2 segments. One segment must contain all sealed material and bear the legend "Supplement--Under Seal" on the cover, and each page of that supplement containing sealed material must bear the legend "Under Seal" at the top of the page. The second appendix segment must bear the legend "Public Appendix-- Sealed Material in Separate Supplement" on the cover; each page from which material under seal has been deleted must bear the legend "Material Under Seal Deleted" at the top of the page. The party must file 7 copies of the sealed supplement and 7 copies of the public appendix. (2) Service; Number of Copies. Each party must be served with one copy of the public appendix and one copy of the sealed supplement, if the party is entitled to receive the material under seal. See, e.g., Fed. R. Crim. P. 6(e). (3) Non-availability to the Public. Supplements to appendices filed with the court under seal are available only to authorized court personnel and will not be made available to the public.
DC	Rule 47.1(f)	Disposal of Sealed Records. (1) In any case in which all or part of the record of this court (including briefs and appendices) has been maintained under seal, the Clerk will, in conjunction with the issuance of the mandate (or the entry of the final order, in a case in which no mandate will issue), order the parties to show cause why the record (or sealed portions) should not be unsealed. If the parties agree to unsealing, the record will be unsealed by order of the court, issued by the Clerk. No order to show cause will be issued in cases where the nature of the materials themselves (e.g., grand jury materials) makes it clear that unsealing would be impermissible. If the parties do not agree to unsealing, the order to show cause, and any responses thereto, will be referred to the court for disposition. (2) Any record material not unsealed pursuant to this rule will be designated "Temporary Sealed Records," and transferred to the Federal Records Center under applicable regulations. The records will be returned to the court for reconsideration of unsealing after a period of 20 years. (3) The court may, on its own motion, issue an order to show cause and consider the unsealing of any records in the court's custody, at any time. (4) Counsel to an appeal involving sealed records must promptly notify the Court when it is no longer necessary to maintain the record or portions of the record under seal.
DC	Rule 47.2(b)(5)	[regarding sentencing appeals:] The filings will be placed in the public record. Parties should avoid matters that could compromise the confidentiality of the presentence report. Where inclusion of confidential matters is unavoidable, the party should move to have the submission placed under seal.
DC	Rule 47.6(a)(3)	[regarding appeals from Alien Terrorist Removal Court:] Submissions to be Filed Under Seal. Unless otherwise specified herein, all submissions filed in the court in an appeal from the Alien Terrorist Removal Court must be filed under seal. In addition, any submission containing or referring to classified information must so indicate in an appropriate legend on the face of the submission. The court and all parties to a removal proceeding must comply with all applicable statutory provisions for the protection of classified information, and with the "Security Procedures Established Pursuant to Pub. L. 96-456, 94 Stat. 2025, by the Chief Justice of the United States for the Protection of Classified Information."

DC	Rule 47.6(b)	[appeals from denial of removal application:] (2) Record. The United States must serve a copy of the notice of appeal on the Alien Terrorist Removal Court. Upon receipt of the notice, the Removal Court must transmit, under seal, the entire record of the application proceeding to the court of appeals. (3) Ex Parte Appeal. An appeal from the denial of a removal application must be conducted ex parte and under seal. No submissions, including the notice of appeal and the memorandum in support of the appeal, will be served on the alien.
DC	Rule 47.6(c)	(2) Record. The United States must serve a copy of the notice of appeal on the Alien Terrorist Removal Court. Upon receipt of the notice, the Removal Court must transmit the entire record of the removal proceeding to the court of appeals. Any portion of the record sealed in the Removal Court must be transmitted to and maintained by this court under seal. (3) Ex Parte Appeal. An appeal from a discovery determination will be conducted ex parte and under seal. No submissions, except the notice of appeal, will be served on the alien.
DC	Rule 47.6(d)	[appeals from determination after removal hearing:] (3) Record. The appellant (except in the case of an automatic appeal) must serve a copy of the notice of appeal on the Alien Terrorist Removal Court. Upon receipt of the notice, the Removal Court must transmit the entire record of the removal proceeding to the court of appeals. Any portion of the record sealed in the Removal Court must be transmitted to and maintained by this court under seal. In the case of an automatic appeal, the Removal Court must, upon the filing of the court's order after the removal hearing, transmit a certified copy of the order, together with the record of the removal proceedings, to the court of appeals. (4) Briefing. Within 10 days of the filing of the appellant's memorandum in support of the appeal, the appellee must file a responsive brief, not to exceed 20 pages in length. Appellant's reply, if any, is due 5 days after the date the response is filed, and may not exceed 10 pages in length. Briefs or memoranda must be filed under seal, to the extent necessary to comply with subsection (a)(3) of this rule.
DC	App. IV. Administrative Order Regarding Electronic Case Filing	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.

DC	App. IV. Administrative Order Regarding Electronic Case Filing	ECF-9. Privacy Protection Unless the court orders otherwise, parties must refrain from including or must redact the following personal data identifiers from documents filed with the court to the extent required by FRAP 25(a)(5): • Social Security numbers. If an individual's Social Security number must be included, use the last four digits only. • Financial account numbers. If financial account numbers are relevant, use the last four digits only. • Names of minors. If the involvement of an individual known to be a minor must be mentioned, use the minor's initials only. • Dates of birth. If an individual's date of birth must be included, use the year only. • Home addresses. In criminal cases, if a home address must be included, use the city and state only. The filer bears sole responsibility for ensuring a document complies with these requirements. Guidance on redacting personal data identifiers is posted on the court's web site and must be followed.
DC	Handbook II.C.2	Any filing or brief (with the exception of emergency, confidential, or sealed documents) may be left, on the date due, in the Court of Appeals filing depository, located inside the Third Street entrance to the Courthouse, unless the Court has ordered that the filing be made at a time certain.
DC	Handbook II.C	5. Privacy Protection. Litigants must be aware of the federal rules and take all necessary precautions to protect the privacy of parties, witnesses, and others whose personal information appears in court filings. Sensitive personal data must be removed from documents filed with the Court and made available to the public -- whether electronically or on paper. All filers must comply with Federal Rule of Appellate Procedure 25(a)(5) and must follow the guidance on redacting personal data identifiers, which is posted on the Court's web site. In addition, ECF filers must comply with the requirements for privacy protection set out in the Administrative Order--ECF-9, effective June 8, 2009.
DC	Handbook III.K	K. Cases with Records Under Seal. (See D.C. Cir. Rule 47.1.) Any portion of the record that was placed under seal in the district court or before an agency remains under seal in this Court unless otherwise ordered. Parties and their counsel are responsible for assuring that materials under seal remain under seal and are not publicly disclosed. Matters under seal may not be filed in the Court of Appeals drop box. For privacy protections that govern all cases filed in this court, see supra Part II.C.5. In any case in which the record in the district court or before an agency is under seal in whole or in part, each party must review the record to determine whether any portions of the record under seal should remain under seal on appeal. If a party determines that some portion should be unsealed, that party must seek an agreement on the unsealing. Such agreement must be promptly presented to the district court or agency for its consideration and issuance of an appropriate order. See D.C. Cir. Rule 47.1(b); see also infra Parts VIII.H (discussing motions to unseal), IX.A.10 (discussing briefs containing material under seal), IX.B.7 (discussing appendices containing matters under seal). For procedures governing disposal of sealed records, see infra Part XIII.A.5. 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.

DC	Handbook VI.D.2	Counsel must serve the appellant with the motion to withdraw. When filing a motion to withdraw because of lack of merit to the appeal in a criminal case, counsel also must submit to the Court and serve on the appellant, *but not on government counsel* , a confidential memorandum under seal setting forth the points the appellant wishes to assert, any other points counsel has considered, and the most effective arguments counsel can make on the appellant's behalf. The Court gives the appellant 30 days to respond to this memorandum; if the Court thereafter concludes there are no meritorious issues on appeal, it will grant counsel's motion to withdraw and ordinarily dismiss the appeal.
DC	Handbook VIII.H	Motions to Unseal. (See D.C. Cir. Rule 47.1.) Parties or other interested persons may move at any time to unseal any portion of the record in this Court, including confidential briefs or appendices filed under Circuit Rule 47.1. See D.C. Cir. Rule 47.1(c). If the case arises from the district court, the motion will ordinarily be referred to that court, and, if necessary, the record will be remanded for that purpose. This Court may, when the interests of justice require, decide such a motion itself. If unsealing is ordered by this Court, the record may be remanded to the district court for unsealing. Unless otherwise ordered, the filing of a motion to unseal any portion of the record does not delay the filing of any brief under any scheduling order.
DC	Handbook IX.A.10	10. Briefs Containing Material Under Seal. (See D.C. Cir. Rule 47.1(d).) If it is necessary to refer in a brief to material under seal, two sets of briefs must be filed. The briefs are to be identical except for references to sealed materials. One set of briefs must bear the legend "Under Seal" on the cover, and each page containing sealed material must bear the legend "Under Seal" at the top of the page. The second set of briefs must bear the legend "Public Copy--Sealed Material Deleted" on the cover, and each page from which material under seal has been deleted must bear a legend stating "Material Under Seal Deleted" at the top of the page. Seven copies of the sealed brief and 15 copies of the public brief must be filed, and 2 copies of the public brief and 2 copies of the brief under seal served on each party, if such party is entitled to receive the material under seal. See, e.g., Fed. R. Crim. P. 6(e). Both sets of briefs must comply with the remainder of the rules, including Federal Rule of Appellate Procedure 32(a)(7) and Circuit Rule 32(a), on the length of briefs. Litigants proceeding in forma pauperis must file 1 copy of the sealed brief and 1 copy of the public brief. Briefs filed with the Court under seal are available only to authorized court personnel and are not made available to the public.

DC	Handbook IX.B.7	Appendix Containing Matters Under Seal. (See D.C. Cir. Rule 47.1(e).) If it is necessary to include material under seal in an appendix, the appendix must be filed in two segments. One segment must contain all sealed material and must bear the legend "Supplement--Under Seal" on the cover, and each page of that segment containing sealed material must bear the legend "Under Seal" at the top of the page. The second appendix segment must bear the legend "Public Appendix--Material Under Seal in Separate Supplement" on the cover; each page from which material under seal has been deleted must bear the legend "Material Under Seal Deleted" at the top of the page. Seven copies of the sealed segment and 7 copies of the public segment of the appendix must be filed, and 1 copy of the public segment of the appendix and 1 copy of the sealed segment served on each party, if such party is entitled to receive the material under seal. See, e.g., Fed. R. Crim. P. 6(e). Segments of appendices filed with the Court under seal are available only to authorized court personnel and are not made available to the public.
DC	Handbook XIII.A.5	Disposal of Sealed Records. (See D.C. Cir. Rule 47.1(f).) In any case in which all or part of the record has been maintained under seal, the Clerk will order the parties to show cause why the record should not be unsealed, unless the nature of the materials themselves (e.g., grand jury material) makes it clear that unsealing would be impermissible. This order will be entered in conjunction with the issuance of the mandate. If the parties agree to unsealing, the record will be unsealed by Clerk's order. Otherwise, the matter will be referred to the Court for disposition. Counsel to an appeal involving sealed records must promptly notify the Court when it is no longer necessary to maintain the record or portions of the record under seal.
DC	NOTICE TO ALL ELECTRONIC FILERS OF RESPONSIBILITY TO PROTECT SEALED INFORMATION (April 15, 2010)	All attorneys and unrepresented parties who electronically file documents through the court's CM/ECF system are strongly reminded that any portion of the record that was placed under seal in the district court or before an agency remains under seal in this court unless otherwise ordered. Parties and their counsel are responsible for assuring that materials under seal remain under seal and are not publicly disclosed. See D.C. Circuit Rule 47.1(a). Furthermore, all documents containing material under seal, including motions to file documents under seal which include any exhibits or attachments, may not be filed or served electronically unless the court orders otherwise. See Administrative Order Regarding Electronic Case Filing ECF-8(B). Since it is the regular practice of this court to maintain a nondescript public docket in all cases where the entire appellate record has been sealed, filers must make certain that no documents are electronically filed in cases bearing the caption In re: Sealed Case, or In re: Grand Jury. Electronic filers are also reminded that documents filed through the CM/ECF system are immediately available to the public through PACER. Additionally, it is not uncommon for non-case participants, along with the parties, to contemporaneously receive electronic notice of the filing containing a hyperlink to the document. Therefore, filers must remain vigilant to ensure that sealed materials are not included with their electronic submission. Counsel who routinely fail to comply with the rules or orders of the Court may be subject to disciplinary action as the circumstances may warrant in accordance with Rule I(a) & (b) of the Rules of Disciplinary Enforcement for the United States Court of Appeals for the District of Columbia Circuit.

First	Rule 11.0(c)	Sealed Materials. (1) Materials Sealed by District Court or Agency Order. The court of appeals expects that ordinarily motions to seal all or part of a district court or agency record will be presented to, and resolved by, the lower court or agency. Motions, briefs, transcripts, and other materials which were filed with the district court or agency under seal and which constitute part of the record transmitted to the court of appeals shall be clearly labeled as sealed when transmitted to the court of appeals and will remain under seal until further order of court.
First	Rule 11.0(c)	(2) Motions to Seal in the Court of Appeals. In order to seal in the court of appeals materials not already sealed in the district court or agency (e.g., a brief or unsealed portion of the record), a motion to seal must be filed in paper form in the court of appeals; parties cannot seal otherwise public documents merely by agreement or by labeling them "sealed." A motion to seal, which should not itself be filed under seal, must explain the basis for sealing and specify the desired duration of the sealing order. If discussion of confidential material is necessary to support the motion to seal, that discussion shall be confined to an affidavit or declaration, which may be filed provisionally under seal. A motion to seal may be filed before the sealed material is submitted or, alternatively the item to be sealed (e.g., the brief) may be tendered with the motion and, upon request, will be accepted provisionally under seal, subject to the court's subsequent ruling on the motion. Material submitted by a party under seal, provisionally or otherwise must be stamped or labeled by the party on the cover "FILED UNDER SEAL." If the court of appeals denies the movant's motion to seal, any materials tendered under provisional seal will be returned to the movant. Motions to seal or sealed documents should never be filed electronically. See Administrative Order Regarding Case Management/Electronic Case Files System.
First	Rule 11.0(c)	(3) Limiting Sealed Filings. Rather than automatically requesting the sealing of an entire brief, motion, or other filing, litigants should consider whether argument relating to sealed materials may be contained in separate supplemental brief, motion, or filing, which may then be sealed in accordance with the procedures in subsection (2).
First	Rule 11.0(d)	References to Sealed Materials. (1) Records or materials sealed by district court, court of appeals, or agency order shall not be included in the regular appendix, but may be submitted in a separate, sealed supplemental volume of appendix. The sealed supplemental volume must be clearly and prominently labeled by the party on the cover "FILED UNDER SEAL." (2) In addressing material under seal in an unsealed brief or motion or oral argument counsel are expected not to disclose the substance of the sealed material and to apprise the court that the material in question is sealed. If the record contains sealed materials of a sensitive character, counsel would be well advised to alert the court to the existence of such materials and their location by a footnote appended to the "Statement of Facts" caption in the opening or answering brief.
First	Rule 28.0	(c) Sealed Items. Notwithstanding the above, sealed or non-public items-- including a presentence investigation report or statement of reasons in a judgment of criminal conviction--should not be included in a public addendum. Rather, where sealed items are to be included, they should be filed in a separate, sealed addendum.
First	Rule 28.1	Briefs filed with the court of appeals are a matter of public record. In order to have a brief sealed, counsel must file a specific and timely motion in compliance with Local Rule 11.0(c)(2) and (3) asking the court to seal a brief or supplemental brief. Counsel must also comply with Local Rule 11.0(d), when applicable.

First	Rule 30.0	(g) Inclusion of Sealed Material in Appendices. Appendices filed with the court of appeals are a matter of public record. If counsel conclude that it is necessary to include sealed material in appendix form, then, in order to maintain the confidentiality of materials filed in the district court or agency under seal, counsel must designate the sealed material for inclusion in a supplemental appendix to be filed separately from the regular appendix and must file a specific and timely motion in compliance with Local Rules 11.0(c)(2), 11.0(c)(3), and 11.0(d) asking the court to seal the supplemental appendix.
First	Notice of Adoption of Amendment to Local Rule 30.0 [2009]	Sealed or otherwise non-public items should not be included in a public appendix or addendum, but rather should be filed in a separate sealed volume. See Local Rules 11.0(d)(1), 28.0(c), 30(g). For example, a pre-sentence report in a criminal case should not be included in a public appendix or addendum. Where a judgment of criminal conviction is required to be included in the addendum, the statement of reasons should be filed in a separate, sealed volume. See Local Rule 28.0(c). Finally, counsel should comply with the privacy protection requirements of Fed. R. App. P. 25(a)(5) and should make appropriate redactions. For more information on redaction requirements see the Notice of Electronic Availability of Case Information on the First Circuit's website at www.ca1.uscourts.gov.
First	Administrative Order Regarding Case Management/Electronic Case Files System (CM/ECF) 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: ... 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; ...
First	Administrative Order Regarding Case Management/Electronic Case Files System (CM/ECF) Rule 7	Sealed Documents 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 1st Cir. R. 11.0(c) and 1st Cir. R. 30.0(f). 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	Administrative Order Regarding Case Management/Electronic Case Files System (CM/ECF) Rule 12	Privacy Protections and Public Access Filers, whether filing electronically or in paper form, must refrain from including or must redact certain personal data identifiers from all documents filed with the court whenever such redaction is required by Fed. R. App. P. 25(a)(5). The responsibility for redacting these personal identifiers rests solely with counsel and the parties. The clerk will not review any document for compliance with this rule. Filers are advised that it is the experience of this court that failure to comply with redaction requirements is most apt to occur in attachments, addenda, or appendices, and, thus, special attention should be given to them.
First	Administrative Order Regarding Case Management/Electronic Case Files System (CM/ECF) Rule 13	Hyperlinks Electronically filed documents may contain hyperlinks except as stated herein. Hyperlinks may not be used to link to sealed or restricted documents. Hyperlinks to cited authority may not replace standard citation format. Complete citations must be included in the text of the document. A hyperlink, or any site to which it refers, will not be considered part of the record. Hyperlinks are simply convenient mechanisms for accessing material in a document. The court accepts no responsibility for the availability or functionality of any hyperlink, and does not endorse any product, organization, or content at any hyperlinked site, or at any site to which that site might be linked.
First	Ten Pointers for an Appeal ¶ 8(B)(3)	Documents that are transmitted to this court under seal, such as presentence reports, must not be included in an addendum or appendix. In addition, pursuant to a policy of the Judicial Conference of the United States, a statement of reasons in a criminal case is a non-public document. Briefs and appendices including such materials will be rejected as noncompliant. However, these materials may be filed in a separate volume clearly marked “SEALED.” See 1st Cir. R. 11.0 and 28.0. Sealed documents may not be filed electronically. See Administrative Order Regarding CM/ECF, Rules 1 and 7.
First	Notice to Counsel Regarding Contents of the Appendix	Sealed or otherwise non-public items should not be included in a public appendix or addendum, but rather should be filed in a separate sealed volume. See Local Rules 11.0(d)(1), 28.0(c), 30(g). For example, a pre-sentence report in a criminal case should not be included in a public appendix or addendum. Where a judgment of criminal conviction is required to be included in the addendum, the statement of reasons should be filed in a separate, sealed volume. See Local Rule 28.0(c). Finally, counsel should comply with the privacy protection requirements of Fed. R. App. P. 25(a)(5) and should make appropriate redactions. For more information on redaction requirements see the Notice of Electronic Availability of Case Information on the First Circuit's website at www.ca1.uscourts.gov.
First	Notice to Counsel and Pro Se Litigants	To avoid the need to seal the entire brief or appendix, counsel shall place sealed or confidential material in a separate, sealed volume of the brief or appendix. 1st Cir. R. 11.0. Sealed documents and motions for permission to file a document under seal should be filed only in paper form in compliance with 1st Cir. R. 11.0(c) and 1st Cir. R. 30.0(f). See Rules 1 and 7 of the Administrative Order Regarding CM/ECF.
Second	Rule 25.1(a)(1)	(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.
Second	Rule 25.1(j)	(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.

Second	Web page: How to Appeal a Civil Case: Documents under seal	On rare occasions a document will be placed "under seal" so that it is not publicly available. A paper that has been sealed in the district court will remain under seal in the Court of Appeals if received as part of the record. A document that was not sealed in the district court will not be sealed in the Court of Appeals without a Court order. A party wishing to file a paper under seal with the Court of Appeals must make a written motion. An informal request to seal a document will not be entertained. All papers submitted to the Court pursuant to a sealing order must be submitted in a sealed envelope, marked SEALED, with a copy of the order placing the document under seal attached to the envelope. Parties must not file sealed documents electronically in CM/ECF.
Second	Web page: How to Use CM/ECF: Sealed documents	Currently the Second Circuit does not accept electronic filing of sealed documents. Parties must file paper copies with the Court. The case manager will make the appropriate docket entries but will not attach any sealed documents to the corresponding docketing event. Parties will receive Notices of Docketing Activity by email for sealed documents filed in public cases. Unless a case was sealed in the court or agency below, the Court will not seal any document in a case unless it grants a party's motion to do so. A motion to seal a case must be filed electronically in accordance with the procedures set forth in Filing a motion. If the Court has permitted a case or document to be sealed, *do not file the sealed documents through ECF.*
Second	Web page: How to Appeal an Agency Case: Documents under Seal	On rare occasions a document will be placed "under seal" so that it is not publicly available. A paper that has been sealed in the agency below will remain under seal in the Court of Appeals if received as part of the record. A document that was not sealed in the agency below will not be sealed in the Court of Appeals without a Court order. A party wishing to file a paper under seal with the Court of Appeals must make a written motion. An informal request to seal a document will not be entertained. All papers submitted to the Court pursuant to a sealing order must be submitted in a envelope, marked SEALED, with a copy of the order placing the document under seal attached to the envelope.
Second	Web page: How to Appeal a Criminal Case: Pre-sentence Investigation Report (PSR)	If the appeal involves any United States Sentencing Guidelines issues, the appellant must submit a copy of the PSR with the appellant's brief and appendix. To preserve the confidentiality of the information contained in the report, the copy of the PSR should be placed in a sealed envelope with the words "Pre-Sentence Investigation Report" written on the outside of the envelope. Also, the appellant must write on the envelope the short caption and docket number of the case in which the PSR is being filed. If the case involves multiple defendants, the appellant must indicate on the envelope which defendant is filing the PSR.
Second	Web page: How to Appeal a Criminal case: Documents under Seal	On rare occasions a document will be placed "under seal" so that it is not publicly available. A paper that has been sealed in the district court will remain under seal in the Court of Appeals if received as part of the record. A document that was not sealed in the district court will not be sealed in the Court of Appeals without a Court order. A party wishing to file a paper under seal with the Court of Appeals must make a written motion. An informal request to seal a document will not be entertained. All papers submitted to the Court pursuant to a sealing order must be submitted in a sealed envelope, marked SEALED, with a copy of the order placing the document under seal attached to the envelope.
Third	Local Appellate Rule 25.3	Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference Policy.

Third	Local Appellate Rule 27.2	(c) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference Policy.
Third	Local Appellate Rule 28.3	(c) All assertions of fact in briefs must be supported by a specific reference to the record. All references to portions of the record contained in the appendix must be supported by a citation to the appendix, followed by a parenthetical description of the document referred to, unless otherwise apparent from context. Hyperlinks to the electronic appendix may be added to the brief. If hyperlinks are used, the brief must also contain immediately preceding the hyperlink a reference to the paper appendix page. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the brief or appendix. Hyperlinks may not be used to link to sealed or restricted documents.
Third	Local Appellate Rule 30.1	(c) In addition to an electronic and paper appendix, hyperlinks to the appendix may be added to the brief. If hyperlinks are used, the brief must also contain immediately preceding the hyperlink a reference to the paper appendix page. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the brief or appendix. Hyperlinks may not be used to link to sealed or restricted documents.
Third	Local Appellate Rule 30.3	(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	Local Appellate Rule 30.3	(c) In an appeal challenging a criminal sentence, the appellant must file, at the time of filing the appendix, four copies of the Presentence Investigation Report and the statement of reasons for the sentence, in four sealed envelopes appropriately labeled. Grand jury materials protected by Fed. R. Crim. P. 6(c), presentence reports, statements of reasons for the sentence and any other similar material in a criminal case or a case collaterally attacking a conviction (cases under 28 U.S.C. §§ 2241, 2254, 2255) must be filed electronically and in paper as separate sealed volumes.
Third	Local Appellate Rule 32.1	(e) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.
Third	Local Appellate Rule 32.2	(e) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.
Third	Local Appellate Rule 32.3	(c) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.
Third	Local Appellate Rule 35.2	(b) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.
Third	Local Appellate Rule 40.1	(b) Certain personal identifiers must be excluded or redacted from all documents filed with the court as specified in L.A.R. Misc. 113.12 and Judicial Conference policy.

Third	Local Appellate Rule 106.1	(a) Generally. With the exception of matters relating to grand jury investigations, filing of documents under seal without prior court approval is discouraged. If a party believes a portion of a brief or other document merits treatment under seal, the party must file a motion setting forth with particularity the reasons why sealing is deemed necessary. Any other party may file objections, if any, within 7 days. A motion to seal must explain the basis for sealing and specify the desired duration of the sealing order. If discussion of confidential material is necessary to support the motion to seal, the motion may be filed provisionally under seal. Rather than automatically requesting the sealing of an entire brief, motion, or other filing, litigants should consider whether argument relating to sealed materials may be contained in a separate sealed supplemental brief, motion or filings. Sealed documents must not be included in a regular appendix, but may be submitted in a separate, sealed volume of the appendix. In addressing material under seal (except for the presentencing report) in an unsealed brief or motion or oral argument counsel are expected not to disclose the nature of the sealed material and to apprise the court that the material is sealed.
Third	Local Appellate Rule 106.1	(b) Grand Jury Matters. In matters relating to grand jury investigations, when there is inadequate time for a party to file a motion requesting permission to file documents under seal, the party may file briefs and other documents using initials or a John or Jane Doe designation to avoid disclosure of the identity of the applicant or the subject matter of the grand jury investigation. Promptly thereafter, the party must file a motion requesting permission to use such a designation. All responsive briefs and other documents must follow the same format until further order of the court.
Third	Local Appellate Rule 106.1	(c) Records Impounded in the District Court. (1) Criminal Cases and Cases Collaterally Attacking Convictions. Grand jury materials protected by Fed. R. Crim. P. 6(c), presentence reports, statements of reasons for the sentence and any other similar material in a criminal case or a case collaterally attacking a conviction (cases under 28 U.S.C. §§ 2241, 2254, 2255), which were filed with the district court under seal pursuant to statute, rule or an order of impoundment, and which constitute part of the record transmitted to this court, remain subject to the district court's impoundment order and will be placed under seal by the clerk of this court until further order of this court. In cases in which impounded documents other than grand jury materials, presentence reports, statements of reasons for the sentence, or other documents required to be sealed by statute or rule, are included in the record transmitted to this court under L.A.R. 11.2, the party seeking to have the document sealed must file a motion within 21 days of receiving notice of the docketing of the appeal in this court, explaining the basis for sealing and specifying the desired duration of the sealing order. If discussion of confidential material is necessary to support the motion to seal, the motion may be filed provisionally under seal.

Third	Local Appellate Rule 106.1	(c) … (2) Civil Cases. When the district court impounds part or all of the documents in a civil case, they will remain under seal in this court for 30 days after the filing of the notice of appeal to give counsel an opportunity to file a motion to continue the impoundment, setting forth the reasons therefor. A motion to continue impoundment must explain the basis for sealing and specify the desired duration of the sealing order. If the motion does not specify a date, the documents will be unsealed, without notice to the parties, five years after conclusion of the case. If discussion of confidential material is necessary to support the motion to seal, the motion may be filed provisionally under seal. If a motion to continue impoundment is filed, the documents will remain sealed until further order of this court.
Third	Local Appellate Rule 106.1	Committee Comments: Prior Court Rule 21.3 has no counterpart in FRAP and is therefore classified as Miscellaneous. The rule has been revised to place an affirmative obligation to file a motion on the party in a civil matter who wishes to continue the sealing of documents on appeal. The archiving center will not accept sealed documents, which presents storage problems for the court. The rule has been amended to require the parties to specify how long documents must be kept under seal after the case is closed. The rule was amended in 2008 to provide that unless otherwise specified, documents in civil cases would remain sealed only for five years.
Third	Local Appellate Rule 113.1	(d) By local rule or order of the court or clerk, electronic access to entire case files or portions thereof may be restricted to the parties and the court. Public documents, except those filed under seal, may be viewed at the clerk's office.
Third	Local Appellate Rule 113.7	(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.
Third	Local Appellate Rule 113.7	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.

Third	Local Appellate Rule 113.12	(a) Parties, counsel, or other persons filing any document, whether electronically or in paper, must refrain from including, or must partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court: (1) Social Security numbers. If an individual's Social Security number must be included, only the last four digits of that number should be used. (2) Names of minor children. If the involvement of a minor child must be mentioned, only the initials of that child should be used. (3) Dates of birth. If an individual's date of birth must be included, only the year should be used. (4) Financial account numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used. (5) Home addresses. In criminal cases, if a home address must be included, only the city and state should be listed.
Third	Local Appellate Rule 113.12	(b) In compliance with the E-Government Act of 2002, a party wishing to file a document containing the personal data identifiers listed above may: (1) File an un-redacted version of the document under seal, or (2) File a reference list under seal. The reference list must contain the complete personal data identifier(s) and the redacted identifier(s) used in its(their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right.
Third	Local Appellate Rule 113.12	(c) The un-redacted version of the document or the reference list must be retained by the court as part of the record. The court may, however, still require the party to file a redacted copy for the public file. (d) The responsibility for redacting these personal identifiers rests solely with the party, counsel, or other person filing the document. The clerk will not review each pleading for compliance with this rule.

Third	Local Appellate Rule 113.12	Comments: It is each filer's responsibility to redact information from documents submitted by the filer. Documents containing prohibited personal identifiers must be redacted by the parties so as not to include un-redacted Social Security numbers, financial account numbers, names of minor children, or dates of birth. In criminal cases, home addresses also must be redacted. Information should be provided in shortened form, rather than completely omitted, with Social Security numbers represented as XXX-XX-1234, financial account numbers reduced to the last four digits, names of minor children represented as initials, dates of birth represented by year, and home addresses listed only by city and state. Parties should consult the "Guidance for Implementation of the Judicial Conference Policy on Privacy and Public Access to Electronic Criminal Case Files." This Guidance explains the policy permitting remote public access to electronic criminal case file documents and sets forth redaction and sealing requirements for documents that are filed. The Guidance also lists documents for which public access should not be provided. A copy of the Guidance is available at the court's website. For further information on privacy issues, see the Judicial Conference policies on privacy and public access to documents filed in civil, criminal, and bankruptcy cases, as well as section 205(c) of the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2914, as amended by Pub. L. No. 108-281, 118 Stat. 889 (2004).
Third	Local Appellate Rule 113.13	(a) Electronically filed documents may contain the following types of hyperlinks: (1) Hyperlinks to other portions of the same document; and (2) Hyperlinks to a location on the Internet or PACER, e.g. the appendix, that contains a source document for a citation. If hyperlinks are used in the brief, counsel must also include immediately preceding the hyperlink a reference to the paper appendix page. Hyperlinks to testimony must be to a transcript. A motion must be filed and granted seeking permission to hyperlink to an audio or video file before such links may be included in the brief or appendix. Hyperlinks may not be used to link to sealed or restricted documents.
Third	IOP 10.5.2	Without limiting I.O.P. 10.5.1, this court as a matter of practice refers to a single judge, the following motions: ... (h) motions to unseal or seal.
Third	SUMMARY OF ELECTRONIC FILING REQUIREMENTS	ACCESS TO DOCUMENTS ON PACER Remote electronic access to documents in immigration cases and social security cases is limited to parties to the case. Non-parties can view documents by coming to the clerk's office. Remote electronic access to appendices in criminal cases is limited to parties to the case. Non-parties can view appendices in criminal cases by coming to the clerk's office. Remote electronic access to sealed documents is limited to parties to the case. Nonparties can not view sealed documents either remotely or by coming to the clerk's office.
Fourth	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	Rule 25(c)(1)	(1) Certificates of Confidentiality. At the time of filing any appendix, brief, motion, or other document containing or otherwise disclosing materials held under seal by another court or agency, counsel or a pro se party shall file a certificate of confidentiality. (A) Record material held under seal by another court or agency remains subject to that seal on appeal unless modified or amended by the Court of Appeals. (B) A certificate of confidentiality must accompany any filing which contains or would otherwise disclose sealed materials. The certificate of confidentiality shall: (i) identify the sealed material; (ii) list the dates of the orders sealing the material or, if there is no order, the lower court or agency's general authority to treat the material as sealed; (iii) specify the terms of the protective order governing the information; and (iv) identify the appellate document that contains the sealed information.
Fourth	Rule 25(c)(2)	(2) Motions to Seal. Motions to seal all or any part of the record are presented to and resolved by the lower court or agency in accordance with applicable law during the course of trial, hearing, or other proceedings below. (A) A motion to seal may be filed with the Court of Appeals when: (i) a change in circumstances occurs during the pendency of an appeal that warrants reconsideration of a sealing issue decided below; (ii) the need to seal all or part of the record on appeal arises in the first instance during the pendency of an appeal; or (iii) additional material filed for the first time on appeal warrants sealing. (B) Any motion to seal filed with the Court of Appeals shall: (i) identify with specificity the documents or portions thereof for which sealing is requested; (ii) state the reasons why sealing is necessary; (iii) explain why a less drastic alternative to sealing will not afford adequate protection; and (iv) state the period of time the party seeks to have the material maintained under seal and how the material is to be handled upon unsealing. (C) A motion to seal filed with the Court of Appeals will be placed on the public docket for at least 5 days before the Court rules on the motion, but the materials subject to a motion to seal will be held under seal pending the Court's disposition of the motion.

Fourth	Rule 25(c)(3)	Filing of Confidential and Sealed Material. (A) Appendices: When sealed material is included in the appendix, it must be segregated from other portions of the appendix and filed in a separate, sealed volume of the appendix. In criminal cases in which presentence reports are being filed for multiple defendants, each presentence report must be placed in a separate, sealed volume that is served only on counsel for the United States and for the defendant who is the subject of the report. (B) Briefs, Motions, and Other Documents: When sealed material is included in a brief, motion, or any document other than an appendix, two versions of the document must be filed: (i) a complete version under seal in which the sealed material has been distinctively marked and (ii) a redacted version of the same document for the public file. (C) Personal Data Identifying Information: Personal data identifying information, such as an individual's social security number, an individual's tax identification number, a minor's name, a person's birth date, a financial account number, and (in a criminal case) a person's home address, must be excluded or partially redacted from filings in accordance with FRAP 25(a)(5). (D) Marking of Sealed and Ex Parte Material: The first page of any appendix, brief, motion, or other document tendered or filed under seal shall be conspicuously marked SEALED and all copies shall be placed in an envelope marked SEALED. If filed ex parte, the first page and the envelope shall also be marked EX PARTE.
Fourth	Rule 25(c)(3)	(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.

Fourth	Rule 25(c)(3)	(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. (G) Responsibility for Compliance: The responsibility for following the required procedures in filing confidential and sealed material rests solely with counsel and the parties. The clerk will not review each filing for compliance with this rule. (H) Public Access: Unless filed under seal, case documents are publicly available on the Internet, except that in immigration and social security cases, only the Court's orders and opinions are available to the public on the Internet. Remote electronic access to other documents in immigration and social security cases is available only to persons participating in the case as CM/ECF filing users. Counsel should notify clients regarding the availability of filings on the Internet so that an informed decision may be made on what information is to be included in a public document filed with the Court.
Fourth	Rule 30(b)(3)	Sentencing Guideline Appeals: In all criminal appeals seeking review of the application of the sentencing guidelines, appellant shall include the sentencing hearing transcript and presentence report in the appendix. The presentence report must be included in a separate sealed volume, stamped "SEALED" on the volume itself and on the envelope containing it, and be accompanied by a certificate stating that the volume contains sealed material. In criminal cases in which presentence reports are being filed for multiple defendants, each presentence report must be placed in a separate, sealed volume that is served only on counsel for the United States and for the defendant who is the subject of the report.
Fourth	Rule 30(b)(4)(C)	Sealed Appendix Volumes: For sealed volumes of the appendix, four paper copies must be filed and one paper copy must be served on lead counsel for each party separately represented who is authorized to have access to the sealed volume and on any party not represented by counsel who is authorized to have access to the sealed volume.
Fourth	Rule 31(d)(3)	Sealed Briefs: For sealed briefs, four paper copies of the sealed version must be filed and one paper copy must be served on lead counsel for each party separately represented who is authorized to have access to the sealed version and on any party not represented by counsel who is authorized to have access to the sealed version. Filing and service of the public version of the brief are governed by (1) and (2) above.

Fourth	IOP 34.3	Effective with its May 2011 argument session, the Court will make audio files of oral arguments available on the Court's Internet site, without charge, two days after argument. Counsel are reminded that the following information should not be included in argument to the Court: (A) Personal data protected by Fed. R. App. P. 25(a)(5): (1) social security and taxpayer identification numbers; (2) dates of birth; (3) names of minor children; (4) financial account numbers; and (5) home addresses in criminal cases. (B) Criminal case information protected by the Judiciary's Privacy Policy for Electronic Case Files: (1) unexecuted summonses or warrants; (2) pretrial bail or presentence investigation reports; (3) statements of reasons in the judgment of conviction; (4) juvenile records; (5) identifying information about jurors or potential jurors; (6) financial affidavits filed under the Criminal Justice Act; (7) ex parte requests to authorize services under the Criminal Justice Act; and (8) sealed documents (e.g., motions for downward departure for substantial assistance, plea agreements indicating cooperation, or victim statements). Any motion to seal argument must be filed on the public docket at least five days before oral argument, in accordance with Local Rule 25(c)(2). Audio files of sealed arguments will not be released absent an order of the Court unsealing the argument.
Fourth	App. IV. Preparation of Appellate Transcript Guidelines, II.B.11	Appellant is required to review the transcript upon filing in the district court and provide the court reporter with a statement of the personal data identifiers, including the page number, line number, and text to be redacted, in accordance with the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files.
Fourth	App. IV. Preparation of Appellate Transcript Guidelines, II.C.3	Appellee is required to review the transcript upon filing in the district court and provide the court reporter with a statement of the personal data identifiers, including the page number, line number, and text to be redacted, in accordance with the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files.

Fourth	App. IV. Preparation of Appellate Transcript Guidelines, II.D.10	The court reporter must make any requested redactions to the transcript and file a redacted version of the transcript in the district court in accordance with the Judicial Conference Policy on Privacy and Public Access to Electronic Case Files. Notice of filing of the redacted version of the transcript must be sent to the court of appeals through CM/ECF.
Fourth	Memorandum on Sealed and Confidential Materials	Local Rule 25(c) limits the sealing of documents by requiring that sealed record material be separated from unsealed material and placed in a sealed volume of the appendix and by requiring the filing of both sealed, highlighted versions and public, redacted versions of briefs and other documents. Since the ECF events for sealed filings make the documents accessible only to the court, counsel must serve sealed documents on the other parties in paper form.
Fourth	Memorandum on Sealed and Confidential Materials	Sealed Volume of Appendix: If sealed record material needs to be included in the appendix, it must be placed in a separate, sealed volume of the appendix and filed with a certificate of confidentiality. In consolidated criminal cases in which presentence reports are being filed for multiple defendants, each presentence report must be placed in a separate, sealed volume served only on Government counsel and counsel for the defendant who is the subject of the report. □ Use ECF event-SEALED APPENDIX to file sealed electronic appendix volume(s) and to indicate that four sealed paper volumes have been sent to the court. Cover of sealed appendix volume must be marked SEALED, and paper copies must be placed in envelopes marked SEALED. Sealed volume must be served on other parties in paper form. □ Use ECF event-Certificate of confidentiality to identify authority for treating material as sealed and to identify who may have access to sealed material. Four paper copies of certificate of confidentiality must accompany the four paper copies of the sealed appendix filed with the court. □ Use ECF event-APPENDIX to file public electronic appendix volumes(s) and to indicate that six public paper volumes have been sent to the court (five if counsel is court appointed). Paper copies of public volumes of appendix do not need to be served on other parties if they were served with full public appendix in electronic form.

Fourth	Memorandum on Sealed and Confidential Materials	Sealed Version of Brief: If sealed material needs to be referenced in a brief, counsel must file both a sealed, highlighted version of the brief and a public, redacted version of the brief, as well as a certificate of confidentiality. □ Use ECF event-SEALED BRIEF to file sealed electronic version of brief in which sealed material has been highlighted and to indicate that four sealed paper copies have been sent to the court. Cover of sealed brief must be marked SEALED, and paper copies must be placed in envelopes marked SEALED. Sealed version must be served on other parties in paper form. □ Use ECF event-Certificate of confidentiality to identify authority for treating material as sealed and to identify who may have access to sealed material. Four paper copies of certificate of confidentiality must accompany the four paper copies of the sealed brief filed with the court. □ Use ECF event-BRIEF to file public electronic version of brief from which sealed material has been redacted and to indicate that eight paper copies have been sent to the court (six if counsel is court appointed). Paper copies of public brief do not need to be served on other parties.
Fourth	Memorandum on Sealed and Confidential Materials	Sealed Version of Motions and Other Documents: If sealed material needs to be referenced in a motion or other document, counsel must file both a sealed, highlighted version and a public, redacted version, as well as a certificate of confidentiality. □ Use ECF event-SEALED DOCUMENT to file sealed electronic version of document in which sealed material has been highlighted. First page of document must be marked SEALED. No paper copies need be filed, but other parties must be served in paper form. □ Use ECF event-Certificate of confidentiality to identify authority for treating material as sealed and to identify who may have access to sealed material. □ Use the appropriate ECF event (e.g., MOTION or RESPONSE/ANSWER) to file public electronic version of document from which sealed material has been redacted. No paper copies of public document are needed for filing or service.
Fourth	Memorandum on Sealed and Confidential Materials	Motions to Seal: If counsel believes it is necessary to seal the entire case or document and that it is not possible to create a public, redacted version of filings, counsel may file a motion to seal the entire case or document. The motion to seal must appear on the public docket for five days; therefore, counsel must file both a sealed, highlighted version of the motion to seal (along with a certificate of confidentiality) and a public, redacted version of the motion to seal. The motion to seal must explain why it is necessary to seal the entire case or document and why a it is not possible to prepare a public, redacted version of filings.
Fifth	Rule 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.

Fifth	Rule 25.2.13	Public Access/Redaction of Personal Identifiers. Parties must refrain from including, or must partially redact where inclusion is necessary, certain personal data identifiers whether filed electronically or in paper form as prescribed in Fed. R. App. P. 25, Fed. R. Civ. P. 5.2(a), and Fed. R. Crim. P. 49.1. Responsibility for complying with the rules and redacting personal identifiers rests solely with counsel. The parties or their counsel may be required to certify compliance with these rules. The clerk will not review pleadings, and is not responsible for data redaction. Parties wishing to file a document containing the personal data identifiers referenced above may: file an un-redacted version of the document under seal, or file a reference list under seal. The list must contain the complete personal data identifier(s) and the redacted identifier(s) used in its (their) place in the filing. All references in the case to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifier. The reference list must be filed under seal, and may be amended as of right. The court will retain the un-redacted version of the document or the reference list as part of the record. The court may require the party to file a redacted copy for the public file.
Fifth	Rule 47.10.3	(c) Presentence Report. If a notice of appeal is filed as authorized by 18 U.S.C. § 3742(a) and (b) for review of a sentence, the clerk will transmit to this court the presentence report. The report is transmitted separately from other parts of the record on appeal and is labeled as a sealed record if sealed by the district court. (d) Presentence reports filed in this court as part of a record on appeal are treated as matters of public record except where the report, or a portion thereof was sealed by order of the district court. (e) Counsel wishing access to, or a copy of, sealed presentence reports, or portions of such reports, may request them from the clerk's office by such means as the clerk permits. Counsel must return the copy of the presentence report, without duplicating it. Counsel should avoid disclosure of confidential matters in their public filings.
Fifth	ECF Filing Standards, Part C(1)	Proposed sealed materials, or those already sealed, may be filed electronically by taking the actions prescribed for sealed items. Failure to follow these steps will result in public disclosure of sensitive material. ECF filers solely are responsible for ensuring that sealed materials are filed appropriately, see also 5TH CIR. R. 25.2.8.
Sixth	Proposed Rule 11(c)	(1) Documents Remain Sealed. If the district court forwards a sealed document, this court will give the document the same confidential treatment. (2) Unsealing. A sealed document will be unsealed and made part of the public record only on this court's or the district court's order. A person seeking to unseal a document sealed by the district court must move to unseal first in the district court.
Sixth	Rule 25	(b) Exceptions to Electronic Filing. The following documents shall not be filed electronically, but shall be filed in paper format: ... (8) Documents filed under seal;
Sixth	Rule 25	(g) Redaction of Certain Information Contained in Documents Filed with the Court. All documents filed with the court must comply with the privacy protection requirements set forth in Fed. R. App. P. 25(a)(5), regardless of whether a document is filed electronically or in paper. It is the responsibility of the filer to redact documents in the manner required by Fed. R. App. P. 25(a)(5).

Sixth	Rule 25	(j) Documents Filed Under Seal. (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. Documents ordered placed under seal must be filed in paper format in a sealed envelope. The face of the envelope containing such documents shall contain a conspicuous notation that it contains "DOCUMENTS UNDER SEAL," or substantially similar language, and shall have attached to it a paper copy of the order authorizing the filing of the documents under seal. (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 be filed in paper format and shall comply with all filing requirements of the court that originally ordered or otherwise authorized the documents to be filed under seal.
Sixth	Proposed 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	Rule 28	(g) Briefs as Public Record. Briefs filed with this court are a matter of public record. If counsel finds it necessary to refer in a brief to information that has been placed under seal, counsel should not assume that the brief itself also will be placed under seal. In order to have all or part of a brief sealed, counsel must file a specific and timely motion seeking such relief.
Sixth	Proposed Rule 28(d)	Briefs as Public Record. Briefs filed with the court are public records. A brief that refers to sealed information is not automatically sealed. A party seeking to have a brief sealed in whole or in part must file a motion seeking such relief.

Sixth	Rule 30(f)	(5) Inclusion of Sealed Record Items. If in counsel's opinion it is necessary to include sealed items, a copy of the sealed item(s) must be placed in a separate sealed envelope and filed with the clerk. An appropriate notation on the cover of the envelope should specify the nature of the sealed enclosure. The balance of the appendix will be treated as part of the public record. The sealed item will not. Counsel is cautioned against attempting to use this procedure to hold out of public view items not previously sealed by order of either the district court or this court. That relief can be had only by way of a timely motion specifically requesting that relief.
Sixth	IOP 11(b)	(b) Pre-Sentence Reports. The circuit clerk will obtain the pre-sentence report and any objections thereto. The court will keep these materials confidential.
Sixth	IOP 11(d)	Sealed Records. Where a record has been transmitted to this Court which has been sealed, in whole or in part, by order or other direction of the district court, this Court will accord the record the same confidential treatment during the pendency of the appeal. The sealed item(s) will be unsealed and made a part of the public record only upon the order of the district court or this Court.
Sixth	Guide to Electronic Filing 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: ... (8) Documents filed under seal; ...
Sixth	Guide to Electronic Filing 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. Documents ordered placed under seal must be filed in paper format in a sealed envelope. The face of the envelope containing such documents shall contain a conspicuous notation that it contains "DOCUMENTS UNDER SEAL," or substantially similar language, and shall have attached to it a paper copy of the order authorizing the filing of the documents under seal. 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 be filed in paper format and shall comply with all filing requirements of the court that originally ordered or otherwise authorized the documents to be filed under seal.
Sixth	Proposed revised Guide to Electronic Filing 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.

Sixth	Guide to Electronic Filing 11.1	Access to all documents maintained electronically, except those filed under seal, is available to any person through the PACER system.
Sixth	Guide to Electronic Filing 12	In accordance with Fed. R. App. P. 25(a)(5), registered attorneys must redact all documents, including briefs, consistent with the privacy policy of the Judicial Conference of the United States. Required redactions include social security numbers and taxpayer identification numbers (the filer shall include only the last four digits of a social security or tax identification number), birth dates (use year of birth only), minors' names (initials may be used), and financial account numbers (except those identifying property allegedly subject to forfeiture in a forfeiture proceeding). It is the responsibility of the filer to redact pleadings appropriately. Pursuant to the privacy policy of the Judicial Conference and applicable statutory provisions, remote electronic access to immigration and social security dockets is limited to the attorneys in the case who are registered in ECF. In this regard, the clerk will restrict electronic public access in these cases to judges, court staff, and the parties and attorneys in the appeal or agency proceeding. The court will not restrict access to orders and opinions in these cases. Parties seeking to restrict access to orders and opinions must file a motion explaining why that relief is required in a given case.
Seventh	Rule 10	(f) Presentence Reports. The presentence report is part of the record on appeal in every criminal case. The district court should transmit this report under seal, unless it has already been placed in the public record in the district court. If the report is transmitted under seal, the report may not be included in the appendix to the brief or the separate appendix under Fed. R. App. P. 30 and Circuit Rule 30. Counsel of record may review the presentence report at the clerk's office but may not review the probation officer's written comments and any other portion submitted in camera to the trial judge.
Seventh	Rule 26.1	(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.
Seventh	IOP 10	(a) Requirement of Judicial Approval. Except to the extent portions of the record are required to be sealed by statute (e.g., 18 U.S.C. § 3509(d)) or a rule of procedure (e.g., Fed. R. Crim. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. (b) Delay in Disclosure. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required by section (a) of this procedure.

Seventh	Website: Electronic Case Filing Procedures	(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.
Seventh	Practitioner's Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit XXI.E	Except to the extent portions of the record are required to be sealed by statute (e.g., 18 U.S.C. §3509(d)) or a rule of procedure (e.g., Fed. R. Crim. P. 6(e), Circuit Rule 26.1(b)), every document filed in or by this court (whether or not the document was sealed in the district court) is in the public record unless a judge of this court orders it to be sealed. Documents sealed in the district court will be maintained under seal in this court for 14 days, to afford time to request the approval required. 7th Cir. Oper. P. 10. Any party that wants a document which was sealed by the district court to remain under seal in the court of appeals must immediately make an appropriate motion in the court of appeals. Such sealing is no longer automatic so counsel must demonstrate sufficient cause in their motion for sealing items. Motions to place documents under seal require specificity, document by document, the propriety of secrecy, providing reasons and legal citations. Baxter International, Inc. v. Abbott Laboratories, 297 F.3d 544, 545-46 (7th Cir. 2002). The court reiterated the Baxter International criteria in United States v. Foster, 564 F.3d 852 (7th Cir. 2009).
Eighth	Rule 25A(g)	Sealed Documents. Sealed documents must only be filed in paper format. Motions for permission to file a document under seal must also be 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	Rule 25A(h)	Privacy. In compliance with the privacy policies of the Judicial Conference of the United States and in order to address the privacy concerns created by Internet access to court documents, parties must refrain from including, or must partially redact where inclusion is necessary, the following personal data identifiers from all documents filed with the court: 1. Minors' names (use initials only); 2. Social Security numbers (use last four digits only); 3. Dates of birth (use year of birth only); 4. Financial account numbers (identify the type of account and institution and provide the last four digits of the account number); and 5. Home address information (use phrases such as the "4000 block of Elm"). 6. The Addendum to a criminal brief must not include the Statement of Reasons or other confidential sentencing materials. The filer bears sole responsibility for redacting documents.
Ninth	Rule 3-5	CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 3-5 A recalcitrant witness summarily ordered confined pursuant to 28 U.S.C. § 1826(a) is entitled to have the appeal from the order of confinement decided within 30 days after the filing of the notice of appeal. In the interest of obtaining a rapid disposition of the appeal, the court impresses upon counsel that the record on appeal and briefs must be filed with the court as soon as possible after the notice of appeal is filed. The court will establish an expedited schedule for filing the record and briefs and will submit the appeal for decision on an expedited basis. If expedited treatment is sought for an interlocutory appeal, motions for expedition, summary affirmance or reversal, or dismissal may be filed pursuant to Circuit Rule 27-4. A party may file documents using a Doe designation or under seal to avoid disclosure of the identity of the applicant or the subject matter of the grand jury investigation. The party should file an accompanying motion to use such a designation.
Ninth	Rule 25-5(b)	Documents excluded from electronic filing requirement. ... (9) Documents to be maintained under seal and motions seeking leave to file a document under seal under Circuit Rule 27-13; …
Ninth	Rule 25-5	CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 25-5 The parties are reminded of their obligations under FRAP 25(a)(5) to redact personal identifiers.

Ninth	Rule 27-13	(a) Procedures. Sealed documents, notifications under subsection (b), and motions under subsection (c) of this rule must be filed in paper format. Cross Reference: • Circuit Rule 25-5. Electronic Filing, specifically, Circuit Rule 25- 5(b)(9), Documents excluded from electronic filing requirement (b) Filing Under Seal. If the filing of any specific document or part of a document under seal is required by statute or a protective order entered below, the filing party shall file the materials or affected parts under seal together with an unsealed and separately captioned notification setting forth the reasons the sealing is required. Notification as to the necessity to seal based on the entry of a protective order shall be accompanied by a copy of the order. Any document filed under seal shall have prominently indicated on its cover and first page the words "under seal." (c) Motions to Seal. A motion to seal may be made on any grounds permitted by law. Any motion to file a brief, excerpts of record, or other material under seal shall be filed simultaneously with the relevant document, which may be filed provisionally under seal. The motion shall indicate whether the party wishes to withhold from public disclosure any specific information, such as the names of the parties and shall state whether the motion itself as well as the referenced materials should be maintained under seal. The document will remain sealed on a provisional basis until the court rules on the motion. Unless otherwise requested in the motion or stated in the order, the seal will not preclude court staff from viewing sealed materials. (d) Motions to Unseal. A motion to unseal may be made on any grounds permitted by law. During the pendency of an appeal, any party may file a motion with this court requesting that matters filed under seal either in the district court or this court be unsealed. Any motion shall be served on all parties.
Ninth	Circuit Advisory Committee Note to Rule 27-13	Absent an order to the contrary, any portion of the district court or agency record that was sealed below shall remain under seal upon transmittal to this Court. The Court does not automatically close oral argument to the public when briefs or the record have been filed under seal. A party seeking a closed hearing must move for such relief.
Ninth	30-1.10	In all cases in which the presentence report is referenced in the brief, the party filing such brief must forward 4 paper copies of the presentence report and may forward 4 copies of any other relevant confidential sentencing documents under seal to the Clerk of the Court of Appeals. This filing shall be accomplished by mailing the 4 copies of the presentence report in a sealed envelope which reflects the title and number of the case and that 4 copies of the presentence report are enclosed. The copies of the presentence report shall accompany the excerpts of record. The presentence report shall remain under seal but be provided by the Clerk to the panel hearing the case

Ninth	General Orders Appendix A: Disposition of Motions by the Clerk	Pursuant to Circuit Rule 27-7, the Court has delegated the authority to decide the following motions to deputized court staff. Unless otherwise noted, a motion can be acted upon by a deputy clerk, staff attorney, circuit mediator or appellate commissioner. Orders are subject to reconsideration pursuant to Circuit Rule 27-10. ... (25) to grant an unopposed motion to file a document under seal when the document was maintained under seal below, the seal is required by law or filing under seal is necessary to preserve the provisions of a protective order entered below.
Tenth	Rule 11.3	(D) Sealed materials. (1) When materials sealed by district court order are sent as part of the record, the district clerk must: (a) separate the sealed materials from other portions of the record; (b) enclose them in an envelope clearly marked “Sealed” if forwarded in hard copy or identify them as sealed in a separate electronic volume when transmitted; and (c) affix a copy of the sealing order to the outside of the envelope if the sealed material is not available electronically. (E) Presentence investigation reports. Presentence reports are confidential. If a presentence report needs to be sent as part of the record on appeal, the district clerk must treat it like sealed material under (D).
Tenth	Rule 11.4	When the district court submits a record electronically, the various volumes shall be forwarded as separate pdf files. Pleadings must be bookmarked and sealed volumes shall be identified as such.
Tenth	Rule 25.5	All filers are required to follow the privacy and redaction requirements of Fed. R. App. P. 25(a)(5), as well as the applicable federal rules of civil procedure, criminal procedure, and the relevant bankruptcy rule. See Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037. Required redactions include social security numbers and tax identification numbers (filers may disclose the last four digits of a social security or tax identification number), birth dates (use year of birth only), minors' names (initials may be used), and financial account numbers (except those identifying property allegedly subject to forfeiture in a forfeiture proceeding). It is the sole responsibility of the filer to redact pleadings appropriately.
Tenth	Rule 30.1(C)(4)	Sealed Documents. Copies of documents under seal in the district court, such as presentence reports, should be filed in a separate volume, under seal.

Tenth	NO. 95-01. IN RE: ELECTRONIC SUBMISSION OF DOCUMENTS AND CONVERSION TO ELECTRONIC CASE FILING GENERAL ORDER II.D	Sealed Materials. The ECF system includes events specifically intended for use in submitting sealed materials. Counsel and litigants may file a sealed motion, response or brief. Any failure to select the "Sealed Briefs and Motions" category in ECF will result in a public, rather than private, submission. Counsel and litigants are responsible for ensuring that sealed materials are filed using these events. Parties seeking to submit a motion to seal materials simultaneously with the materials should use these events even if the motion is not submitted as sealed.
Tenth	NO. 95-01. IN RE: ELECTRONIC SUBMISSION OF DOCUMENTS AND CONVERSION TO ELECTRONIC CASE FILING GENERAL ORDER IV	All filers are required to follow the privacy and redaction requirements of Fed. R. App. P. 25(a)(5), as well as applicable federal rules of civil procedure, criminal procedure and the relevant bankruptcy rule. See Fed. R. Civ. P. 5.2; Fed. R. Crim. P. 49.1; Fed. R. Bankr. P. 9037. Required redactions include social security numbers and taxpayer identification numbers (filers may disclose the last four digits of a social security or tax identification number), birth dates (use year of birth only), minors' names (initials may be used), and financial account numbers (except those identifying property allegedly subject to forfeiture in a forfeiture proceeding). It is the sole responsibility of the filer to redact pleadings appropriately.
Tenth	NO. 95-01. IN RE: ELECTRONIC SUBMISSION OF DOCUMENTS AND CONVERSION TO ELECTRONIC CASE FILING GENERAL ORDER V	B. Certification. In addition to a certificate of service, all ECF pleadings shall include certification that: (1) all required privacy redactions have been made …

Tenth	PRACTITIONER'S GUIDE TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IV.A.2	Sealed Documents. Documents that are not part of the public record, including, for example, presentence investigation reports or discovery documents that were sealed by the district court, should be filed in separate volumes. Two copies of the separate volume or volumes in separate sealed envelopes must be submitted. To make an effective cover for the sealed envelope, counsel may tape a copy of the cover of the document to the envelope. Except for presentence investigation reports, which are sealed by 10th Cir. R. 11.3(E), a motion for leave to file documents under seal is required. Documents tendered under seal will be held under seal provisionally pending a ruling on whether to seal. For additional information regarding filing sealed materials via ECF, please see the court's ECF User Manual. It is available on the court's website.
Tenth	CM/ECF User's Manual II.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.
Tenth	CM/ECF User's Manual II.K	Sealed Materials and Sealed Cases With regard to all sealed materials, parties should note remote public access (that is, PACER access) is available only to parties and attorneys in the case who have entered an appearance *and* who are registered to file via CM/ECF.
Eleventh	ELECTRONIC RECORDS ON APPEAL PROGRAM COMPONENTS	(A) The appellant will be required to file expanded record excerpts that contain, in addition to the documents already required by 11th Cir. R. 30- 1, these things: ... 5) In an appeal from a criminal case in which any issue is raised involving the sentence, a copy of the transcript of the sentence proceeding, and a copy of the presentence investigation report and addenda (under seal in a separate envelope). ... In an appeal by an incarcerated pro se party, counsel for appellee must submit expanded record excerpts that include the specific portions of any record materials (except sealed materials) referred to in either appellant's or appellee's briefs or that are necessary to the resolution of an issue on appeal. ...

Eleventh	Rule 25-5	In order to promote electronic access to case files while also protecting personal privacy and other legitimate interests, parties shall refrain from including, or shall partially redact where inclusion is necessary, the following personal data identifiers from all pleadings filed with the court, including exhibits thereto, whether filed electronically or in paper, unless otherwise ordered by the court. a. Social Security numbers and Taxpayer Identification numbers. If an individual's social security number or taxpayer identification number must be included in a pleading, only the last four digits of that number should be used. b. Names of minor children. If the involvement of a minor child must be mentioned, only the initials of that child should be used. For purposes of this rule, a minor child is any person under the age of eighteen years, unless otherwise provided by statute or court order. c. Dates of birth. If an individual's date of birth must be included in a pleading, only the year should be used. d. Financial account numbers. If financial account numbers are relevant, only the last four digits of these numbers should be used. e. Home addresses. If a home address must be included, only the city and state should be used. [cont'd]
Eleventh	Rule 25-5	Subject to the exemptions from the redaction requirement contained in the Federal Rules of Civil, Criminal, and Bankruptcy Procedure, as made applicable to the courts of appeals through FRAP 25(a)(5), a party filing a document containing the personal data identifiers listed above shall file a redacted document for the public file and either: (1) a reference list under seal. The reference list shall contain the complete personal data identifier and the redacted identifier used in its place in the redacted filing. All references in the filing to the redacted identifiers included in the reference list will be construed to refer to the corresponding complete personal data identifiers. The reference list must be filed under seal, may be amended as of right, and shall be retained by the court as part of the record. A motion to file the reference list under seal is not required. Or (2) an unredacted document under seal, along with a motion to file the unredacted document under seal specifying the type of personal data identifier included in the document and why the party believes that including it in the document is necessary or relevant. If permitted to be filed, both the redacted and unredacted documents shall be retained by the court as part of the record. The responsibility for redacting these personal data identifiers rests solely with counsel and the parties. The clerk will not review each pleading for compliance with this rule. A person waives the protection of this rule as to the person's own information by filing it without redaction and not under seal. [cont'd]

Eleventh	Rule 25-5	Consistent with FRAP 25(a)(5), electronic public access is not provided to pleadings filed with the court in social security appeals and immigration appeals. Therefore, parties in social security appeals and immigration appeals are exempt from the requirements of this rule. In addition to the foregoing, a party should exercise caution when filing a document that contains any of the following information. A party filing a redacted document that contains any of the following information must comply with the rules for filing an unredacted document as described in numbered paragraph (2) above. • Personal identifying number, such as driver's license number; • medical records, treatment and diagnosis; • employment history; • individual financial information; • proprietary or trade secret information; • information regarding an individual's cooperation with the government; • national security information; • sensitive security information as described in 49 U.S.C. § 114(s).
Eleventh	Rule 25-6	(a) When any paper filed with the court, including motions and briefs, contains: (1) ad hominem or defamatory language; or (2) information the public disclosure of which would constitute a clearly unwarranted invasion of personal privacy; or (3) information the public disclosure of which would violate legally protected interests, the court on motion of a party or on its own motion, may without prior notice take appropriate action. (b) The appropriate action the court may take in the circumstances described above includes ordering that: the document be sealed; specified language or information be stricken from the document; the document be struck from the record; the clerk be directed to remove the document from electronic public access; that the party who filed the document explain why including the specified language or disclosing specified information in the document is relevant, necessary, and appropriate or file a redacted or replacement document. (c) When the court takes such action under this rule without prior notice, the party may, within 14 days from the date the court order is issued, file a motion to restore language, information, or a document without alteration, setting forth with particularity any reasons why the action taken by the court is unwarranted. The timely filing of a motion to restore language, information, or a document will postpone the due date for filing any redacted or replacement document until the court rules on the motion.
Eleventh	General Order 10	If the presentence investigation report has been maintained under seal in the district court, the report shall be filed under seal in this Court. Upon written application to the clerk of this court, however, counsel for the defendant and for the government may examine the presentence investigation report or obtain a copy thereof, provided that counsel agrees not to duplicate the report or disclose the contents thereof to any person other than to the members of their staffs who have a need to know such contents and to the defendant.
Eleventh	General Order 33	[discussing requirements for pilot program:] Briefly stated, the prerequisites are that the district court must be able to provide the Court of Appeals with virtually the entire record electronically, including unredacted transcripts and sealed documents.

Eleventh	General Order 35	(A) The appellant will be required to file expanded record excerpts that contain, in addition to the documents already required by 11th Cir. R. 30-1, these things: ... (3) In an appeal from a criminal case in which any issue is raised involving the sentence, a copy of the transcript of the sentence proceeding, and a copy of the presentence investigation report and addenda (under seal in a separate envelope).
Eleventh	General Order 37	[From the Eleventh Circuit Guide to Voluntary Electronic Filing:] The following documents are exempted from the electronic filing requirement and are to be filed in paper format: ... (7) A document filed under seal or requested to be filed under seal;
Eleventh	General Order 37	[From the Eleventh Circuit Guide to Voluntary Electronic Filing:] 8.1. Access to all documents maintained electronically, except those under seal, is available to any person through the PACER system. PACER accounts are established through the PACER Service Center. See contact information in Section 13.
Eleventh	General Order 37	[From the Eleventh Circuit Guide to Voluntary Electronic Filing:] 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	Rule 11	(b) Access of Parties and Counsel to the Original Record. (1) Material Not Subject to a Protective Order; Inspection and Copying. When a notice of appeal is filed, the trial court clerk must permit a party or counsel for a party to inspect and copy the nonconfidential original papers, transcripts, and exhibits to prepare the appendix. This inspection and copying is subject to reasonable regulation by the trial court. (2) Material Subject to a Protective Order; Inspection and Copying. A party or counsel for a party must be permitted to inspect and copy material in the record governed by a protective order of the trial court in accordance with that order. If this court modifies or annuls the protective order, the access of a party or counsel is governed by the order of this court. (c) Preserving a Protective Order on Appeal. Any portion of the record that was subject to a protective order in the trial court remains subject to that order unless otherwise ordered. (d) Agreement by Parties to Modify a Protective Order; Certificate of Compliance. If any portion of the record in the trial court is subject to a protective order and a notice of appeal has been filed, each party must promptly review the record to determine whether protected portions need to remain protected on appeal. If a party determines that some portions no longer need to be protected, that party must seek an agreement with the other party. Any agreement that is reached must be promptly presented to the trial court, which may issue an appropriate order. Whether or not an agreement is reached, each party must file a certificate of compliance within 45 days of docketing stating it complied with this rule. This Federal Circuit Rule 11(d) does not apply in a case arising under 19 U.S.C. § 1516a. (e) Motion to Modify the Protective Order. A party may move at any time in this court to modify a protective order to remove protection from some material or to include another person within its terms. This court may decide the motion or may remand the case to the trial court. This court, sua sponte, may direct the parties to show cause why a protective order should not be modified.

Federal	Rule 17	(d) Access of Parties and Counsel to Original Record. (1) Material Not Subject to a Protective Order; Inspection and Copying. When a petition for review or notice of appeal is filed, the agency must permit a party or counsel for a party to inspect and copy the nonconfidential original papers, transcripts, and exhibits to prepare the appendix. This inspection and copying is subject to reasonable regulation by the agency. (2) Material Subject to a Protective Order; Inspection and Copying. A party or counsel for a party must be permitted to inspect and copy material contained in the record governed by a protective order of an agency in accordance with that order. If this court modifies or annuls the protective order, the access of a party or counsel is governed by the order of this court. (e) Preserving a Protective Order on Appeal. Any portion of the record that was subject to a protective order in an agency remains subject to that order unless otherwise ordered. (f) Agreement by Parties to Modify Protective Order; Certificate of Compliance. If any portion of the record in an agency is subject to a protective order and a petition for review or notice of appeal has been filed, each party must promptly review the record to determine whether protected portions need to remain protected on appeal. If a party determines that some portions no longer need to be protected, that party must seek an agreement with the other party. Any agreement that is reached must be promptly presented to the agency, which may issue an appropriate order. Whether or not an agreement is reached, each party must file a certificate of compliance within 45 days of docketing stating it complied with this rule. (g) Motion to Modify the Protective Order. A party may move at any time in this court to modify a protective order to remove protection from some material or to include another person within its terms. This court may decide the motion or may remand the case to the agency. This court, sua sponte, may direct the parties to show cause why a protective order should not be modified.

Federal	Rule 27	(m) Motion Papers Containing Material Subject to a Protective Order. (1) Two Sets of Motion Papers. If a party refers in motion papers to material subject to confidentiality mandated by statute or to a judicial or administrative protective order, two sets of motion papers must be filed. (A) Confidential set; labeling; number of copies. One set of motion papers, consisting of the original and three copies, must be labeled "confidential" and filed with the court. If confidentiality will end on a date certain or upon the happening of an event, this must be stated on the cover, e.g., "CONFIDENTIAL UNTIL [DATE]," or "CONFIDENTIAL DURING JUDICIAL REVIEW." Each page containing confidential material must enclose this material in brackets or indicate this material by highlighting. (B) Nonconfidential set; labeling; number of copies. The second set of motion papers, consisting of the original and three copies from which confidential matter has been deleted, must be labeled "nonconfidential" and filed with the court. Each page from which material subject to a protective order has been deleted must bear a legend so stating. The introductory paragraph of the nonconfidential motion or response must describe the general nature of the confidential material that has been deleted. (2) Service. Each party to the appeal must be served two copies of the nonconfidential motion papers and, when permitted by the applicable protective order, two copies of the confidential motion papers. (3) Availability to the Public. The confidential motion papers will be made available only to authorized court personnel and must not be made available to the public. After 5 years following the end of all proceedings in the court, the parties may be directed to show cause why confidential motion papers (except those protected by statute) should not be made available to the public.
Federal	Rule 28	(d) Brief Containing Material Subject to a Protective Order. (1) Two Sets of Briefs. If a party refers in a brief to material subject to confidentiality mandated by statute or to a judicial or administrative protective order, two sets of briefs must be filed. (A) Confidential set; labeling; number of copies. One set of briefs, consisting of the original and eleven copies, must be labeled "confidential" and filed with the court. If confidentiality will end on a date certain or upon the happening of an event, this must be stated on the cover, e.g., "CONFIDENTIAL UNTIL [DATE]," or "CONFIDENTIAL DURING JUDICIAL REVIEW." Each page containing confidential material must enclose this material in brackets or indicate this material by highlighting. (B) Nonconfidential set; labeling; number of copies. The second set of briefs, consisting of the original and four copies from which confidential matter has been deleted, must be labeled "nonconfidential" and filed with the court. Each page from which material subject to a protective order has been deleted must bear a legend so stating. The table of contents of a nonconfidential brief must describe the general nature of the confidential material that has been deleted. (2) Service. Each party to the appeal must be served two copies of the nonconfidential brief and, when permitted by the applicable protective order, two copies of the confidential brief. (3) Availability to the Public. The confidential briefs will be made available only to authorized court personnel and must not be made available to the public. After 5 years following the end of all proceedings in the court, the parties may be directed to show cause why confidential briefs (except those protected by statute) should not be made available to the public.

Federal	Rule 28	Practice Notes Informal Brief. The informal brief procedure is explained in the Guide for Pro Se Petitioners and Appellants. Multiple Parties. When there are multiple parties represented by the same counsel or counsel from the same firm, a combined brief must be filed on behalf of all the parties represented by that counsel or firm. Describing the General Nature of Confidential Material Deleted from the Nonconfidential Brief. The following example is acceptable: CONFIDENTIAL MATERIAL OMITTED The material omitted on page 42 describes the circumstances of an alleged lost sale; the material omitted in the first line of page 43 indicates the dollar amount of an alleged revenue loss; the material omitted on page 44 indicates the quantity of the party's inventory and its market share; the material omitted in the text on page 45 describes the distributor's experiences concerning the inventories and order lead times; and the material omitted in the footnote on page 45 describes non-price factors affecting customers' preferences between competing methods. Justification for Claim of Confidentiality. Unnecessarily designating material in the briefs and appendix as confidential may hinder the court's preparation and issuance of opinions. Counsel must be prepared to justify at oral argument any claim of confidentiality.
Federal	Rule 30	(h) Appendices Containing Material Subject to a Protective Order. (1) Two Sets of Appendices. If a party refers in appendices to material subject to confidentiality mandated by statute or to a judicial or administrative protective order, two sets of appendices must be filed. (A) Confidential set; labeling; number of copies. One set of appendices, consisting of 12 copies of the complete appendix, must be labeled "confidential" and filed with the court. If confidentiality will end on a date certain or upon the happening of an event, this must be stated on the cover, e.g., "CONFIDENTIAL UNTIL [DATE]," or "CONFIDENTIAL DURING JUDICIAL REVIEW." The confidential appendix must include at the beginning (i.e., in front of the judgment or order appealed from) pertinent excerpts of any statutes imposing confidentiality or the entirety of any judicial or administrative protective order. Each page containing confidential material must enclose this material in brackets or indicate this material by highlighting. (B) Nonconfidential set; labeling; number of copies. The second set of appendices, consisting of the original and four copies from which confidential matter has been deleted, must be labeled "nonconfidential" and filed with the court. Each page from which material subject to a protective order has been deleted must bear a legend so stating. The table of contents of a nonconfidential appendix must describe the general nature of the confidential material that has been deleted. (2) Service. Each party to the appeal must be served two copies of the nonconfidential appendices and, when permitted by the applicable protective order, two copies of the confidential appendices. (3) Availability to the Public. The confidential appendices will be made available only to authorized court personnel and must not be made available to the public. After 5 years following the end of all proceedings in the court, the parties may be directed to show cause why confidential appendices (except those protected by statute) should not be made available to the public.

Federal	Rule 31	(b) Number of Copies. Except for briefs containing material subject to a protective order (see Federal Circuit Rule 28(d)), 12 copies of each brief, including the original or a copy designated as the original, must be filed with the court and 2 copies must be served on the principal counsel for each party, intervenor, and amicus curiae separately represented.
Federal	Rule 34	Practice Notes ... Justification for Claim of Confidentiality. Unnecessarily designating material in the briefs and appendix as confidential may hinder the court's preparation and issuance of opinions. Counsel must be prepared to justify at oral argument any claim of confidentiality.
Federal	Rule 35(c)	(4) Number of Copies. If only nonconfidential copies are filed, an original and eighteen copies of a petition for hearing or rehearing en banc must be filed with the court. Two copies must be served on each party separately represented. If confidential and nonconfidential copies are filed, an original and eighteen copies of the confidential petition and original and three copies of the nonconfidential petition must be filed with the court. Two copies of the confidential petition and one copy of the nonconfidential petition must be served on each party separately represented.
Federal	Rule 39	[Practice Notes:] Allowable Costs. Costs may be billed for 16 copies of briefs and appendices, plus 2 copies for each additional party, plus any copies required or allowed, e.g., confidential briefs or appendices….
Federal	Rule 47.8	On motion showing that the interest of justice requires it, the court may sit in camera, seal its record, or both.
Federal	Form 7. Appeal Information Sheet	Is this matter under seal? ____ Yes ____ No
Federal	Form 23. Bill of Costs Instruction Sheet	… The additional costs of confidential briefs and appendices should be incorporated in the quantity billed, e.g., a 50-page brief that has 15 confidential pages will allow 65 original pages to be billed. …
Federal	IOP 3.5	Briefs and other materials marked Confidential or Protected Materials and no longer needed in chambers, will be returned to the clerk for supervised destruction after the mandate has issued.

Federal	IOP 4	1. All materials (e.g., briefs, appendices, motions, parts of the record) that are subject to a protective order (see Fed. Cir. R. 11 and 17) shall on receipt be supplied with a large sticker stamped "Confidential" and placed on the front and back of the materials. Protected materials shall be disposed of upon completion of the case according to procedures established by the clerk. 2. The senior staff attorney and senior technical assistant shall endeavor to limit circulation of protected materials on an as-needed basis. 3. The clerk shall designate persons on his or her staff authorized to process protected materials. 4. Protected materials in the clerk's office shall be stored in a secure area. 5. After the case is closed, the clerk will return any original protected materials to the trial tribunal, and will destroy extra copies not required for permanent files of the court. 6. A case involving protected materials may be heard in camera, on motion or on sua sponte order of the court. 7. Oral argument in camera ordinarily shall be scheduled in a regular courtroom as the last case of a session. Before calling the case, the presiding judge shall order the courtroom cleared of all unauthorized persons. Counsel are solely responsible for persons seated at counsel table. Court employees authorized access to the protective materials, and whose duties require attendance, may remain during the hearing. 8. Electronic recordings of in camera hearings shall be considered and treated as protected materials. 9. Public or press inquiries about protected materials or in camera hearings will be referred to the clerk. 10. All court personnel shall be sensitive to the confidential nature of protected material.
Federal	ADMINISTRATIVE ORDER REGARDING ELECTRONIC CASE FILING, May 17, 2012, ECF-6(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.

Federal	ADMINISTRATIVE ORDER REGARDING ELECTRONIC CASE FILING, May 17, 2012, ECF-8	(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. 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. 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.
Federal	ADMINISTRATIVE ORDER REGARDING ELECTRONIC CASE FILING, May 17, 2012, 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	ADMINISTRATIVE ORDER REGARDING ELECTRONIC CASE FILING, May 17, 2012, ECF-12(B)	Internet Publication. If a party refers in appendices to materials containing security, privacy or other sensitive information that such party determines for good reason and in compliance with court rules should not be made available to the public on the Internet through Pacer, two versions of the appendices must be filed: a nonconfidential, public version with the sensitive materials redacted, and an unredacted confidential version of the full document. See ECF-9. 1) Responsibility for Redactions. The responsibility for redacting restricted materials from the appendices and for assuring that all materials contained in the nonconfidential, public versions of the appendices are freely available for publication on the Internet through Pacer rests solely with the parties and their counsel. The clerk will not review documents filed for compliance with this rule.

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MEMORANDUM

DATE: August 29, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 11-AP-E

At the spring 2012 meeting, the Committee discussed a proposal by Roger I. Roots that Appellate Rule 4(b) be amended to accord criminal defendants the same 30-day appeal period that applies to government appeals in criminal cases.[1] In his suggestion, in proposed testimony that he forwarded to the Administrative Office, and in the article cited in his suggestion,[2] Dr. Roots argued that the current disparity in criminal appeal times gives the government an unfair advantage; that the appeal-time disparity violates Equal Protection and Due Process principles; and that it contravenes a long common-law tradition of treating all litigants equally.

Although members were unpersuaded by the Equal Protection and Due Process arguments, there was interest in considering whether Rule 4(b)'s deadline poses a hardship to defendants. The discussion also touched upon the effect that the deadline for the notice of appeal might have on other matters of timing. In addition, members expressed interest in having further information concerning the Committee's prior discussions of this topic (in 2001-2004). Part I of this memo describes those prior discussions. Part II considers the question of potential hardship to defendants, and Part III discusses possible links between the timing of the notice of appeal and the timing of other events.

I. The Committee's prior discussions

Prior discussions of Rule 4(b)'s appeal period originated during the Committee's consideration of comments submitted by the National Association of Criminal Defense Lawyers (NACDL) on the published version of what would become the 2002 amendment to Rule 4(b)(5). The amendment revised Rule 4(b)(5) to provide that the filing of a Criminal Rule 35(a) motion to correct a sentence does not toll the time to appeal the judgment of conviction.[3] NACDL's

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[1] I enclose a copy of the suggestion and a copy of the proposed testimony that Dr. Roots provided to the Administrative Office.

[2] *See* Roger Roots, *Unfair Federal Rules of Procedure: Why Does the Government Get More Time?*, 33 AM. J. TRIAL ADVOC. 493 (2010).

[3] *See* Report of the Advisory Committee on Appellate Rules to the Standing Committee on Rules of Practice and Procedure 13 (Dec. 3, 1999). The original proposal referred to motions

comments advocated, instead, amending Rule 4(b) to provide that such motions *would* toll the time to appeal the judgment of conviction.[4] The minutes of the Appellate Rules Committee's April 2001 meeting reflect the Committee's discussion of that suggestion:

> A member said that he understood the motivation behind the NACDL's comments; obviously, criminal defense attorneys want as much time as possible to file notices of appeals. However, if this Committee believes that the 10-day appeal period provided in Rule 4(b)(1)(A) is too short, it should address the problem directly by amending Rule 4(b)(1)(A) rather than indirectly by permitting FRCrP 35(c) motions to toll the time to appeal.[5]

The Committee approved the proposed amendment, but discussed in subsequent meetings the question of the defendant's appeal time under Rule 4(b)(1)(A).

At the Committee's request, Douglas Letter submitted comments on behalf of the Department of Justice (DOJ) prior to the Committee's April 2002 meeting. The DOJ argued that there was no need to amend Rule 4(b) to lengthen criminal defendants' appeal time, and pointed out that the government needs extra time in order to engage in multi-level internal deliberations concerning whether to appeal. It noted the policies favoring (and authorities requiring) speedy disposition of criminal cases. The DOJ's letter concluded that "given the strong public policy favoring fair but expeditious processing of criminal matters, and the absence of any evidence suggesting that the current ten-day time limit needs to be lengthened, there is no reason to propose amendments to FRAP 4(b) at this time."[6]

At its April 2002 meeting, the Committee discussed the possibility of amending the Appellate Rules to clarify "whether an appeal from an order granting or denying an application for attorney's fees under the Hyde Amendment (Pub. L. No. 105-119, Title VI, § 617, reprinted in 18 U.S.C. § 3006A (historical and statutory notes)) should be governed by the time limitations of Rule 4(a) ... or by the time limitations of Rule 4(b)."[7] The Committee's discussion of the

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under Criminal Rule 35(c), but the proposal was revised to refer to Criminal Rule 35(a) to accord with an amendment to Criminal Rule 35. *See* Note on Changes Made After Publication and Comment, following 2002 Committee Note to Appellate Rule 4(b)(5).

[4] *See* Report of the Advisory Committee on Appellate Rules to the Standing Committee on Rules of Practice and Procedure 23-24 (May 11, 2001).

[5] Minutes of Spring 2001 Meeting of Advisory Committee on Appellate Rules 23 (April 11, 2001).

[6] I enclose a copy of Mr. Letter's March 26, 2002, letter.

[7] Minutes of Spring 2002 Meeting of Advisory Committee on Appellate Rules 19 (April 22, 2002).

challenges of categorizing certain appeals as civil or criminal led members to suggest possible ways to alter the framework for appeal deadlines. A member suggested "a rule that would state simply that Rule 4(b) would apply to appeals from judgments of conviction or sentence, and that Rule 4(a) would apply to all other appeals,"[8] but another member argued such a rule would be unworkable and undesirable.[9] After the suggestion "that the Committee consider abolishing the distinction between civil and criminal appeals and give litigants against the United States 60 days to appeal all judgments or orders, regardless of the type of case in which they are entered," other members "said that they would be more comfortable with a rule that addresses specifically — on a category-by-category basis — which deadlines apply to which orders."[10] The Committee asked the DOJ to draft a proposed amendment taking the latter approach.[11]

Later in the same meeting, the Committee turned to another agenda item that addressed specifically the idea of lengthening criminal defendants' Rule 4(b) deadlines. After Mr. Letter outlined the DOJ's reasons for opposing such a change, members discussed the proposal as follows:

> A member agreed with Mr. Letter that filing a notice of appeal in a criminal case is a routine matter for the defendant and should not take more than 10 days. It is common for appointed trial counsel to file a notice of appeal as her last act, often on the same day that the judgment of conviction is entered.
>
> A member said that, if the issue were viewed in isolation, he would be

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The circuit split on this issue persists, but is very lopsided. *Compare United States v. Braunstein*, 281 F.3d 982, 993 (9th Cir. 2002) (applying Appellate Rule 4(a) to Hyde Amendment appeal); *United States v. Wade*, 255 F.3d 833, 839 (D.C. Cir. 2001) (same); *In re 1997 Grand Jury*, 215 F.3d 430, 436 (4th Cir. 2000) (same); *United States v. Truesdale*, 211 F.3d 898, 904 (5th Cir. 2000) (same), *with United States v. Robbins*, 179 F.3d 1268, 1270 (10th Cir. 1999) ("Because an appeal under the 'Hyde Amendment' arises out of a criminal case, Fed. R.App. P. 4(b) applies."). A later panel of the Tenth Circuit has criticized *Robbins*. *See In re Special Grand Jury 89-2*, 450 F.3d 1159, 1167-68 (10th Cir. 2006) ("Rather than conducting an analysis of the essential nature of the proceeding at issue, as had been our prior practice, [*Robbins*] simply held that the motion for attorney fees was criminal because it 'arises out of' a criminal prosecution, and therefore the shorter appeal period in Rule 4(b) applied.... Although other circuits have not adopted that view ... , it is still controlling in this circuit.").

[8] Minutes of Spring 2002 Meeting of Advisory Committee on Appellate Rules 19 (April 22, 2002).

[9] *See id.* at 19-20.

[10] *Id.* at 20.

[11] *See id.*

inclined not to change the rule. But the member said that he was concerned about the difficulty that courts are having distinguishing "civil" motions from "criminal" motions when trying to decide whether the time limitations of Rule 4(a) or 4(b) apply to an appeal of an order disposing of a motion. Giving all parties 30 or 60 days in all cases — or giving the government 60 days in all cases, and all other parties 30 days in all cases — would obviate the need to make that distinction, while not really harming the judicial system or any party.

Other members expressed the view that the current system does not appear to be "broke," and thus they are disinclined to "fix" it, especially in an area that is a focus of as much litigation as appellate deadlines.

A member moved that Item No. 01-04 be removed from the study agenda. The motion was seconded. The motion carried (8-1).[12]

Although the Committee had removed this particular item from its agenda, the general topic recurred during the Committee's ongoing discussions of the distinction between civil and criminal appeals. At the Committee's Fall 2002 meeting, Mr. Letter presented a draft Rule 3.1 that would define some types of appeals as civil and others as criminal.[13] Then-Professor Patrick Schiltz, the Committee's Reporter, opposed adopting a rule that would try to provide such a "catalog."[14] The ensuing discussion "focused on trying to come up with a more general approach that would solve the circuit splits — and prevent future circuit splits."[15] The discussion encompassed a number of options:

- Giving all parties 30 days to appeal all orders in all cases — civil and criminal. This would render irrelevant the distinction between an "appeal in a civil case" and an "appeal in a criminal case." The Committee concluded that this approach would not work as it would provide too little time for the government to decide whether to appeal — and that, in turn, would result in the government filing numerous protective appeals.

- Giving all parties 60 days to appeal all orders in all cases. The Committee rejected this approach as giving too much time to defendants in criminal cases.

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[12] *Id.* at 28-29.

[13] *See* Minutes of Fall 2002 Meeting of Advisory Committee on Appellate Rules 42 (November 18, 2002).

[14] *Id.*

[15] *Id.* at 43.

- Giving all parties 30 days to appeal in cases in which the government was not a party, and 60 days to appeal in cases in which the government was a party. The Committee rejected this approach, again because it would give too much time to defendants in criminal cases.

- Giving all parties 30 days to appeal all orders in all cases — except that the government (and the government alone) would get 60 days to appeal all orders in all cases. The Committee concluded that this approach was promising, even though it would lengthen the time for defendants in criminal cases to appeal from 10 days to 30 days, and shorten the time for parties in civil cases involving the government to appeal from 60 days to 30 days.[16]

By the end of the meeting, the Committee had asked the DOJ to think further about four possible approaches:

1. Retaining the status quo.

2. Amending Rule 4 to provide that all parties get 30 days to appeal all orders in all cases, except that the government gets 60 days to appeal all orders in all cases.

3. Amending Rule 4 to provide that all appeals are appeals in a civil case for purposes of Rule 4, with the exception of direct appeals from judgments of conviction entered under Fed. R. Crim. P. 32(d).

4. Adding a new Rule 3.1 that would take the "catalog" approach.[17]

Prior to the Committee's Fall 2003 meeting, Mr. Letter wrote on behalf of the DOJ to urge the Committee not to alter Rule 4's appeal times.[18] Focusing on the 30 day / 60 day proposal (option 2 in the list quoted above), he wrote:

> Although there would be one benefit from the simplified proposal (eliminating the need to decide if a case is governed by civil or criminal appeal times), we do not believe that there remains any pressing problem with FRAP 4 that needs to be fixed, and that extending the time for criminal appeals – both by the Government and by defendants – would raise a variety of problems, and would cause the overall substantial disadvantage of slowing down appeals in criminal cases. In

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[16] *Id.*

[17] *Id.* at 44.

[18] I enclose a copy of Mr. Letter's October 15, 2003, letter.

> addition, the proposal described above would require the Committee to recommend to the Supreme Court that it take the serious step of promulgating a rule that would directly overrule existing statutory provisions.

At the Committee's November 2003 meeting, Mr. Letter summarized these considerations, and "[m]ost members agreed that the particular proposal that the Department had studied should not go forward. Members were concerned about slowing down the criminal appeals process and about approving a rule that would directly conflict with a statute."[19] The upshot of this discussion was a request that the DOJ study the option of amending Rule 4 to state "that the time limitations of Rule 4(b) apply to direct appeals of criminal convictions, and the time limitations of Rule 4(a) apply to all other appeals."[20]

The Committee's final discussion of this proposal occurred at the Committee's Spring 2004 meeting. Mr. Letter outlined the DOJ's reasons for opposing the latest option under consideration:

> The Department identified a number of appeals in criminal proceedings — including appeals brought by defendants, appeals brought by the government, and even appeals brought by uncharged individuals — that must now be filed within a relatively brief period of time (usually 10 days, sometimes more). The proposal would apply a 60-day deadline to these appeals and thus inject considerable delay into criminal proceedings.[21]

Mr. Letter also questioned whether the circuit split over the characterization of Hyde Amendment appeals provided a reason for amending Rule 4. The Committee agreed:

> After a brief discussion, members quickly reached consensus that, despite the best efforts of the Committee and the Department, a workable solution to the problem of distinguishing "civil" from "criminal" appeals appears to be out of reach.
>
> A member moved that Item No. 00-07 be removed from the Committee's study agenda. The motion was seconded. The motion carried (unanimously).[22]

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[19] Minutes of Fall 2003 Meeting of Advisory Committee on Appellate Rules 3 (November 7, 2003).

[20] *Id.*

[21] Minutes of Spring 2004 Meeting of Advisory Committee on Appellate Rules 39 (April 13-14, 2004).

[22] *Id.* at 40.

II. Potential hardship to defendants

The Committee rightly noted, at the Spring 2012 meeting, that a key question is whether Rule 4(b)'s 14-day deadline causes hardship to defendants. The logistics for filing a notice of appeal are straightforward.[23] And in many cases, the decision whether to appeal will also be straightforward. Available data concerning federal criminal appeals tell us how many defendants forego appeals, but it is more difficult to discern why.

The notice of appeal is a simple document that must merely specify the appellant, designate the judgment being appealed, and name the court to which the appeal is taken. *See* Appellate Rule 3(c)(1). Criminal Rule 32(j)(1) requires the district court, after sentencing the defendant, to advise the defendant of the right to take an appeal, and also requires the district court to advise indigent defendants of their right to ask to appeal in forma pauperis. Moreover, Criminal Rule 32(j)(2) provides that "[i]f the defendant so requests, the clerk must immediately prepare and file a notice of appeal on the defendant's behalf."

Thus, ordinarily, the only challenge that a defendant will face before taking a criminal appeal will be to decide whether to take the appeal at all. And in most instances this decision should not be difficult. Admittedly, counsel needs to satisfy himself or herself that there is some colorable basis for appealing.[24] And if a notice of appeal has not already been filed on the defendant's behalf by the clerk, then counsel must ascertain whether the defendant wishes to appeal. But in most cases the latter choice will be straightforward.[25] If logistical difficulties

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[23] A complication might arise in some cases if the defendant is confused as to whether the appeal qualifies as civil or criminal for purposes of choosing between Rule 4(a) and Rule 4(b). However, lengthening criminal defendants' appeal deadline to 30 days would not remove this potential problem, because a criminal defendant who erroneously believed that Rule 4(a) governed the appeal time would conclude that (because the government was a party) the appeal deadline was 60 days.

[24] "A criminal-defense lawyer may take any step required or permitted by the constitutional guarantee of the effective assistance of counsel. With respect to propositions of law, a criminal-defense lawyer may make any nonfrivolous argument. Under decisions of the United States Supreme Court, a lawyer representing a convicted person on appeal may be required to file a so-called *Anders* brief in the event the lawyer concludes that there is no nonfrivolous ground on which the appeal can be maintained." Restatement (Third) of Law Governing Lawyers § 110 cmt. f (2000). *See also, e.g.*, *United States v. Gomez*, 24 F.3d 924, 926 (7th Cir. 1994) ("If this were a civil case, we would award sanctions under Fed.R.App.P. 38 for the taking of a frivolous appeal. We have generally refrained from using this measure in criminal cases (although there are exceptions ...)....").

[25] One can think of exceptions, such as the "grisly choice" faced by a defendant who escaped a death sentence but believes that constitutional error produced his or her conviction. *See Fay v. Noia*, 372 U.S. 391, 440 (1963) ("His [Noia's] was the grisly choice whether to sit

arise, the defendant could seek an extension of the time to appeal under Appellate Rule 4(b)(4).[26] In instances where an incarcerated defendant files the notice of appeal himself or herself, Appellate Rule 4(c)'s inmate-filing provision allows the inmate to meet the appeal deadline by "deposit[ing the notice of appeal] in the institution's internal mail system on or before the last day for filing." And in instances where the defendant has directed the lawyer to file the notice of appeal and the lawyer fails to do so within the appeal time, this failure would constitute ineffective assistance and, thus, establish cause for purposes of surmounting the procedural-default hurdle to a later Section 2255 petition.[27]

Published data show the proportion of defendants who appeal and some basic information about those defendants. Data collected by the Administrative Office indicate that during fiscal year 2011, 91,938 defendants were convicted in federal court; of those, 89,635 pleaded guilty.[28] Many, though presumably not all, of those defendants pleaded guilty pursuant to plea agreements, and some of those plea agreements included appeal waivers. The scope of

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content with life imprisonment or to travel the uncertain avenue of appeal which, if successful, might well have led to a retrial and death sentence."), *overruled as to "deliberate bypass" test by Wainwright v. Sykes*, 433 U.S. 72 (1977).

[26] *See, e.g.*, *United States v. Smith*, 60 F.3d 595, 596 (9th Cir. 1995) (finding no abuse of discretion in district court's grant of extension where "[t]he district court found that Smith and his attorney had attempted to contact each other regarding whether to file a notice of appeal, but that it was difficult for Smith's attorney to locate Smith because Smith was moved to prisons in different states three times during the period immediately following entry of the judgment").

[27] *See Wainwright v. Sykes*, 433 U.S. 72, 87 (1977) (requiring showing of cause and prejudice in order to excuse state prisoner's state-court procedural default); *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986) (applying in the context of a federal prisoner's Section 2255 petition the same cause-and-prejudice test applied in the context of state prisoners' habeas petitions, and stating that constitutionally ineffective assistance of counsel constitutes "cause"); *Strickland v. Washington*, 466 U.S. 668, 687, 684 (1984) (ineffective-assistance test requires both that the attorney's performance fell below the standard of "reasonably effective assistance" and "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different"); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (holding in a state-prisoner habeas case that the *Strickland* test "applies to claims ... that counsel was constitutionally ineffective for failing to file a notice of appeal"); *id.* at 477, 486 (stating that "a lawyer who disregards specific instructions from the defendant to file a notice of appeal" plainly meets *Strickland*'s first prong and that *Strickland*'s second prong is met by showing that "but for counsel's deficient conduct, [the petitioner] would have appealed").

[28] *See* Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2011, available at http://www.uscourts.gov/Statistics/JudicialBusiness.aspx#5 (last visited August 17, 2012).

such appeal waivers varies.[29] Of the 91,938 defendants convicted during that year, roughly 79,200 were sentenced to imprisonment, with an average sentence of 52.9 months.[30] During that year, 12,198 criminal appeals were filed; within a subset of 11,717 of those appeals,[31] 2,610 appeals concerned only the sentence, 7,950 concerned both sentence and conviction, 417 concerned only the conviction, and 740 were uncategorized.[32] Data collected by the United States Sentencing Commission[33] indicate that the vast majority of criminal appeals are taken by

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[29] *See, e.g.*, United States Attorneys' Manual, tit. 9, § 626.2, available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00626.htm (last visited August 17, 2012) ("[T]he scope of a sentencing appeal waiver in a plea bargain will depend upon the precise language used in the sentencing appeal waiver provision.").

[30] The figure for "Regular Sentences to Imprisonment" was 79,202, and the average sentence noted in the text was calculated based on those sentences. Not included in those figures were 197 life sentences and 9,340 "other" sentences (a category that encompassed "deportation, suspended sentences, sealed sentences, imprisonment of four days or less, and no sentence"). Table D-5: U.S. District Courts—Criminal Defendants Sentenced After Conviction, by Offense, During the 12-Month Period Ending September 30, 2011, available at http://www.uscourts.gov/Statistics/JudicialBusiness.aspx#5 (last visited August 17, 2012).

[31] This subset appears to be the set of 11,717 appeals that the Administrative Office characterized as "Guidelines Appeals." Table S-6: U.S. Courts of Appeals—Criminal Appeals Filed Under the Sentencing Guidelines During the 12-Month Periods Ending September 30, 2007 Through 2011, available at http://www.uscourts.gov/Statistics/JudicialBusiness.aspx#5 (last visited August 17, 2012). The table in question does not explain what criteria lead an appeal to be categorized as a "Guidelines Appeal."

[32] *See* Table S-6: U.S. Courts of Appeals—Criminal Appeals Filed Under the Sentencing Guidelines During the 12-Month Periods Ending September 30, 2007 Through 2011, available at http://www.uscourts.gov/Statistics/JudicialBusiness.aspx#5 (last visited August 17, 2012).

[33] The Sentencing Commission's data for 2011 are drawn from different sources than the AO's 2011 data. The Sentencing Commission's "data collection system ... relies on slip opinions received directly from some circuits, electronic legal databases, individual circuit court websites, and from the federal judiciary public access electronic records system (PACER)." United States Sentencing Commission, 2011 Annual Report 41 n.81, available at http://www.ussc.gov/Publications/Annual_Reports_and_Statistical_Sourcebooks/index.cfm (last visited August 17, 2012). The Sentencing Commission's fiscal 2011 data covers "9,651 appellate court cases. Of those cases, 5,875 (60. 9%) were sentencing appeals; 'conviction only' appeals accounted for 1,970 (20.6%) of appeals, and 1,708 (17.9%) were Anders briefs." *Id.* at 41. "Cases involving co-appellants are treated as separate appeals for statistical purposes." U.S. Sentencing Commission's 2011 Sourcebook of Federal Sentencing Statistics, Introduction, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/SBTOC11.ht

defendants.[34] Most appeals concern sentencing, though a substantial fraction also challenge the conviction; in more than a sixth of the total number of appeals, counsel files an *Anders* brief.[35] 12.8 percent of sentencing appeals are "[d]ismissed," but the Sentencing Commission data do not state the reason for the dismissal.[36] Among criminal appellants, more than two out of five have less than a high school education, and more than a quarter of appellants have a Criminal History Level of I (denoting someone with little or no criminal record).[37]

Thus, it appears that fewer than one-seventh of federal criminal defendants who are

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m (last visited August 17, 2012).

[34] *See* United States Sentencing Commission, 2011 Annual Report, *supra* note 33, at 41 ("Of the 9,651 appellate court cases [decided in fiscal year 2011], the defendant was the appellant in 9,570 (99.2%), the government was the appellant in 46 (0.5%), and 35 (0.4%) were cross appeals."). It is unclear to me whether the Sentencing Commission dataset includes interlocutory appeals.

[35] Among a total of 9,553 appeals decided during fiscal year 2011, the Commission found that 4,573 (or 47.9 percent) concerned only the sentence; 1,302 (or 13.6 percent) concerned both sentence and conviction; 1,970 (or 20.6 percent) concerned only the conviction; and 1,708 (or 17.9 percent) were appeals in which counsel filed an *Anders* brief. *See* U.S. Sentencing Commission's 2011 Sourcebook of Federal Sentencing Statistics tbl. 55, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/SBTOC11.htm (last visited August 17, 2012).

[36] United States Sentencing Commission, 2011 Annual Report, *supra* note 33, at 41. After I sought her guidance while writing this memo, Marie Leary verified with the Sentencing Commission that they do not have a further breakdown of these cases that would identify Rule 4(b) dismissals; however, the Commission offered to provide us with the list of cases, which we could use to make this determination.

[37] In a set of 5,619 appellants for whom educational data were gathered for fiscal year 2011, the Commission reported that 2,536 (or 45.1 percent) had less than a high school education; 1,892 (or 33.7 percent) had graduated high school; 852 (or 15.2 percent) had spent some time in college; and 339 (or 6.0 percent) were college graduates. *See* U.S. Sentencing Commission's 2011 Sourcebook of Federal Sentencing Statistics tbl. 60, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/SBTOC11.htm (last visited August 17, 2012). In a set of 5,702 appellants for whom criminal history data were gathered, 1,661 (or 29.1 percent) had a criminal history category of I. *See id.* "The guidelines assign each offender to one of six criminal history categories based upon the extent of an offender's past misconduct. Criminal History Category I is the least serious category and includes many first-time offenders." United States Sentencing Commission, An Overview of the Federal Sentencing Guidelines 2, available at http://www.ussc.gov/About_the_Commission/index.cfm (last visited August 17, 2012).

convicted – and fewer than one-sixth of those who are sentenced to imprisonment – appeal.[38] What explains the fact that most defendants who are convicted do not appeal? In some instances, they may not perceive any basis for an appeal. In many instances, they may have entered into plea agreements that include appeal waivers. In other instances, they might prefer the sentence they have received to the risk of a longer one upon re-sentencing. In at least some instances, they lose the right to appeal by failing to file the notice of appeal within the 14-day deadline; but the published data noted above provide no insights into the frequency of this problem. The fact that more than a tenth of sentencing appeals were "dismissed" might at first appear suggestive, but dismissals occur for a range of reasons – some due to untimeliness, admittedly, but others due to want of prosecution or the appeal's frivolity. (The fact that more than a sixth of appeals in the Sentencing Commission data featured an *Anders* filing suggests that frivolity-related dismissals may be relatively common.[39])

After reviewing the published data described above, I asked Marie Leary whether she knew of other sources that might shed light on these questions. Ms. Leary consulted with her colleagues in the FJC's Research Division who attend the meetings of the Criminal Law Committee and Criminal Rules Committee, and she reports that none of them know of any other relevant data sources. Ms. Leary then performed some very informative preliminary research herself. That research was labor-intensive because there is no disposition code one can use to target only criminal appeals that were dismissed on timeliness grounds; thus, Ms. Leary limited the scope of her search, looking only at "criminal appeals terminated in the Third Circuit since January 1, 2011." Ms. Leary "found 9 cases that were dismissed pursuant to FRAP 4(b) for failure to meet the 14 day filing deadline and all 9 cases were filed by pro se prisoners." She noted that any inferences that can be drawn from this finding would have to be tentative. If one assumes that the pattern in other circuits is similar, then one could infer "that the 14 day deadline appears to be problematic only for incarcerated defendants not represented by counsel." But additional PACER research would be necessary in order to learn how many defendants file appeals in the other circuits "unaware of the 14 day appeal window or file seeking an extension or exemption from the deadline." Ms. Leary also pointed out the limitations of such research:

> [N]either PACER nor the Sentencing Commission data can provide us with the complete universe of criminal defendants turned away under the Rule 4(b) deadline because it can't answer the question of how many criminal defendants just never moved forward with an appeal that they otherwise would have taken because they were outside of the 14 day window prescribed in the Rule 4(b). For insight into this question, we would probably have to turn to Federal Public

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[38] These figures do not distinguish the rate of appeals in cases that were tried from the rate of appeals in cases where conviction followed a guilty plea; it seems likely that the appeal rate is considerably higher among cases that went to trial.

[39] A search in Westlaw's CTA database for [appeal /p dismiss! /p frivol! /p anders] pulled up 1,126 results as of August 17, 2012.

> Defenders and inquire either generically as to whether the 14 day deadline prevents appeals, to what extent and why or we may need to ask more case specific inquiries. Our results here would give us approximations as there is no way to nail down the "what if" question ... (i.e., would an extra 5 days, 10 days or 15 days [have] guaranteed that the defendant would have filed the appeal?).

In sum, the question posed here – why do most defendants not appeal after they are convicted? – is a very interesting one, but one that cannot be answered based on previously published data. Ms. Leary's study of appeals recently terminated in one circuit, and her guidance on possible further avenues for research, illustrate measures that could shed further light on the question.

III. The notice of appeal and the timing of other events

At the spring 2012 meeting, members asked whether an extension in defendants' Rule 4(b) appeal deadline would affect the timing of other events. As I discuss in Part III.A below, it seems possible that such an extension could delay the processing of some appeals by a couple of weeks. Part III.B observes that such a delay would not raise constitutional or statutory speedy trial problems, although such a delay might run counter to the general policy in favor of celerity in criminal cases. Part III.C considers the circumstances under which such a delay might affect the start date or the length of a defendant's incarceration.

A. The appellate briefing schedule

The filing of the notice of appeal commences the appellate process. If the notice of appeal is filed a couple of weeks later, then that may produce a commensurate delay in the rest of the chain of events that leads to the briefing and disposition of the appeal.

Appellate Rule 10(b)'s deadlines for ordering the transcript run from the date the notice of appeal is filed. Under Rule 11(b)(1), the reporter's presumptive deadline for completing the transcript runs from the receipt of the order. Rule 11(b)(2) provides that when the record is complete the district clerk must forward it to the circuit clerk. Under Rule 12(c), when the circuit clerk receives the record he or she must file it and let the parties know the filing date; Rule 31(a)(1) provides that the appellant's brief is due within 40 days thereafter.

Local circuit provisions may alter this presumptive schedule, but when they do so, they tend to set a schedule that also is tied in some way to the date when the notice of appeal is filed. For example, Seventh Circuit Rule 31(a) sets a presumption that "the time for filing briefs shall run from the date the appeal is docketed, regardless of the completeness of the record at the time of docketing." Under Appellate Rule 12(a), the docketing date is tied to the filing date of the notice of appeal in the sense that "the circuit clerk must docket the appeal" upon "receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d)." As another example, Eleventh Circuit Rule 31-1(a) sets a general principle that "the appellant shall serve and file a brief within 40 days after the date on which the record is deemed filed as

provided by 11th Cir. R. 12-1." Eleventh Circuit Rule 12-1, in turn, provides that when "a transcript is ordered, the record is deemed completed and filed on the date the court reporter files the transcript with the district court," and that when "all necessary transcripts are already on file, or a transcript is not ordered, the record is deemed completed and filed on the date the appeal is docketed in the court of appeals pursuant to FRAP 12(a)."

B. Speedy trial requirements

It seems unlikely that an extension of a criminal defendant's appeal deadline from 14 to 30 days would lead to violations of constitutional or statutory guarantees of the right to a speedy trial. However, those guarantees do reflect a general preference for the expeditious resolution of criminal matters.[40]

It appears that the Sixth Amendment's speedy trial guarantee does not apply to appellate proceedings after the judgment of conviction.[41] Nonetheless, a number of courts analyzing appellate delay under the Due Process Clause have adapted (for that purpose) the test that the Court articulated for speedy trial claims under the Sixth Amendment.[42] It is unnecessary, here, to examine the application of this test in detail, because it seems unlikely that a 16-day elongation of the deadline for appeal could result in (or contribute meaningfully to) a Due Process violation under this analysis.[43] The caselaw concerning the length of appellate delay

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[40] *See also* Criminal Rule 50 ("Scheduling preference must be given to criminal proceedings as far as practicable.").

[41] *See, e.g.*, WAYNE R. LAFAVE ET AL., 5 CRIMINAL PROCEDURE § 18.5(c) (3d ed.) ("Because appeals are not a part of the 'criminal prosecutions' to which Sixth Amendment rights attach, ... it seems clear that a speedy trial claim may not be made with respect to delays in the appellate process.").

[42] *See, e.g.*, *United States v. Smith*, 94 F.3d 204, 207-08 (6th Cir. 1996) (following courts that "have ... adopted the speedy trial analysis set forth in *Barker v. Wingo*, 407 U.S. 514 ... (1972), with slight modifications, as the framework for evaluating delay in the appellate context"); United States v. Hawkins, 78 F.3d 348, 350-51 (8th Cir. 1996). *See also Barker v. Wingo*, 407 U.S. 514, 530 (1972) (listing, as four factors to balance in performing Sixth Amendment speedy trial analysis, "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant"). *But see* United States v. DeLeon, 444 F.3d 41, 58 (1st Cir. 2006) ("In our view, the due process issues caused by delay on appeal are more limited than those resulting from delay in the trial court.... And so we reject, at least in cases of delayed transcripts on appeal, the direct analogy made to tests involving the Sixth Amendment speedy trial right ....").

[43] In death penalty cases, the possibility exists that a very long delay in imposing a death sentence might violate the Eighth Amendment. *Compare Knight v. Florida*, 120 S. Ct. 459, 461 (1999) (Breyer, J., dissenting from denial of certiorari) ("Where a delay, measured in decades,

tends to use units of years, not days.[44]

The Speedy Trial Act sets deadlines for filing an information or indictment[45] and for commencing the trial.[46] Delay resulting from interlocutory appeals is excluded when calculating the relevant time period.[47] The Act applies to trials that take place following an appeal, but in such instances it re-sets the clock in a way that excludes the period of the appeal.[48]

C. Implementation of sentence

My lack of familiarity with criminal practice makes this section particularly tentative. For the reasons that follow, it seems to me that lengthening the appeal time for criminal defendants could cause a modest delay in the start of incarceration for a defendant who is released pending sentencing and appeal and whose sentence of imprisonment is ultimately affirmed.

The Bail Reform Act provides that a defendant "who has been found guilty of an offense

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reflects the State's own failure to comply with the Constitution's demands, the claim that time has rendered the execution inhuman is a particularly strong one."), *with id.* at 459 (Thomas, J., concurring in denial of certiorari) ("I am unaware of any support in the American constitutional tradition or in this Court's precedent for the proposition that a defendant can avail himself of the panoply of appellate and collateral procedures and then complain when his execution is delayed."). But a 16-day difference in appeal deadlines would obviously have no relevance to such a claim (if such a claim exists).

[44] *See, e.g.*, *Harris v. Champion*, 15 F.3d 1538, 1547 (10th Cir. 1994) ("[D]elay in finally adjudicating a direct criminal appeal beyond two years is presumptively excessive.").

[45] *See* 18 U.S.C. § 3161(b).

[46] *See* 18 U.S.C. § 3161(c).

[47] *See* 18 U.S.C. § 3161(h)(1)(C).

[48] *See* 18 U.S.C. § 3161(d)(2) (providing that "[i]f the defendant is to be tried upon an indictment or information dismissed by a trial court and reinstated following an appeal, the trial shall commence within seventy days from the date the action occasioning the trial becomes final" and permitting an extension for logistical reasons); 18 U.S.C. § 3161(e) (providing that "[i]f the defendant is to be tried again following an appeal or a collateral attack, the trial shall commence within seventy days from the date the action occasioning the retrial becomes final" and permitting extension for logistical reasons). *See also* United States v. Pete, 525 F.3d 844, 853 (9th Cir. 2008) ("[G]enerally, after an appeal, the period of excludable delay under the [Speedy Trial Act] ends on the day this court's mandate issues, because that is the date the appellate decision is final and jurisdiction returns to the district court.").

and who is awaiting imposition or execution of sentence" is to be detained unless the judge finds by clear and convincing evidence that the person is not dangerous and does not pose a flight risk;[49] the statute sets even stricter rules for defendants who have been convicted of certain types of serious crimes.[50] Among defendants who have been sentenced and have filed an appeal, the Act requires detention for those convicted of one of the types of serious crimes mentioned above;[51] for all other such defendants, the statute mandates detention unless the defendant *both* makes the clear-and-convincing showing that he or she is non-dangerous and not a flight risk *and* shows that the appeal meets certain specifications of substantiality.[52]

I noted in Part III.A that lengthening the appeal deadline by 16 days might delay the briefing schedule (and thus perhaps the disposition of the appeal) by a similar amount of time. The effect of such a delay on the incarceration of the defendant would depend on whether the defendant was on release pending appeal and on how the appeal turned out. The chart below sketches the possible interaction of those variables, on an oversimplified basis.[53]

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[49] *See* 18 U.S.C. § 3143(a)(1) (setting general rule that "the judicial officer shall order that a person who has been found guilty of an offense and who is awaiting imposition or execution of sentence, other than a person for whom the applicable guideline ... does not recommend a term of imprisonment, be detained, unless the judicial officer finds by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community").

[50] *See* 18 U.S.C. § 3143(a)(2) (as to persons convicted of an offense described in 18 U.S.C. § 3142(f)(1)(A), (B), or (C), requiring detention pending "imposition or execution of sentence" unless the judicial officer finds lack of dangerousness and absence of flight risk by clear and convincing evidence *and* either "there is a substantial likelihood that a motion for acquittal or new trial will be granted; or ... an attorney for the Government has recommended that no sentence of imprisonment be imposed on the person").

[51] *See* 18 U.S.C. § 3143(b)(2) (as to a person convicted and sentenced to prison for an offense described in 18 U.S.C. § 3142(f)(1)(A), (B), or (C), "and who has filed an appeal or a petition for a writ of certiorari," requiring detention).

[52] *See* 18 U.S.C. § 3143(b)(1) (as to a person convicted and sentenced to prison "who has filed an appeal or a petition for a writ of certiorari," setting general principle requiring detention unless the judicial officer finds lack of dangerousness and absence of flight risk by clear and convincing evidence *and* "that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in – (i) reversal, (ii) an order for a new trial, (iii) a sentence that does not include a term of imprisonment, or (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process").

[53] The "disposition of appeal" variable is oversimplified because the chart does not show, inter alia, the possibility of a reduction (but not outright reversal) of the prison sentence. The

	Defendant released pending sentencing and appeal	*Defendant detained pending sentencing and appeal*
Prison sentence upheld	Delay in appeal disposition delays start of incarceration but does not affect length of incarceration	Delay in appeal disposition does not affect start of incarceration and does not affect its length
Prison sentence reversed	Delay in appeal disposition delays closure	Delay in appeal disposition does not affect the start of incarceration but does affect its length

As this chart suggests, my impression is that a delay in disposition of the appeal would not affect either the start date or the duration of incarceration in two sets of cases: (1) when the defendant is released pending sentencing and appeal and the prison sentence is ultimately reversed, and (2) when the defendant is detained pending sentencing and appeal and the prison sentence is ultimately upheld. In the latter scenario, the defendant would receive credit for time served prior to disposition of the appeal,[54] and thus – so long as the period of time in detention prior to disposition of the appeal was shorter than the length of the sentence[55] – the total time spent incarcerated would be unaffected by delay in disposition of the appeal.

By contrast, the other two cells in the table denote instances when a delay in disposition of the appeal would affect either the start date or the duration of incarceration. If the defendant

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"detention" variable is oversimplified because the chart focuses on instances when the defendant is either released or detained throughout the period from conviction to disposition of appeal; other possibilities (not depicted) include, for example, cases in which the court revokes the defendant's release once the appeal is filed and found to be insubstantial.

[54] *See* 18 U.S.C. § 3585(b)(1) (providing that "[a] defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences ... as a result of the offense for which the sentence was imposed ... that has not been credited against another sentence").

[55] One other complexity here is that a person serving a sentence of imprisonment may be able to obtain certain limited reductions in the time in custody based on "good time" or drug treatment. *See* 18 U.S.C. § 3624(b) (with respect to prison sentences of more than one year, providing for limited credit for "exemplary" behavior as determined by Bureau of Prisons); 18 U.S.C. § 3621(e)(2)(B) (providing for reduced time in custody for a nonviolent offender who completes a substance abuse treatment program). It is unclear to me whether a person would ever become eligible for such reductions based on a period of time spent in custody pending appeal. If not, then it is theoretically possible that a person detained pending appeal might end up spending more time incarcerated than a person who either did not appeal or was released pending appeal.

is released pending sentencing and appeal and the sentence is ultimately upheld, then a delay in the appeal disposition will have delayed the start of the defendant's incarceration (though the length will be unaffected). If the defendant is detained pending appeal and the prison sentence is ultimately reversed, then the delay in appeal disposition will have extended the time spent in custody. In the latter scenario, a delay caused by a defendant's taking extra time to file a notice of appeal seems relatively unlikely to occur, because a defendant who is detained has an incentive to speed the processing of the appeal and would therefore likely file the notice of appeal as quickly as possible.

Accordingly, it seems to me that the delay in appeal disposition that could flow from an extension in the defendant's appeal time would have its greatest effect on the timing of incarceration in those instances where the defendant is released pending sentencing and appeal and the sentence of imprisonment is ultimately upheld.

IV. Conclusion

Part I of this memo described the Committee's thorough consideration, during the period from 2001 to 2004, of proposals that would have extended Rule 4(b)'s appeal deadline for criminal defendants. As noted in Part II, the task of filing a notice of appeal is a straightforward one, and the Rules provide a number of safeguards designed to ensure that a criminal defendant is able to file the notice within the time set by Rule 4(b). It is difficult to discern how many defendants forfeit the chance to take an appeal because of a failure to comply with Rule 4(b)(1)(A)'s 14-day deadline. Part III observed that an extension of Rule 4(b)(1)(A)'s 14-day deadline to 30 days could delay the disposition of some appeals by a couple of weeks; although such a delay seems unlikely to bring about any statutory or constitutional speedy trial violations, it could delay by a couple of weeks the start of incarceration for a defendant who secures release pending sentencing and appeal and whose prison sentence is ultimately affirmed.

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TAB 4B

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11-AP-E

suggestion for a proposed rule change
ROGER ROOTS
to:
rules_support
11/14/2011 05:23 PM
Hide Details
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November 14, 2011

Advisory Committee

Federal Rules of Appellate Procedure

c/o Secretary of the Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

SUGGESTION FOR PROPOSED AMENDMENT TO THE FEDERAL RULES OF APPELLATE

PROCEDURE

Dear Advisory Committee:

My name is Roger Roots and I am an attorney in private practice, a member of the bars of the State of Rhode Island and the U.S. 1st, 8th, 9th and 10th Circuit Courts of Appeals. Over the past couple of years, I have been conducting some research regarding the fairness of the various Federal Rules of Procedure. I have authored a law review article entitled, "Unfair Rules of Procedure: Why Does the Government Get More Time?, *American Journal of Trial Advocacy*, Vol. 33, pp. 493-520 (2010) (available at http://www.constitution.org/lrev/roots/unfair_rules_procedure2.pdf).

SUGGESTION FOR RULE CHANGE:

At present, *Federal Rule of Appellate Procedure* 4(b) provides that the United States has 30 days to appeal from criminal judgments, compared with only 14 days for criminal defendants.

I would like to suggest that this Rule be amended to read:

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

I believe this rule change is necessary to eliminate an unfair advantage that the government has in federal criminal litigation. I believe the current filing disparity in Rule 4 also violates the common law rule that parties before the courts are to litigate on a level playing field. *See, e.g., State v. Bowers*, 9 A. 125, 126 (Md. 1886) (indicating that although criminal appeals should be resolved as quickly as reasonably possible, the law of notice periods should make "no distinction between an appeal or writ of error taken by the state and one taken by the accused." *See also* Roots, *supra*, 33 Am. J. Trial Adv. 493, 503-09 (2010) (discussing common law and constitutional basis for a requirement of equal procedures).

Sincere thanks,

/s/ Roger Roots

Dr. Roger Roots

TAB 4C

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Before the Advisory Committee on Appellate Rules

April 12-13, 2012 meeting in Washington, DC

TESTIMONY OF ROGER I. ROOTS, J.D., PH.D.

IN SUPPORT OF 11-AP-D

My name is Roger Roots and I am an attorney in private practice, a member of the bars of the State of Rhode Island and the U.S. 1st, 8th, 9th and 10th Circuit Courts of Appeals. Over the past several years, I have been conducting some research regarding the unfairness of the various Federal Rules of Procedure. I have authored a law review article entitled, *"Unfair Rules of Procedure: Why Does the Government Get More Time?,"* American Journal of Trial Advocacy, Vol. 33, pp. 493-520 (2010).

I strongly urge the Committee to adopt proposed amendment 11-AP-D, which will amend the filing time periods for filing notices of appeal in criminal cases.

The suggested rule change will equalize the filing time periods for both the Government and a criminal defendant in all criminal cases. At present, Federal Rule of Appellate Procedure 4(b) provides that the United States has 30 days to appeal from criminal judgments, compared with only 14 days for criminal defendants. Proposal 11-AP-D will provide each side with 30 days to file a notice of appeal.

Rule 4(b) will be amended to read:

(b) Appeal in a Criminal Case.
(1) Time for Filing a Notice of Appeal.
(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 30 days after the later of:
(i) the entry of either the judgment or the order being appealed; or
(ii) the filing of the government's notice of appeal.
(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:
(i) the entry of the judgment or order being appealed; or
(ii) the filing of a notice of appeal by any defendant.

I believe this rule change is necessary to eliminate an unfair advantage that the government has in federal criminal litigation, which is compounded over time and with repetition. The current disparity is pointless and not necessary to counteract any burdens faced by the government. The government's additional time for filing notices of appeal translates into more drafting time, more research time, and more time for government lawyers to think about and confer over litigation strategy.

Upon its plain face, the current Rule 4(b) violates the basic principle that parties before the courts are to be equals in an adversarial system. Constitutional standards grounded in the Equal Protection Clause, the Due Process Clauses of the Fifth and Fourteenth Amendments, and Article III itself all provide support for the mandate of symmetry and equality in court procedures. Under the current Rule 4(b), litigants who face the United States government in criminal cases are playing against a stacked deck, with an opponent who enjoys more than a two-fold time advantage when deciding whether to appeal.

THE CONCEPT OF EQUAL PROCEDURES IN ANGLO-AMERICAN LAW

The idea that fair courts require equal rights of procedure has been a component of Anglo-American common law for centuries. James Wilson, one of only six people who signed both the Declaration of Independence and the U.S. Constitution (and a member of the first panel of the U.S. Supreme Court), wrote in the 1790s that the concept of common law itself is grounded in equality of procedure. "[T]he same equal right, law, or justice," wrote Wilson, is "due to persons of all degrees."[1] Several American colonies required equal treatment for all parties before courts, regardless of wealth.[2] For example, the Pennsylvania Charter of Privileges (October 28, 1701) stated in Section IV that "all Criminals shall have the same Privileges of Witnesses and Council as their Prosecutors"). Stephen Hopkins, Rhode Island's eminent signer of the Declaration of the Independence, wrote in 1764 that "just and equal laws" were among the fundamental rights of the American colonists.[3]

According to Yale Law Professor Akhil Amar, the Framers who debated the criminal procedure provisions of the Bill of Rights were obsessed with procedural fairness. "Notions of basic fairness and symmetry" were the mainstay of the Sixth Amendment.[4] "In formulating the precise wording of the compulsory process clause," according to Amar, "Madison seems to have borrowed from Blackstone's *Commentaries*, which also explicitly embraced the symmetry principle."[5] The First Congress drafted a statute defining the rights of capital defendants in 1790,[6] again emphasizing what Amar calls "the symmetry principle."[7]

Significantly, the Constitution's Framers firmly rejected the lopsided inquisitorial court procedures that accompanied the notorious British Star Chamber court of the seventeenth century.[8] In THE FEDERALIST No. 78, widely regarded as a primary source of illumination regarding the original intent behind the Constitution's judiciary provisions, Alexander Hamilton

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[1] James Wilson, 2 Collected Works of James Wilson 749 (Kermit L. Hall and Mark D. Hall, editors (2007) (quoting Richard Woodeson, Elements of Jurisprudence (1783) (referencing the code of King Edward the Elder).

[2] *See* Paul S. Reinsch, The English Common Law in the Early American Colonies, in 1 Selected Essays on Anglo-American Legal History 367, 404-05 (1907).

[3] Stephen Hopkins, The Rights of Colonies Examined, pp. 45-61 (1764) in American Political Writing During the Founding Era 1760-1805, Vol. 1, 45 (Charles S. Hyneman and Donald S. Lutz 1983).

[4] Akhil R. Amar, The Bill of Rights: Creation and Reconstruction 116 (1998).

[5] Amar at 116.

[6] Federal Crimes Act of 1790, ch. 9, 1 Stat. 112, 118-19.

[7] Amar at 116.

[8] Amanda Beltz, *Prosecuting Rape in International Criminal Tribunals: The Need to Balance Victim's Rights With the Due Process Rights of the Accused*, 23 St. John's J.L. Comm. 167 (2008) (discussing the Framers' fear of one-sided procedures associated with the British Star Chamber); Thomas Y. Davies, *Crawford and Beyond: Exploring the Future of the Confrontation Clause in Light of Its Past: What Did the Framers Know, and When Did They Know It? Fictional Originalism in Crawford v. Washington*, 71 Brooklyn L. Rev. 105, 206-17 (2005) (discussing the Framers' antagonism against inquisitorial justice systems).

noted the toxicity of "unjust and partial laws." As Justice Stephen J. Field wrote in 1887, "[b]etween [the accused] and the state the scales are to be evenly held."[9]

EQUAL RIGHTS OF PROCEDURE UNDER AMERICA'S ADVERSARIAL SYSTEM

Equal court procedures are not simply an end; they are a means to creating accurate and sound court outcomes.[10] "Our adversary system is premised upon the idea that the most accurate and acceptable outcomes are produced by a real battle between equally-armed contestants; thus the adversary system requires, if it is to achieve these goals, some measure of equality in the litigants' capacities to produce their proofs and arguments."[11]

The current Rule 4(b)'s additional 16 days provided to the Government translates into 16 additional days for Justice Department lawyers to consider and strategize regarding the chances, effectiveness or propriety of an appeal. The proposed rule change—from 14 days for defendants to file notices of appeal to 30 days—will create more accurate findings in the federal justice system.

"[O]ur adversary system presupposes," wrote Justice Potter Stewart, that "accurate and just results are most likely to be obtained through the equal contest of opposed interests."[12] Thus, he continued, the State's interest in child's welfare may be best served by even-handed hearings in which both parents and the State are represented by counsel, without whom the contest of interests may become unwholesomely unequal.[13] The Supreme Court also recognized this important benefit of impartial adversarial procedures in *Little v. Streater*,[14] in which the Court held that procedures that denied DNA testing to an indigent father denied due process in part because they increased the likelihood of inaccurate paternity findings.[15]

But for an adversarial system to function properly, the parties must be somewhat equally capable of producing their cases.[16] If one party has more time and resources to develop its cases than others, the law is subverted by the accumulation of inaccurate or even deceptive court findings.[17]

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[9] Hayes v. Missouri, 120 U.S. 68, 70 (1887). I believe the current filing disparity in Rule 4 also violates the common law rule that parties before the courts are to litigate on a level playing field. *See also State v. Bowers*, 9 A. 125, 126 (Md. 1886) (indicating that although criminal appeals should be resolved as quickly as reasonably possible, the law of notice periods should make "no distinction between an appeal or writ of error taken by the state and one taken by the accused").

[10] *Id*. at 1874.

[11] William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 Cardozo L. Rev. 1865, 1867-68 (2002).

[12] Lassiter v. Dep't of Soc. Srvcs., 452 U.S. 18, 28 (1981).

[13] Lassiter v. Dep't of Soc. Srvcs., 452 U.S. 18, 28-30 (1981) (stating that inaccurate findings are a likely consequence of unequal procedural rules).

[14] Little v. Streater, 452 U.S. 1, 14 (1981).

[15] *See id*. For another Supreme Court decision recognizing the importance of symmetrical procedures in the generation of accurate court rulings, *see Lindsey v. Normet*, 405 U.S. 56 (1972) (striking down an Oregon statute requiring tenants seeking to appeal evictions to post a double bond).

[16] *Id.*

[17] Pankratz at 1097 ("All citizens have a right to "neutral access" to the courts—that is, access sufficient to provide citizens a reasonable opportunity to have the law neutrally applied to them in fact").

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U.S. Department of Justice
Civil Division, Appellate Staff
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DNL

Douglas N. Letter
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October 15, 2003

Professor Patrick J. Schiltz
St. Thomas More Chair in Law
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 302
Minneapolis, MN 55403-2015

Re: Possible Amendment to FRAP 4 Notice of Appeal Times

Dear Patrick:

At our last meeting, the Federal Rules of Appellate Procedure Advisory Committee asked me to report on a possible amendment to FRAP 4, which would provide 30 days for notices of appeal for all private parties in both civil and criminal cases, and 60 days for notices of appeal by the Government in both types of cases. For various reasons, the Department of Justice strongly opposes this proposal, and instead believes that no change in the FRAP 4 notice of appeal times is either necessary or desirable.

Although there would be one benefit from the simplified proposal (eliminating the need to decide if a case is governed by civil or criminal appeal times), we do not believe that there remains any pressing problem with FRAP 4 that needs to be fixed, and that extending the time for criminal appeals – both by the Government and by defendants – would raise a variety of problems, and would cause the overall substantial disadvantage of slowing down appeals in criminal cases. In addition, the proposal described above would require the Committee to recommend to the Supreme Court that it take the serious step of promulgating a rule that would directly overrule existing statutory provisions.

1. Some background knowledge of the statutes and rules setting notice of appeal times is necessary.

By statute, the time for taking appeals in private cases "of a civil nature" is 30 days after the entry of the appealable judgment, order, or decree. 28 U.S.C. 2107(a). In any action in which the United States, or its agencies or officers is a party, all parties – whether private or governmental –

have 60 days from such entry. 28 U.S.C. 2107(b).

FRAP 4(a) also discusses the deadlines for filing notices of appeal "in a Civil Case," and provides the same timing for civil cases as does Section 2107. See FRAP 4(a)(1).

No statute currently sets the time within which a defendant in a criminal case may file a notice of appeal. However, the time for the Government to appeal in criminal cases is generally set by 18 U.S.C. 3731 at 30 days.

FRAP 4(b)(1) governs appeal times in "a Criminal Case," and provides ten days for a defendant, and 30 days for the Government. A cross-appeal may be filed by a defendant within ten days of the Government's appeal, and by the Government within 30 days of a defendant's appeal.

In addition to these statutes and rules setting the notice of appeal times in general, there are various specialized statutes and rules providing different times for particular types of appeals. For example, ten days are provided to appeal in the following situations: (1) certain interlocutory civil appeals (28 U.S.C. 1292(b)); (2) Government appeals under the Classified Information Procedures Act (18 U.S.C. App. 3, Sec. 7); and, discretionary appeals from orders involving class action certifications (FRCP 23(f)).

2. The difference in criminal and civil notice of appeal times reflects the more general practice that criminal appeals are handled more expeditiously by the Circuits than standard civil cases. See, e.g., Second Circuit Local Rules Appendix Part B ("Revised Second Circuit Plan to Expedite the Processing of Criminal Appeals"); Fifth Circuit Local Rules Appendix I ("Plan for Expediting Criminal Appeals"). Such treatment appears to be based partially on statutory command (see 18 U.S.C. 3731 (criminal appeals by the Government "shall be diligently prosecuted"; 18 U.S.C. 3145(c) (appeals under the Bail Reform Act from a release or detention order "shall be determined promptly"), and a lengthy tradition, recognized by the Supreme Court. See Corey v. United States, 375 U.S. 169, 171-72 (1963) (explaining purpose of rules governing federal criminal appeals – including the ten-day period for filing notices of appeal: "The dominant philosophy embodied in these rules reflects the twin concerns that criminal appeals be disposed of as expeditiously as the fair and orderly administration of justice may permit, and that the imposition of actual punishment be avoided pending disposition of an appeal"). See also U.S. Const., Amend VI (providing a constitutional right to a "speedy and public trial").

3. As I recall, the FRAP Committee began examining the notice of appeal times several years ago because there had been court of appeals case law addressing the issue of whether different cases are governed by the civil or criminal deadlines in different contexts. By proposing a new rule, which was eventually adopted by the Supreme Court, the Committee expressly resolved a conflict existing among the Circuits concerning the time for appeal from an order granting or denying a writ of *coram nobis* (see FRAP 4(a)(1)(C)). (There is still an inconsistency within the Circuits concerning the nature of Hyde Amendment appeals, but, as I have previously informed the Committee, this situation does not pose a serious problem and does not warrant the substantial

process needed to achieve a FRAP amendment.)

In the course of considering the appeal time issue, Committee members have raised the question whether the period for notices of appeal by criminal defendants is too short, and should be expanded to equal the Government's deadline of 30 days. By letter of March 26, 2002 (a copy of which is attached here), I have already explained why such an expansion is unnecessary and problematic. In addition, some members of the Committee have suggested that any future controversies about appeal times could be eliminated by making all notices of appeal due within 30 days, regardless of the type of case or party involved. I opposed this proposal, pointing out that there is a very good reason why the Government has 60 days in civil cases to file a notice of appeal: the Solicitor General must be given sufficient time to gather recommendations from various interested federal agencies and to decide whether or not to appeal, and this process works in many cases, thus saving the district and appellate courts substantial time and resources as fewer protective notices of appeal are filed.

Another informal proposal was then raised, providing that all notices of appeal by private parties would be due within 30 days, and all notices of appeal by the Government would be due within 60 days. (I do not know how this proposal would treat the various types of speedy specialized appeals mentioned above.)

4. From our perspective, the first problem with this proposal is that it will put in motion the substantial process for amending a FRAP provision when there is no actual need for it. As you know, some Committee members in the past have expressed the view that ten days is too short a period for a criminal defendant to decide to appeal. However, our understanding is that this period has been the rule for approximately 70 years, and the federal criminal bar is by now fully familiar with it. In addition, the recent change to FRAP 26(a)(2), covering its method of counting days, means that criminal defendants actually have between 14 and 17 days (depending upon the calendar) in which to have a notice of appeal filed, thus mitigating lingering concerns that a ten-day period is too short. And, we are not aware that the Committee has ever heard convincing evidence that defendants are being prejudiced by the current ten-business day notice of appeal time.

In addition, there is an overwhelming policy interest in the speedy resolution of criminal cases, which includes their appeals. The restrictive time limits for criminal cases in the Constitution, statutes, and rules embody the principle that the Government and criminal defendants should proceed expeditiously with their appeals. Defendants challenging their convictions and sentences through appeals should move swiftly so that the convictions can become final and, presumably, the defendants can accept the convictions and begin the process of rehabilitation. See United States v. Craig, 907 F.2d 653, 656 (7th Cir. 1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration. * * * [R]ule 4(b) is just a small part of a larger scheme to ensure that criminal prosecutions do not plod on indefinitely"); United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (noting the "policy

considerations supporting prescription of a very short time for appeal in a criminal case").

Additional time for criminal defendants to appeal will have reverberations on timing through different aspects of a criminal case. For example, 18 U.S.C. 3145(c) commands that an appeal from a release or a detention order "shall be determined promptly." An expansion of the time for filing a notice of appeal from the current 10/30 day scheme to a 30/60 day scheme would undermine that command. As noted earlier, 18 U.S.C. 3731 limits to 30 days the period within which the Government may appeal an order releasing a defendant, dismissing an indictment, suppressing evidence, or granting a new trial. Particularly with respect to interlocutory appeals, an expansion of the current time limits would delay trials in a manner inconsistent with the statutory and constitutional speedy trial guarantees. Once sentence is imposed, FRCrP 33(b)(2) and 34(b) give the defendant only seven days to file a motion seeking relief from the judgment. Likewise, FRCrP 35(a) gives the district court only seven days within which to correct the sentence. These short seven-day periods are designed to fit within the defendant's ten-day window for filing a notice of appeal. Like the ten-day period, they expedite post-judgment review and move the case quickly to the court of appeals.

We also note that many of the Government's criminal appeals are from interlocutory orders. Providing 60 days to file a notice of appeal in such situations will cause serious disruption and delay for the underlying case, and seems thoroughly inconsistent with the principle of speedy resolution of such cases. Indeed, a 60-day period for filing a notice of appeal would plainly be antithetical to the structure and purpose of the Speedy Trial Act, which provides the Government with only 70 days to bring a case to trial. See 18 U.S.C. 3161(c)(1).

Further, we believe that increasing the notice of appeal time for defendants will result in more appeals by defendants, particularly among those who pled guilty. As defendants have increased time to contemplate their ongoing incarcerations, and come under the greater influence of "jailhouse lawyers," we think it likely that more of them will decide to launch unmeritorious appeals, thereby increasing the burden on the courts. And, a longer notice of appeal time will create greater opportunities for defendants to delay final resolution of their cases through such additional trial court pleadings as reconsideration motions, ineffective-assistance-of-counsel claims, attacks on prosecutorial conduct, and bail requests. Our experience is that many such generally wasteful filings are currently avoided as defendants instead follow the tradition of moving rapidly on to the court of appeals and final determinations.

Any change in the current FRAP 4 rules would also raise some complications with the need to consider cross-appeals. In criminal cases, the United States currently can file a cross-appeal within 30 days of any defendant's notice of appeal. See FRAP 4(b)(1)(B). And, any defendant has ten days beyond the filing of an appeal by the Government. See FRAP 4(b)(1)(A)(ii). While surmountable, this problem simply underscores our concern that amending well-established FRAP provisions can be difficult as changes in one rule affect various other related rules. This problem would have to be solved, as well as the need to find appropriate phrasing to deal with the timing for the various specialized appeals mentioned earlier.

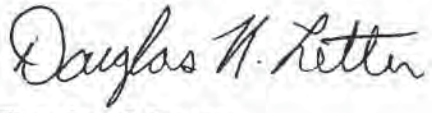
5. The proposal on the table also raises a serious concern because it would call for altering some statutorily-set appeal periods. As noted previously, the time for the Government to appeal in criminal cases is established by statute at 30 days. And, the time for private parties to appeal in civil cases involving the Government is set by statute at 60 days. The new proposed rule would override those deadlines.

The statutory scheme providing the Supreme Court with the power to set the rules for the lower Article III courts does provide that the Court can establish new rules overriding existing contrary statutory provisions. See 28 U.S.C. 2072 (providing that the Supreme Court has the power to prescribe general rules of practice and procedure in the United States district and appellate courts, and that "[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect"). And, the rules process provides Congress with notice of new proposed rules, and time to override them through legislation if it wishes. See 28 U.S.C. 2074.

Thus, although the Rules Enabling Act allows the Supreme Court to promulgate new rules that directly override statutes, we believe this power has been sparingly, if ever, used to date. It strikes us as odd to test this principle on a new rule that does not appear to be demanded by any pressing need.

In sum, given the fact that there does not appear to be a serious problem requiring an amendment to FRAP 4, we do not favor the radical revisions to FRAP 4 tentatively proposed to me. We believe that such a change is unnecessary, will likely lead to more and slower criminal appeals, and an increased number of filings by convicted defendants in the district courts seeking to disrupt proceedings, rather than moving on to the appellate stage. Accordingly, we strongly urge the Committee to leave in place the long-entrenched rules that govern notices of appeal, and that do not appear to be causing any significant trouble.

Sincerely,



Douglas N. Letter

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March 26, 2002

Professor Patrick J. Schiltz
Associate Dean and Professor of Law
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Re: Time To File Notice Of Appeal In Criminal Cases

Dear Patrick:

At the April 2001 meeting of the Federal Rules of Appellate Procedure Advisory Committee, there was discussion concerning an amendment to FRAP 26(a)(2) to make the time-computation provisions of FRAP consistent with those of the Federal Rules of Civil Procedure. During that discussion some members of the Committee raised the issue of whether the time within which defendants can file appeals in criminal cases should be increased beyond ten days because the Government has 30 days in which to appeal in such cases. See FRAP 4(b)(1). I was asked by Judge Garwood to study this issue and report to the Committee, which I am now doing by this letter. We do not believe that any change in the current rule is warranted.

There are persuasive policy and practical reasons for the Government to have more time than defendants to decide whether to appeal a criminal case. First, it takes the Government, because of its sheer size and bureaucratic organization, more time than most private parties to decide whether or not to appeal a decision. By regulation, any appeal must be authorized by the Solicitor General. See 28 C.F.R. § 0.20(b). This process entails memoranda by the United States Attorney's Office that tried the matter and by the Criminal Division at the Main Justice Department, followed by consideration by attorneys in the Solicitor General's Office. For obvious reasons, this process of winnowing the cases in order to pursue only appropriate appeals takes time.

We note that, in many instances, there is a strong preference for obtaining final appellate authorization -- or at least an indication that authorization to appeal likely will be forthcoming -- before any notice of appeal is filed. This practice is beneficial to the courts because it minimizes the number of protective notices of appeal that must be filed.

The Federal Rules of Appellate Procedure generally recognize that the appeal consideration process within the Department of Justice requires extra time. These rules grant more time to the Government to file a notice of appeal in civil cases (60 days when the Government is a party, versus 30 days when the appeal involves only private litigants) (see FRAP 4(a)(1)), and more time to seek

en banc review of adverse appellate decisions. See FRAP 40(a) (granting parties 45 days, instead of 14 days, to file a petition for rehearing in a civil case when the United States is a party).

Second, the Government's decision to appeal -- apart from the time-consuming institutional review associated with that process -- usually entails a probing substantive analysis of both the merits of the issue as well as the institutional consequences of pursuing an appeal. This consideration is necessary because the Government must not only consider whether an appeal makes sense in a particular case, but also the ramifications of such an appeal in terms of presenting a uniform position across the nation and in terms of consistency with whatever the Government's overarching policy is in the particular area. These are factors that an individual defendant simply need not consider.

We recognize that in the civil context, both the Government and private parties are given the same extra time to file an appeal in cases involving the Government. See FRAP 4(a). Apparently, this equal-time rule was adopted in the civil context because, in the view of the 1946 Advisory Committee, "[i]t would be unjust to allow the United States * * * extra time and yet deny it to other parties in the case." See 9 Moore's Federal Practice § 203.25[1], § 3-102 (2d ed. 1985).

However, the dynamics of criminal cases are fundamentally different from civil cases, and there is no good reason to extend the practice in civil cases to criminal ones. There is a special public policy interest in the speedy and orderly disposition of criminal cases -- embodied most prominently in the Speedy Trial Clause in the Constitution, the Speedy Trial Act (18 U.S.C. §§ 3161 et seq.), and the resulting priority given to criminal cases on court dockets. Indeed, the very fact that the Government is granted only 30 days in criminal cases to file a notice of appeal -- instead of the 60 days it is accorded in civil cases -- indicates that time is of the essence in criminal cases, and that the extra time given to the Government in criminal cases is a necessary concession to practical realities, a concession that should not be extended to other parties who do not face that reality.

Not surprisingly, the one appellate decision we have found to evaluate the time disparity contained in FRAP 4(b) for the Government and for defendants upheld that disparity against an equal protection challenge. Then-Ninth Circuit Judge Anthony Kennedy wrote:

> Applying [the rational basis] test, we have no difficulty finding that the different periods provided the government and criminal defendants for filing an appeal do not deny defendants the equal protection of the laws. It is reasonable to presume that it takes a large, bureaucratic organization such as the government, responsible for prosecuting thousands of cases across the country, a greater time to assess the merits of an appeal than it does an individual defendant. In reaching its decision whether or not to appeal, the government must be concerned, moreover, with the consistency of its positions and the future impact of the case, considerations that do not weigh as heavily, if at all, in the decision of the defendant.

United States v. Avendano-Camacho, 786 F.2d 1392, 1394 (9th Cir. 1986).

In addition, the appeal rights of the Government and of defendants are quite different in criminal cases. The Government may appeal in criminal cases only when authorized by statute and not barred by the Double Jeopardy Clause. Thus, the Government may appeal only in limited circumstances, authorized by 18 U.S.C. §§ 3731 and 3742, which usually involve interlocutory orders that have the effect of terminating a prosecution, post-verdict rulings that disregard a jury's verdict, or the severity of a sentence. The Government cannot appeal a not guilty verdict. By contrast, a defendant generally cannot appeal except from the final judgment of conviction (with some narrow exceptions). Thus, a defendant's decision to appeal typically involves only the verdict and sentence.

Moreover, we are aware of no pressing problem that would seem to favor amendment of Rule 4(b) to allow more time for defendants to appeal.

As noted already, there is a strong policy interest in the speedy resolution of criminal cases. The restrictive time limits for criminal cases in the Constitution, statutes, and rules embody the principle that criminal defendants should proceed expeditiously with challenges to their convictions and sentences, so that the convictions can become final and, presumably, the defendants can accept the convictions and begin the journey of rehabilitation. See United States v. Craig, 907 F.2d 653, 656 (7th Cir. 1990) ("The shorter time limit for criminal appeals furthers the public interest in the prompt resolution of criminal proceedings. Neither the interests of society nor of individual criminal defendants are served by a plodding appellate process that could change the results of a trial, often while the defendant has already begun to serve a sentence of incarceration. * * * [R]ule 4(b) is just a small part of a larger scheme to ensure that criminal prosecutions do not plod on indefinitely."); United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (noting the "policy considerations supporting prescription of a very short time for appeal in a criminal case").

Balanced against the need for quick finality is the fairness consideration of allowing criminal defendants sufficient time to file a timely appeal. At this point, however, we know of no evidence suggesting that ten days is proving insufficient for criminal defendants to decide whether to appeal and to file a notice. Because such a high percentage of defendants convicted in disputed criminal proceedings do appeal, it seems clear that this decision is not generally a difficult one. Further, the federal rules do not obligate defendants to file a brief or even file a list of issues to be preserved or questions presented within that time. Thus, the need for defendants to decide quickly that they want a notice of appeal filed is not an onerous burden,

In our view, given the strong public policy favoring fair but expeditious processing of criminal matters, and the absence of any evidence suggesting that the current ten-day time limit needs to be lengthened, there is no reason to propose amendments to FRAP 4(b) at this time.

Sincerely,

Douglas Letter
Appellate Litigation Counsel

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MEMORANDUM

DATE: August 29, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 11-AP-D: possible Appellate Rules amendments relating to electronic filing

At the fall 2011 meeting, the Committee discussed possible amendments to the Appellate Rules to take account of the shift to electronic filing and service. The Committee noted that it might be useful to explore the possibility of working jointly on this topic with the other Advisory Committees. During the spring of 2012, the Standing Committee formed a subcommittee to consider the question of terminology – in the national Rules – relating to electronic filing and service. That subcommittee concluded that the best approach is to ensure that consultation is available whenever an Advisory Committee desires a sounding board for proposed Rule amendments that use terminology designed to encompass electronic means for making a document available. A joint project to review and revise all the sets of national Rules in light of electronic filing developments does not seem imminent at this time. Thus, the Appellate Rules Committee may wish to revisit the question whether to embark on a project focused on review of the Appellate Rules alone.

As context for that discussion, I enclose my September 2011 memo on this topic. The passage of time has rendered two statements in that memo inaccurate:

- The Eleventh and Federal Circuits now accept electronic filings.

- The Second Circuit, which as of 2009 did not permit service to be made through CM/ECF, subsequently adopted a local rule providing that filing in CM/ECF counts as service on any person who is registered as a Filing User in PACER and who receives a Notice of Docket Activity concerning that filing. *See* Second Circuit Local Rule 25.1(h).

One other issue that occurred to me, while re-reading the September 2011 memo, has to do with in forma pauperis litigants. PACER's website states that "[i]n Forma Pauperis status does not automatically entitle you to free access to PACER. Users must petition the court separately to request free access to PACER."[1] Perhaps the Committee might consider whether Appellate Rule 24 and/or Form 4 might usefully address access to PACER.

Encl.

[1] http://www.pacer.gov/psc/faq.html (last visited August 21, 2012).

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TAB 5B

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MEMORANDUM

DATE: September 21, 2011

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 11-AP-D: possible Appellate Rules amendments relating to electronic filing

This memo discusses possible amendments to the Appellate Rules to take account of the shift to electronic filing and service. It seems useful to take up this topic, now that all circuits except the Eleventh and Federal Circuits accept electronic filings.[1] Moreover, the proposed amendments to Part VIII of the Bankruptcy Rules provide a potential model for the treatment of some of the issues raised by electronic filing and service.

In preparing this memo, I benefited from guidance by Leonard Green and his colleagues in other circuits. They compiled a list of Appellate Rules provisions on which to focus:

- **Rule 3(d)(1)** - Service by the district clerk of notice of filing of a notice of appeal to all counsel other than the appellant's.
- **Rule 5(c)** - Form of papers and number of copies of papers attendant to a petition for permission to appeal.
- **Rules 6(b)(2)(C) & (D)** - Forwarding and filing the record in bankruptcy appeals from the district court or bankruptcy appellate panel.
- **Rules 11(b)(2) & (c)** - District clerk's duty to forward the record on appeal; retaining the record temporarily in district court.
- **Rule 21** - Form of papers and number of copies of petitions for writs of mandamus and prohibition, and other extraordinary writs.
- **Rule 25** - Filing and manner of service generally.
- **Rule 27** - Form of papers, number of copies with respect to motions.
- **Rule 28(e)** - References to the record in briefs.
- **Rule 30** - The appendix.
- **Rule 31** - Serving and filing briefs.

They observed that for a number of these rules, it might suffice if the current requirements and proscriptions were kept in place, but were supplemented with some language to the effect that individual circuits which permit or require certain filings to be electronic may promulgate local

[1] *See* Appellate ECF Local Information, available at http://www.pacer.gov/announcements/general/ea_filer_info.html (last visited Sept. 17, 2011).

rules prescribing particular technical requirements governing the manner of filing.

The remainder of this memo builds on the Clerks' guidance by focusing on eight aspects of appellate practice that could be affected by the shift to CM/ECF. Part I discusses provisions that require court clerks to serve certain documents on parties. Part II discusses provisions relating to electronic filing and service by parties. Part III considers the treatment of the record. Part IV notes a proposal concerning the use of audio recordings in lieu of transcripts. Part V discusses the appendix. Part VI turns to the format requirements for briefs and other papers. Part VII discusses requirements concerning paper copies of filings. Part VIII briefly notes provisions that refer to "original" documents.

I. Service by the clerk

A number of provisions in the Appellate Rules require service by the district clerk (or Tax Court clerk) or circuit clerk. *See* Rule 3(d) (district clerk to serve notice of filing of notice of appeal); Rule 6(b)(1) (Rule 3(d) applies to appeals from bankruptcy appellate panels and, in such appeals, "district court" includes "appellate panel"); Rule 13(a)(1) (Tax Court clerk to serve notice of filing of notice of appeal); Rule 15(c) (circuit clerk to serve copy of petition for review of agency decision on each respondent); Rule 21(b)(2) (if court of appeals orders response to mandamus petition, circuit clerk "must serve the order to respond on all persons directed to respond"); Rule 36(b) ("On the date when judgment is entered, the clerk must serve on all parties a copy of the opinion – or the judgment, if no opinion was written – and a notice of the date when the judgment was entered."); Rule 45(c) ("Upon the entry of an order or judgment, the circuit clerk must immediately serve a notice of entry on each party, with a copy of any opinion, and must note the date of service on the docket. Service on a party represented by counsel must be made on counsel."). *See also* Rule 6(b)(2)(D) (in bankruptcy appeals from mid-level appellate court, circuit clerk to "immediately notify all parties of the filing date" of the record); Rule 12(c) (similar requirement in non-bankruptcy appeals).

Some observers have suggested that it makes little sense to require the clerk to serve notice of an electronic filing on parties who are participating in CM/ECF. Thus, for example, in 2008 Judge Kravitz drew to the Committee's attention a comment by the Connecticut Bar Association Federal Practice Section's Local Rules Committee ("CBA Local Rules Committee") concerning Appellate Rule 3(d). The CBA Local Rules Committee pointed out that due to the advent of electronic filing, there is a "discrepancy between FRAP 3(d), which indicates that the District Court Clerk's office will handle service of notices of appeals and the reality that it does not serve civil notices of appeals."[2] More recently, Professor Steven Gensler relayed to the Committee a suggestion by an attorney, Harvey D. Ellis, Jr., that "FRAP 3(d)(1) could use an amendment to allow a notice of electronic filing to suffice in a district with ECF procedures."[3]

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[2] This suggestion was docketed as Item No. 08-AP-A.

[3] This suggestion was docketed as Item No. 11-AP-C.

When the Committee discussed this question in 2008, it seemed prudent to take a wait-and-see approach rather than amending Rule 3(d). At that time, not all the district courts which were on CM/ECF for filing permitted the notice of appeal to be filed electronically. Moreover, the appellate courts' transition to electronic filing was still in process. Three years later on, electronic filings are accepted by most district courts, at least some bankruptcy appellate panels, and all courts of appeals except the Eleventh and Federal Circuits. The Tax Court now requires most counseled parties to file electronically,[4] but the Tax Court's electronic filing system, eAccess, does not appear to be linked with PACER or the CM/ECF system,[5] and the Tax Court does not permit notices of appeal to be filed electronically.[6]

The prevalence of electronic filing does not mean that notices of appeal will always be filed electronically in the lower court. For one thing, a lower court that generally permits electronic filing may make an exception for notices of appeal.[7] For another, filers who are exempt from electronic filing (e.g., many pro se litigants) will file notices of appeal in paper form. And even when a notice of appeal is filed electronically in the lower court, the lower court's clerk presumably must serve paper copies of the notice of appeal on any litigants who are not on the CM/ECF system.[8]

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[4] See Tax Court Rule 26 ("The Court will accept for filing documents submitted, signed, or verified by electronic means that comply with procedures established by the Court."); United States Tax Court, eAccess, available at http://www.ustaxcourt.gov/electronic_access.htm (last visited Sept. 17, 2011) ("eFiling is mandatory for most parties represented by counsel (practitioners) in open cases in which the petition is filed on or after July 1, 2010.").

[5] PACER's list of CM/ECF courts (Individual Court PACER Sites, available at http://www.pacer.gov/psco/cgi-bin/links.pl, last visited Sept. 17, 2011) does not mention the Tax Court, and the Tax Court's eAccess site does not mention PACER or CM/ECF.

[6] *See* United States Tax Court, eAccess Guide for Petitioners and Practitioners 11, 18.

[7] For example, N.D. Cal. Order 45 provides: "Until such time as the United States Courts of Appeals for the Ninth Circuit and the Federal Circuit institute rules and procedures to accommodate Electronic Case Filing, notices of appeal to those courts shall be filed, and fees paid, in the traditional manner on paper rather than electronically. All further documents relating to the appeal shall be filed and served in the traditional manner as well. Appellant's counsel shall provide paper copies of the documents that constitute the record on appeal to the District Court Clerk's Office."

[8] Rule 3(d)(1)'s requirement that when a criminal defendant appeals "the clerk must also serve a copy of the notice of appeal on the defendant" is somewhat ambiguous: Does this require service on the attorney for a represented defendant, or on the defendant himself or herself? The 1966 Committee Note to Criminal Rule 37(a)(1) explained this requirement by stating that "The duty imposed on the clerk by the sixth sentence is expanded in the interest of providing a defendant with actual notice that his appeal has been taken and in the interest of orderly

Thus, any amendment (to the Appellate Rules that require service by a clerk) should take account of the likely persistence of paper filings and paper service by or on certain parties (such as inmates[9] or other pro se litigants). The provisions might usefully be amended to exempt the relevant clerk from the relevant service requirement as to parties who automatically receive notice of the relevant filing through the CM/ECF system. However, it would not seem to make sense to adopt this approach for Rule 15(c), which concerns notice of the filing of a petition for review of agency action. Unlike appeals from district court or bankruptcy appellate panel judgments, petitions for review of agency action are filed in the court of appeals itself, and one could not assume that the respondents would be registered in CM/ECF as of the date that the circuit clerk would be serving the copy of the petition.[10]

Assuming that Rules 3(d), 13(a)(1),[11] 21(b)(2), 36(b), and 45(c) are to be amended in this manner, it would make sense to consider whether any amendments are needed in the provisions that currently require litigants to furnish sufficient copies to be used by the clerk to comply with service requirements. *See* Rule 3(a)(1) ("[T]he appellant must furnish the clerk with enough

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procedure generally." This might suggest that the defendant himself or herself is to be notified. On the other hand, when this provision was originally adopted in Criminal Rule 37(a)(1) the Rule also spoke of service of the notice on "all parties other than the appellant," perhaps suggesting that the drafters used "party" to refer to counsel in the case of represented parties. The notification provided by Rule 3(d)(1) may be particularly useful to a defendant who has availed himself or herself of the option – provided by Criminal Rule 32(j)(2) – to ask the clerk to prepare and file a notice of appeal on the defendant's behalf.

To the extent that Rule 3(d)(1) requires a criminal defendant-appellant to be personally served with the notice of appeal – even if represented – this would add another category of appeals in which paper service by the clerk would ordinarily be necessary.

[9] When an inmate confined in an institution files a notice of appeal under Rule 4(c), that filing will (for the foreseeable future) be in paper form. With respect to such inmate filings, Rule 3(d)(2) requires the clerk to alert counsel (and pro se parties) to the *date of docketing* of the notice; this is important because in such instances Rule 4(c) provides that certain periods that would run from the date of the inmate's filing are counted from the date of docketing rather than the date of filing. I am unsure whether parties who participate in CM/ECF would receive notice of the date of docketing through the CM/ECF electronic notification system, but if not, then Rule 3(d)(2)'s requirement would continue to be important even for participants in CM/ECF.

[10] Admittedly, the respondents will be agencies who are repeat players, so perhaps my assumption will not always hold true; but the likely pattern does seem significantly different in the context of agency review than elsewhere.

[11] As noted above, the Tax Court has its own electronic filing system and does not currently permit electronic filing of the notice of appeal. Thus, the desirability and nature of any amendments to Rule 13(a)(1) would require separate consideration.

copies of the notice to enable the clerk to comply with Rule 3(d)."); Rule 13(a)(1) (similar requirement). I see no need for any amendment to Rules 3(a)(1) and 13(a)(1). Those rules currently direct the litigant to provide "enough copies," and that phrase is flexible: If all parties are CM/ECF participants, then zero copies would be enough copies.

Another requirement that should probably be retained for the moment is Rule 3(d)(1)'s requirement that the district clerk notify the court of appeals of the filing of the notice of appeal and of any later district-court filings that may affect the progress of the appeal (e.g., motions that may suspend the effectiveness of the notice of appeal). I imagine that when CM/ECF is fully operational in all the courts of appeals, one benefit may be that such notifications become automatic. But until then, I would guess that the Rule's requirement will continue to be important. Like all the other issues discussed here, this is one as to which the guidance of the Clerks will be important.

II. Electronic filing and service

The Appellate Rules currently acknowledge the possibility of electronic filing and service. In the context of an overall review of the Rules' treatment of electronic filings, it makes sense to review Rule 25's provisions for electronic service and filing as well as Rule 26(c)'s treatment of the three-day rule.

Rule 25(a)(2)(D) authorizes each circuit to adopt a local rule permitting or requiring electronic filing, subject to the proviso that any electronic filing requirement include reasonable exceptions. Rule 25(a)(2)(D) also helpfully defines an electronically filed paper as a "written paper" for purposes of the Appellate Rules.[12]

Rule 25(c)(1) permits electronic service "if the party being served consents in writing." (I believe that such consent is ordinarily required as a condition of registration in CM/ECF.) Rule 25(c)(2) permits parties to use the court's transmission equipment to make electronic service if authorized by local rule.[13] Rule 25(c)(3) directs parties to serve other parties in "a manner at least as expeditious as the manner used to file the paper with the court," when "reasonable" in light of relevant factors. Presumably, parties who are filing electronically should

[12] For rules referring to writings, see, e.g., Rule 11(f) ("written stipulation filed in the district court"); Rule 17(b)(2) ("parties may stipulate in writing that no record or certified list be filed"); Rule 27(a)(1) ("A motion must be in writing unless the court permits otherwise."); Rule 41(d)(2)(B) (notification to circuit clerk "in writing"); Rules 44(a) and (b) ("written notice to the circuit clerk").

[13] One question that is worth investigating is whether the circuits that use CM/ECF also permit service to be made through CM/ECF. As of 2009, the Second Circuit was not permitting parties to effect service through CM/ECF; rather, electronic service had to be made by email.

serve other parties electronically unless those parties are not registered in CM/ECF.[14] Rule 25(c)(4) provides that "[s]ervice by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served."

Rule 26(c) sets out the three-day rule: "When a party may or must act within a specified time after service, 3 days are added after the period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of service." The three additional days apply not only to service by mail or commercial carrier, but also to electronic service: "For purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service." Chief Judge Easterbrook has proposed abolishing the three-day rule;[15] he argues that the three-day rule is particularly incongruous as applied to electronic service. Though Chief Judge Easterbrook's suggestion relates only to the Appellate Rules, the criticism of the three-day rule is relevant, as well, to Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f). For more than a decade, there have been periodic discussions of whether electronic service ought to be included within the three-day rule. The Appellate, Bankruptcy, and Civil Rules Advisory Committees, and the Standing Committee, have discussed the question, as did participants in the time-computation project. Though there has been some support, in those discussions, for excluding electronic service from the three-day rule, ultimately the decision was taken to include electronic service within the three-day rule for the moment.

Some of the reasons given for including electronic service may be somewhat less weighty now than they were a decade ago: Concerns that electronic service may be delayed by technical glitches or that electronically served attachments may arrive in garbled form are perhaps less urgent in districts (or circuits) where electronic service occurs as part of smoothly-running CM/ECF programs. It may also be the case that when CM/ECF is mandatory for counsel, counsel no longer (as a practical matter) has the inclination or, perhaps, ability to decline consent to electronic service; in those districts or circuits, there would be no need to give counsel an incentive to consent to electronic service (or to avoid giving counsel a disincentive to consent to electronic service) by maintaining the three-day rule for electronic service. However, the concern remains that counsel might strategically serve an opponent by electronic means on a Friday night in order to inconvenience the opponent. Thus, though some of the rationales for including electronic service in the three-day rule may have become less persuasive over time, the concern over possible strategic misuse of electronic filing persists.

III. Treatment of the record

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[14] Even if a party is not registered in CM/ECF, if the party has consented in writing to electronic service, then service by email may be most appropriate when documents are filed electronically.

[15] This proposal is on the Committee's agenda as Item No. 08-AP-C.

One of the most significant changes that CM/ECF may bring to appellate practice is the treatment of the record. If the appellate judges and clerks can access the district court record by means of links in the electronic docket, then the need for a paper record may eventually dissipate.

The proposed Part VIII bankruptcy rules provide a model.[16] Proposed Bankruptcy Rule 8010 provides for the "transmission" of the record in order to underscore the default principle of electronic transmission.[17] As the draft Committee Note to Bankruptcy Rule 8010 explains:

> [Rule 8010(b)] requires the bankruptcy clerk to transmit the record to the clerk of the appellate court when the record is complete .... This transmission will be made electronically, either by sending the record itself or sending notice of how the record can be accessed electronically. The appellate court may, however, require that a paper copy of some or all of the record be furnished, in which case the bankruptcy clerk will direct the appellant to provide the copies or will make the copies at the appellant's expense.

The proposed amendments to Appellate Rule 6 that are presented elsewhere in the agenda book are designed to dovetail with the approach taken in the Part VIII rules. The proposed Rule 6 and Part VIII amendments illustrate an approach that could be generalized to the non-bankruptcy context by means of similar amendments to Appellate Rules 11 and 12. However, it seems likely that a different approach to the record would be taken in certain contexts, such as appeals

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[16] Local circuit provisions provide additional models and should also be studied. *See, e.g.*, Third Circuit Local Appellate Rule 11.2 ("A certified copy of the docket entries in the district court must be transmitted to the clerk of this court in lieu of the entire record in all counseled appeals. In all pro se cases, all documents, including briefs filed in support of dispositive motions, that are not available in electronic form on PACER, must be certified and transmitted to the clerk of this court."); *id.* (providing for transmission of non-electronic documents in habeas cases); Fifth Circuit Rule 10.2 ("The district court must furnish the record on appeal to this court in paper form, and in electronic form whenever available. The paper and electronic records on appeal must be consecutively numbered and paginated. The paper record must be bound in a manner that facilitates reading."); Sixth Circuit Rule 10(c) ("As a general matter, the district court does not send non-electronic records to the court of appeals unless and until the circuit clerk requests them.... This sub-rule (c) applies to non-electronic exhibits that a party wishes to draw particular attention to by assuring that the court has actual possession of the exhibits or copies of them."); Sixth Circuit IOP 11(a).

[17] A number of the Appellate Rules use the term "send" or the term "forward." When electronic sharing of records between district and appellate courts becomes the norm, "transmit" may be a better fit than "send" or "forward." Professor Kimble has indicated, however, that there is a style objection to substituting "transmit" for "send." That issue is likely to play out in the context of the project to revise Part VIII of the Bankruptcy Rules.

from the Tax Court[18] and petitions for review of agency action.

It would also make sense to review Rule 28(e)'s treatment of references to the record. It could be useful to require references that make it easy to find the relevant document on PACER, for example by referring to the document's docket number. It may also be worthwhile to consider whether to note the possibility of providing hyperlinks to relevant record documents.

IV. Treatment of the transcript

Digital audio recording has been an approved method of making the record of district court proceedings for more than a decade. Judge Michael Baylson has suggested that the Appellate Rules Committee consider the possibility of allowing the use of digital audio recordings in place of written transcripts for the purposes of the record on appeal.[19]

Under Rule 10(a), the record on appeal consists of "(1) the original papers and exhibits filed in the district court; (2) the transcript of proceedings, if any; and (3) a certified copy of the docket entries prepared by the district clerk." Rule 10(b)(1) provides that "[w]ithin 14 days after filing the notice of appeal or entry of an order disposing of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later, the appellant must do either of the following: (A) order from the reporter a transcript of such parts of the proceedings not already on file as the appellant considers necessary, subject to a local rule of the court of appeals ... ; or (B) file a certificate stating that no transcript will be ordered." If the appellant orders less than the entire transcript, Rule 10(b)(3) permits the appellee to designate additional parts of the transcript.

Read literally, Appellate Rule 10(b) does not require all appellants to order a transcript. But in reality, the appellant's choices are more constrained, because the appellant must make sure that the record includes all the information that the court of appeals will need in order to assess the appellant's challenges to the relevant ruling(s) below. In some instances the appellant may be able to omit some or all of the transcript. But as one commentator advises, the prudent litigator will "[r]esolve all doubts in favor of inclusion. Aside from costs, there is no reason to

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[18] Under Rule 13(d)(1), the provisions in Rules 10, 11, and 12 concerning the record also apply to appeals from the Tax Court. Unless the Tax Court's electronic filing system becomes linked to CM/ECF, it seems unlikely that a Tax Court record could be transmitted electronically to a court of appeals. Thus, if Rules 11 and 12 are amended to contemplate electronic transmission of the record, it may also be necessary to amend Rule 13 to provide separately for records on appeals from the Tax Court. *Cf.* Sixth Circuit Rule 13 cmt. ("Tax Court appeals will generally be handled the same as district court appeals. However, the Tax Court's electronic records are not easily transferable to the court of appeals. Therefore, as set out in 6 Cir. R. 30, in Tax Court appeals there will be appendices instead of an electronic record on appeal.").

[19] This suggestion appears on the Committee's docket as Item No. 08-AP-Q.

exclude anything from the transmitted record that might be useful. For every appeal where the court of appeals complains about over-designation, there are ten where it refuses to consider an argument because appellant failed to include the record needed to support that point."[20] The Rule itself requires the appellant to order a transcript if the appellant is challenging factual findings: Rule 10(b)(2) provides that "[i]f the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion." Other types of challenges that will likely require at least portions of the transcript include challenges to jury selection, to evidentiary rulings, or to jury instructions. To put the matter more generally, the evaluation of a challenge to a trial ruling will frequently require the inclusion of the parts of the transcript that show an objection to the challenged ruling, the parts that reflect the ruling itself, and any parts that are relevant to a determination of whether the error (if any) was harmless.

Even when the court of appeals would ordinarily need to consult some or all of the transcript in order to evaluate the appellant's contentions, Rule 10 offers a few ways to avoid providing the transcript itself. Rule 10(d) permits the parties to agree upon "a statement of the case showing how the issues presented by the appeal arose and were decided in the district court." The statement, which is to focus on the matters "essential to the court's resolution of the issues," is reviewed and (if accurate) approved by the district court and is then "certified to the court of appeals as the record on appeal." In some relatively simple cases, Rule 10(d)'s agreed statement could provide a cost-effective way to create the record on appeal; but it appears from anecdotal evidence that this mechanism is relatively rarely used. Rule 10(c) provides a mechanism for reconstructing a statement of the trial-court proceedings "[i]f the transcript of a hearing or trial is unavailable." However, Rule 10(c)'s mechanism appears to be reserved for instances when the transcript is unavailable irrespective of cost;[21] a number of courts have taken the view that the mere fact that the preparation of the transcript would be prohibitively expensive does not justify recourse to Rule 10(c).

In short, under current practice many appellants cannot succeed on appeal unless they ensure that the record on appeal includes at least some portions of the transcript of the proceedings below. There will also sometimes be instances when the appellee needs to designate portions of the transcript that were not ordered by the appellant. The question raised by Judge Baylson is whether litigants can avoid the costs of ordering the transcript by using the digital audio files instead.

The use of audio files in place of a transcript would permit the parties to avoid the cost of obtaining the transcript, but a number of judges and lawyers are likely to prefer using transcripts.

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[20] Knibb, Fed. Ct. App. Manual § 28:1 (5th ed.).

[21] This would arise if the proceedings had for some reason not been recorded or if the recording were lost.

The likely variation in preferences on this matter suggests that the use of audio files in lieu of transcripts may, in the near term, be more likely to take hold in district courts than in the courts of appeals.[22] Thus, the Committee may wish to maintain its wait-and-see approach with respect to audio files. In the interest of completeness, here are some considerations concerning the treatment of audio files under the current Rules.

There do not yet appear to exist any local circuit rules that address the use of audio files in lieu of transcripts. The Appellate Rules could be read to permit the adoption of local rules authorizing the use of audio files in lieu of the transcript for purposes of the record on appeal, at least in some cases. But there are several ways in which the existing procedures under the Appellate Rules would be a somewhat awkward fit in cases where audio files are used instead of the transcript.

Rule 10(a)'s definition of the record. An audio recording of the district court proceeding is not itself a "transcript" or a "paper"; nor would it seem to come within the ordinary meaning of "exhibit." But a court of appeals presumably could by local rule clarify that an audio recording of the district court proceeding could be included in the record on appeal.

Rule 10(b)(3)'s statement of issues and counter-designations. Rule 10(b)(1) does not require the appellant to order a transcript; but if the appellant does not order the transcript, Rule 10(b)(1)(B) requires the appellant to "file a certificate stating that no transcript will be ordered." A local rule could authorize the appellant to include in the certificate a statement that the appellant intends to rely on the audio recording rather than ordering a transcript. If the appellant were to do so, then Appellate Rule 10(b)(3) would require the appellant to file and serve on the appellee "a statement of the issues that the appellant intends to present on the appeal." Rule 10(b)(3) is obviously intended to enable the appellee to determine what portions, if any, of the transcript it wishes to order. But if the appellee, too, is comfortable with the idea of relying on the audio recording rather than ordering a transcript, then the parties could simply include all the audio files as part of the record, rather than engaging in the process of designations and counter-designations contemplated by Rule 10(b).

Rule 10(b)(2)'s requirement of "a transcript." In cases where the appellant wishes to challenge factual findings, Rule 10(b)(2), read literally, would seem to require a "transcript" rather than permitting the use of audio files: "If the appellant intends to urge on appeal that a finding or conclusion is unsupported by the evidence or is contrary to the evidence, the appellant must include in the record a transcript of all evidence relevant to that finding or conclusion."

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[22] At the district court level, variation among judges' preferences would not prevent the use of audio files in lieu of transcripts, because any district judge who shares Judge Baylson's receptivity to the use of audio files can permit that use in his or her cases. At the court of appeals level, however, even if some judges are receptive to the use of audio files it seems likely that others on the same court will prefer to have a transcript.

Rule 28(e)'s requirement of page citations. The importance of providing specific record citations is well known. If a system were adopted for using audio recordings in lieu of transcripts, it would be possible for the litigant to pinpoint the part of the audio file to which the litigant wishes to direct the court's attention by citing the relevant hour and minute. Such measures could comply with the spirit of Rules 28(a), 28(b) and 28(e). But they would fit awkwardly with the letter of Rule 28(e), which requires citations to the "page" of the appendix or of the document in the original record.

Rule 30's provisions concerning the appendix. Rule 30's provisions concerning the appendix clearly contemplate that the matter to be placed in the appendix will be in paginated form. However, the flexibility provided to the courts of appeals by Rule 30(f) has permitted a great deal of local variation, and it seems likely that the permissible variations could include the use of audio files as part of the original record.

V. Treatment of the appendix

At present, Rule 30 provides circuits with flexibility to put in place their preferred requirements concerning the appendix. Though those local circuit requirements vary, it seems likely that the general purpose of the appendix is similar across circuits – namely, to collect in one place the most salient portions of the record.

Even if the transition to electronic filing renders it appropriate to transmit the record in electronic form, my intuition is that some courts will continue to want the parties to distill that record into an appendix.[23] An appendix – even if filed electronically – provides conveniences that an electronic record would not. To access the electronic record, a judge or clerk would need internet access. An electronic copy of the appendix, by contrast, could be read even without internet access; and the appendix would also serve to highlight the parties' view of the most important portions of the record.[24]

It is thus unclear to me whether the transition to electronic filing warrants amendments to Rule 30. However, it is possible that a study of local circuit practices would reveal aspects of the Rule that could be altered in response to electronic filing.

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[23] *But see* Sixth Circuit Rule 30(a) (providing that in appeals in which "the court will have the electronic record of district court proceedings available, an appendix is not necessary and is not to be filed").

[24] Admittedly, there are other ways to highlight those portions. *See, e.g.*, Sixth Circuit Rule 30(b) ("In appeals from the district court where there is an electronic record in the district court, documents in the electronic record must not be included in an appendix. To facilitate the court's reference to the electronic record in such cases, each party must include in its principal brief a designation of relevant district court documents.").

VI. Format of briefs and other papers

Some of the Appellate Rules' detailed instructions concerning the format of briefs and other papers may be unnecessary for electronic filings. Requirements that seem unnecessary include those concerning the following:

- Opaque and unglazed paper. *See* Rule 27(d)(1)(A); Rule 32(a)(1)(A).
- Single-sided printing. *See* Rule 27(d)(1)(A); Rule 32(a)(1)(A).
- Color of covers. *See* Rule 27(d)(1)(B); Rule 28.1(d); Rule 32(a)(2); Rule 32(b)(1); Rule 32(c)(2)(A).
- Binding. *See* Rule 27(d)(1)(C); Rule 32(a)(3); Rule 32(b)(3).
- Paper size. *See* Rule 27(d)(1)(D); Rule 32(a)(4).
- Glossy reproductions of photographs. *See* Rule 32(a)(1)(C).

Although these requirements seem beside the point with respect to electronic filings, it is not clear that there is an urgent need to amend the rules to acknowledge these requirements' inapplicability to electronic filings. It is difficult to imagine a clerk's office rejecting an electronically filed paper (filed in conformance with local CM/ECF rules) for failure to comply with any of the requirements in the bullet point list above.[25]

VII. Required number of copies

Several provisions in the Appellate Rules require a litigant to provide a certain number of copies of a filing, presumably for the internal use of the court.[26] See Rule 5(c) (original and three copies of petition for permission to appeal or of answer to petition, "unless the court requires a different number by local rule or by order in a particular case"); Rule 21(d) (original and three copies of papers on petition for extraordinary writ, unless different number required by local rule or order in case); Rule 26.1(c) (same, with respect to corporate disclosure statement filed separately from brief); Rule 27(d)(3) (same, with respect to motion papers); Rule 31(b) ("Twenty-five copies of each brief must be filed with the clerk and 2 copies must be served on each unrepresented party and on counsel for each separately represented party. An unrepresented party proceeding in forma pauperis must file 4 legible copies with the clerk, and one copy must be served on each unrepresented party and on counsel for each separately represented party. The court may by local rule or by order in a particular case require the filing or service of a different number."); Rule 35(d) ("The number of copies to be filed [in connection with a petition for rehearing en banc] must be prescribed by local rule and may be altered by order in a particular case."); Rule 40(b) ("Copies [of a petition for panel rehearing] must be served and filed as Rule

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[25] Rule 32(e) provides that "[b]y local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule."

[26] I omit from this discussion Rules 3(a)(1) and 13(a)(1), which require the provision of copies to be served on other litigants and which are discussed in Part I.

31 prescribes."). Rule 25(e) provides generally that "[w]hen these rules require the filing or furnishing of a number of copies, a court may require a different number by local rule or by order in a particular case."

As judges become accustomed to using electronic copies of briefs and other papers, courts may decide to adopt local rules lowering the number of required paper copies. But that choice depends on the preferences of a particular circuit's judges. Under the Appellate Rules, each circuit is currently free to specify that it requires a different number of paper copies, or no paper copies. It does not seem to me that any change in the Appellate Rules on this topic is warranted at this time.

VIII. Original documents

Some Appellate Rules provisions refer to "original" documents. For example, Rule 10(a) provides that the record on appeal includes "the original papers and exhibits filed in the district court," and Rule 45(d) directs the circuit clerk not to "permit an original record or paper to be taken from the clerk's office." When applied to a case in which all papers were electronically filed, the reference to "originals" seems anachronistic. A few of those references may be worth updating in connection with other amendments relating to electronic filing.[27] In particular, if Rules 11 and 12 are amended to provide for electronic transmission of the record, it might make sense to amend Rule 10(a) to provide that the record includes the original filings or electronic versions thereof. And provisions that contemplate the appeal being heard on the "original record" might be amended to provide, as an alternative, that the appeal can be heard on the basis of the electronic record. *See* Rule 24(c) ("A party allowed to proceed on appeal in forma pauperis may request that the appeal be heard on the original record without reproducing any part."); Rule 30(f) ("The court may, either by rule for all cases or classes of cases or by order in a particular case, dispense with the appendix and permit an appeal to proceed on the original record with any copies of the record, or relevant parts, that the court may order the parties to file.").

IX. Conclusion

Not all of the topics discussed in this memo merit Rule amendments. In some instances, a practice may not yet be sufficiently widespread to warrant treatment in the Rules. In other

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[27] Other instances seem harmless, as where a rule provides for the use of "originals or copies." *See* Rule 8(a)(2)(B)(ii) (required contents of motion for stay include originals or copies of affidavits); Rule 18(a)(2)(B) (similar requirement regarding motion for stay pending review of agency determination). And in some instances the reference to originals continues to make sense. For example, on review of an agency determination Rule 17(b)(1) requires the agency to file "the original or a certified copy of the entire record or parts designated by the parties." And where multiple appeals are taken from a Tax Court decision, Rule 13(d)(2) allocates the "original record" to the "court named in the first notice of appeal filed."

instances, the existing Rules may be flexible enough to permit new practices relating to electronic service and filing. In drafting any amendments to the Rules, it will be important to provide the capacity to accommodate future technological advances.

TAB 6

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TAB 6A

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MEMORANDUM

DATE: August 29, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-H

During the past four years, the Civil and Appellate Rules Committees – and the Civil / Appellate Subcommittee – have discussed the possibility of amending the Rules to address the topic of "manufactured finality." As discussed in more detail in the enclosed memo from March 2009, this topic concerns the efforts of a would-be appellant to "manufacture" appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. (As in the prior memo, I will refer here to the voluntarily-dismissed claims as "peripheral" claims, and the claims concerning which appellate review is sought as the "central" claims.)

The Civil / Appellate Subcommittee's extensive discussions of this topic produced agreement among Subcommittee members on some but not all the relevant issues. Subcommittee members were in accord that a dismissal of the remaining claims with prejudice should produce an appealable final judgment and that a dismissal of those claims without prejudice should not. Subcommittee members were divided, though, on how to treat conditional dismissals with prejudice – that is to say, instances when the nature of the dismissal of the remaining claims is understood to depend on the outcome of the appeal. (The typical scenario, in conditional dismissals with prejudice, is that the plaintiff commits not to reassert the voluntarily-dismissed claims if the appellate court affirms). At least one Subcommittee member supported the adoption of the Second Circuit's approach, in which a conditional dismissal with prejudice produces a final, appealable judgment. However, it proved challenging to draft a rule that would implement that approach, even in simple cases involving only two parties, and with respect to more complex scenarios the drafting challenges multiplied. Other participants in Committee discussions questioned the value of amending the rules to approve the conditional-prejudice approach and suggested that, if anything, it should be disapproved. Although participants in the discussions recognized the value of national uniformity, the deliberations thus far have uncovered many subtleties in this area and have not produced consensus on a rule amendment.

The enclosed memo sets out the varied caselaw that grounded the prior discussions of this topic. In this memo, I briefly survey relevant caselaw developments that postdate the March 2009 memo. I will organize my summary of those developments according to the taxonomy employed in the March 2009 memo.

Peripheral claims dismissed with prejudice. The March 2009 memo noted that in this

scenario, most courts take the view that there exists a final, appealable judgment. The intervening years have not altered that consensus.[1]

Peripheral claims *conditionally* dismissed with prejudice. As noted above, this scenario typically arises when the plaintiff dismisses the peripheral claims on the understanding that the dismissal is with prejudice *unless the court of appeals reverses the dismissal of the central claims.*

The March 2009 memo observed that, in the Second Circuit, this produces an appealable judgment. The Second Circuit reaffirmed that approach, but also limited its reach, in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011).[2] In *Gabelli*, the district court dismissed several of the SEC's claims; its rulings left standing one claim against the defendants (under the Advisers Act), but limited the relief that could be obtained on that claim. *See id.* at 55-56. The district court granted the SEC's motion "to voluntarily dismiss the remaining claim without prejudice to the SEC's refiling this claim if, but only if, the SEC were successful" on appeal. *Id.* at 56. After the SEC appealed the district court's rulings, the defendants cross-appealed from the district court's order to the extent that it denied summary judgment as to liability on the Advisers Act claim. *See id.* Citing *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003), the court of appeals held that it had jurisdiction over the SEC's appeal, but not the defendants' cross-appeal: "[G]iven the strong policy against interlocutory appeals, we see no reason to extend the narrow exception announced in *Purdy* to the defendants' cross-appeals." *Id.* at 56-57.

The March 2009 memo listed, as circuits that have disapproved the conditional-dismissal approach, the Third and Ninth Circuits. The Seventh and Eighth Circuits can now be added to that list. In *Clos v. Corrections Corp. of America*, 597 F.3d 925 (8th Cir. 2010), the district court dismissed almost all of the plaintiff's claims, leaving standing one claim against two of the defendants. *See id.* at 927. The parties presented the district court with a stipulation in which they "agreed that Clos's remaining claim would be dismissed without prejudice[,] indicated that it would be 'reinstated' if Clos should 'prevail on appeal of any of the claims dismissed on summary judgment,'" and stated that if the appeal failed the dismissal would "become with prejudice." *Id.* The district court then certified the order that had dismissed most of the plaintiff's claims as a separate final judgment under Civil Rule 54(b). *See id.* The court of appeals expressed strong disapproval of the parties' stipulation, in terms indicating that it viewed such a conditional dismissal with prejudice as materially similar to a dismissal without prejudice: "The parties in this case attempted to manufacture appellate jurisdiction by crafting a stipulation

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[1] *See, e.g.*, *Sprint Spectrum, L.P. v. Platte County*, 578 F.3d 727, 730 (8th Cir. 2009) ("Following the court's judgment, Sprint voluntarily dismissed the remaining counts in its complaint with prejudice, thus creating a final, appealable judgment.").

[2] The defendants have sought review of the court of appeals' decision in *Gabelli*, but their petition concerns the merits and does not discuss the jurisdictional ruling described in this memo. *See* Petition for a Writ of Certiorari i, *Gabelli v. SEC* (No. 11-1274).

in which Clos tied the fate of his remaining claim to the outcome of his appeal. We have repeatedly condemned similar attempts to manufacture jurisdiction because they undermine the final judgment rule." *Id.* at 928.[3] The court of appeals also held that the Rule 54(b) certification was "conclusory" and therefore an abuse of discretion. *See id.* at 929. The court of appeals rejected the parties' contention that the stipulation justified the Rule 54(b) certification. *See id.* at 929 n.2 ("[W]e do not read the parties' failed attempt to manufacture jurisdiction as a reason for Rule 54(b) certification.").

In *India Breweries, Inc. v. Miller Brewing Co.*, 612 F.3d 651 (7th Cir. 2010), the targets of the conditional dismissal were counterclaims rather than claims by the plaintiff, but that distinction made no difference to the court's reasoning. The district court had granted the defendant summary judgment dismissing the plaintiff's claims, but had denied the defendant's request for summary judgment on its counterclaims. *See id.* at 656-57. Subsequently, the defendant dismissed its counterclaims pursuant to a stipulation in which the parties agreed that the defendant would only reassert the counterclaims if the plaintiff secured appellate reversal of the summary judgment dismissing the plaintiff's claims. *See id.* at 657. The court of appeals stated that the nature of this dismissal prevented the judgment from being final and appealable; it was only the defendant's "unequivocal[] dismiss[al of] its counterclaims with prejudice after we pressed the matter at oral argument" that provided appellate jurisdiction. *Id.* at 657-58.

Peripheral claims dismissed without prejudice, and the statute of limitations has run out on the peripheral claims (or there is some other reason why the peripheral claims cannot be reasserted). The March 2009 memo stated that in this situation, appellate jurisdiction has been upheld by the Second, Third, Fourth, and Tenth Circuits.

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[3] As examples of those prior condemnations, the court cited two cases: *Fairbrook Leasing, Inc. v. Mesaba Aviation, Inc.*, 519 F.3d 421, 425 n.4 (8th Cir. 2008), and *Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc.*, 198 F. 3d 685, 688 (8th Cir. 1999)). *See Clos*, 597 F.3d at 928. *Fairbrook Leasing* did not involve a conditional dismissal with prejudice. *See Fairbrook Leasing*, 519 F.3d at 425 & n.4. In *Great Rivers Co-op* (a class action), the district court – when notifying class members of its intent to dismiss the remaining claims – had stated "that the motion to dismiss had been filed 'to facilitate appellate review' of the prior dismissals, and that the claims to be voluntarily dismissed could be reinstated if the appeal was successful." *Great Rivers Co-op*, 198 F.3d at 688. But it is not clear that the dismissal would have barred reassertion of the peripheral claims after an affirmance; and the court of appeals referred to the dismissal in terms that did not suggest that the ability to reassert the peripheral claims depended on the outcome of the appeal concerning the central claims: "[A] dismissal without prejudice, coupled with the intent to refile the voluntarily dismissed claims after an appeal of the interlocutory order, is a clear evasion of the judicial and statutory limits on appellate jurisdiction." *Id.* And, in fact, the court of appeals reached the merits of the appeal in *Great Rivers Co-op* in the interest of fairness to the plaintiff class. *See id.* at 690. Accordingly, my March 2009 memo did not present *Great Rivers Co-op* as a case rejecting the conditional-dismissal-with-prejudice approach. *Clos* provides a much clearer rejection of that approach.

The Seventh Circuit has now joined that list. In *Palka v. City of Chicago*, 662 F.3d 428 (7th Cir. 2011), the district court dismissed the plaintiff's claim against the City of Chicago and narrowed the remedies available on his claim against an individual defendant. *See id.* at 431-32. The plaintiff voluntarily dismissed his claim against the individual defendant. *See id.* at 432. The court of appeals stated that the without-prejudice dismissal of the claim against the individual defendant ordinarily would not have produced an appealable judgment. *See id.* at 433. In this case, however, the statute of limitations had run on the claim against the individual defendant, and thus the court had appellate jurisdiction. *See id.* at 433-34.[4]

The Seventh Circuit employed similar reasoning in dictum in *Arrow Gear Co. v. Downers Grove Sanitary District*, 629 F.3d 633 (7th Cir. 2010). In *Arrow Gear*, after the district court dismissed the plaintiff's claims against all but two of the defendants, the plaintiff voluntarily dismissed the claims against the remaining two defendants without prejudice. *See id.* at 636. The court of appeals observed that the without-prejudice dismissal of those claims would have barred appellate jurisdiction, but for the fact that (after questioning at oral argument) the plaintiff chose to convert the dismissal into one with prejudice. *See id.* at 637. In dictum, the court endorsed the view that nominally without-prejudice dismissals will not bar appellate jurisdiction if there are practical reasons that assure the claim cannot be re-filed; one interesting aspect of this discussion is that the court indicated that the relevant question is whether the claim can be filed again in *federal* court:

> A dismissal without prejudice doesn't *always* enable a suit to be refiled, even in a different court, and when that is so—the litigation is over, its resolution in the district court final—there is no objection to an immediate appeal. The statute of limitations may have run, as in *Doss v. Clearwater Title Co.*, 551 F.3d 634, 639 (7th Cir. 2008), or in the cases discussed in *LNC Investments LLC v. Republic Nicaragua*, ... 396 F.3d [342,] 346 [(3d Cir. 2005)]. And although dismissal for want of subject-matter jurisdiction (which might be a voluntary dismissal, though it makes no difference whether it is or not) is without prejudice, a suit dismissed on that ground cannot be refiled in the same court; and likewise if the basis for dismissal (and so again a dismissal without prejudice) is *forum non conveniens*, which does not extinguish the claim but does expel it from the court in which it was filed. *Mañez v. Bridgestone Firestone North American Tire, LLC*, 533 F.3d 578, 583–84 (7th Cir. 2008). These dismissals are final from the standpoint of the court that orders them, unlike [a] case in which dismissal without prejudice of a complaint for failure to state a claim allows the plaintiff to start over in the same court.

[4] The court of appeals reviewed only the dismissal of the claim against the City; it did not review the district court's treatment of the claim against the individual defendant, because the plaintiff had invited dismissal on that claim. *See id.* at 436.

Arrow Gear, 629 F.3d at 636-37.[5]

Dismissal without prejudice of peripheral claims results in the complete removal of a particular defendant from the suit. The March 2009 memo observed that in the Eighth and Ninth Circuits, such a dismissal gives rise to a final judgment. The *Palka* and *Arrow Gear* decisions suggest that the Seventh Circuit takes a contrary view: In both *Palka* and *Arrow Gear*, it seems that the voluntary dismissals of the peripheral claims entirely eliminated one or more defendants from the suit, *see Palka*, 662 F.3d at 432, and *Arrow Gear*, 629 F.3d at 636 – yet that did not suffice to give rise to an appealable final judgment.

The peripheral claims are dismissed without prejudice and there is no reason to think that their reassertion would necessarily be barred by the statute of limitations or any other impediment. The March 2009 memo reviewed the circuit caselaw on this scenario and concluded that, as of that time:

- Panels in the Second, Third, Fifth, Seventh, Tenth and Eleventh Circuits had concluded that the judgment is not final for appeal purposes in this situation. (But the Seventh Circuit caselaw was varied.)

- Panels in the Sixth and Federal Circuits had concluded that a voluntary dismissal of the peripheral claims produces a final judgment. And without explicitly considering the question of jurisdiction, panels in the First and D.C. Circuits had reached the merits of appeals taken after peripheral claims were dismissed without prejudice.

- The Eighth Circuit had taken varying approaches to this issue.

- The Ninth Circuit employed an "intent" test that asked whether the would-be

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[5] *Doss* and *Mañez*, upon which the *Arrow Gear* court relied, did not involve manufactured-finality issues as such. Manufactured-finality cases – as noted in the text – concern instances where some but not all claims are resolved by the district court and (in order to obtain appellate review of that resolution) the plaintiff dismisses all the remaining claims. In *Doss*, the district court – responding to a motion to dismiss that the plaintiff opposed – apparently dismissed all of the plaintiff's claims against all defendants (except one defendant against whom the court had previously entered a default judgment). *See Doss v. Clearwater Title Co.*, 551 F.3d 634, 637 (7th Cir. 2008). The court of appeals stated a general principle that the dismissal of a complaint without prejudice to its re-filing does not produce an appealable final judgment, but reasoned that "first, reading the district court's orders as a whole, we have no doubt that the district court was finished with this case once and for all; and second, any new action that Doss might try to bring would be barred by the three-year statute of repose by this time." *Id*. at 639. In *Mañez*, the district court had dismissed the plaintiffs' entire suit on forum non conveniens grounds. *See Mañez*, 533 F.3d at 582.

appellant had tried to manipulate the court's appellate jurisdiction.

Since the time of the March 2009 memo, the published[6] Seventh Circuit decisions on this topic have consistently taken the view that without-prejudice dismissals of the peripheral claims bar appellate jurisdiction. However, the court has been raising this issue at oral argument and has taken jurisdiction of the appeal if the claimant agrees to the conversion of the without-prejudice dismissal into a with-prejudice dismissal.[7]

In *Robinson-Reeder v. American Council on Education*, 571 F.3d 1333 (D.C. Cir. 2009), the court noted that the D.C. Circuit has only "nibbled around the edges" of the manufactured-finality question, *id.* at 1339. "[C]ontinu[ing] to do no more than nibble," the court held that it had no appellate jurisdiction where the plaintiff had dismissed its remaining claim without prejudice and without a court order. *Id.* at 1336, 1339. The fact that (under Civil Rule 41(a)(1)) the dismissal required no court approval appears to have swayed the court, which noted that finding appellate jurisdiction in such a scenario "would effectively transfer to the litigants the 'dispatcher' function that Rule 54(b) vests in the district court." *Id.* at 1340.

The Ninth Circuit continued to apply its intent-to-manipulate standard, concluding in *Sneller v. City of Bainbridge Island*, 606 F.3d 636 (9th Cir. 2010), that the plaintiffs' dismissal of their state-law claims with the plan of re-filing them, if at all, in state court did not show an intent to manipulate the court of appeals' jurisdiction, *see id.* at 638.

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[6] In preparing this memo, I limited my research to published appellate opinions.

[7] *See Helcher v. Dearborn County*, 595 F.3d 710, 717 (7th Cir. 2010) (appellate jurisdiction present because, after court raised issue at oral argument, "parties entered a joint stipulation dismissing [plaintiffs' peripheral claims] with prejudice"); *Owner-Operator Independent Drivers Ass'n, Inc. v. Mayflower Transit, LLC*, 615 F.3d 790, 791 (7th Cir. 2010) ("[The defendant] dismissed some counterclaims without prejudice, planning to reinstate them after the appeal. That made the decision non-final.... But after the problem was pointed out at oral argument, the parties filed a stipulation resolving the counterclaims with prejudice. That made the decision final, and as in other recent appeals we give effect to this belated disposition."). It would be wise for parties to be prepared to commit to a with-prejudice dismissal at oral argument, because waffling on that issue during the argument might lead the court to wonder whether the party is hedging until it gets a sense of the court's views on the merits of the appeal. *See National Inspection & Repairs, Inc. v. George S. May Intern. Co.*, 600 F.3d 878, 884 (7th Cir. 2010) ("Jurisdiction is not something to be determined *post hoc*. But because we permitted the parties to submit a revised statement regarding their respective intent not to pursue these claims, and both parties have agreed not to pursue the claims, we may consider their position in conjunction with the original briefs filed."); *id.* (observing that one party's commitment to with-prejudice dismissal "was made after oral argument, when [the party] had time to project its relative success on the appeal").

Some other circuits also issued decisions that appeared to focus on whether there was intent to manipulate appellate jurisdiction. In *Gannon International, Ltd. v. Blocker*, 684 F.3d 785 (8th Cir. 2012), the district court granted summary judgment dismissing various of the plaintiff's claims, and the plaintiff then obtained voluntary dismissal of the remaining claims without prejudice in order to re-file those claims in a state-court lawsuit brought against it by the federal-court defendant, *see id.* at 789-91. The court of appeals took jurisdiction of the plaintiff's ensuing appeal, ruling that the without-prejudice dismissal of the remaining claims showed no intent on the plaintiff's part to manipulate appellate jurisdiction. *See id.* at 792. Similarly, the Eleventh Circuit held in *Equity Investment Partners, LP v. Lenz*, 594 F.3d 1338 (11th Cir. 2010), that the IRS's voluntary dismissal of its counterclaim and cross-claim did not bar appellate jurisdiction because the IRS's dismissal was motivated by the district court's refusal to permit the joinder of an indispensable party on those claims, *see id.* at 1341 & n.2. *Acevedo v. Allsup's Convenience Stores, Inc.*, 600 F.3d 516 (5th Cir. 2010), involved a somewhat "unusual" chain of events, *id.* at 520. The district court ruled that the multiple plaintiffs in that suit could not join their claims in a single lawsuit. *See id.* at 519. The plaintiffs appealed, and the court of appeals questioned whether appellate jurisdiction existed. *See id.* The parties sought clarification from the district court of its prior disposition, and the district court thereupon ordered that "all Plaintiffs are hereby dismissed without prejudice to refiling their claim in accordance with" the court's earlier joinder analysis. *Id.* at 520. The court of appeals first stated that the district court should not have dismissed *all* plaintiffs' claims merely because it found the joinder of those claims in one suit to be improper; but the court of appeals ruled that because the district court, not the parties, had decided to dismiss all of the plaintiffs' claims, appellate jurisdiction existed. *See id.* at 520 ("Appellants did not seek a voluntary dismissal. Instead, in response to our inquiry, they sought clarification from the district court as to the reach of its earlier order. Our previous cases refusing appellate jurisdiction have not involved such a situation; rather, they have concerned a party's explicit request on its own initiative to dismiss all remaining claims before the district court.").

* * *

A few trends may be discerned in the caselaw developments since the time of the March 2009 memo. The circuit split concerning the effect of conditional dismissals with prejudice has become somewhat more lopsided. A circuit split may be developing concerning the effect of without-prejudice dismissals that entirely remove a particular defendant from the suit. With respect to without-prejudice dismissals more generally, a number of circuits seem at times to employ something similar to the Ninth Circuit's approach of examining whether the circumstances of the dismissal show an intent on the would-be appellant's part to manipulate appellate jurisdiction.

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MEMORANDUM

DATE: March 27, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-H

At its fall 2008 meeting, the Appellate Rules Committee discussed the possibility of amending the Rules to respond to the circuit split on the viability of "manufactured finality" as a means of securing appellate review. "Manufactured finality" describes instances when the district court dismisses with prejudice fewer than all of the plaintiff's claims and the plaintiff then voluntarily dismisses the remaining claims in the hopes of achieving a final – and thus appealable – judgment.[1] The Appellate Rules Committee noted the importance of seeking the views of the Civil Rules Committee, and the two committees are now proceeding to address the issue jointly.

Part I of this memo briefly reviews the nature of the problem[2]; Part II discusses some possible ways of responding to it. The memo incorporates insights from the Appellate Rules Committee's fall discussion and from discussions since then with Judge Kravitz and Professor Cooper.

I. The "manufactured finality" doctrine

28 U.S.C. § 1291 authorizes appeals from final decisions of the district courts, and the

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[1] See Mark I. Levy, Manufactured Finality, Nat'l L.J., May 5, 2008; Laurie Webb Daniel, Circuit Split Report: Appellate Jurisdiction When Claims Are Voluntarily Dismissed Without Prejudice, The Appellate Advocate, Issue 2, 2008; Mark R. Kravitz, Creating Finality, Nat'l L.J., July 8, 2002, at B9.

A litigant's desire to manufacture finality may also arise from events other than the dismissal of a claim. This might happen, for example, if the court denies a motion to strike a defense that the plaintiff fears will be dispositive, or grants summary judgment on a central fact without dismissing a claim, or denies the plaintiff's motion for summary judgment. (As to the third of these examples, see the *Helm Financial Corporation* case cited in footnote 25.)

[2] A longer treatment of some points discussed in this memo can be found in the agenda materials for the Appellate Rules Committee's fall 2008 meeting, which are available at http://www.uscourts.gov/rules/Agenda%20Books/Appellate/AP2008-11.pdf.

Supreme Court has defined final decisions as those that "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment."[3] The policies behind the final judgment rule include the need to conserve appellate resources, avoid piecemeal appeals, and curb the delay that such piecemeal appeals could cause in the district court.

But there are costs to the final judgment rule, and thus both Congress and the rulemakers have adopted certain safety valves. Of most relevance here, 28 U.S.C. § 1292(b) permits interlocutory appeals – but only if both the district court and the court of appeals grant permission, and only if the district court certifies both that an immediate appeal "may materially advance the ultimate termination of the litigation" and that the challenged order "involves a controlling question of law as to which there is substantial ground for difference of opinion." Civil Rule 54(b) only requires permission from the district court (not the court of appeals); it permits the district court (in cases involving multiple claims or parties) to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties." However, Rule 54(b) certification is only proper if the district court certifies "that there is no just reason for delay." This determination lies within the district court's discretion.

These safety valves may not always address a litigant's concerns. If the court dismisses the plaintiff's most important claims ("central claims"), leaving only claims about which the plaintiff cares less ("peripheral claims"),[4] the continued pendency of the peripheral claims means there is no final judgment despite the dismissal of the central claims. The district court may not be willing to enter a final judgment on the central claims under Civil Rule 54(b); for example, the district court may not be convinced that there is "no just reason for delay" in entering the

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[3] See, e.g., Cunningham v. Hamilton County, Ohio, 527 U.S. 198, 204 (1999) (internal quotation marks omitted).

[4] I borrow the terms "peripheral" and "central" from Rebecca A. Cochran, Gaining Appellate Review by "Manufacturing" a Final Judgment Through Voluntary Dismissal of Peripheral Claims, 48 Mercer L. Rev. 979, 982 (1997).

Distinct issues are posed when the district court dismisses the plaintiff's federal-law claims with prejudice and dismisses supplemental state-law claims without prejudice under 28 U.S.C. § 1367(c). See, e.g., Erie County Retirees Ass'n v. County of Erie, Pa., 220 F.3d 193, 202 (3d Cir. 2000) ("While the district court's order in this case did permit appellants to reinstitute their dismissed state law claims, they could do so only in state court, as there would be no basis for the district court to exercise jurisdiction over such a reinstituted action. Thus, we have jurisdiction over this appeal."); Amazon, Inc. v. Dirt Camp, Inc. 273 F.3d 1271, 1275 n.4 (10th Cir. 2001) ("The district court's decision to decline supplemental jurisdiction over the state law claims effectively excluded the remainder of Amazon's suit from federal court through no action of Amazon, and the order is therefore final as to the federal court proceedings."). I do not address these issues in this memo.

final judgment.[5] And, similarly, there may not be strong arguments that the order dismissing the central claims "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"; even if there are good arguments to this effect, a permissive appeal under Section 1292(b) requires both trial court and appellate court permission.[6] But what if the plaintiff voluntarily dismisses the peripheral claims, thus leaving no claims in the suit? Can the plaintiff thereby "manufacture" a final judgment? It should first be noted that in many instances the plaintiff will need either the consent of all parties who have appeared or court permission in order to dismiss the remaining claims.[7]

Several scenarios might then result. Each scenario involves the district court's dismissal of the plaintiff's central claim, followed by the plaintiff's dismissal of the remaining peripheral claims. The circuits vary in their treatment of these scenarios; what follows is not an exhaustive listing of the caselaw, but rather a survey of representative cases.

Peripheral claims dismissed with prejudice.[8] In this scenario, most courts take the view that there exists a final, appealable judgment.[9]

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[5] Even if the district judge is willing to enter a Rule 54(b) judgment, there are some outer limits on the district judge's discretion to do so. See, e.g., Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1434 (7th Cir. 1992).

[6] For the transcript of a colloquy in which a district judge criticized the Seventh Circuit for its unwillingness to permit interlocutory appeals and Rule 54(b) appeals, see Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1437-39 (7th Cir. 1992).

[7] The plaintiff may file a notice of dismissal without party consent or court order if the notice is filed "before the opposing party serves either an answer or a motion for summary judgment." Civil Rule 41(a)(1)(A)(i). This might occur, for example, if the plaintiff's most important claims were dismissed on a pre-answer motion to dismiss under Civil Rule 12(b)(6).

Even if all parties consent to the dismissal of the peripheral claims *and* to the plaintiff's attempt to appeal the dismissal of the central claims, it is to be expected that the court of appeals will consider itself bound to raise the question of appellate jurisdiction. See, e.g., Horwitz v. Alloy Automotive Co., 957 F.2d 1431, 1435 (7th Cir. 1992).

[8] Courts of appeals have permitted the plaintiff-appellant (who had previously dismissed peripheral claims without prejudice) to stipulate on appeal that the dismissal of the peripheral claims is with prejudice – thus providing appellate jurisdiction. See, e.g., JTC Petroleum Co. v. Piasa Motor Fuels, Inc., 190 F.3d 775, 776-77 (7th Cir. 1999).

[9] See John's Insulation, Inc. v. L. Addison & Assoc., Inc., 156 F.3d 101, 107 (1st Cir. 1998); Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005); Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996); Great Rivers

However, one case from the Eleventh Circuit suggests a different view. In Druhan v. American Mutual Life, 166 F.3d 1324 (11 Cir. 1999), the district court denied plaintiff's motion to remand, holding that her claims were completely preempted by ERISA. The plaintiff then secured a voluntary dismissal of her "ERISA" claim with prejudice. See id. at 1325. The court of appeals held that the order denying remand was unreviewable; it stated both that there was no longer a case or controversy (because the plaintiff herself had requested the dismissal) and that Congress has not authorized appeals from orders denying remand. Id. at 1326. In so holding, the court of appeals recognized the existence of caselaw from other circuits stating "that allowing appeals from voluntary dismissals with prejudice 'furthers the goal of judicial economy by permitting a plaintiff to forgo litigation on the dismissed claims while accepting the risk that if the appeal is unsuccessful, the litigation will end.'" Id. (citing Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996)). The *Druhan* majority refused to follow such precedents, reasoning that the decision to adopt such a view "rests in the hands of Congress, which, along with the Constitution, sets the boundaries of this court's jurisdiction." *Id.* at 1326. Judge Barkett concurred in the determination that the court of appeals lacked jurisdiction, on the ground that the plaintiff could have continued to press her claim under ERISA, and thus that authorities from other circuits (holding that a voluntary dismissal with prejudice of all remaining claims creates a final judgment) were inapposite. See id. at 1327 (Barkett, J., concurring).

More recently, an Eleventh Circuit panel majority held (over a dissent) that *Druhan* (and another similar case) did not govern the question of appealability in a case where the plaintiff suggested that the district court should dismiss its claims with prejudice after the district court issued an order excluding the testimony of plaintiff's expert witness: "Unlike the remand orders at issue in *Druhan* and *Woodard* that concerned only the forum where the cases would be heard, the sanctions order here excluding plaintiff's legal expert was case-dispositive because it foreclosed Fitel from presenting the expert testimony required to prove professional negligence, which was a core element in all of its claims." OFS Fitel, LLC v. Epstein, Becker and Green, P.C., 549 F.3d 1344, 1357 (11th Cir. 2008). The *OFS Fitel* majority viewed *Druhan* as a case in which the plaintiff voluntarily dismissed her claims and was therefore not "adverse" to the judgment; that being so, the *OFS Fitel* court reasoned, the plaintiff could not challenge the judgment by appealing. By contrast, the court viewed the *OFS Fitel* plaintiff as adverse to the judgment and viewed the dismissal as not so much voluntary as invited out of a recognition that the court's prior sanctions order had effectively ended the case. *See OFS Fitel*, 549 F.3d at 1358.

Peripheral claims *conditionally* dismissed with prejudice – i.e., plaintiff dismisses the peripheral claims on the understanding that the dismissal is with prejudice *unless the court of*

Co-op. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 688 (8th Cir. 1999).

appeals reverses the dismissal of the central claims.[10] In this scenario, the Second Circuit has held that there is a final judgment:

> [W]hen a plaintiff is completely free to relitigate voluntarily dismissed claims, the final judgment rule ordinarily precludes this court from reviewing any adverse determination by the district court in that case. However, where, as here, a plaintiff's ability to reassert a claim is made conditional on obtaining a reversal from this court, the finality rule is not implicated in the same way.... Purdy runs the risk that if his appeal is unsuccessful, his malpractice case comes to an end. We therefore hold that a conditional waiver such as Purdy's creates a final judgment.

Purdy v. Zeldes, 337 F.3d 253, 258 (2d Cir. 2003). However, the Third and Ninth Circuits have disagreed.[11]

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[10] Judge Easterbrook has noted the possibility that the principle advocated by the plaintiff in such a case might be viewed as analogous to "the principle that allows a dispositive *issue* to come up, when the plaintiff is willing to stake the entire case on its resolution." First Health Group Corp. v. BCE Emergis Corp., 269 F.3d 800, 802 (7th Cir. 2001). But the *First Health Group* court did not need to decide whether the analogy held, because the plaintiff decided to dismiss the relevant claims unconditionally, thus removing the jurisdictional question. Id.

[11] In the Third Circuit, see Federal Home Loan Mortgage Corp. v. Scottsdale Ins. Co., 316 F.3d 431, 440 (3d Cir. 2003) ("[T]he Consent Judgment preserved Freddie Mac's right to reinstate Counts Two and Three, if we were to reverse and remand the district court's ruling.... The Consent Judgment thus represented an inappropriate attempt to evade § 1291's requirement of finality."). The original order had stated that the relevant counts were "dismissed, without prejudice, subject to the plaintiffs' right to reinstate Counts Two and Three if the March 19th Order should be vacated and this matter remanded for trial by the Third Circuit Court of Appeals based upon the appeal." Id. at 437. After oral argument, Freddie Mac sought and obtained a district-court order dismissing Counts 2 and 3 "with prejudice," and this rendered the judgment final. Id. at 442.

In the Ninth Circuit, see Dannenberg v. Software Toolworks Inc., 16 F.3d 1073, 1076 (9th Cir. 1994) (stating that "stipulations to dismiss claims with the right to reinstate upon reversal ... implicate identical policy concerns" as dismissals without prejudice). See also Cheng v. C.I.R., 878 F.2d 306, 311 (9th Cir. 1989) ("A plaintiff who has alleged several separate claims could conceivably appeal as many times as he has claims if he is willing to stipulate to the dismissal of the claims (contingent upon the affirmance of the lower court's judgment) the court has not yet considered."). The Ninth Circuit later suggested that the presence of a stipulation permitting reinstatement of the peripheral claims in the event that the dismissal of the central claims is reversed on appeal shows intent to circumvent the final judgment rule, and thus

Peripheral claims dismissed without prejudice, and the statute of limitations has run out on the peripheral claims (or there is some other reason why the peripheral claims cannot be reasserted). This scenario ought to be functionally similar to a dismissal with prejudice. The statute of limitations, if it has run, would bar the plaintiff from reinstating the peripheral claims, assuming that the defendant properly asserts the statute of limitations bar in the future proceeding. Panels in the Second, Third and Tenth Circuits have approved such an approach.[12]

The Fourth Circuit took a somewhat similar approach in GO Computer, Inc. v. Microsoft Corp., 508 F.3d 170 (4th Cir. 2007). The *GO Computer* plaintiffs had asserted a number of antitrust claims, including claims for injuries to another company (Lucent). The district court, expressing serious concerns about the factual basis for the claims based on injuries to Lucent, struck the allegations relating to those claims from the complaint. Plaintiff obtained reconsideration of this order by "offer[ing] to voluntarily dismiss its federal claims for continuing antitrust injuries to Lucent, promising not to seek reinstatement of those claims or to file a new complaint raising them." Id. at 174-75. Ultimately, the district court dismissed the other claims on statute of limitations grounds and permitted the voluntary dismissal without prejudice of the claims based on injuries to Lucent. See id. at 175. Oddly, when GO Computer appealed, its first contention on appeal was that the absence of a final judgment deprived the court of appeals of appellate jurisdiction. Taking a "pragmatic" approach to the final judgment rule, the court of appeals held that it had jurisdiction:

> When the district court dismissed some of GO's claims without prejudice, it was utterly finished with GO's case. The claims in question, of course, are those based on injuries to Lucent that GO never had a right to allege .... GO escaped Rule 11 sanctions and won dismissal without prejudice by promising never to raise these claims in federal court again. And even if another district court by some chance did allow GO to file a new complaint for the Lucent claims, that case would be based on distinct facts from this one; in no sense would GO have saved this action by amending this complaint. The district court thus rendered a final judgment, and

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indicates that appellate jurisdiction should be disallowed; in making this observation, the court distinguished plain dismissals without prejudice, which the court said leave the plaintiff exposed to the risk that the peripheral claims will become time-barred. James v. Price Stern Sloan, Inc., 283 F.3d 1064, 1066 (9th Cir. 2002).

[12] See Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 n.3 (2d Cir. 1996); Fassett v. Delta Kappa Epsilon (New York), 807 F.2d 1150, 1155 (3d Cir. 1986) (alternative holding, over a dissent); Jackson v. Volvo Trucks N. Am., Inc., 462 F.3d 1234, 1238 (10th Cir. 2006). See also Carr v. Grace, 516 F.2d 502, 503 (5th Cir. 1975) ("Under the peculiar circumstances of this case, we have no difficulty in concluding that a dismissal even 'without prejudice' after the statute of limitations has run is a final order for purposes of appeal. The appealability of an order depends on its effect rather than its language."). *Carr* is not directly on point, for present purposes, because in *Carr* the entire case had been dismissed.

we have jurisdiction to consider it.

GO Computer, 508 F.3d at 176.

Dismissal without prejudice of peripheral claims results in the complete removal of a particular defendant from the suit. In this context, two courts of appeals have held that the dismissal creates a final judgment. The Eighth Circuit panel majority, in so holding, reasoned that cases refusing to permit appeals from the dismissal of a plaintiff's central claim against a defendant where peripheral claims against the same defendant were later dismissed without prejudice "further the well-entrenched policy that bars a plaintiff from splitting its claims against a defendant. But this policy does not extend to requiring a plaintiff to join multiple defendants in a single lawsuit, so the policy is not violated when a plaintiff 'unjoins' multiple defendants through a voluntary dismissal without prejudice." State ex rel. Nixon v. Coeur D'Alene Tribe, 164 F.3d 1102, 1106 (8th Cir. 1999). The Ninth Circuit, reaching a similar conclusion in Duke Energy Trading & Marketing, L.L.C. v. Davis, 267 F.3d 1042 (9th Cir. 2001), felt the need to distinguish Dannenberg v. The Software Toolworks Inc., 16 F.3d 1073 (9th Cir.1994), which the *Duke Energy* court characterized as holding that the court of appeals "did not have jurisdiction under § 1291 over an order granting partial summary judgment where the parties stipulated to the dismissal of the surviving claims without prejudice, subject to the plaintiff's right to reinstate them in the event of reversal on appeal." Duke Energy, 267 F.3d at 1049. The *Duke Energy* court distinguished its ruling in *Dannenberg* on the ground that *Dannenberg* "did not involve the effect of the complete dismissal of a defendant pursuant to Rule 41(a)(1)(i) for appellate jurisdiction purposes." *Duke Energy*, 267 F.3d at 1049.

The peripheral claims are dismissed without prejudice and there is no reason to think that their reassertion would necessarily be barred by the statute of limitations or any other impediment. Panels in the Second,[13] Third,[14] Fifth,[15] Seventh,[16] Tenth[17] and Eleventh[18]

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[13] See Rabbi Jacob Joseph Sch. v. Province of Mendoza, 425 F.3d 207, 210 (2d Cir. 2005); Chappelle v. Beacon Communications Corp., 84 F.3d 652, 654 (2d Cir. 1996).

[14] See LNC Investments LLC v. Republic Nicaragua, 396 F.3d 342, 347 (3d Cir. 2005). See also Morton Int'l, Inc. v. A.E. Staley Mfg. Co., 460 F.3d 470, 477 (3d Cir. 2006).

[15] See Swope v. Columbian Chems. Co., 281 F.3d 185, 192 (5th Cir. 2002).

[16] See Horwitz v. Alloy Auto. Co., 957 F.2d 1431, 1435-36 (7th Cir. 1992).

[17] See Heimann v. Snead, 133 F.3d 767, 769 (10th Cir. 1998). See also Cook v. Rocky Mountain Bank Note Co., 974 F.2d 147, 148 (10th Cir. 1992).

[18] In State Treasurer of State of Michigan v. Barry, 168 F.3d 8 (11th Cir. 1999), an Eleventh Circuit panel applied circuit precedent stating that "appellate jurisdiction over a non-final order cannot be created by dismissing the remaining claims without prejudice," id. at

Circuits have concluded that the judgment is not final for appeal purposes in this situation. It should be noted, however, that the Seventh Circuit caselaw on this question is in some disarray.[19]

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11. A panel member wrote separately to criticize that approach and to advocate en banc reconsideration of it, see id. at 21 (Cox, J., specially concurring). The panel majority suggested that its ruling might be limited to cases involving "an appellant (1) who suffered an adverse non-final decision, (2) who subsequently either requested dismissal without prejudice under Rule 41(a)(2), or stipulated to dismissal without prejudice under Rule 41(a)(1), of the remaining claims." Id. at 15 n.10.

The Eleventh Circuit subsequently followed *Barry*, observing that *Barry* followed this approach as "1. consistent with 28 U.S.C. § 1291; 2. followed by two other circuits; 3. allowing district courts, not litigants, to control when and what interim orders are appealed; 4. forcing litigants to make hard choices and to evaluate seriously their cases; and 5. circuit precedent for 25 years." Hood v. Plantation Gen. Med. Ctr., Ltd., 251 F.3d 932, 934 (11th Cir. 2001).

In a case decided the same year as *Barry*, the Eleventh Circuit refused to extend *Barry* to a situation in which the plaintiff first voluntarily dismissed certain claims, and the district court only later dismissed all other claims on the merits. In such a situation, the court explained, the danger of manipulation of appellate jurisdiction does not exist, and in addition there would be no opportunity, in such a situation, for the district court to enter a judgment under Civil Rule 54(b). Schoenfeld v. Babbitt, 168 F.3d 1257, 1265-66 (11th Cir. 1999).

[19] A Seventh Circuit panel has narrowly interpreted *Horwitz* (discussed supra note 16), as a case that turned on the court's view of the parties' and the district court's intent: "*Horwitz* did not announce a principle that dismissal of some claims without prejudice deprives a judgment on the merits of all other claims of finality for purposes of appeal. Rather, the court concentrated on the intent of the district court and the parties to bypass the rules." United States v. Kaufmann, 985 F.2d 884, 890-91 (7th Cir. 1993). In *Kaufmann*, the court of appeals had dismissed the defendant's prior appeal from a judgment of conviction on one count because other counts were unresolved. The district court then (on the government's motion) dismissed the other counts without prejudice under Criminal Rule 48. The court of appeals took jurisdiction of this second appeal; it emphasized that its disposition of the prior appeal had explicitly contemplated such a mechanism, and it distinguished *Horwitz* by concluding that in *Kaufmann* that the parties were not attempting to manipulate the court's jurisdiction. *Kaufmann*, 985 F.2d at 891.

On the other hand, a Seventh Circuit panel later followed *Horwitz* after noting the difficulty of reconciling the circuit's divergent precedents: "The recent cases disallowing a sort of manufactured finality like that found in the present lawsuit are consistent with the fundamental policy disfavoring piecemeal appeals. Hence, West's voluntary dismissal without prejudice is under current law insufficient to create a final judgment." West v. Macht, 197 F.3d 1185, 1189-90 (7th Cir. 1999). The *West* court noted a relatively early case, Division 241

By contrast, panels in the Sixth[20] and Federal[21] Circuits have concluded that a voluntary dismissal of the peripheral claims produces a final judgment. Without explicitly considering the question of jurisdiction, panels in the First[22] and D.C.[23] Circuits have reached the merits of appeals taken after peripheral claims were dismissed without prejudice.

The Eighth Circuit has taken varying approaches to this issue. In Hope v. Klabal, 457 F.3d 784, 789-90 (8th Cir. 2006), the Eighth Circuit panel noted some prior cases in which it had either recharacterized a dismissal without prejudice as a dismissal with prejudice[24] or had

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Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264, 1266 (7th Cir. 1976), in which the remaining claims had been voluntarily dismissed without prejudice and the court of appeals rejected a challenge to its appellate jurisdiction. The court in *West* noted that "[s]ubsequent cases have, without mentioning *Division 241*, avoided that case's result, though *Division 241* has never been overruled." West, 197 F.3d at 1188.

On still another hand, the Seventh Circuit yet more recently distinguished *West* and followed *Kauffman* in deciding that a prior judgment was final and appealable and thus eligible for res judicata effect. See Hill v. Potter, 352 F.3d 1142 (7th Cir. 2003). The *Hill* court rejected the contention that the prior judgment lacked finality because one of the claims had been voluntarily dismissed without prejudice. The court explained: "[A] litigant is not permitted to obtain an immediate appeal of an interlocutory order by the facile expedient of dismissing one of his claims without prejudice so that he can continue with the case after the appeal is decided.... But, as in United States v. Kaufmann, 985 F.2d 884, 890-91 (7th Cir.1993), and James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir.2002), that is not the proper characterization of Hill's motion to dismiss his claim of retaliation. The record is clear that the reason for the request to dismiss was to avoid two trials, by joining the claim to the EAS claims that had been dismissed for failure to exhaust, after exhausting those claims." Hill v. Potter, 352 F.3d 1142, 1145 (7th Cir. 2003). As the court's citation to the *James* case suggests, it is possible to read this as endorsing a test that looks to the intent behind the dismissal of the claim without prejudice.

[20] See Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987).

[21] See Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008).

[22] See Rymes Heating Oils, Inc. v. Springfield Terminal R. Co., 358 F.3d 82, 87 (1st Cir. 2004).

[23] See Stewart v. District of Columbia Armory Bd., 863 F.2d 1013, 1016 (D.C. Cir. 1988).

[24] "Following the district court's grant of partial summary judgment, MPB voluntarily dismissed all its remaining claims for the purpose of making the district court's profits ruling final and appealable. If MPB took this action assuming that it could later revive its claims for other relief, it has badly miscalculated. When entered, the district court's profits order did not

dismissed for lack of a final judgment. However, the court adhered to other circuit caselaw and held that the voluntary dismissal without prejudice created a final judgment.[25]

The Ninth Circuit has injected an "intent" test into the analysis. In James v. Price Stern Sloan, Inc., 283 F.3d 1064 (9th Cir. 2002), the court held that the district court's grant of plaintiff's request under Rule 41(a)(2) to dismiss the peripheral claims created a final judgment. The court distinguished cases where the district court had previously refused a Rule 54(b) request, reasoning that in *James* the district court's grant of the Rule 41(a)(2) request evinced a judgment similar to that which a district court would make under Rule 54(b). See id. at 1069. "[W]hen a party that has suffered an adverse partial judgment subsequently dismisses remaining claims without prejudice with the approval of the district court, and the record reveals no evidence of intent to manipulate our appellate jurisdiction, the judgment entered after the district court grants the motion to dismiss is final and appealable under 28 U.S.C. § 1291." Id. at 1070. The Ninth Circuit's intent-to-manipulate test seems somewhat unpredictable in application. For a decision holding – over a dissent – that manipulation foreclosed appellate jurisdiction, see American States Insurance Co. v. Dastar Corp., 318 F.3d 881, 891 (9th Cir. 2003) ("[T]he parties

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resolve all of MPB's claims and therefore was not appealable absent a Fed.R.Civ.P. 54(b) determination. A Rule 54(b) determination would have been an abuse of the district court's discretion-the rejection of one form of Lanham Act equitable relief, an accounting of profits, should not be appealed until the court has resolved whether MPB is entitled to Lanham Act injunctive relief.... That being so, MPB may not evade the final judgment principle and end-run Rule 54(b) by taking a tongue-in-cheek dismissal of its remaining claims. Those claims must be deemed dismissed with prejudice." Minnesota Pet Breeders, Inc. v. Schell & Kampeter, Inc., 41 F.3d 1242, 1245 (8th Cir. 1994).

The Eighth Circuit has also suggested that the question could be approached from another angle, by reviewing the propriety of the Rule 41(a)(2) dismissal: "[W]hat Farmland presents as a jurisdictional issue is in fact the question whether the district court abused its discretion when it dismissed the remaining claims without prejudice for the purpose of allowing the class to appeal the court's interlocutory summary judgment orders." Great Rivers Co-op. of Se. Iowa v. Farmland Indus., Inc., 198 F.3d 685, 689 (8th Cir. 1999). Accordingly, the court indicated, one response could be to review the propriety of the Rule 41(a)(2) order. (The court did not follow this course in *Great Rivers Co-op*, however, because of the case's "unique procedural posture" with respect to dismissal of claims by a plaintiff class. 198 F.3d at 690.)

[25] In another rather unusual situation, the Eighth Circuit held that it had appellate jurisdiction where the district court had denied summary judgment to the plaintiff on certain claims and the plaintiff had then dismissed all other claims (some with prejudice and some without). (The court reasoned that the denial of summary judgment to the plaintiff "had the effect of terminating any further consideration of the" claims on which the plaintiff had sought summary judgment.) Helm Fin. Corp. v. MNVA R.R., Inc., 212 F.3d 1076, 1080 (8th Cir. 2000).

appear to have colluded to manufacture appellate jurisdiction by dismissing their indemnity claims after the district court's grant of partial summary judgment."). For a case noting questions as to *James*' applicability to a multiple-defendant scenario, *see* Romoland School Dist. v. Inland Empire Energy Center, LLC, 548 F.3d 738, 750 (9th Cir. 2008) ("[T]his case presents such anomalous procedural issues that attempting to fit it within or outside the exception created by *James* – by deciding whether and under what circumstances the principle established in *James* applies to cases involving multiple defendants, for example – is neither necessary nor advisable"). The *Romoland* majority, employing a "pragmatic evaluation of finality," decided to treat the voluntary dismissal of the plaintiffs' claims against a particular defendant (by means of an order that did not state the dismissal was with prejudice) "as being with prejudice." *Id.*

II. Possible rulemaking responses

At the Appellate Rules Committee's fall 2008 meeting, the discussion elicited a variety of perspectives. A judge member questioned whether there is a real need for changes directed toward this issue; an attorney member responded by stressing the importance of clarity and uniformity on the question of appealability. Though members acknowledged statutory authority to engage in rulemaking on these matters,[26] some members expressed diffidence concerning the desirability of such a course, and a strong sense was expressed that it was necessary to seek the views of the Civil Rules Committee.

Since the time of the fall meeting, discussions with Judge Kravitz and Professor Cooper have helped to clarify the issues. Part II.A. below discusses general possibilities for responding to the divergent caselaw on manufactured finality; Part II.B. discusses some of the more specific drafting questions that might arise.

A. General possibilities

In contemplating a possible rulemaking response to manufactured-finality questions, it is useful first to consider the broad contours of such a response. The policy choices in this area vary in difficulty depending on the nature of the dismissal.

Dismissal with prejudice. Where the plaintiff dismisses the peripheral claims with prejudice, the best view is that this produces a final judgment that permits appellate review of the central claims. That conclusion makes sense, since there is no danger of a piecemeal appeal. As

[26] See 28 U.S.C. § 2072(c) (authorizing the promulgation of rules that "define when a ruling of a district court is final for the purposes of appeal under [28 U.S.C. §] 1291"). See also 28 U.S.C. § 1292(e) ("The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).").

to the peripheral claims, no further litigation will result under any scenario.[27] To the extent that the Eleventh Circuit's decision in *Druhan* indicates that such a dismissal does not create an appealable judgment, the *Druhan* court's reasoning would not bar the adoption of a rule or statute that alters this approach.

Dismissal with de facto prejudice. Where the dismissal was nominally without prejudice but a time-bar or other impediment ensures that the peripheral claims can no longer be reasserted, one might argue that it would make sense to treat the dismissal the same as one that is nominally "with prejudice." This, however, seems less important to establish, assuming that the plaintiff can cure any problem by stipulating after the fact that the dismissal is with prejudice; in instances where the peripheral claim clearly cannot be reasserted, such a stipulation provides a way to make clear that the judgment is final. In instances where it is uncertain whether the peripheral claim can or cannot be reasserted, that uncertainty might provide a reason not to treat the dismissal as one with prejudice unless the plaintiff provides a stipulation (or the district court amends the order of dismissal) to that effect.

Conditional dismissal with prejudice. Where the peripheral claims are conditionally dismissed with prejudice, the plaintiff agrees to dismiss the peripheral claims and not to reassert them unless the central claim's dismissal is reversed on appeal. It would probably make sense to provide that this creates a final judgment. If the court of appeals affirms the dismissal of the central claim, the litigation is at an end. If the court of appeals reverses the dismissal of the central claim, the plaintiff can reassert the peripheral claims on remand.[28] But that arguably is efficient, since the litigation will continue in any event with respect to the now-reinstated central claim.[29] And if one pictures the alternative scenario (which would arise if the conditional dismissal with prejudice does not create an appealable judgment), that would be a scenario in which the plaintiff litigates the peripheral claims to final judgment; then appeals the dismissal of

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[27] Because the dismissal of the peripheral claims is voluntary, the plaintiff would be unable to challenge that dismissal on appeal. See, e.g., Chavez v. Illinois State Police, 251 F.3d 612, 628 (7th Cir. 2001); Hicks v. NLO, Inc., 825 F.2d 118, 120 (6th Cir. 1987).

[28] It is worthwhile to explore the possibility of treating the reassertion of the peripheral claims, on remand, as a situation in which the plaintiff is carrying forward those peripheral claims as they were originally asserted in the action – thus avoiding statute of limitations problems.

[29] It is possible to imagine instances when the judgment is reversed on appeal with respect to the central claims but no proceedings are required on remand with respect to those central claims. It may be worthwhile to consider whether resurrection of the peripheral claims should be permitted in that circumstance even though no further district-court proceedings are needed with respect to the central claims.

the central claim;[30] wins reversal of the dismissal of the central claim; and then litigates the central claim on remand. Either way, there may be more than one appeal; so it seems unclear that permitting conditional dismissals with prejudice to create an appealable judgment would be inefficient. It is true that the delay occasioned by the appeal from the central claim's dismissal might disadvantage the defendant, but an outer limit on the disadvantage posed by such delay would be provided by the duration of the appeal (if not by a statute of limitations on the peripheral claims).[31] As to the other concern embodied in the final judgment rule – maintaining the district court's control over the progress of the litigation – one might argue that if the district court approves a conditional dismissal with prejudice, that indicates the district court's view that the proposed appeal will further efficient resolution of the matters in the district court. (Of course, if the district court holds such a view, then in many instances it may be possible for the district court to enter a partial final judgment under Civil Rule 54(b).)

Dismissal without prejudice. When the peripheral claims are dismissed without prejudice, it is much less clear that the resulting judgment should be considered final.[32] Admittedly, the plaintiff runs the risk that the peripheral claims might be time-barred by the time the plaintiff attempts to reassert them; but reassertion (after disposition of the appeal from the dismissal of the central claim) seems in general to be a likely enough scenario that this permutation could be seen as an end run around the constraints of Civil Rule 54(b).[33] Not surprisingly, the circuits are split on this question and I will not attempt to argue here in favor of either side of the split. One thing that can be said is that the Ninth Circuit's approach – which in some instances has injected an inquiry concerning the intent behind the dismissal – may be unpredictable in its application.

Resolving these issues would entail difficult choices; and some of the choices would alter practice in a number of circuits. This memo does not attempt to suggest definitively which choices are best; instead, my goal is to sketch some of the relevant questions. Nor does this memo canvass all potentially related issues. For instance, this memo also does not address the related question of appealability that arises when an appellant's remaining claims are dismissed for want of prosecution or as a sanction for failure to comply with court orders, and the appellant

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[30] This assumes either that the plaintiff either has lost on the peripheral claim or failed to recover as much on the peripheral claim as the plaintiff expects to recover on the central claim.

[31] On the question of limitations periods, see supra note 28.

[32] It would, however, make sense to permit a plaintiff who sought such a dismissal without realizing that it would fail to produce an appealable judgment to stipulate that the dismissal of the peripheral claims is with prejudice, thereby rendering the judgment appealable.

[33] As noted above, the Eighth and Ninth Circuits take the view that a final judgment is created if the claims dismissed without prejudice are against a different defendant than the claims the dismissal of which the plaintiff seeks to appeal. The strength of such a distinction is not entirely clear.

seeks to challenge on appeal prior orders dismissing other claims.[34]

B. Logistics and particulars of a rulemaking response

If the decision were taken to amend the Rules to provide for appealability in the event of a conditional dismissal with prejudice,[35] a number of drafting and logistical questions would arise.

Coordination among Advisory Committees. In addition to the joint deliberations by the Civil and Appellate Rules Committees, consultation with other Advisory Committees also makes sense. United States v. Kaufmann, 985 F.2d 884 (7th Cir. 1993) (discussed in note 19) illustrates that similar questions of finality may sometimes arise in criminal cases. I lack any intuitions concerning the likelihood of similar questions arising in bankruptcy matters, but consultation with both the Bankruptcy and Criminal Rules Committees would be advisable as deliberations proceed.

Placement of a provision in the Civil Rules. Appellate Rules Committee members have suggested that a provision addressing manufactured finality might fit more comfortably in the Civil Rules than in the Appellate Rules. Professor Cooper notes that such a provision might be added either to Civil Rule 41 or to Civil Rule 54, and that alternatively the provision might be placed in a new Civil Rule 41.1 or a new Civil Rule 54.1. As he notes, the choice among these placements is best made after the nature of the provision is more precisely delineated.

Events that trigger the conditional dismissal. Professor Cooper points out that there will be a drafting choice concerning the triggers for a conditional dismissal: "It would be possible to specify that the right to dismiss on these terms arises only after a 'claim' has been 'dismissed' on motion under Rule 12 or Rule 56. Drafting might instead be more open-ended, all the way down to allowing use of this ploy after any district-court action that can merge in a final judgment and be reviewed on appeal."

Complex cases and dismissal by agreement or court order. Professor Cooper's comments suggest the intricacy of the situations that may require consideration:

Things become more complex when there is a counterclaim, or more than one

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[34] See, e.g., John's Insulation, Inc. v. L. Addison & Assoc., Inc., 156 F.3d 101, 105 (1st Cir. 1998) (adopting the rule that "interlocutory rulings do not merge into a judgment of dismissal for failure to prosecute, and are therefore unappealable").

[35] If such a decision were taken, it presumably would logically entail as well a clarification (to the extent such clarification is necessary) that the *unconditional* dismissal with prejudice of all remaining claims results in an appealable judgment.

> plaintiff, or more than one defendant (with different combinations of counterclaims and defendants and plaintiffs), third-party claims, and so on. If we were going to establish finality without court action, I suppose we would be looking for agreement by as many parties as required to establish dismissal with "conditional prejudice" of all claims and all parties. If we decide instead to open it up to achieving finality with the district court's consent, we might fall back closer to Rule 54(b). One out of many possible approaches would be to provide that in determining whether to enter a Rule 54(b) judgment the court may take account of (and approve?) a conditional dismissal with prejudice. That would be relatively clean as to a judgment that, subject to the condition, finally resolves all disputes between at least one identified party-pair. It would be a bit trickier as to different parts of a single "claim" as that term is (more or less) defined for Rule 54(b) purposes, but it would make sense.

Discretion in the court of appeals. Professor Cooper also notes that we should consider "whether the court of appeals should be able to reject the reservation of a right to revive the things dismissed with conditional prejudice." One approach might be to provide that the court of appeals' reversal of the district court's disposition of the central claims triggers an unconditional right to revive the conditionally-dismissed peripheral claims, "even in the unlikely event that reversal does not otherwise lead to remand." But it seems useful to consider whether there might "be circumstances in which -- most likely on arguments made by the appellee -- the court of appeals should be able to reject something conditionally preserved so as to focus proceedings on remand."

III. Conclusion

Though Part II does not exhaust the issues that may arise as the committees consider rulemaking responses to the question of manufactured finality, it sketches possible starting places for the discussion. As the input from Judge Kravitz and Professor Cooper demonstrates, collaboration with the Civil Rules Committee on these questions will be indispensable.

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TAB 7A

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MEMORANDUM

DATE: August 29, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-B

The pending Appellate Rules amendments include a set of proposed changes to Form 4 (concerning applications to proceed in forma pauperis ("IFP")) that make some technical changes and remove the current Form's requirement of detailed information concerning the IFP applicant's expenditures for legal and other services in connection with the case. One of the technical changes reads as follows:

> If you are a prisoner seeking to appeal a judgment in a civil action or proceeding, you must attach a statement certified by the appropriate institutional officer showing all receipts, expenditures, and balances during the last six months in your institutional accounts. If you have multiple accounts, perhaps because you have been in multiple institutions, attach one certified statement of each account.

After publication of the proposed amendments, the sole comment received by the Committee concerning Form 4 was a suggestion by the National Association of Criminal Defense Lawyers ("NACDL") that when the Form specifies that the requirement of an institutional-account statement is limited to prisoners "seeking to appeal a judgment in a civil action or proceeding," the form should further specify that for this purpose neither a habeas proceeding nor a proceeding under 28 U.S.C. § 2255 counts as a civil proceeding.[1] Rather than addressing that suggestion in the context of the pending amendments to Form 4, the Committee decided to add the proposal to the study agenda as a new item.

Part I of this memo summarizes the background of NACDL's proposal. Part II.A reviews relevant caselaw and concludes that the requirement of an institutional-account statement clearly does not apply to proceedings under 28 U.S.C. § 2254 and also should not apply to proceedings under 28 U.S.C. § 2255 or 28 U.S.C. § 2241. (Part II.A largely duplicates the analysis from my memo on this topic in the spring 2012 agenda materials.) Part II.B assesses how the choice of wording for Form 4 might affect the risk that an IFP applicant would make an error in compiling his or her IFP application. The risk of error – under the wording of the pending amendment to

[1] I enclose Peter Goldberger's February 2012 letter on behalf of NACDL.

Form 4 – would be a risk of inconvenience to incarcerated IFP applicants (and perhaps to the institutions housing them). The risk of error – under NACDL's proposed wording – would be a (probably much less widespread) risk that some incarcerated IFP applicants would file incomplete IFP applications because they incorrectly thought they did not need to include the institutional-account statement. Omission of the institutional-account statement ought to be curable without affecting the timeliness of the filing, so long as the applicant promptly corrects the error, though the possibility remains that a court could reach a contrary conclusion.

I. NACDL's comment on the Form 4 proposal

NACDL's comment concerned one of the technical amendments that are included among the pending amendments to Form 4. As the Committee knows, these technical amendments arose from our discovery that the version of Form 4 in the December 1, 2009, House pamphlet (and prior such pamphlets) was not identical to the version of Form 4 transmitted by the Chief Justice to Congress on April 24, 1998. The House pamphlets had reproduced the version of Form 4 that was approved by the Judicial Conference in fall 1997 for submission to the Supreme Court (the "Committee Version") – rather than the version transmitted by the Supreme Court to Congress in spring 1998 (the "Transmitted Version"). Believing the Committee Version to be preferable to the Transmitted Version, the Committee has included among the pending amendments to Form 4 the alterations necessary to eliminate the discrepancies between the official Form 4 and the Committee Version.

One of those changes concerns Form 4's Question 4. Question 4 in the Committee Version directs the submission of certified institutional-account statement(s) by any applicant who is "a prisoner seeking to appeal a judgment in a civil action or proceeding." Question 4 in the Transmitted Version omits the limiting phrase "seeking to appeal a judgment in a civil action or proceeding." The basis for the limiting phrase presumably is 28 U.S.C. § 1915(a)(2), which provides that "[a] prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined."[2] The pending amendment, as noted on page 1 of this memo, will bring Form 4 into conformity with the Committee Version by inserting the limiting phrase "seeking to appeal a judgment in a civil action or proceeding."

NACDL's comment proposes a further amendment to this language:

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[2] If the appellant is a criminal defendant who was determined to be financially unable to employ counsel, Appellate Rule 24(a)(3) permits that party to proceed on appeal IFP "without further authorization" unless the district court (stating its reasons in writing) certifies the appeal as not taken in good faith or finds that the party is not otherwise entitled to proceed IFP.

The committee proposes to clarify that the requirement that a prisoner attach a statement of the balance in his or her institutional account applies only when the prisoner[] seeks to appeal "a judgment in a civil action or proceeding." NACDL suggests that this wording be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)." Such proceedings, while generally treated as "civil" for purposes of appeal, are not governed by the PLRA. *See, e.g.*, *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996) (Becker, J.).

II. Analysis

In drafting the in forma pauperis provisions in the Prison Litigation Reform Act ("PLRA"), Congress used the term "civil action or proceeding" without defining what it meant.[3]

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[3] As NACDL notes, habeas and Section 2255 proceedings are treated as civil for purposes of determining the time to appeal. *See* Rule 11(b) of the Rules Governing § 2255 Proceedings ("Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules."); Bowles v. Russell, 551 U.S. 205, 208-09 (2007) (applying Appellate Rule 4(a) and 28 U.S.C. § 2107 to an appeal by a habeas petitioner). The 1979 Committee Note to Rule 11 of the Section 2255 Rules states:

> Prior to the promulgation of the Rules Governing Section 2255 Proceedings, the courts consistently held that the time for appeal in a section 2255 case is as provided in Fed.R.App.P. 4(a), that is, 60 days when the government is a party, rather than as provided in appellate rule 4(b), which says that the time is 10 days in criminal cases. This result has often been explained on the ground that rule 4(a) has to do with civil cases and that "proceedings under section 2255 are civil in nature." E.g., *Rothman v. United States*, 508 F.2d 648 (3d Cir.1975). Because the new section 2255 rules are based upon the premise "that a motion under § 2255 is a further step in the movant's criminal case rather than a separate civil action," see Advisory Committee Note to Rule 1, the question has arisen whether the new rules have the effect of shortening the time for appeal to that provided in appellate rule 4(b). A sentence has been added to Rule 11 in order to make it clear that this is not the case.
>
> Even though section 2255 proceedings are a further step in the criminal case, the added sentence correctly states current law. In *United States v. Hayman*, 342 U.S. 205 (1952), the Supreme Court noted that such appeals "are governed by the civil rules applicable to appeals from final judgments in habeas corpus actions." In support, the Court cited *Mercado v. United States*, 183 F.2d 486 (1st Cir.1950), a case rejecting the argument that because § 2255 proceedings are criminal in nature the time for appeal is only 10 days. The *Mercado* court

The question before the Committee is whether Form 4 should supply clarification that is absent from the statute itself. In Part II.A, I express general agreement with NACDL's analysis of the caselaw concerning the scope of the institutional-account statement. Part II.B analyzes how that conclusion should affect the text of Form 4.

A. The scope of "civil action or proceeding"

NACDL is correct that the caselaw has reached a general consensus that the term "civil action or proceeding" (as used in Section 1915) does not include habeas proceedings.[4] Caselaw from all twelve of the relevant circuits[5] now agrees that state prisoners' habeas petitions under 28 U.S.C. § 2254 fall outside the terms of the PLRA's IFP provisions.[6] I have found caselaw from

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> concluded that the situation was governed by that part of 28 U.S.C. § 2255 which reads: "An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus." Thus, because appellate rule 4(a) is applicable in habeas cases, it likewise governs in § 2255 cases even though they are criminal in nature.

Habeas proceedings are not characterized as "civil" for all purposes. *See, e.g.*, Harris v. Nelson, 394 U.S. 286, 293-94 (1969) ("It is, of course, true that habeas corpus proceedings are characterized as 'civil.' .... But the label is gross and inexact.... Essentially, the proceeding is unique."). *Compare* Browder v. Director, Dept. of Corrections, 434 U.S. 257, 269 (1978) ("It is well settled that habeas corpus is a civil proceeding."); 28 U.S.C. § 1914(a) ("The clerk of each district court shall require the parties instituting any civil action, suit or proceeding in such court, whether by original process, removal or otherwise, to pay a filing fee of $350, except that on application for a writ of habeas corpus the filing fee shall be $5.").

[4] NACDL presents its suggestion as one that will bring Form 4 more closely into line with existing caselaw, rather than as a suggestion that Form 4 be amended to depart from the approach taken in existing caselaw. This makes sense to me. As discussed in this memo, the caselaw interprets statutory law (the PLRA). I doubt that the Committee would wish to take an approach in Form 4 that purported to supersede the PLRA's requirements. It is an interesting question whether the Rules Enabling Act's supersession clause – which refers to supersession via rules and does not mention forms, see 28 U.S.C. § 2072(b) – would authorize supersession by means of the combination of Appellate Rule 24 and Form 4.

[5] For obvious reasons, the Federal Circuit's caselaw does not address questions concerning habeas or Section 2255 proceedings.

[6] *See* Martin v. Bissonette, 118 F.3d 871, 874 (1st Cir. 1997) (holding on an appeal from the dismissal of a Section 2254 petition that "the PLRA does not apply to habeas petitions prosecuted in federal courts by state prisoners"); Reyes v. Keane, 90 F.3d 676, 678 (2d Cir. 1996) (holding in the context of an appeal from the dismissal of a state prisoner's habeas petition"that Congress did not intend the PLRA to apply to petitions for a writ of habeas

seven circuits reaching the same conclusion about federal prisoners' petitions under 28 U.S.C. § 2255.[7] And there are holdings in five circuits – and dicta in two more – that take the same approach to habeas petitions under 28 U.S.C. § 2241.[8] (A further complication arises when a

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corpus"), *overruled on other grounds by* Lindh v. Murphy, 521 U.S. 320, 336-37 (1997); Santana v. United States, 98 F.3d 752, 756 (3d Cir. 1996) (directing court clerks with circuit not to apply PLRA's in forma pauperis provisions to Section 2254 or Section 2255 proceedings); Smith v. Angelone, 111 F.3d 1126, 1131 (4th Cir. 1997) (holding on appeal from the denial of a Section 2254 petition that "the in forma pauperis filing fee provisions of the PLRA do not apply in habeas corpus actions"); Carson v. Johnson, 112 F.3d 818, 820-21 (5th Cir. 1997) (concluding that "the new PLRA requirements do not apply to habeas petitions under § 2254," but characterizing the suit at hand as a Section 1983 action rather than a habeas action); Kincade v. Sparkman, 117 F.3d 949, 951 (6th Cir. 1997) ("[T]he fee requirements of the Prison Litigation Reform Act do not apply to cases or appeals brought under § 2254 and § 2255."); Martin v. United States, 96 F.3d 853, 855-56 (7th Cir. 1996) (addressing a Section 2255 proceeding and a state-prisoner habeas proceeding); Malave v. Hedrick, 271 F.3d 1139, 1140 (8th Cir. 2001) (per curiam) (in the context of an appeal from the dismissal of a Section 2241 petition, "holding that the PLRA's filing-fee provisions are inapplicable to habeas corpus actions"); Carmona v. Minnesota, 23 Fed. Appx. 629, 630 (8th Cir. 2002) (nonprecedential opinion applying *Malave* in the context of a Section 2254 petition); Naddi v. Hill, 106 F.3d 275, 277 (9th Cir. 1997) (Section 2254 proceeding); United States v. Simmonds, 111 F.3d 737, 741 (10th Cir. 1997) (holding that neither Section 2254 proceedings nor Section 2255 proceedings are "'civil actions' for purposes of 28 U.S.C. § 1915"), overruled on other grounds by United States v. Hurst, 322 F.3d 1256, 1261 n.4 (10th Cir. 2003); Anderson v. Singletary, 111 F.3d 801, 806 (11th Cir. 1997) (holding that "the filing fee provisions of section 804(a) of the PLRA do not apply in 28 U.S.C. § 2254 or 28 U.S.C. § 2255 proceedings"); United States v. Levi, 111 F.3d 955, 956 (D.C. Cir. 1997) (per curiam) (holding that the PLRA does not apply to Section 2254 or Section 2255 proceedings).

[7] *See Santana*, 98 F.3d at 756; United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996) (holding that the PLRA "is inapplicable to § 2255 petitions"); *Kincade*, 117 F.3d at 951; *Martin*, 96 F.3d at 855-56; *Simmonds*, 111 F.3d at 741; *Anderson*, 111 F.3d at 806; *Levi*, 111 F.3d at 956; United States v. Ortiz, 136 F.3d 161, 169 (D.C. Cir. 1998) ("[T]he in forma pauperis filing fee provisions of the PLRA do not apply to proceedings under § 2255.").

[8] *See* Davis v. Fechtel, 150 F.3d 486, 487 (5th Cir. 1998) (holding in the context of a habeas action by a federal prisoner "that Congress did not intend for the term 'civil action' [in the PLRA] to include section 2241 habeas proceedings"); *Malave*, 271 F.3d at 1140; McIntosh v. U.S. Parole Comm'n, 115 F.3d 809, 811-12 (10th Cir. 1997) (reasoning that "a § 2241 action challenging prison disciplinary proceedings, such as the deprivation of good-time credits, is not challenging prison *conditions*, it is challenging an action affecting the fact or duration of the petitioner's custody" and holding that "§ 2241 habeas corpus proceedings, and appeals of those proceedings, are not 'civil actions' for purposes of §§ 1915(a)(2) and (b)."); Blair-Bey v. Quick, 151 F.3d 1036, 1037, 1041 (D.C. Cir. 1998) (holding that the PLRA did not apply to petitioner's Section 2241 action challenging "the procedures by which he was denied parole").

mandamus petition – arising out of an underlying proceeding under Sections 2241, 2254, or 2255 – is filed in the court of appeals. A number of circuits have concluded that the PLRA's applicability to a mandamus petition depends on whether the underlying district-court proceeding falls within the PLRA's scope.[9])

The Seventh Circuit had previously held to the contrary. *See* Newlin v. Helman, 123 F.3d 429, 438 (7th Cir. 1997); Thurman v. Gramley, 97 F.3d 185, 187 (7th Cir. 1996) (dictum). However, in 2000 it reversed course and joined other circuits in holding that "the PLRA does not apply to any requests for collateral relief under 28 U.S.C. §§ 2241, 2254, or 2255." Walker v. O'Brien, 216 F.3d 626, 629 (7th Cir. 2000). The *Walker* court reasoned that a distinction "between habeas corpus petitions that relate to the original criminal prosecution and those that do not, for purposes of the PLRA, is not consistent with the Supreme Court's decisions in this area, is in tension with the distinct statutory systems Congress has created for habeas corpus actions and other civil actions, and is confusing for the district courts to administer." *Id.* at 634.

See also Harris v. Garner, 216 F.3d 970, 979 n.7 (11th Cir. 2000) (en banc) (discussing figures concerning cases subject to the PLRA and noting that "[t]he statistic we cite does not include 28 U.S.C. §§ 2241, 2254, and 2255 filings, because they are not covered by the PLRA."); Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 634 (2d Cir. 2001) (resting decision concerning exhaustion requirement in a Section 2241 proceeding on caselaw rather than the PLRA, observing that "[a] number of other circuits ... have ruled the Litigation Reform Act inapplicable to habeas actions brought by federal prisoners under § 2241," and stating that "[d]oubtless the same rule should obtain in § 2241 cases as in § 2254 petitions").

[9] *See* In re Stone, 118 F.3d 1032, 1034 (5th Cir. 1997) ("In a mandamus proceeding ... the nature of the underlying action will determine the applicability of the PLRA."); *Martin*, 96 F.3d at 854 ("When as is normally the case in the federal courts mandamus is being sought against the judge presiding in the petitioner's case, it is realistically a form of interlocutory appeal, and whether an interlocutory appeal is within the scope of the new Act should turn on whether the litigation in which it is being filed is within that scope."); In re Grant, 635 F.3d 1227, 1232 (D.C. Cir. 2011) ("[P]risoners filing petitions for mandamus in civil cases must comply with the filing-fee requirements of the PLRA.").

The Tenth Circuit initially took a different view, holding the PLRA applicable to a mandamus petition that asked the court of appeals to require prompt resolution of the petitioner's habeas petition. *See* Green v. Nottingham, 90 F.3d 415, 416, 418 (10th Cir. 1996). Some two years later, however, the Tenth Circuit disavowed *Green*'s holding without citing it by name: "[T]his circuit will no longer require mandatory fees under the PLRA for filing petitions for writs of mandamus seeking to compel district courts to hear and decide actions brought solely under 28 U.S.C. §§ 2241, 2254 and 2255. To the limited extent that any of our earlier cases could be interpreted to the contrary, they are overruled." In re Phillips, 133 F.3d 770, 771 (10th Cir. 1998).

The analysis supporting these decisions seems persuasive to me. Courts have reasoned that interpreting the PLRA's IFP provisions to include habeas petitioners would run counter to the tradition of access to courts for such petitioners.[10] Courts have noted that the PLRA was directed principally at perceived abuses of suits concerning prison conditions,[11] and that the same Congress that enacted the PLRA separately addressed questions concerning the appropriate scope of habeas and Section 2255 relief in the Antiterrorism and Effective Death Penalty Act of

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See also In re Nagy, 89 F.3d 115, 117 (2d Cir. 1996) ("Nagy filed the pending motion for i.f.p. status in aid of a petition for a writ of mandamus directed to a judge conducting a criminal trial. Such a petition is not analogous to the lawsuits to which the PLRA applies. We will therefore not apply our PLRA procedure to Nagy's motion."); Madden v. Myers, 102 F.3d 74, 77-78 (3d Cir. 1996) (expressing agreement "with the courts of appeals that have held that where the underlying litigation is criminal, or otherwise of the type that Congress did not intend to curtail, the petition for mandamus need not comply with the PLRA," but also stating that "*bona fide* mandamus petitions, regardless of the nature of the underlying actions, cannot be subject to the PLRA"); In re Crittenden, 143 F.3d 919, 920 (5th Cir. 1998) (holding that "the 'three strikes rule' of 28 U.S.C. § 1915(g) prevents Crittenden from filing a petition for a writ of mandamus in this Court without first paying the applicable filing fees when his petition arises from an underlying civil rights action"); In re Tyler, 110 F.3d 528, 529 (8th Cir. 1997) (holding that "a mandamus petition arising from an ongoing civil rights lawsuit falls within the scope of the PLRA" but leaving undecided "whether the PLRA applies to mandamus petitions when the underlying litigation is a civil habeas corpus proceeding"); In re Smith, 114 F.3d 1247, 1250 (D.C. Cir. 1997) (holding that because petition for writ of prohibition "includes compensatory and punitive damage claims ... that are civil in nature, and was filed after the effective date of the PLRA while he was still in prison, the fee requirements of the PLRA apply").

[10] *See Carson*, 112 F.3d at 820; *Reyes*, 90 F.3d at 678 ("Congress has endeavored to make the filing of a habeas corpus petition easier than the filing of a typical civil action by setting the district court filing fee at $5, compared to the $120 applicable to civil complaints. See 28 U.S.C. § 1914. It is not likely that Congress would have wished the elaborate procedures of the PLRA to apply to a habeas corpus petition just to assure partial, monthly payments of a $5 filing fee."); *Martin*, 96 F.3d at 855-56 ("[A]pplication of the Prison Litigation Reform Act to habeas corpus would block access to any prisoner who had filed three groundless civil suits and was unable to pay the full appellate filing fee (compared to the $5 fee for an application for habeas corpus). This result would be contrary to a long tradition of ready access of prisoners to federal habeas corpus.").

[11] *See Reyes*, 90 F.3d at 678 ("[T]he PLRA was aimed primarily at prisoners' suits challenging prison conditions, many of which are routinely dismissed as frivolous.... There is nothing in the text of the PLRA or its legislative history to indicate that Congress expected its filing fee payment requirements to apply to habeas corpus petitions.").

1996, Pub. L. No. 104-132, 110 Stat. 1214 ("AEDPA").[12] And courts have observed that the PLRA and AEDPA adopted different methods for dealing with frequent filers.[13] In sum, though the Supreme Court has not spoken to the issue and though not all circuits have ruled on all permutations of the issue, I think that NACDL's statement – that the PLRA's IFP provisions do not apply to habeas or Section 2255 proceedings – is clearly accurate as to Section 2254 proceedings and likely accurate as to Section 2255 and Section 2241 proceedings.

There are, however, a few caveats. If a prisoner erroneously styles as a habeas petition something that actually presents a challenge to prison conditions[14] – or if a prisoner includes a prison-conditions challenge in a petition that also presents a claim that does fall within the core of habeas[15] – the court is likely to conclude that the PLRA's IFP provisions apply. And to the extent (currently unclear) that a habeas proceeding could be employed to assert some challenges to prison conditions, it seems possible that the PLRA's IFP provisions would apply to such a proceeding.[16]

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[12] *See Carson*, 112 F.3d at 820; Reyes, 90 F.3d at 678 ("Congress gave specific attention to perceived abuses in the filing of habeas corpus petitions by enacting Title I of the AEDPA. That title imposes several new restrictions on habeas corpus petitions, but makes no change in filings fees or in a prisoner's obligation for payment of existing fees."); United States v. Cole, 101 F.3d 1076, 1077 (5th Cir. 1996); *Naddi*, 106 F.3d at 277; Santana v. United States, 98 F.3d 752, 755 (3d Cir. 1996) ("If Congress had wanted to reform the *in forma pauperis* status of habeas petitioners, it might have done so in the AEDPA; yet nothing in the AEDPA changes the filing fees attached to habeas petitions or a prisoner's obligation to pay those filing fees.")

[13] *See* Walker v. O'Brien, 216 F.3d 626, 637 (7th Cir. 2000) ("AEDPA handles the problem of repeat filers through the requirement that inmates seeking to file second or successive petitions for a writ of habeas corpus must obtain the permission of the court of appeals, in 28 U.S.C. § 2244. The PLRA, in contrast, handles the problem of repetitive filers through the 'three strikes' rule .... See 28 U.S.C. § 1915(g).").

[14] *See Walker*, 216 F.3d at 634 n.4 ("We emphasize that the action must be a proper habeas corpus action. Our ruling is not intended in any way to suggest that the district courts should not look beyond the label the petitioner attaches to his pleading to ensure that the proper procedural regime is followed.").

[15] *Cf.* Jennings v. Natrona County Detention Center Medical Facility, 175 F.3d 775, 779 & n.2 (10th Cir. 1999) (holding that dismissal of prior habeas action did not count as a strike under 28 U.S.C. § 1915(g), but noting that the court was "not dealing here with a habeas petition containing both habeas corpus and civil rights claims, which, when dismissed under § 1915(e) as frivolous, may count as a prior occasion .... Nor are we dealing with a habeas petition more appropriately construed as a § 1983 action and thus countable as a strike.").

[16] The D.C. Circuit has reasoned as follows:

B. Implications for Form 4

If this description of the caselaw is accurate, that suggests the following thoughts about the wording of Form 4's Question 4. The current wording of Form 4 is over-inclusive and could mislead appellants in criminal cases into thinking that they must submit the institutional-account statement. Thus, the pending amendments to Form 4 constitute an improvement over Form 4's current wording, because adding a limitation to "civil action[s] or proceeding[s]" alerts readers that no institutional-account statement is needed for IFP applications in criminal proceedings.

The question then becomes whether it would be even better to specify further, in the Form, that the account-statement requirement does not apply to habeas or Section 2255 proceedings. Given that habeas and Section 2255 proceedings are treated as civil actions for some purposes (such as the time to appeal), the pending amendment to Form 4 could lead some readers to believe that the institutional-account statement applies to such proceedings. Adding the further specification about habeas and Section 2255 proceedings would avoid that problem.

On the other hand, it is worth asking whether the addition of the habeas / Section 2255 specification might mislead some prisoners into thinking that they need not submit an institutional-account statement when they actually must do so. This problem could arise to the extent that the prisoner erroneously styles his or her complaint as a habeas petition when it actually should be styled as a *Bivens* or Section 1983 claim about prison conditions.[17] It is possible that this sort of wrong guess by a prisoner would be less likely to occur at the stage of an appeal, because by that point the district court would likely have recharacterized the claims

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> It is possible that habeas corpus might be available to challenge prison conditions in at least some situations. The Court expressly left this possibility open in Preiser v. Rodriguez, see 411 U.S. 475, 499 ... (1973); see also Brown v. Plaut, 131 F.3d 163, 168 (D.C. Cir.1997), cert. denied, 524 U.S. 939 ... (1998); Abdul-Hakeem v. Koehler, 910 F.2d 66, 69-70 (2d Cir.1990); but cf. Gomez v. United States, 899 F.2d 1124, 1125-26 (11th Cir.1990). Such claims, if they are permissibly brought in habeas corpus, would have to be subject to the PLRA's filing fee rules, as they are precisely the sort of actions that the PLRA sought to address. See In re Smith, 114 F.3d at 1250 (D.C. Cir.1997) ("[I]t would defeat the purpose of the PLRA if a prisoner could evade its requirements simply by dressing up an ordinary civil action as a petition for mandamus or prohibition or by joining it with a petition for habeas corpus.").

Blair-Bey, 151 F.3d at 1042.

[17] As noted above, the possibility appears to remain that in some instances habeas may provide an avenue to challenge some prison conditions. If a challenge to prison conditions could be properly styled as a habeas petition in a given case, the courts might well apply the PLRA's IFP provisions to such a habeas petition.

appropriately, thus putting the prisoner on notice that the action is not properly styled as a habeas petition. But it should be noted that the choices that the Committee makes with respect to Form 4 may affect practice in the district courts as well as practice in the Supreme Court.[18] The Administrative Office has created forms for use in connection with requests to proceed IFP in the district courts. Form AO 240 is a short form that dispenses with much of the detail sought by Appellate Form 4. Form AO 239 is a longer form that is more similar to Appellate Form 4. AO 239 and AO 240 both require prisoners to include the institutional-account statement; because AO 239 and AO 240 are styled for use in civil actions (they include a space at the top for a civil action number), their approach is consistent with that taken by the published amendments to Appellate Form 4. But if Appellate Form 4 were amended to further specify the institutional-account-statement requirement's inapplicability to habeas and Section 2255 proceedings, that could raise the question whether AO 239 and AO 240 should be similarly amended.

In comparing the merits of an over-inclusive approach – i.e., an approach in which the applicable forms purport to require an institutional-account statement in all "civil actions" – with the merits of a more specific approach – i.e., an approach in which the applicable forms explicitly exempt habeas and Section 2255 proceedings from the institutional-account-statement requirement – it seems useful to ask what the consequences would be if an inmate misunderstands the instructions on the form. If the inmate erroneously understands the form to require an institutional-account statement when it does not, then that inconveniences the inmate (and perhaps the institution in which the inmate is held). If the inmate erroneously understands the form not to require an institutional-account statement and therefore does not provide one, then the inmate's IFP application will be incomplete.

This raises the question whether such a defect in an IFP filing would harm the would-be IFP litigant's interests. In particular, would an otherwise timely complaint or notice of appeal be deemed untimely because the inmate plaintiff or appellant sought to proceed IFP but failed to include the institutional-account statement? Appellate caselaw and local circuit provisions indicate that the answer should be no, though the matter is not entirely free from doubt in circuits that have not yet addressed the issue. I should note that most of the relevant cases and local circuit provisions do not discuss failures to provide institutional-account statements specifically, but rather concern the more general topic of failures to pay the relevant fee and/or move for

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[18] As the Committee knows, changes to Form 4 directly affect practice in the Supreme Court because Supreme Court Rule 39 requires an IFP applicant to "file a motion for leave to [proceed IFP] together with the party's notarized affidavit or declaration (in compliance with 28 U. S. C. § 1746) in the form prescribed by the Federal Rules of Appellate Procedure, Form 4." I have not found caselaw that addresses the applicability of the PLRA's IFP provisions to petitions for certiorari seeking Supreme Court review. Even if these PLRA provisions were construed to extend to Supreme Court proceedings in civil actions, I would think that the reasoning that justifies exempting appeals to the courts of appeals in habeas and Section 2255 proceedings would also justify exempting petitions for certiorari seeking Supreme Court review in connection with such proceedings.

permission to proceed IFP.

Caselaw in the Eighth Circuit and local circuit provisions in the Third, Fourth, and Federal Circuits suggest that failure to include the institutional-account statement does not in itself render a notice of appeal untimely, though the local circuit provisions warn that if the failure to provide the statement persists for some length of time (such as 14 or 15 days), the appeal will be dismissed.[19] This is consistent with the treatment of the question of fees in the Appellate Rules and in the caselaw. Rule 3(e) requires that "[u]pon filing a notice of appeal, the appellant must pay the district clerk all required fees." But the court has the authority under Rule 26(b) to grant an extension of the fee-payment deadline for "good cause."[20] And Rule

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[19] *See* Henderson v. Norris, 129 F.3d 481, 484 (8th Cir. 1997) (providing that inmate appellant "must submit to the clerk of the district court a certified copy of the prisoner's prison account for the last six months within 30 days of filing the notice of appeal" and that "failure to file the prison account information will result in the assessment of an initial appellate partial fee of $35 or such other amount that is reasonable, based on whatever information the court has about the prisoner's finances"); Third Circuit Local Appellate Rule 24.2 ("Failure to file any of the documents specified in Rule 24.1 will result in the dismissal of the appeal by the clerk under L.A.R. 3.3 and L.A.R. Misc. 107.1(a)."); Third Circuit Local Appellate Rule 3.3(a) ("If a proceeding is docketed without prepayment of the applicable docketing fee, the appellant must pay the fee within 14 days after docketing. If the appellant fails to do so, the clerk is authorized to dismiss the appeal."); Third Circuit Local Appellate Rule 3.3(b) ("If an action has been dismissed by the district court pursuant to 28 U.S.C. § 1915 as frivolous or malicious, or if the district court certifies pursuant to § 1915(a) and FRAP 24(a) that an appeal is not taken in good faith, the appellant may either pay the applicable docketing fee or file a motion to proceed in forma pauperis within 14 days after docketing the appeal. If appellant fails to either pay the applicable docketing fee or file the motion to proceed in forma pauperis and any required supporting documents, the clerk is authorized to dismiss the appeal 30 days after docketing of the appeal."); Third Circuit Local Appellate Rule 107.1(a) ("The clerk is authorized to dismiss the appeal if the appellant does not pay the docketing fee within 14 days after the case is opened in the court of appeals, as prescribed by 3d Cir. L.A.R. 3.3."); Fourth Circuit Rule 24(a) ("If a prisoner proceeding under this rule fails to file the forms or make the payments required by the Court, the appeal will be dismissed pursuant to Local Rule 45."); Fourth Circuit Rule 45 ("When an appellant ... fails to comply with the Federal Rules of Appellate Procedure or the rules or directives of this Court, the clerk shall notify the appellant ... that upon the expiration of 15 days from the date thereof the appeal will be dismissed for want of prosecution, unless prior to that date appellant remedies the default."); Federal Circuit Appendix II: Guide for Pro Se Petitioners and Appellants ¶ 5 ("If ... you do not submit the motion and affidavit for leave to proceed IFP and the supplemental in forma pauperis form [authorizing provision of prison account statement] within 14 days of the date of docketing, the prisoner's appeal shall be dismissed.").

[20] Rule 26(b) bars extensions of "the time to file ... a notice of appeal (except as authorized in Rule 4)." But the filing of the notice of appeal is conceptually separate from the

3(a)(2) provides that "[a]n appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the court of appeals to act as it considers appropriate, including dismissing the appeal." An established line of cases holds that the notice of appeal is timely even if the filing fee is not paid until after the deadline for taking the appeal has passed.[21] Local circuit provisions in the Second, Fifth, Sixth, Seventh, Ninth, Tenth, and Federal Circuits provide for dismissal of such an appeal if the filing fee is not paid relatively promptly thereafter; a number of these circuits set 14 days as the limit for late payment of the fee.[22] Some of these provisions make explicit the fact that by the relevant

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payment of the fees, even though these events are ordinarily expected to occur simultaneously. *See* 1979 Committee Note to Rule 3(e) (observing that "[p]roposed new Rule 3(e) ... requir[es] that both [docketing and filing] fees be paid at the time the notice of appeal is filed, but subject to the provisions of Rule 26(b) preserving the authority of the court of appeals to permit late payment").

[21] *See* Parissi v. Telechron, Inc., 349 U.S. 46, 47 (1955) (per curiam) ("We think that the Clerk's receipt of the notice of appeal within the 30-day period satisfied the requirements of § 2107, and that untimely payment of the § 1917 fee did not vitiate the validity of petitioner's notice of appeal."); Gould v. Members of New Jersey Division of Water Policy and Supply, 555 F.2d 340, 341 (3d Cir. 1977) (following *Parissi*); Searcy v. City of Dayton, 38 F.3d 282, 288 (6th Cir. 1994) (applying same principle to failure to provide $105 filing fee upon filing cross-appeal); Klemm v. Astrue, 543 F.3d 1139, 1142 (9th Cir. 2008) (applying *Parissi* to case in which appellant proffered postdated check for filing fee); Brennan v. U.S. Gypsum Co., 330 F.2d 728, 729 & n.3 (10th Cir. 1964) (following *Parissi*).

This line of cases has also been extended to the treatment of petitions filed in the court of appeals seeking review of agency determinations. *See* Wisniewski v. Director, Office of Workers' Compensation Programs, 929 F.2d 952, 955 (3d Cir. 1991) ("Because the requirement that a petitioner pay a filing or docketing fee for a petition for review is not jurisdictional, payment of such a fee beyond the time prescribed by statute for filing the petition for review does not render the petition untimely or deprive the court of jurisdiction."); City of Chicago v. U.S. Dept. of Labor, 737 F.2d 1466, 1471 (7th Cir. 1984) (applying *Parissi*); B. J. McAdams, Inc. v. I. C. C., 551 F.2d 1112, 1115 n.3 (8th Cir. 1977) (petition for review was effective despite late payment of docketing fee); Long v. U.S. Dept. of Air Force, 751 F.2d 339, 342 (10th Cir. 1984) (same with respect to late payment of filing fee).

[22] *See* Second Circuit Rule 12.1(a) ("All actions required under this rule must be completed within 14 days after the filing of a notice of appeal."); *id.* 12.1(c) ("An appellant or petitioner must pay the docketing fee fixed by the U.S. Judicial Conference under 28 U.S.C. § 1913, unless the appellant or petitioner is seeking or has obtained leave to proceed in forma pauperis under 28 U.S.C. § 1915 and FRAP 24, and so notifies the circuit court."); *id.* 12.1(d) ("Failure to take any of the above actions may result in dismissal of the appeal."); Fifth Circuit IOP accompanying Rule 21 ("If the [mandamus] petitioner does not accompany the petition with the requisite filing fee or motion to proceed IFP, the clerk will, by letter, notify the petitioner of

deadline, the appellant must either pay the fee or file a proper request for permission to proceed IFP.

A number of appellate cases provide roughly similar treatment of the question of the timeliness of a complaint that is filed in the district court without payment of the required fee. One Eighth Circuit case specifically treats the question of the institutional-account statement, holding that its absence does not render the complaint untimely, though the statement must be filed "within a reasonable time" thereafter.[23] As to the more general question of fee payment, some cases appear to provide simply that the filing of the complaint itself is the relevant event for purposes of applying the statute of limitations, even if the required fee is not paid (and/or a motion to proceed IFP is not made) until after the running of the limitations period.[24] Other

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the defect and set a correction deadline. If the petitioner fails to meet the deadline, the clerk will dismiss the petition 15 days after the deadline in accordance with our practices under 5th Cir. R. 42.3.1."); Sixth Circuit Rule 3 ("The court may dismiss an appeal if required fees are not paid."); Seventh Circuit Rule 3(b) ("If a proceeding is docketed without prepayment of the docketing fee, the appellant shall pay the fee within 14 days after docketing. If the appellant fails to do so, the clerk is authorized to dismiss the appeal."); Ninth Circuit Rule 3-1 (providing that if filing and docket fees "are not paid promptly, the Court of Appeals Clerk will dismiss the case after transmitting a warning notice," but also providing that "[t]he docket fee need not be paid upon filing the notice of appeal when ... an application for in forma pauperis relief or for a certificate of appealability is pending"); Tenth Circuit Rule 3.3(b) ("An appeal may be dismissed immediately if, within 14 days after filing the notice of appeal, a party fails to: (1) pay a required fee; (2) file a timely motion for extension of time to pay the required fee; or (3) file a timely motion for leave to proceed without prepayment of fees."); Tenth Circuit Rule 24.1 ("[I]f a prisoner tenders no filing fee, or less than the full fee, when a notice of appeal is filed, the district court shall obtain sufficient information to determine the prisoner's eligibility for, and make the assessment of, a partial filing fee under the Act.... The appeal should be processed and submitted to this court in the normal course, as required by Federal Rule of Appellate Procedure 3(d), without waiting for the determination of the prisoner's eligibility for paying less than the full filing fee."); Federal Circuit Rule 24(a) ("If an appeal or petition for review is docketed without payment of the docketing fee, the clerk in providing notice of docketing will forward to the appellant or petitioner the form prescribed by this court for the motion to proceed on appeal in forma pauperis.... Except as provided in Federal Rule of Appellate Procedure 24(a), if the clerk does not receive a completed motion, the docketing fee, or a completed Form 6B within 14 days of the date of docketing of the appeal or petition, the clerk is authorized to dismiss the appeal or petition."); Federal Circuit Rule 52(d) (restating provision concerning dismissal).

[23] Garrett v. Clarke, 147 F.3d 745, 746 (8th Cir. 1998).

[24] *See* Casanova v. Dubois, 304 F.3d 75, 80 (1st Cir. 2002) (holding that failure to tender fee along with complaint did not render complaint untimely because local rule requiring prepayment was subject to waiver and because "appellants appear to have done everything within their power to comply with the filing fee provisions of the court"); McDowell v.

cases specify that the filing of a motion to proceed IFP tolls the running of the statute of limitations; if the court grants the application, then there is no timeliness problem, but if the court denies the application, these courts state that the statute of limitations resumes running and that the plaintiff must pay the filing fee within the limitations period or face dismissal on timeliness grounds.[25] Whether or not a circuit employs such a tolling approach, the court has ample means to enforce the fee requirement where IFP status has been denied, because continued failure to pay the fee can result in dismissal for want of prosecution.[26]

Overall, these cases provide strong reason to hope that an inmate who erroneously failed to include an institutional-account statement with his or her IFP application would be able to avoid dismissal by promptly furnishing the statement after the problem is pointed out. It seems to this writer that a contrary conclusion would unduly disadvantage poor incarcerated litigants, by subjecting them to a worse result than they would face if they had avoided seeking IFP status at all.[27]

Delaware State Police, 88 F.3d 188, 191 (3d Cir. 1996) ("[W]e deem a complaint to be constructively filed as of the date that the clerk received the complaint – as long as the plaintiff ultimately pays the filing fee or the district court grants the plaintiff's request to proceed in forma pauperis."); Wrenn v. American Cast Iron Pipe Co., 575 F.2d 544, 545, 547 (5th Cir. 1978) (payment of filing fee outside limitations period and nine days after deadline set by district court did not render complaint untimely); Farzana K. v. Indiana Dept. of Educ., 473 F.3d 703, 707 (7th Cir. 2007) ("[A] complaint must be accepted and filed even if neither the fee nor an application to proceed in forma pauperis is enclosed, and that the complaint alone satisfies the statute of limitations."); Rodgers ex rel. Jones v. Bowen, 790 F.2d 1550, 1551-53 (11th Cir. 1986) (plaintiff filed complaint and IFP application just within limitations period; about a month after the district court denied her IFP application, she paid the filing fee; court of appeals held that the complaint was timely and that the delay in paying filing fee did not justify dismissal for failure to prosecute).

[25] *See* Truitt v. County of Wayne, 148 F.3d 644, 648 (6th Cir. 1998) (holding that complaint is filed for statute-of-limitations purposes when fee is paid or IFP status is granted, but also stating that the limitations period is tolled during period when IFP petition is pending); Williams-Guice v. Board of Educ. of City of Chicago, 45 F.3d 161, 163-65 (7th Cir. 1995) (reasoning that filing of complaint suspends running of limitations period while plaintiff amends deficient IFP application and until the court denies the application – but that limitations period starts running again after denial of IFP application); Jarrett v. US Sprint Communications Co. 22 F.3d 256, 259-60 (10th Cir. 1994) (reasoning that where IFP petition is ultimately denied, limitations period is tolled while the petition is pending, and perhaps for a brief period thereafter, but holding that the plaintiff in this case waited too long).

[26] *See, e.g.*, *Farzana K.*, 473 F.3d at 707.

[27] That is to say, if the inmate simply failed to pay the required fee and did not request IFP status, the caselaw described above would treat the notice of the complaint or the appeal as

However, at least a word of caution is required, because the possibility exists that a judge focusing only on the text of Section 1915(a) might reach a contrary conclusion. As amended by the PLRA, the first two subdivisions of Section 1915(a) state:

> (1) Subject to subsection (b), **any court of the United States may authorize the commencement**, prosecution or defense **of any suit, action or proceeding, civil or criminal, or appeal therein**, without prepayment of fees or security therefor, by a person who submits an affidavit that includes a statement of all assets such prisoner possesses that the person is unable to pay such fees or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that the person is entitled to redress.
>
> (2) A prisoner seeking to bring a civil action or appeal a judgment in a civil action or proceeding without prepayment of fees or security therefor, in addition to filing the affidavit filed under paragraph (1), shall submit a certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the 6-month period immediately preceding the filing of the complaint or notice of appeal, obtained from the appropriate official of each prison at which the prisoner is or was confined.

28 U.S.C. § 1915(a) (emphases added). A few judges have taken the view that by referring to "commencement," the statute indicates that the lawsuit or appeal is not "commenced" for purposes of timeliness until the fee is paid or the litigant receives permission to proceed IFP.[28]

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timely filed despite the absence of the fee (though the continued failure to pay the fee would expose the litigant to dismissal of the case or the appeal).

[28] The panel majority in one Eighth Circuit case stated as follows:

> [T]he PLRA would seem clearly to prevent a prisoner from filing an action in forma pauperis until he has complied with the requirements of subsection (a) of § 1915.... Our recent opinion in *Garrett v. Clarke*, however, takes a contrary position, holding that the PLRA allows a prisoner to file the complaint and then satisfy the requirements of § 1915(a) within a reasonable time.... We believe that this is an incorrect interpretation of the statute and is contrary to the policies established by Congress with the enactment of the Prison Litigation Reform Act of 1995. In our view, such a rule will needlessly and improperly create numerous case and docket management problems for the district courts in this circuit. Nevertheless, we are bound by the decision in *Garrett*.

Murray v. Dosal, 150 F.3d 814, 816 n.4 (8th Cir. 1998).

A Seventh Circuit panel also acknowledged this textual argument: "To say that the judge

However, I know of no court of appeals that has actually adopted such a view.

IV. Conclusion

NACDL's suggested revision to Form 4 would help to ensure that habeas petitioners do not erroneously assume that they must provide institutional-account statements when seeking permission to proceed IFP. Given the very large number of habeas filings and the fact that habeas proceedings are treated as civil actions for some key purposes, it seems possible that such confusion could be relatively widespread. On the other hand, the harm to an IFP applicant who makes this sort of error would likely be limited to the inconvenience entailed in obtaining the institutional-account statement.

Specifying in Form 4 that the institutional-account-statement requirement does not apply to habeas petitioners might cause a different sort of confusion at the margin, to the extent that a litigant erroneously believes that a proceeding is a habeas proceeding when it is not. This sort of confusion should be much more rare than the sort (noted above) that NACDL's proposal seeks to avoid; especially by the time of an appeal, litigants should not make this sort of category error. However, the downside of this kind of confusion could be more serious for the litigant, because the absence of the institutional-account statement would render the IFP application incomplete. On the other hand, the existing caselaw and local circuit provisions support the view that such a defect will not render the initial filing untimely (for purposes of appeal deadlines or, in the district court, statutes of limitations). Such a view seems strongly persuasive to me, but it should be noted that some judges have questioned it – leaving the possibility that a court might in future impose a forfeiture on a litigant who erroneously omitted to supply the institutional-account statement at the time of initial filing.

Encl.

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may 'authorize the commencement' of a suit is to imply that depositing a copy of the complaint with the clerk does *not* commence the litigation and therefore does not satisfy the statute of limitations. Only the judge's order permitting the plaintiff to proceed *in forma pauperis*, and accepting the papers for filing, would commence the action." *Williams-Guice*, 45 F.3d at 162. The *Williams-Guice* court, however, rejected this inference, observing that it "would make judicial delay fatal to some actions." *Id.* Instead, the court noted circuit precedent holding "that the receipt of the complaint by the clerk suffices, at least when the judge ultimately permits the plaintiff to proceed IFP," and it went on to adopt a tolling approach for instances when the IFP request is ultimately denied. *See id.* at 162, 164-65.

TAB 7B

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11-AP-003

February 14, 2012
via e-mail

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
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Washington, DC 20002

COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to the Federal Rules of Appellate Procedure
Published for Comment in August 2011

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments with respect to the proposed changes in the Federal Rules of Appellate Procedure. NACDL's comments on the proposed amendments to the Evidence and Criminal Rules are being submitted separately. Our organization has more than 12,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of about 35,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

FRAP 28. The proposed amendment to Rules 28(a)(6) and (b)(4) would eliminate the prior, artificial distinction between the "statement of the case" and the "statement of facts." (Conforming amendments to Rule 28.1 are also proposed.) As amended, Rule 28 would require only the appellant's brief contain, "a concise statement of the case setting out the facts relevant to the issues submitted for review and identifying the rulings presented for review …." NACDL agrees that the prior requirement to separate these two "statements" has sometimes proven confusing and

unhelpful to either counsel or the court. The "facts" underlying an issue that arose in the courtroom are often indistinguishable from the details of the procedural history of the case. The new requirement that the now-consolidated Statement of the Case include a specific reference to any ruling of the lower court which the appellant seeks to have reviewed is also bound to be helpful.

At the same time, we note that the wording of the new rule could lead to new forms of confusion. Practitioners may think, from the use of the term "relevant," that all the facts pertinent an argument must be in this new Statement. We assume this would not be a correct reading of the words, "setting out the facts relevant to the issues submitted for review," particularly since the statement is required to be "concise." Accordingly, NACDL suggests that the Advisory Committee Note concerning this change be expanded somewhat to make clear that a brief overview of the facts may be sufficient in the Statement, where additional necessary details are set forth in the Argument portion of the brief, showing how the issues raised and argument for reversal (or affirmance, in the case of the appellee's brief) arises out of the factual history of the case.

Conversely, we assume that the Committee does not mean to suggest that a brief statement of "the nature of the case, the course of proceedings, and the disposition below" is *not* expected to be found in every appellant's brief, despite the deletion of those words. As presently worded, the committee's proposal, as we read it, could suggest that these basic "facts" are not appropriate for inclusion in an appellate brief. If those words are not restored to the Rule, then at least the Note should be amended to make the expectation clear, since their pointed elimination is potentially misleading. We suggest language such as the following: "a concise statement setting forth the nature of the case, the essential procedural history (including reference to the rulings presented for review), and the key facts giving rise to the claims or charges as well as those relevant to the issues submitted for review …."

Form 4 - IFP. The committee proposes to clarify that the requirement that a prisoner attach a statement of the balance in his or her institutional account applies only when the prisoners seeks to appeal "a judgment in a civil action or proceeding." NACDL suggests that this wording be clarified to reflect more accurately the coverage of the Prison Litigation Reform Act, by adding "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)." Such proceedings, while generally treated as "civil" for purposes of appeal, are not governed by the PLRA. See, *e.g.*, *Santana v. United States*, 98 F.3d 752 (3d Cir. 1996) (Becker, J.).

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on these proposals. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,
s/Peter Goldberger

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National Association of Criminal Defense Lawyers
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TAB 8

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TAB 8A

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MEMORANDUM

DATE: August 29, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-C

Item No. 12-AP-C arises from comments submitted by the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division (the "Council") on the pending amendments to Rules 28 and 28.1.

Among other suggestions, the Council proposes "amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts."[1] The Council explains:

> Like all prior versions, the current version of Rule 28 and the proposed amendment require record citations only in the statement of facts. While experienced appellate counsel should know better, this leads some lawyers to believe that record references are unnecessary elsewhere in the brief. Statements in briefs that lack citations to the appendix or record waste the time of court personnel, especially law clerks.

Rather than address this proposal in the context of the amendments to Rules 28 and 28.1 concerning the statement of the case, the Committee decided at its spring 2012 meeting to add the proposal to the agenda as a new item.

I. Current Rule 28 and the requirement of citations to the record

As noted above, the Council asserts that Rule 28 "require[s] record citations only in the statement of facts." This is not entirely accurate. It is true that record citations are required for the statement of the facts. Current Rule 28(a)(7) requires "a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e))." If the pending amendments to Rule 28(a) are adopted, then new Rule 28(a)(6) will require "a

[1] I enclose a copy of the Council's February 2012 submission; the proposal concerning pinpoint citations is set out on pages 5-6 of that document.

concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e)).” But that is not the only provision in Rule 28 that requires record citations. Rule 28(a)(9)(A) requires that the argument section contain “appellant’s contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies.”

On the other hand, the Council is correct that Rule 28 does not, in general,[2] explicitly require citations to the record for factual or procedural assertions that appear outside the statement of facts and the argument. As to some sections of the brief, this is unsurprising; it is hard to imagine a need for record citations in the corporate disclosure statement; the table of contents; the table of authorities; the conclusion; or the certificate of compliance with type-volume limits. That leaves the jurisdictional statement, the statement of the issues, and the summary of argument. The question, it would seem, is whether judges and practitioners are encountering briefs in which factual and procedural assertions in any of these three sections are unaccompanied by record citations.

II. Relevant local circuit provisions

The First, Third, Fifth, Sixth, Ninth, and Eleventh Circuits have local provisions that specify that record citations are required for factual assertions wherever those assertions appear in the brief.[3] The D.C., Third, and Tenth Circuits have local provisions directing that briefs

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[2] Rule 28(e) requires that “[a] party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.” This directive presumably applies to all sections of the brief.

[3] *See* United States Court of Appeals For the First Circuit Rulebook at ix ¶ 4 (“Notice to Litigants” stating, inter alia, that “[t]o enable the Court to verify the documentary basis of the parties' arguments, factual assertions must be supported by accurate references to the appendix or to the record”); Third Circuit Local Appellate Rule 28.3(c) (“All assertions of fact in briefs must be supported by a specific reference to the record.”); Fifth Circuit Rule 28.2.2 (“Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record, whether in paper or electronic form, where the matter is found.”); Sixth Circuit Rule 28(a) (“A brief must direct the court to those parts of the record to which the brief refers. It must refer to the particular item in the record and the specific pages by reference to the record entry number or particular transcript or exhibits.”); Sixth Circuit Guide to Electronic Filing ¶ 6.2 (“Each brief will cite with specificity those parts of the record to which reference is made.”); Ninth Circuit Rule 28-2.8 (“Every assertion in briefs regarding matters in the record shall be supported by a reference to the location in the excerpts of record where the matter is to be found.”); Ninth Circuit Advisory Committee Note to Rule 28-2 (“Sanctions may be imposed for failure to comply with this rule, particularly with respect to record references. *See Mitchel v.*

provide record citations when identifying the rulings presented for review.[4] The Fourth, Seventh, and Eighth Circuits have provisions underscoring the requirement of record citations in the statement of the facts.[5]

III. Preliminary assessment

It seems clear that the failure of some briefs to include appropriate citations to the record causes considerable difficulties for appellate judges – as demonstrated by the rather large body of caselaw expressing frustration with (and sometimes imposing sanctions as a result of) this

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General Elec. Co., 689 F.2d 877 (9th Cir. 1982)."); Eleventh Circuit Rule 28-1(i) ("In the statement of the case, as in all other sections of the brief, every assertion regarding matter in the record shall be supported by a reference to the volume number (if available), document number, and page number of the original record where the matter relied upon is to be found.").

See also Fourth Circuit Rule 25(a)(12) ("Hyperlinks do not replace citations to the appendix, record, or legal authority and are not considered part of the appellate record. Documents must contain standard citations in support of statements of fact or points of law, in addition to any hyperlink.").

[4] *See* D.C. Circuit Rule 28(a)(1)(B) (requiring a statement of "Rulings Under Review" and stating that "[a]ppropriate 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"); Third Circuit Local Appellate Rule 28.1(a) ("The brief of appellant/petitioner must include ... (1) in the statement of the issues presented for review required by FRAP 28(a)(5), a designation by reference to specific pages of the appendix or place in the proceedings at which each issue on appeal was raised, objected to, and ruled upon."); Tenth Circuit Rule 28.2(C)(2) ("For each issue raised on appeal, all briefs must cite the precise reference in the record where the issue was raised and ruled on."); Tenth Circuit Rule 28.2(C)(3) ("Briefs must cite the precise reference in the record where a required objection was made and ruled on, if the appeal is based on: (a) a failure to admit or exclude evidence; (b) the giving of or refusal to give a particular jury instruction; or (c) any other act or ruling for which a party must record an objection to preserve the right to appeal.").

[5] *See* Fourth Circuit Rule 28(f) ("The ... STATEMENT OF FACTS will include exhibit, record, transcript, or appendix references showing the source of the facts stated."); Seventh Circuit Rule 28(c) ("The statement of the facts required by Fed. R. App. P. 28(a)(7) shall be a fair summary without argument or comment. No fact shall be stated in this part of the brief unless it is supported by a reference to the page or pages of the record or the appendix where that fact appears."); Eighth Circuit IOP III.I.4 ("The statement of facts should be complete, concise, and nonargumentative. It should be in narrative form with references to the transcript or other parts of the record.").

failure. But it is not clear what proportion of the record-citation failures concerns parts of the briefs other than the statement of the facts and the argument. Many of the decisions that criticize or sanction the failure to provide record citations focus on the absence of such citations from the statement of facts[6] and/or the argument section.[7]

On the other hand, the fact that six circuits have local provisions directing the provision of record citations in support of factual assertions wherever those assertions are found in the brief suggests that those circuits perceive a problem that extends beyond the facts and argument sections. It may thus be worthwhile to consider whether to amend Rule 28 to impose a global requirement of record citations for factual and procedural assertions.

A logical place to add such a requirement would be in Rule 28(e), which already addresses "[r]eferences to the [r]ecord." Here is a sketch of a possible amendment:

(e) References to the Record.

> (1) Requirement of record citations. Every assertion regarding a matter in the record must be supported by a citation to the record. A party referring to evidence whose admissibility is in controversy must cite the pages of the record at which the evidence was identified, offered, and received or rejected.
>
> (2) Manner of record citations. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed, a party referring to the record must follow one of the methods detailed in Rule 30(c). If the original record is used under Rule 30(f) and is not consecutively paginated, or if the brief refers to an unreproduced part of the record, any reference must be to the page of the original document. For example:
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> • Answer p. 7;

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[6] *See, e.g.*, *Gross v. Town of Cicero*, 619 F.3d 697, 701-02 (7th Cir. 2010) (striking statement of facts "and any assertion that relies solely upon it"); *Walker v. Holder*, 589 F.3d 12, 13 n.1 (1st Cir. 2009) (explaining that where statement of facts fails to include proper record citations, court will resolve doubts in favor of opponent).

[7] *See, e.g.*, *Aquila, Inc. v. C.W. Mining*, 545 F.3d 1258, 1268 (10th Cir. 2008) (citing Rule 28(a)(9)(A) and noting that "reading a record should not be like a game of Where's Waldo?"); *Sioson v. Knights of Columbus*, 303 F.3d 458, 460 (2d Cir. 2002) (dismissing appeal due to inadequate briefing and noting, inter alia, that "there is not one fact, or supposed fact, let alone a fact properly cited to the record, in the brief's 'argument' section").

• Motion for Judgment p. 2;

• Transcript p. 231.

Only clear abbreviations may be used. ~~A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.~~

If the Committee were to adopt such an amendment, it would also need to decide whether to remove the more specific references to record citations in Rules 28(a)(7) and 28(a)(9)(A). One could argue that the global citation requirement in Rule 28(e) would render the more specific provisions redundant; and one might argue that the more specific provisions could confuse litigants who (if they overlooked Rule 28(e)) might take the specific references in subparts of Rule 28(a) to exclude a similar citation requirement for sections of the brief discussed in other subparts of Rule 28(a). However, some might prefer to retain the specific requirements as a way of emphasizing the particular importance of record citations in the facts and argument sections of the brief.

IV. Conclusion

In determining whether to proceed with the amendment suggested by the Council, it is necessary to consider whether deficient briefs are being filed at a rate that demands a national rulemaking response and whether the deficiencies actually concern portions of the brief in which Rule 28 does not currently require record citations. If so, then a second question is whether such deficient filings justify the usual costs of alterations in the rules, and whether the amendment can be drafted in such a way as to avoid unintended consequences.

Encl.

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TAB 8B

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COUNCIL OF APPELLATE LAWYERS

ABA Judicial Division
APPELLATE JUDGES CONFERENCE
AMERICAN BAR ASSOCIATION

COMMENTS ON PROPOSED AMENDMENTS TO FED. R. APP. P. 28 & 28.1: MERGING STATEMENTS OF THE CASE AND FACTS

(Advisory Committee on Appellate Rules Agenda Item No. 10-AP-B)

The Council of Appellate Lawyers supports the proposal to amend FED. R. APP. P. 28(a) (Appellant's Brief) by consolidating subdivisions (a)(6) and (a)(7) to require a single, combined statement of the case and facts, with conforming amendments of Rules 28(b) (Appellee's Brief) and 28.1(c) (Cross Appeals: Briefs), for the reasons summarized in the proposed Committee Note on the amendment of Rule 28(a).[1] As the Honorable Jeffrey S. Sutton observed when he initiated the study that led to these proposed amendments, the separation of the statement of the case from the statement of facts in the 1998 amendment of Rule 28(a) has confused appellate lawyers, and has unintentionally encouraged redundancy in briefs and unnecessary procedural details in descriptions of "the course of proceedings." This redundancy and excessive detail compound the potential for redundancy in other sections of the brief, especially the jurisdictional statement. All agree that redundancy and irrelevant matter in briefs disserves the courts, the parties, and the public.

The Council of Appellate Lawyers' broad survey of experienced appellate lawyers (reproduced in the appendix to these comments), our own experience and analysis, and published literature support Judge Sutton's diagnosis of the problems and the proposed solution. Recombining the statements of the case and facts, and giving lawyers flexibility in choosing the order of the elements that comprise the combined statement, should solve the unintended difficulties that followed the 1998 amendments.

However, we are concerned that the specific language of the proposed

[1] Appellate Rules Advisory Committee, Proposed Amendments to the Federal Rules of Appellate Procedure 4–5 (May 2, 2011; rev. June 2, 2011), *at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Publication%20Aug%202011/AP_May_2011.pdf [hereinafter Proposed Amendments].

amendment of Rule 28(a) lends itself to misinterpretation. In our opinion, experience with widespread confusion and misinterpretation of the 1998 amendments indicates the need for greater specificity in this amendment's language to achieve the objectives summarized in the proposed Committee Note.

RECOMMENDATIONS

Before the 1998 amendments, FED. R. APP. P. 28(a)(3) required a single statement of the case with the content that the current subdivision (a)(6) prescribes, followed by a statement of facts as described in the current subdivision (a)(7).[2] Modest as the 1998 change was, dividing the pre-amendment statement in two led some lawyers to increase the procedural details in descriptions of "the course of proceedings" beyond what was pertinent to deciding the appeal. Further, separation of the statements coupled with requiring description of "the course of proceedings" to precede the statement of facts—which reverses the actual chronological sequence—led to repetition of some procedural details in the chronological statement of facts.

The consensus solution is to combine the contents of subdivisions (a)(6) and (a)(7) to create a statement of the case that includes the facts—which in substance would recreate the pre-1998 Rule 28(a)(3)—but *not* prescribe the order of the elements. That would permit, at counsel's option, "a statement of the case briefly indicating the nature of the case," followed by a chronological "statement of facts relevant to the issues submitted for review," followed by a concise chronological description of "the course of proceedings" to the extent relevant to the issues submitted for review, with a brief and purely factual summary of "the disposition below"—or, alternatively, "the

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[2] As now in force, FED. R. APP. P. 28(a)(6)–(7) provides:

> (a) APPELLANT'S BRIEF. The appellant's brief must contain, under appropriate headings and in the order indicated: ….
>
> (6) a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below;
>
> (7) a statement of facts relevant to the issues submitted for review with appropriate references to the record (see Rule 28(e)); ….

rulings presented for review"[3]—as part of the chronological "course of proceedings."

According to the Committee Note, the proposed amendment of Rule 28(a) implements the consensus solution described in the preceding paragraph:

> Rule 28(a) is amended to consolidate subdivisions (a)(6) and (a)(7) into a new subdivision (a)(6) that provides for one "statement." This permits but does not require the lawyer to present the factual and procedural history chronologically.[4]

The Council of Appellate Lawyers supports amending Rule 28(a) as described in the Committee Note. In our opinion, it is the best solution to problems that are frequent in appellate practice under the current rule. It is also the solution favored by a substantial majority of experienced appellate lawyers who responded to our survey (see the appendix to these comments).

Unfortunately, the proposed amendment does not conform to the amendment's description in the Committee Note. The proposed amendment's language differs materially from a consolidation of subdivisions (a)(6) and (a)(7).

- The proposed amendment would eliminate current subdivision (a)(6)'s brief indication of "the nature of the case." In the many discussions and commentaries on Rule 28(a) that we have read, we do not recall any that recommended eliminating this very useful introduction to the case that sets the stage for the rest of the brief. We believe it helps the court to know at the outset that the case is, for example, an action for patent infringement, or a medical malpractice case arising under diversity jurisdiction, or a civil antitrust action for price fixing. Since the preamble of Rule 28(a) states that a "brief must contain" the contents prescribed by the numbered subdivisions "in the order indicated," any contents not prescribed are, at least arguably, forbidden.
- The proposed amendment would eliminate entirely current

[3] Proposed Amendments at 2.

[4] Proposed Amendments at 5.

subdivision (a)(6)'s "course of proceedings." While we recognize the problem caused by inclusion of *irrelevant* procedural details, the solution is not to banish *all* procedural history. The solution is to make clear that procedural history should be limited to that which is necessary to inform the court of the posture of the case and give context to the issues presented for review. Some issues on appeal, and some appeals, may be based entirely on the procedural course in the lower court.

- Current subdivision (a)(7) prescribes "a statement of facts relevant to the issues submitted for review." The proposed amendment would change "a statement of facts" to "setting out the facts." While this does not alter meaning, the change is inconsistent with the carefully crafted styling of the rest of Rule 28(a), which consistently uses nouns to define a brief's elements (e.g., "a table," "a statement," "the basis," "an assertion," "a summary," "the argument").[5] The proposed language is a verb construction that describes what the statement of facts *does*, rather than a noun construction that defines what it *is*.
- The proposed amendment would replace current subdivision (a)(6)'s "the disposition below" with "identifying the rulings presented for review." In our opinion, "identifying" is vague and will lead to unnecessary confusion, especially for those with less appellate experience—that is, those most in need of clear guidance. The proposed language could mean any of the following, *none* of which is what the rule intends: (a) citation to the pages in the appendix or record where the rulings appear; (b) the district court's docket numbers for the rulings; or (c) the titles and dates of the documents that contain the rulings. On the other hand, the proposed "rulings presented for review" is more accurate than, and therefore preferable to, the current

[5] The restyling of the Federal Rules of Appellate Procedure effective December 1, 1998, was the first product of the Judicial Conference's multi-year project that restyled all the federal rules of practice and procedure. Based on innovative principles developed by Bryan Garner, the restyling project modernized the rules' language, eliminated jargon, shortened sentences, improved clarity, and brought consistency to the federal rules, among other benefits. *See generally* BRYAN A. GARNER, GUIDELINES FOR DRAFTING AND EDITING COURT RULES (1996).

"disposition below." For example, "the rulings presented for review" might include evidentiary rulings, jury instructions, and interlocutory orders that *resulted* in the disposition below.

Considering the specific problems to be solved and to reduce the likelihood of confusion, such as that which followed from the 1998 amendment, we propose the following reformulation of Rule 28(a)(6) to implement the solution described in the proposed Committee Note: [6]

(6) a statement of the case, which must contain:

(A) a brief statement of the general nature of the case;

(B) a concise statement of facts relevant to the issues submitted for review;

(C) a concise statement, without discussion or argument, of those aspects of the case's procedural history that are necessary to understand the posture of the appeal or are relevant to the issues submitted for review; and

(D) a concise statement, without discussion or argument, of the rulings presented for review.

We also propose amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief.[7] Like all prior versions, the current version of Rule 28 and the proposed amendment require record citations only in the statement of facts. While experienced appellate counsel

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[6] The structure of this proposed amendment is modeled on current Rule 28(a)(8).

[7] *See* 11TH CIR. R. 28-1(i) (emphasis added): "In the statement of the case, *as in all other sections of the brief*, every assertion regarding matter in the record shall be supported by a reference to the volume number (if available), document number, and page number of the original record where the matter relied upon is to be found."

should know better, this leads some lawyers to believe that record references are unnecessary elsewhere in the brief. Statements in briefs that lack citations to the appendix or record waste the time of court personnel, especially law clerks.

Finally, to reduce redundancy, we recommend amending Rule 28 to caution parties against repeating the same material in more than one of the sections of the brief that precede the summary of argument.

HISTORICAL CONTEXT

As originally adopted effective July 1, 1968, FED. R. APP. P. 28(a) provided as follows:

> BRIEF OF THE APPELLANT. The brief of the appellant shall contain under appropriate headings and in the order here indicated:
>
> (1) A table of contents, with page references, and a table of cases (alphabetically arranged), statutes and other authorities cited, with references to the pages of the brief where they are cited.
>
> (2) A statement of the issues presented for review.
>
> (3) A statement of the case. The statement shall first indicate briefly the nature of the case, the course of proceedings, and its disposition in the court below. There shall follow a statement of the facts relevant to the issues presented for review, with appropriate references to the record (see subdivision (e)).
>
> (4) An argument. The argument may be preceded by a summary. The argument shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on.
>
> (5) A short conclusion stating the precise relief sought. [8]

Rule 28(a) remained unchanged for 28 years. Subsequent history has been one of accretion, often to nationalize additional contents prescribed by some circuit rules.

- The first amendment, in 1991, added the jurisdictional statement.
- A 1993 amendment required the argument to include a statement of the standard of review for each issue on appeal. The Committee Note explains that this addition was based on favorable

[8] According to the Committee Note, FED. R. APP. P. 28 was modeled on SUP. CT. R. 40, which corresponds to current SUP. CT. R. 24.

experience in five circuits that had imposed this requirement by local rule.

- Amendments to subdivisions (a) and (b) in 1994 added the requirement that main briefs include a summary of the argument, to precede the argument itself. Again, this addition was based on rules in several circuits. Before this amendment, including a summary of the argument was optional.
- Finally, the amendments effective December 1, 1998, the year of restyling, made four additions to subdivision (a): the corporate disclosure statement, subdivision (1); separating the table of contents, subdivision (2), and table of authorities, subdivision (3), which many lawyers did before the amendment; the certificate of compliance with the length limitation, where required, subdivision (11); and, most pertinent here, separating the statement of the case, subdivision (6), and statement of facts, subdivision (7).

ANALYSIS OF THE PROBLEM

So far as we recall, the original 1968 formulation of the combined statement of the case and facts in FED. R. APP. P. 28(a)(3) was unproblematic throughout the 30 years it was in force. The 1998 amendment to that formulation was remarkably modest: all it did was add a separate heading for the statement of facts. The amendment did not change the contents that the original rule required or their prescribed order. Logically, the amended version should have been as unproblematic as the original. But experience under the amendment defies that logic.

One can only speculate why. Perhaps some lawyers believed that the amendment's isolation of the statement of the case signaled a greater emphasis on, and therefore devoting more pages to, the contents described in subdivision (a)(6). Perhaps this led some lawyers, especially those with limited training and experience in appellate practice, to puzzle over the undefined "nature of the case" and to suppose that that stating "the course of proceedings" required listing each pleading, motion, discovery demand, and stipulation extending time. When they moved to the separate statement of facts, they felt obliged to repeat some of the same procedural facts as part of the

factual chronology. Combining this with other elements of the brief—the relatively new jurisdictional statement, the newly required summary of argument, and the argument itself—some procedural facts might be stated five times, instead of twice or thrice. This multi-redundancy, even if confined to a minority of briefs, disserves the courts.

Many knowledgeable observers are dissatisfied with the current formulation. The Council of Appellate Lawyers shares the concerns that led the Appellate Rules Advisory Committee to re-examine Rule 28(a)(6) and (7). Indeed, on invitation by the Advisory Committee's Chair in 2002, the Council proposed recombining the statements of case and facts based on concerns similar to those that led to the current proposed amendment.[9] The Advisory Committee took up our recommendation in 2003 and again in 2004. On those occasions, several members expressed their dissatisfaction and observed widespread confusion among practitioners about what the statement of the case should include. However, the Advisory Committee reached no consensus to amend the rule and dropped the item from its working agenda.[10]

Several circuits have adopted local rules that elaborate or conflict with FED. R. APP. P. 28(a)(6)–(7).[11] According to two experts in federal appellate practice, one of whom is a member of the Advisory Committee, "The language of Rule 28 is somewhat murky on the relationship between the Statement of the Case and the Statement of the Facts, which is a separate, required section."[12]

In 2010, at Judge Sutton's suggestion, the Advisory Committee on Appellate Rules launched a study (Agenda Item No. 10-AP-B) of

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[9] Letter from Robert A. Vort to Honorable Samuel A. Alito, Jr., 5 (September 17, 2002) (considered as Item No. 02-12 on the Advisory Committee's agenda).

[10] Catherine T. Struve, Memorandum on Item No. 10-AP-B, 2–6 (March 13, 2010).

[11] Catherine T. Struve, Memorandum on Item No. 10-AP-B, 13–15 (March 11, 2011), reproduced in the agenda materials for the Advisory Committee's April 2011 meeting at 185–99, in Tab V-A-2 (Item No. 10-AP-B).

[12] Douglas N. Letter & Mark B. Stern, *Substantive Statements and Summary of Argument*, *in* A PRACTITIONER'S GUIDE TO APPELLATE ADVOCACY 225, 226 (Anne Marie Lofaso et al. eds., 2010).

whether to repeal or amend the current requirement that the appellant's brief include "a statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below," FED. R. APP. P. 28(a)(6), followed by a statement of the facts relevant to the issues on appeal, FED. R. APP. P. 28(a)(7), under separate headings.[13] As was the case in 2003 and 2004, some members of the Advisory Committee have expressed concern that subdivision (6) confuses some lawyers and has unintentionally encouraged redundancy in briefs.

In considering this issue, we spoke informally with many experienced appellate lawyers and some appellate judges. We also invited comments from the Council of Appellate Lawyers' membership. All the written comments we received are included in the appendix to this report. Many of those comments reflect widespread confusion about what to include in the statement of the case or how to differentiate it from the statement of facts—either by the commentators themselves (including a teacher of appellate practice) or observed by the commentators in other lawyers.[14] Likewise, many of the comments observe that the separate statements of the case, facts, and jurisdiction lead to repetition and excessive procedural history beyond what will aid the court in deciding the appeal. Close reading of the comments reveals that appellate specialists who profess to understand the current rule do not all understand it the same way.

Even comments that oppose amending the rule do not do so on the ground that practice under the current rule is satisfactory. Rather, they propose other solutions to the acknowledged problems, including better education of appellate advocates, restricting appellate practice to certified specialists, and local circuit rules that override FED. R. APP. P. 28(a)(6)–(7). One comment despairs, "I don't know that changing the

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[13] "The appellant's brief must contain, under appropriate headings and in the order indicated," the items listed in FED. R. APP. P. 28(a). The appellee's brief must contain the same elements in the same order, except for the "short conclusion stating the precise relief sought," FED. R. APP. P. 28(a)(10), and with appellee having the option to omit several of the elements, including the statements of the case and the facts, "unless the appellee is dissatisfied with the appellant's statement …." FED. R. APP. P. 28(b).

[14] *Accord* Letter & Stern, *supra* p. 8 note 12, quoted *supra* p. 8.

rule will necessarily solve the problem of attorneys including irrelevant information."

Similarly, two recent writings in the same publication differ on how to frame the statement of the case. One, after stressing the importance of a powerful statement of facts in chronological order, teaches the following approach under the subheading "Adhere to a chronological structure even if you have to include a separate Statement of the Case":

> In many appellate courts, you are required to have a separate "Statement of the Case" that must precede the "Statement of Facts." If so, my recommendation is not to abandon a chronological structure. Rather, you can draft a pointed one- or two-paragraph statement that relays the critical procedural events of the case but does not attempt to address them in detail. Leave the detail for the procedural history section of your Statement of Facts….[15]

The other advocates a different treatment:

> From this [the language of FED. R. APP. P. 28(a)(6)–(7)], one might (wrongly) infer that the Statement of the Case should contain relevant procedural history and the Statement of Facts should contain only a discussion of record evidence. That impression is heightened by reference to the Advisory Committee's statement that the rule provides for two statements, "one procedural, called the statement of the case; and one factual, called the statement of facts."
>
> In practice, however, it is probably more accurate to view the Statement of the Case as providing a brief introduction to and summary of the Statement of Facts. The Statement of Facts will then not only set out the relevant evidence but also will present a full account of prior proceedings. In that sense, the Statement of the Case bears approximately the same relation to the Statement of Facts as the Summary of Argument to the Argument.[16]

Both of these writings counsel lawyers to ignore the explicit distinction between subdivisions (6) and (7), a distinction that is reinforced in the authoritative Advisory Committee Note that accompanied the 1998 amendment.

Widespread dissatisfaction with the current rule among appellate

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[15] Lawrence D. Rosenberg, *The Appellate Brief*, *in* A PRACTITIONER'S GUIDE TO APPELLATE ADVOCACY, *supra* p. 8 note 12, at 181, 199.

[16] Letter & Stern, *supra* p. 8 note 12, at 227 (footnote omitted).

specialists, lingering confusion about what the statement of the case should contain, and the counterproductive practices by a minority of practitioners are pivotal factors that warrant amendment of the rule.

ANALYSIS OF POSSIBLE SOLUTIONS

Because FED. R. APP. P. 28(a) has a long history, an amendment cannot be written on a clean slate. Practitioners will not look merely at the rule as amended. They will compare it to the current version of the rule, and possibly prior versions, to divine the amendment's intent. In view of the unanticipated misunderstanding of the 1998 amendments, the amended rule should provide an extra measure of clarity.

Our proposed reformulation of Rule 28(a)(6), *supra* pp. 2–6, increases specificity by adding subdivisions devoted to each element of the combined statement. We also recommend more explanation in the text of the amended rule. We believe this is important to avoid misunderstanding and to educate lawyers who are not appellate specialists. Not all lawyers read Committee Notes with the same care as they read the rules; some do not read the notes at all, and some are not aware that they exist. Indeed, some of the lawyers who are most in need of explanation may be among the least likely to read Committee Notes.

Some commentators suggest reversing the prescribed order of the separate statements of case and facts, to correspond to the usual chronological order: (1) plaintiff patents invention (fact); (2) plaintiff sues for infringement (case). In many appeals, perhaps most, this sequence would be optimal. However, in appeals that primarily concern procedure in the lower court, it may be preferable to begin with the pertinent procedural facts upon which the appeal turns. This may be true, for example, where a district court enters final judgment on a motion for summary judgment and the losing party's main argument is that the trial court erred in granting summary judgment without first allowing reasonable discovery. Therefore, we favor allowing counsel flexibility to order the elements as counsel believes most appropriate for the particular appeal.

Another possible solution, suggested in one or two comments we received, is to eliminate altogether "the course of proceedings." In our opinion, this is an overreaction to the present problems; a larger number of the comments we received share our opinion. Some

procedural history is necessary to inform the court of the posture of the appeal and give context to the issues presented for review. And, as explained above, aspects of the procedural history will be dispositive of some appeals. Therefore, that is one of our disagreements with the proposed amendment that was published for comment.

CONCLUSION

We respectfully offer these comments for consideration by the Advisory Committee on Appellate Rules, and recommend adoption of the amendments proposed *supra* pp. 2–6.

February 2012

Respectfully submitted,

Steven Finell
Chair, Rules Committee
StevFinell@aol.com

About the Council

The Council of Appellate Lawyers is a part of the Appellate Judges Conference of the American Bar Association's Judicial Division. It is the only nationwide Bench-Bar organization devoted to appellate practice. The views expressed here are solely those of the Council, and have not been endorsed by the Appellate Judges Conference, the Judicial Division, or the American Bar Association.

APPENDIX

COMMENTS BY MEMBERS OF THE COUNCIL OF APPELLATE LAWYERS

QUESTION

-----Original Message-----
From: for the Council of Appellate Lawyers, part of the Appellate Judges Conference/JD [mailto:AJCCAL@MAIL.ABANET.ORG] on Behalf of Steven Finell
Sent: Tuesday, January 25, 2011 10:03 PM
To: AJCCAL@MAIL.ABANET.ORG

Subject: Requests for Comments on Fed. R. App. P. 28(a)(6) - Statement of the Case

Judge Jeffrey S. Sutton, Chair of the Appellate Rules Advisory Committee, has asked the Council of Appellate Lawyers to comment on a proposal to repeal or amend Fed. R. App. P. 28(a)(6), which requires the appellant's brief to include a "statement of the case briefly indicating the nature of the case, the course of proceedings, and the disposition below." This requirement was added in 1998. Before that, rule 28 required a statement of the case that included both the procedural history and the relevant facts.

Judge Sutton is concerned that some lawyers unnecessarily repeat some of the same material in the statement of the case, the jurisdictional statement, and the statement of facts. He is also concerned that some lawyers include unnecessary procedural details that have no bearing on the appeal.

If you have any comments on this proposal, please email them to me. Thank you.

Steven Finell
Chair, Council of Appellate Lawyers Rules Committee

RESPONSES

When I read your email, the first thought that came to mind is a law school legal writing class. The majority of what is taught is to teach students how to write but the methods and requirements are generally forgotten by the student the first time a partner gives the summer associate an assignment. At that point all that matters is the style the

boss prefers. However, one part of the law school legal writing experience that carries over to the real world is the repetitive and structured nature of the writing. I did a quick search and found the quote below my text. I would personally suggest removing the requirement, however, like the partner referenced in the quote a busy judge may find the section a necessary evil for his/her quick initial review of a brief. That being said, I would turn the question back to Judge Sutton and ask if he and his colleagues find it a useful exercise.

"I tried everything I could think of in an effort to persuade them to accept the theory behind the CRAC format but they just wouldn't buy it. Regardless of the philosophical rationalization proffered in support of the CRAC format, it was met with shaking heads and looks of disdain. And then, way in the back, a young woman raised her hand in obvious annoyance. 'I was an English major,' she said. 'I know how to write. Why should I write like that when it seems so stilted and repetitive?' she asked. And that's when, with nothing left in my arsenal, I blurted out the only answer I could think of: 'Because your boss is billing the client $400 an hour and your client won't pay him to spend 20 minutes poring over your memo just to find out what your conclusion is.' " (http://west.thomson.com/pdf/perspec/Spring%202003/Spr033.pdf)

I agree with. Judge Sutton

I agree with the proposal. At the very least, it will cut unnecessary verbiage from a brief.

I'd support an amendment. As the rules are written, it's hard to avoid duplication over those three sections. I've only been practicing since 2002, but the 1998 version of the rule makes a lot of sense to me. One statement of the case setting out the factual background, the procedural posture, and the basis for appellate jurisdiction ought to do the trick, and it would be a whole lot easier to write.

Steven, I appreciate Judge Sutton's concern. I have taught Appellate Advocacy at … and both in teaching and in my own practice, I have found the same, often necessary repetition in the jurisdictional statement, statement of the case, and statement of facts.

The jurisdictional statement seems to me to stand on its own, but the statements of case and facts overlap in almost all cases, although more in procedurally driven appeals than otherwise. For a teacher, differentiating the two types of statements is difficult. I would suggest keeping the jurisdictional statement requirement but substituting a combined statement of case/facts.

I'm sure that's true, but I don't know that changing the rule will necessarily solve the problem of attorneys including irrelevant information. That may be a problem with the attorneys, not the rule.

When properly used, the rule serves a very useful function. It allows judges to know whether this is a commercial dispute, personal-injury action, or civil-rights claim. It allows the judges to know whether it is an appeal from a jury or bench trial, and whether judgment was entered on a verdict or notwithstanding a verdict. It also allows the judges to learn the name of the trial judgment, and the size of any judgment.

Judge Sutton's complaint seems to be that a lot of lawyers don't know how to write a good brief, in that they include unnecessary information or repeat things needlessly. That can't be legislated against. A better solution would be to adopt something akin to the British barrister system and require special certification before one can appear in an appellate court.

I'm against a change to the rule.

I think the statement of the case can serve a valuable purpose, so I would not want to see it eliminated. I know how I use that statement – as an overview of the case that gives me a context for what I am about to read. If that was the legislative intent behind the rule, perhaps the

rule needs to be rewritten, not removed:

> (6) a one-paragraph summary of the relevant facts of the case and issues on appeal, suitable for inclusion in the court's website description of the docket;

What do you think?

Personally, I have used the brief statement of the case in lieu of an introduction, and have never had more than one page. As for course of proceedings, I have written things like "Plaintiff filed her Complaint in early 2007, and following extended discovery Defendant filed a Motion for Summary Judgment which was granted by the District Court on December 17, 2010."

I think whether you have this rule or not, there are folks who will (as I did in the first few appellate briefs I did back when I started) include each and every pleading and date. The distinction for me came with experience. Perhaps if the rule were amended to state "the course of relevant proceedings" it might send the message to less experienced appellate practitioners that they should leave out those things that are not relevant to the appeal.

I agree with the proposal. My experience has been the same as Judge Sutton's with duplication between the statement of facts and statement of the case, and unnecessarily detailed discussions of the immaterial procedural history.

My preference would be elimination of the requirement to include a statement of the case in the briefs. I agree that the statement of the case is duplicative of other parts of the brief.

But I do see some purpose in having the appellant provide "the nature of the case, the course of the proceedings, and the disposition below" earlier in the appeal -- particularly in cases with inexperienced appellate counsel or pro se appellants. Such information could be provided in a "docketing statement," such as that used by the Texas appellate courts under Texas Rule of Appellate Procedure 32. Having a

"docketing statement" in the early stages of an appeal would expedite the identification of jurisdictional or procedural problems and would provide additional information for judges in their self-recusal decisions.

Steve, thanks for your email about modifying FRAP 28(a)(6). Judge Sutton's concerns are well-taken. My firm has long disliked the way Rule 28(a)(6) interacts with other components of Rule 28(a), so we've submitted a letter addressing our particular concerns. (A PDF copy is attached.) Our points are separate from the concerns Judge Sutton identified, but please feel free to weigh in on them as you see fit when preparing CAL's response.

NOTE: The attached PDF was the letter from Peder K. Batalden to Peter G. McCabe dated January 27, 2011

FYI from a legal writing professor:

I looked at several other similar rules and thought this might be a good starting point. I believe the items I've incorporated are important to the Court's complaints and for the sake of brevity, but that it could be better written.

Proposal to Amend Fed. R. App. P. 28 (a)(6)

"The Statement of the Case shall contain a brief summary of the state of the case, to include: (1) a description of the form (nature) of the action, (2) a brief procedural history and (3) a brief synopsis of any prior determination(s) issued by any court or governmental agency. Matters provided in the Statement of the Case should not be repeated; matters that have no bearing on the appeal should not be included, and; the Statement of the Case should not contain any argument. "

Whether the "form of the action" or the "nature of the action" is used, is a matter of choice.

I believe the jurisdictional statement and the statement of facts should be separately discussed under separate headings.

I appreciate this opportunity to comment.

I am opposed to eliminating this from FRAP 28 because I think it can be handled by local rule. For example, the D.C. Circuit's local rules say that a statement of the case is not required. This gives counsel a choice, and many counsel omit the section from D.C. Circuit briefs. A local rule can also advise counsel to avoid repeating information that has already been presented in the jurisdictional statement, such as procedural information about the filing and timeliness of the notice of appeal.

There are times when a statement of the case is warranted. For example, when an appeal arises from earlier protracted proceedings--such as a previous appeal and remand--it is helpful to give the court the procedural history of the case--and to give it up front rather than waiting until the end of the statement of facts to end with a factual statement of litigation history. (Lately I've had a number of appeals that have previously been on appeal.) If a case has gone to the Supreme Court and has been sent back to the circuit court, the statement of the case is the place to give that information at the outset.

Another example is when there are multiple claims and parties, but not all of those claims or parties are involved in the appeal. This occurs not only in the context of a Rule 54(b) certification, but also when the case below has been processed through multiple stages--e.g., a previously unappeased 12(b)(6) ruling knocking out some claims or parties, followed by summary judgment ruling on some other issues, followed by trial. It's helpful to clarify separately and at the outset--in the statement of the case--what the case was when it began, what it is now, and why (in terms of claims and parties).

I also like that the statement of the case is an opportunity for counsel to present a thematic statement of what the case is about, an opportunity that doesn't exist in other pre-argument sections. (Of course, many lawyers alternatively insert an introduction before the jurisdictional statement.)

Steven - in my experience, the Statement of the Case seldom contains anything that is not already in the Statement of Facts.

In the Kansas state courts, the appellant is required to indicate the "Nature of the Case." Despite the fact that the judges have repeatedly urged that this not be used for argument, it often is. I think the problem (if you want to call it that) is even more pronounced in the federal appellate courts where rule 28(a)(6) requires more than just the "nature" of the case. I recently received an appellant's brief in which the Statement of the Case extended 7 pages and was probably 80% argument. Under the circumstances, I could not say I was satisfied with the appellant's statement and had to do my own in the appellee's brief.

I think that if the Statement of the Case requirement were eliminated, the Court would receive all the information that is needed about the nature of the case and the proceedings below from the Jurisdictional Statement and the Factual Statement.

As an aside, it seems to me that the Jurisdictional Statement is also superfluous in most instances. The docketing statement usually provides all that is needed in this regard. I also find it cumbersome to have to provide a Summary of the Argument, before the argument itself. Of course, the judges are in a better position to determine what information they really need in the briefs.

Thank you for providing the opportunity for input.

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MEMORANDUM

DATE: August 29, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-D

At the Committee's spring 2012 meeting, Kevin Newsom suggested that it might be useful to consider the possibility of adopting amendments that would clarify practice under Appellate Rule 8 and Civil Rule 62 concerning procedures for appeal bonds.

Any treatment of this area of law and practice would require close coordination with the Civil Rules Committee. As an initial matter, it may be helpful to decide what topics warrant attention. This memo surveys some possible topics; my goal in this memo is not to treat any of them comprehensively, but rather to generate discussion of these and other possible questions. I have limited the scope of the memo to questions implicated by stays of damages judgments; stays of injunctions pose separate issues and are not addressed here.

Part I discusses bonds that secure stays of execution pending the disposition of post-judgment motions. Part II takes up the topic of appeal bonds. Part III notes a few issues that are common to both types of bonds.

I. Stays pending disposition of post-judgment motions

A defendant who wishes to make a post-judgment motion and who wishes to avoid execution of the judgment pending the determination of that motion will need to seek a stay of that judgment. In Part I.A, I discuss questions relating to the timing of such stay motions; Part I.B discusses the terms on which a stay will be granted.

A. Timing

Rule 62(a)'s automatic stay covers the first 14 days after entry of the judgment. Before that automatic stay expires, the defendant should seek a further stay.

Civil Rule 62(b) provides:

On appropriate terms for the opposing party's security, the court may stay the

execution of a judgment – or any proceedings to enforce it – pending disposition of any of the following motions:

(1) under Rule 50, for judgment as a matter of law;

(2) under Rule 52(b), to amend the findings or for additional findings;

(3) under Rule 59, for a new trial or to alter or amend a judgment; or

(4) under Rule 60, for relief from a judgment or order.

Prior to the 2009 amendments to the Civil Rules, the length of the automatic stay and the time period for making post-judgment motions under Civil Rules 50, 52(b), and 59 were the same – namely, 10 days.[1] In 2009, the deadlines for those post-judgment motions were lengthened to 28 days, but the automatic stay period was changed to 14 days (a change that merely reflected the shift to a days-are-days approach to counting time).

Last fall, the Civil Rules Committee discussed a question posed by Judge Eric Melgren concerning the time period after expiration of the automatic stay and prior to the filing of a post-judgment motion:

> .... The question is whether the court can stay execution more than 14 days after judgment is entered if there is no pending motion under Rule 50, 52, 59, or 60 but time remains to make such a motion.
>
> Discussion began with the suggestion that the rule recognizes authority to grant a stay if a party seeks a stay before filing a motion under Rules 50, 52, 59, or 60, but represents that a timely motion will be filed. The time for Rule 50, 52, and 59 motions was extended to recognize that the former 10-day period was often inadequate to frame a motion, even as computed under the former rules that made a 10-day period equal to at least 14 calendar days. This opportunity should be preserved, without forcing an accelerated motion in order to avoid a gap after the automatic stay expires. This conclusion is easily supported by finding that a stay ordered before a promised motion is filed is one "pending disposition of" the motion. If there is concern about procedural maneuvering, the stay can readily be ordered to expire automatically if a timely motion is not filed under Rule 50, 52, 59, or 60.
>
> Incidental discussion reflected the belief that it makes sense to have an automatic stay. The alternative of forcing an immediate motion could not always

[1] Under the pre-2009 method for computing time, ten days always meant at least 14 days because intermediate weekends and holidays were skipped.

> protect against immediate execution before the judgment debtor learns of the judgment and takes steps to seek a stay. There may be many good reasons for a stay, including both the prospect of post-judgment motions in the trial court and appeal. (Other provisions deal with stays once an appeal has been taken.) And forcing an immediate motion would generate hasty drafting and argument. On the other hand, there may be good reasons to deny a stay even when a post-judgment motion has been filed.
>
> Committee members agreed that a court has authority to stay execution of its own judgment, and that judges will realize this power as an essential safeguard. Unless misunderstanding becomes common enough to show a real problem, there is no need to amend Rule 62. This proposal will be removed from the agenda.

Minutes of the Advisory Committee on Civil Rules 36-37 (November 7-8, 2011).

The fact that the court has authority to stay execution prior to the filing of a promised post-judgment motion does not entirely answer the question of optimal defense strategy. Such stays are discretionary, and the level of clarity with which the defendant can articulate the nature of its intended-but-not-yet-filed motion may influence the court's exercise of its discretion.

Another question that might arise – if the automatic stay expires prior to the entry of a Rule 62(b) stay – is whether the latter can operate retroactively and thus can undo enforcement efforts that occurred prior to the grant of the stay.[2]

B. Standard

Rule 62(b)'s language indicates that the grant of a stay pending disposition of a post-judgment motion lies within the district court's discretion: the Rule uses the term "may" and refers to "appropriate terms for the opposing party's security."[3] The question, then, is how to

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[2] *See Newburgh/Six Mile Ltd. Partnership II v. Adlabs Films USA, Inc.*, 2010 WL 3582542, at *5 (E.D.Mich. Sept. 10, 2010) (unreported decision) (after noting uncertainty in the caselaw and performing an equitable analysis, imposing stay retroactive to the date of the expiration of the automatic stay so that "[a]ll collection efforts thus far are nullified"). The analysis likely differs with respect to a stay under Civil Rule 62(d). *See, e.g.*, *Phansalkar v. Andersen Weinroth & Co., L.P.*, 211 F.R.D. 197, 200-01 (S.D.N.Y. 2002) (noting variation in caselaw on potential retroactive effect of supersedeas bonds).

[3] Three districts' local rules invert the presumption set by Civil Rule 62(a) and (b) by providing that

> [u]nless otherwise directed by the Court, all proceedings to enforce a judgment

define what constitutes appropriate terms and what factors should guide the district court's exercise of discretion.

Discussions of those questions appear more frequently in district-court caselaw than in appellate decisions or treatises. A decision by Judge Kravitz sums up relevant principles:

> Rule 62(b) is intended to protect the prevailing party's interest in the judgment while preserving the status quo pending the disposition of post-trial motions.... Normally, the party seeking a stay under Rule 62(b) is required to post a bond sufficient to protect the prevailing party's interest in the judgment.... However, the Court may grant a stay without requiring the judgment debtor to post a bond if the judgment debtor can show that in the absence of standard security, the judgment creditor will be properly secured against the risk that the judgment debtor will be less able to satisfy the judgment after the disposition of the post-trial motions.[4]

As Judge Kravitz notes, an alternative to a bond may provide "appropriate ... security" under Rule 62(b); caselaw illustrates that such alternatives might include letters of credit, the use of cash or other property as collateral, and/or a commitment not to dissipate assets.[5] Some courts

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are stayed pending the disposition of the following motions:

(a) new trial or to alter or amend a judgment made pursuant to Fed. R. Civ. P. 59;

(b) relief from judgment or order made pursuant to Fed. R. Civ. P. 60;

(c) judgment as a matter of law made pursuant to Fed. R. Civ. P. 50; or

(d) to amend the findings or for additional findings made pursuant to Fed. R. Civ. P. 52(b).

E.D. Okla. Local Civil Rule 62.1; N.D. Okla. Local Civil Rule 62.1; W.D. Okla. Local Civil Rule 62.1.

[4] *Lawyers Title Ins. Corp. v. Singer*, 2011 WL 1827268, at *1 (D. Conn. March 7, 2011) (unreported decision).

[5] *See, e.g.*, *Newburgh/Six Mile Ltd. Partnership II*, 2010 WL 3582542, at *1, *3 (granting stay based on provision of an "irrevocable letter of credit"); *Slip N' Slide Records, Inc. v. Teevee Toons, Inc.*, 2007 WL 1489810, at *3 (S.D. Fla. May 18, 2007) (unpublished decision) ("To preserve the status quo in the case, and taking into account TVT's financial condition, the Court will require the pledge not to dissipate assets *in addition* to the posting as security of 100% of the compensatory damage portion of the judgment, $2,279,200. That security can be in the form of a surety bond, the posting of cash in escrow, or a secured pledge of assets that are not

may accord special treatment to governmental defendants.[6]

II. Stays pending appeal

Rules and cases concerning supersedeas bonds address a number of issues. Part II.A discusses the amount of the supersedeas bond, while Part II.B discusses the possibility of alternatives to a surety bond. Part II.C discusses authorities that treat governmental appellants specially. Part II.D considers the division of authority, with respect to supersedeas bonds, between the judge and the district clerk. Part II.E notes a circuit split concerning whether an appeal by the judgment winner permits the judgment debtor to obtain a stay of execution without a supersedeas bond. Part II.F observes that the Rules do not address questions concerning the terms or interpretation of a surety bond.

A. Amount of supersedeas bond

With respect to money judgments, Civil Rule 62(d) provides that "[i]f an appeal is taken, the appellant may obtain a stay by supersedeas bond." Rule 62(d) does not specify the amount of the bond, but that question has been addressed both in caselaw and in the local rules of some district courts. In Part II.A.1, I survey those authorities. Part II.A.2 makes a brief comparison to state laws concerning supersedeas bonds.

1. Federal caselaw and rules

Ordinarily, to supersede a federal-court damages judgment, the supersedeas bond must cover the full amount of the judgment. *See Olcott v. Delaware Flood Co.*, 76 F.3d 1538, 1559 (10th Cir. 1996). However, the appellant may be able to convince the court to approve a lower amount:

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already encumbered."); *Gallatin Fuels v. Westchester Fire Ins. Co.*, 2006 WL 952203, at *2 (W.D. Pa. April 12, 2006) (unreported decision) ("In deciding whether to order an unsecured stay, the court should consider the movant's justification for granting a stay without security, as well as the movant's financial position, including whether the movant has shown whether posting a bond or otherwise providing adequate security is impossible or impractical."), *underlying judgment aff'd in part & rev'd in part on other grounds*, 244 Fed. Appx. 424 (3d Cir. 2007) (unpublished decision).

[6] *See, e.g.*, *Johnston v. School District of Philadelphia*, 2006 WL 563003, at *1 (E.D. Pa. March 7, 2006) (unreported decision) (staying monetary portion of judgment against school district without requiring a bond); *United States ex rel. Garibaldi v. Orleans Parish School Bd.*, 1998 WL 774172, at *1 (E.D. La. Oct. 30, 1998) (unreported decision) (citing state law in support of determination that defendant school board "is not required to post bond pending the post-trial motions").

> The purpose of the supersedeas bond is to secure the appellee from loss resulting from the stay of execution. Because the stay operates for the appellant's benefit and deprives the appellee of the immediate benefits of his judgment, a full supersedeas bond should be the requirement in normal circumstances, ... such as where there is some reasonable likelihood of the judgment debtor's inability or unwillingness to satisfy the judgment in full upon ultimate disposition of the case and where posting adequate security is practicable. In unusual circumstances, however, the district court in its discretion may order partially secured or unsecured stays if they do not unduly endanger the judgment creditor's interest in ultimate recovery.

Federal Prescription Service, Inc. v. American Pharmaceutical Ass'n, 636 F.2d 755, 760-61 (D.C. Cir. 1980). The Seventh Circuit has reasoned "that an inflexible requirement of a bond would be inappropriate in two sorts of case: where the defendant's ability to pay the judgment is so plain that the cost of the bond would be a waste of money; and – the opposite case, one of increasing importance in an age of titanic damage judgments – where the requirement would put the defendant's other creditors in undue jeopardy." *Olympia Equipment Leasing Co. v. Western Union Telegraph Co.*, 786 F.2d 794, 796 (7th Cir. 1986). The caselaw on this topic, however, is hardly uniform.[7]

Local rules addressing the amount of the bond vary. Some courts' rules set a presumptive amount for the bond; such rules provide that, unless the court otherwise orders, the bond must be a particular percentage of the judgment (with percentages ranging from 110 to 125 percent – or, in one case, 150 percent for small judgments).[8] One court's local rules set the

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[7] *See* David M. Axelrad & Peder K. Batalden, *Staying Enforcement of a Money Judgment Pending Appeal: An Overview*, 76 DEF. COUNS. J. 140, 144 (2009) ("[M]ost courts take a much harder line, generally rejecting unsecured stays that a defendant requests simply because he cannot post a bond or provide other security."); JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS § 7:19 (listing factors considered by courts in deciding whether to relax "the traditional bond requirements"); Edward Mullins & Annette C. Escobar, *Staying a Money Judgment in Federal Court Without Posting a Supersedeas Bond*, 77-DEC FLA. B.J. 45, 45 (2003) ("[T]he general consensus is that, although the posting of a supersedeas bond guarantees the appellant a stay 'as a matter of right,' the discretion to grant or deny a stay in the absence of a bond always belongs to the trial court.... While this is the predominant view, some circuits have yet to declare an official position.").

[8] *See* E.D. Cal. General Rule 151(d) (125 percent); S.D. Fl. General Rule 62.1(a) (110 percent); D. Kan. Rule 62.2 (125 percent); E.D. La. Local Civil Rule 62.2 (120 percent); M.D. La. Local Civil Rule 62.2 (120 percent); W.D. La. Local Civil Rule 62.2 (120 percent); D. Maine Civil Rule 65.1(c) (110 percent, plus $ 500 "to cover costs"); D. Md. Civil Rule 110.1(a) (120 percent, plus $ 500 "to cover costs on appeal"); D. Mass. Rule 62.2 (110 percent, plus $ 500 "to cover costs"); N.D.N.Y. Local Rule 67.1(d) (111 percent, "plus $250 to cover costs"); D.R.I.

presumptive bond amount at the amount of the judgment plus a year's worth of interest and a set amount for costs.[9] Some other local rules specify the types of items that the bond must cover (such as interest and costs) but do not specify amounts or a percentage of the judgment.[10]

2. A comparison to state laws concerning supersedeas bonds

A brief comparison to state-court practice concerning supersedeas bonds may be valuable as context. Prior to about the year 2000, state laws appear to have followed two approaches; some states flatly required a supersedeas bond in the full amount of the judgment, while other states gave the court discretion to approve a smaller bond or an alternative type of security.[11] Defendants have decried the hardship posed by the full-amount approach in cases involving enormous damages awards, and these criticisms have led to changes in the laws of many states.

The facts of the famous Texaco-Pennzoil dispute illustrate that, where a monetary judgment is huge, there is a need for flexibility in the determination of the bond amount. Douglas Laycock has summarized Texaco's argument in that litigation:

> Texaco's claim ... ran as follows: The Texas trial court entered judgment against Texaco for more than $11 billion – $10.5 billion plus interest. Pennzoil could begin executing on that judgment thirty days after its entry, unless Texaco filed a supersedeas bond in the full amount of the judgment. It was impossible for Texaco to file an $11 billion bond. Consequently, Texaco claimed that the bond requirement would result in a forfeiture of its right to appeal. Moreover, the bond was unnecessary and served no purpose, because Texaco had a net worth of $23

Local Civil Rule 62 (110 percent, "plus an amount established by law or directed by the Court to cover costs"); D.S.C. Local Civil Rule 62.01(A) ("150% of the amount of the judgment if the judgment does not exceed ten thousand dollars ($10,000) or 125% if the judgment exceeds ten thousand dollars ($10,000)"); N.D. Tex. Local Civil Rule 62.1 (120 percent "plus $250.00 to cover costs"); E.D. Tex. Local Civil Rule 62(a) (same); E.D. Wis. Civil Local Rule 62(a) (115 percent "plus $500.00 to cover costs").

[9] *See* N.D. Ill. Local Rule 62.1 (setting presumptive amount of bond at "the judgment plus one year's interest at the rate provided in 28 U.S.C. § 1961, plus $500 to cover costs," and noting that any party can "seek timely judicial determination of a higher or lower amount").

[10] *See* D.N.H. Civil Rule 62.1 (bond "shall be in the amount of the judgment, plus interest at a rate consistent with 28 U.S.C. § 1961(a), plus an amount to be set by the court to cover costs and any award of damages for delay"); D.N.M. Local Civil Rule 65.1(d)(1) ("The amount of a supersedeas bond must cover the judgment, interest and allowable costs. Interest will be computed at the current rate of United States Treasury obligations.").

[11] *See* Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089, 1099-1101 (2006).

> billion and a liquidation value of $22 billion. Thus, Texaco could pay the judgment, but it could not post a bond. Because the bond requirement would deprive Texaco of its appeal without benefitting Pennzoil, the bond requirement was arbitrary, irrational, and a violation of the due process and equal protection clauses.[12]

Those arguments were sufficiently persuasive that the Second Circuit affirmed a preliminary injunction restraining enforcement of the Texas state-court judgment (after Texaco had posted $ 1 billion worth of security); the Supreme Court, reversing on abstention grounds, did not reach the merits of the challenge to the Texas bond requirement. *See Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1136, 1141, 1145, 1157 (2d Cir. 1986) (reasoning that "the automatic enforcement of the Texas lien and bond requirements against Texaco's property to the extent of $12 billion lacks any rational basis, since it would destroy Texaco and render its right to appeal in Texas an exercise in futility"), *reversed*, *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 10 (1987) (holding that federal courts should have abstained, under *Younger v. Harris*, 401 U.S. 37 (1971), from enjoining enforcement of Texas state-court judgment). Ultimately, Texaco reached a settlement with Pennzoil after filing for bankruptcy.[13]

Concerns about state-law appeal-bond requirements have made their way into the debate over tort reform. A recent study by Doug Rendleman describes two "waves" of state legislation concerning appeal bonds. "[T]he first wave of appeal-bond tort reform originated in the 'tobacco' states, largely in response to huge punitive damages in a jury award in smokers' litigation in Florida.... [and] provided relief to a judgment debtor by limiting the amount of an appeal bond that could be required for the punitive damages part of the award."[14] Professor Rendleman describes a "second wave" of legislation that encompassed additional states: "This second-wave development included (1) the widespread adoption of the appeal bond caps in states other than the 'tobacco' states; and (2) the expansion of areas of coverage under the statutes."[15] The American Tort Reform Association, which "supports appeal bond reform legislation that limits the size of an appeal bond when a company is not liquidating its assets or attempting to flee from justice," has compiled a list of state legislation relating to appeal bonds; I

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[12] Douglas Laycock, *The Remedies Issues: Compensatory Damages, Specific Performance, Punitive Damages, Supersedeas Bonds, and Abstention*, 9 REV. LITIG. 473, 501-02 (1990) (footnotes omitted).

[13] *See* Rendleman, *supra* note 11, at 1106 ("In the shadow of the bankruptcy court's automatic stay, Texaco and Pennzoil settled for about 20% of the jury verdict while Texaco paid its other creditors in full.").

[14] Rendleman, *supra* note 11, at 1108.

[15] *Id.* at 1116.

enclose a copy.[16]

As discussed in Part II.A.1 of this memo, Civil Rule 62(d) does not specify the size of the bond required in order to supersede a federal-court money judgment, but the federal caselaw commences with a presumption that the bond will equal the amount of the judgment (plus, perhaps, an allowance for interest and costs), and recognizes the court's discretion to stay execution based on a lesser amount or alternative form of security when circumstances warrant. An interesting question, which I leave untouched in this memo due to space and time constraints, is the extent (if any) to which a state-law cap on appeal bonds would operate in a federal diversity suit.[17]

B. Alternative forms of security

Courts are sometimes willing to approve a stay on the basis of an alternative to a surety bond, but the judgment debtor will have the burden of convincing the court that such an alternative is needed and appropriate.[18] Some local district court rules authorize the use of other

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[16] The list is available online at http://www.atra.org/issues/appeal-bond-reform (last visited August 18, 2012).

[17] *Compare, e.g.*, *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 2, 7 (1987) (holding that Appellate Rule 38's discretionary standard for sanctions for frivolous appeals "occupie[d] the ... field" and prevented the application in a diversity case of "a state statute that imposes a fixed penalty on appellants who obtain stays of judgment pending unsuccessful appeals"), *with Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 437-38 & n.22 (1996) (holding that when assessing a Civil Rule 59 motion for a new trial on grounds of excessiveness of a damages award on a claim under New York state law, the court should apply New York state law concerning the standard for excessiveness).

[18] The Fifth Circuit has sketched the following examples:

> If a judgment debtor objectively demonstrates a present financial ability to facilely respond to a money judgment and presents to the court a financially secure plan for maintaining that same degree of solvency during the period of an appeal, the court may then exercise a discretion to substitute some form of guaranty of judgment responsibility for the usual supersedeas bond. Contrariwise, if the judgment debtor's present financial condition is such that the posting of a full bond would impose an undue financial burden, the court similarly is free to exercise a discretion to fashion some other arrangement for substitute security through an appropriate restraint on the judgment debtor's financial dealings, which would furnish equal protection to the judgment creditor.

Poplar Grove Planting and Refining Co., Inc. v. Bache Halsey Stuart, Inc., 600 F.2d 1189, 1191 (5th Cir. 1979).

measures in lieu of a surety bond. Such measures include the deposit with the court of cash or federal government obligations[19] or the encumbrance of real or personal property,[20] or the provision of a letter of credit.[21] Some rules expressly disallow certain forms of security.[22]

As a practical matter, if it is possible to reach agreement with the judgment winner concerning the nature and amount of security, that will address the issue. Some local rules include a general provision by which the parties can employ a stipulation in lieu of a supersedeas bond.[23]

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[19] *See* E.D. Cal. General Rule 151(h) ("lawful money or negotiable bonds of the United States"); N.D. Ill. Local Rule 65.1(b)(1) ("cash or obligations of the United States in the amount of the bond"); E.D. La. Local Civil Rule 65.1.1 (cash or U.S. government obligation); M.D. La. Local Civil Rule 65.1.1 (same); W.D. La. Local Civil Rule 65.1.1 (same); D. Mass. Rule 67.1(c)(1) (cash or U.S. government obligations); W.D. Mich. Local Civil Rule 65.1 (cash); N.D.N.Y. Local Rule 65.1.1(b) ("cash or government bonds"); E.D. Okla. Local Civil Rule 62.2(d) (cash); N.D. Okla. Local Civil Rule 62.2(d) (cash); W.D. Okla. Local Civil Rule 62.2(d) ("lawful money or negotiable bonds of the United States"); D.R.I. Local Civil Rule 65.1(a)(1) ("cash or obligations of the United States").

[20] *See* E.D. Cal. General Rule 151(i) ("If personal property is provided as security, it shall be accompanied by a security agreement and a financing statement, executed in conformity with the California Commercial Code. If real property is provided as security, a trust deed naming the Clerk as beneficiary and describing the property shall be deposited with the Clerk."); *id.* Rule 151(j) (requiring "[a]ffidavit of [o]wnership").

[21] *See* N.D. Ill. Local Rule 65.1(b)(4) ("[A]n unconditional letter of credit is an approved form of security and shall be submitted on LR65.1 Form of Letter of Credit, or on a form agreed to by the parties.").

[22] *See* E.D. Okla. Local Civil Rule 62.2(h) ("This Court will not accept real estate as security."); N.D. Okla. Local Civil Rule 62.2(h) (same).

[23] *See* E.D. La. Local Civil Rule 65.1.1 (setting surety requirement for bonds and providing that "[b]y stipulation of the parties or order of the court, some other form of surety [may] be posted"); M.D. La. Local Civil Rule 65.1.1 (setting surety requirement for bonds and stating that "[o]nly by stipulation of the parties or by order of the court may some other form of surety be permitted"); W.D. La. Local Civil Rule 65.1.1 (same); D.N.H. Civil Rule 62.1 (The parties may waive the supersedeas bond by stipulation without order of the court."); N.D. Tex. Local Civil Rule 62.1 ("The parties may waive the requirement of a supersedeas bond by stipulation."); E.D. Tex. Local Civil Rule 62(a) (same); E.D. Va. Local Civil Rule 62(B) ("In lieu of any supersedeas bond, the parties may stipulate with respect to any agreement or undertaking.... The prevailing party in the District Court should seriously consider this subdivision as, in the event of a reversal, the premium of any bond will be taxed as a part of the costs. All such stipulations must be approved by the Court and filed in the record.").

C. Exemption of some governmental litigants

Civil Rule 62(e) provides that "[t]he court must not require a bond, obligation, or other security from the appellant when granting a stay on an appeal by the United States, its officers, or its agencies or on an appeal directed by a department of the federal government." Local rules in some federal districts extend a similar exemption to certain other government litigants.[24]

D. Authority of the clerk

Civil Rule 62(d) does not specify whether a supersedeas bond requires a judge's approval or whether the Clerk's approval suffices. *See* Civil Rule 62(d) (providing that "[t]he stay takes effect when the court approves the bond"). Some local district court rules authorize the clerk to approve supersedeas bonds; sometimes these rules provide that to qualify for approval by the clerk, the bond must conform to certain default requirements.[25]

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[24] *See* D. Md. Civil Rule 110.1(b) ("Unless otherwise ordered by the Court, the state of Maryland, any of its political subdivisions, and any agents thereof shall not be required to post a supersedeas or appeal bond."); D.N.M. Local Civil Rule 65.1(d)(2) ("The United States, any state, or any of their political subdivisions, officers or agents need not post a supersedeas bond or other undertaking to secure payment of costs on appeal."); E.D. Va. Local Civil Rule 62(A) ("The Commonwealth of Virginia, or any political subdivision or any office or agent thereof, shall not be required, unless otherwise ordered by the Court, to post a supersedeas bond or other undertaking which includes security for the payment of costs on appeal.").

[25] *See* S.D. Cal. Civil Local Rule 65.1.2(f)(1) ("If eligible under Civil Local Rule 65.1.2, the bond may be approved and filed by the clerk."); *id.* Rule 65.1.2(f)(2) ("The court must determine objections to the form of the bond or sufficiency of the surety."); D. Idaho Local Civil Rule 62.2(a) ("If eligible under Dist. Idaho Loc. Civ. R. 67.1, the bond may be approved and filed by the Clerk."); *id.* Rule 62.2(b) ("The Court will determine objections to the form of the bond or sufficiency of the surety."); N.D. Ill. Local Rule 62.1 ("If in conformance with LR65.1, the bond may be approved by the clerk."); D. Maine Civil Rule 65.1(a) ("The Clerk is authorized to approve the form of, and the sureties on, all bonds and undertakings required in any proceeding in this Court and approve any other security offered in lieu of sureties as provided by law; but the Clerk's action may be suspended or altered or rescinded by the Court upon cause shown."); D. Mass Rule 67.1(f) ("Except as otherwise provided by law, the Clerk of Court may approve a bond in the amount fixed by the court or by statute or rule, and secured in the manner provided by subsections (c)(1) or (2) [i.e., with cash, U.S. government obligations, or a corporate surety]."); D.R.I. Local Civil Rule 65.1(e) ("Except as otherwise provided by law, the Clerk may approve a bond the amount of which has been fixed by the Court or by statute or rule and which is secured in the manner provided by subsections (a)(1)-(a)(3) of this Rule."); D.S.C. Local Civil Rule 62.01 ("The approval of the supersedeas bond by the Clerk of Court, unless contested by the opposing party, shall constitute a stay of the judgment when the judgment is for the payment of money only ...."); E.D. Wis. Civil Local Rule 62(a) ("If eligible under Civil L.R. 77(b) [which

E. Effect of appeal by judgment winner

There appears to be a lopsided circuit split concerning the effect of an appeal by a judgment winner on the judgment winner's ability to execute on the judgment. *Compare Tennessee Valley Authority v. Atlas Mach. & Iron Works, Inc.*, 803 F.2d 794, 797 (4th Cir. 1986) (stating in dictum that "where the prevailing party is the first to take an appeal, no supersedeas bond can be required of the losing party when it subsequently files its own appeal, because the execution of the judgment has already been superseded by the prevailing party's appeal"), *with BASF Corp. v. Old World Trading Co.*, 979 F.2d 615, 617 (7th Cir. 1992) ("[A] prevailing party's appeal suspends enforcement of the judgment only when the theory of the appeal is inconsistent with enforcement in the interim."); *Enserch Corp. v. Shand Morahan & Co., Inc.*, 918 F.2d 462, 464 (5th Cir. 1990) (reasoning that "a lower court judgment may be suspended without bond when the relief sought by the prevailing party on appeal is inconsistent with enforcement of the lower court's judgment"); *Trustmark Ins. Co. v. Gallucci*, 193 F.3d 558, 559 (1st Cir. 1999) (following *BASF Corp.*).

F. The terms and interpretation of the surety bond

The national Rules have nothing to say about the terms or interpretation of the surety bond.[26] "No federal statute or provision of the Federal Rules of Civil Procedure or the Federal Rules of Appellate Procedure defines the conditions that must occur to trigger an appellant's obligation under a supersedeas bond.... Instead, the extent of the appellant's liability is governed by the terms of the bond itself." *Atlas Machine*, 803 F.2d at 798. The Restatement (First) of Security addressed various questions relating to appeal bonds. *See* Restatement (First) of Security, §§ 189-93 (1941). The recent Restatement (Third) of Suretyship and Guaranty does not give specific treatment to appeal bonds; rather, it treats such bonds under the general topic of "legally mandated bonds." *See* Restatement (Third) of Suretyship & Guaranty § 71 (1996) cmt. d.

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refers to bonds "of corporate sureties holding certificates of authority from the Secretary of the Treasury"], the supersedeas bond may be approved by the Clerk of Court."). *Compare* D. Idaho Civil Rule 65.1.2(b) ("All personal surety bonds must be presented to the judge for approval.").

[26] Such issues are sometimes addressed in local rules. *See, e.g.*, N.D. Ill. Local Rule 62.1 ("The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs, interest, and damages as the appellate court may adjudge and award.").

III. Issues common to stays pending disposition of post-judgment motions and stays pending appeal

As I noted in Parts I and II, stays of execution pending post-judgment motions and stays of execution pending appeal pose some distinct issues and are sometimes treated separately in the rules and caselaw. However, those two types of stays also share some commonalities. This section briefly surveys three of the issues that appear to be treated similarly as to both types of stay. Part III.A discusses requirements for sureties. Part III.B considers the possibility that a court will afford the judgment debtor an additional grace period during which to get the necessary bond in place. Part III.C notes Civil Rule 62(f)'s incorporation, under certain circumstances, of state law concerning stays of execution.

A. Sureties

A number of local district court rules require that corporate sureties comply with federal-law and/or state-law requirements for sureties.[27] Some local rules disqualify (or presumptively disqualify) certain groups of people – such as lawyers or court personnel – from serving as

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[27] *See* E.D. Cal. General Rule 151(f) (requiring "compliance with the provisions of 31 U.S.C. §§ 9304-06"); S.D. Cal. Civil Local Rule 65.1.2(b) (requiring authorization under either 31 U.S.C. §§ 9301-9306 or California state law); D. Idaho Civil Rule 65.1.2(a)(2)(A) (requiring authorization under either federal or Idaho state law); E.D. La. Local Civil Rule 65.1.1 (one option to secure a bond is "a corporation authorized by the Secretary of the Treasury of the United States to act as surety on official bonds, pursuant to 31 U.S.C. 9303-9309"); M.D. La. Local Civil Rule 65.1.1 (same); W.D. La. Local Civil Rule 65.1.1 (same); N.D. Ill. Local Rule 65.1(b)(2) (one option for securing a bond is an undertaking by "a corporate surety holding a certificate of authority from the Secretary of the Treasury"); W.D. Mich. Local Civil Rule 65.1 (one acceptable type of surety is "a surety company approved by the United States Department of Treasury"); D.N.M. Local Civil Rule 65.1(c) ("A surety company must be duly qualified to conduct business in New Mexico and hold a certificate of authority from the United States Secretary of the Treasury."); E.D. Okla. Local Civil Rule 62.2(c) (requiring, inter alia, "compliance with the provisions of 31 U.S.C. §§ 9301-09"); N.D. Okla. Local Civil Rule 62.2(c) (same); W.D. Okla. Local Civil Rule 62.2(c) (same); D.R.I. Local Civil Rule 65.1(a)(2) (security can be provided by "the guaranty of a company or corporation holding a certificate of authority from the Secretary of the Treasury pursuant to 31 U.S.C. § 9304 et seq."); E.D. Tex. Local Civil Rule 62(a) ("The bond shall: (1) confirm that the insurance company is on the Treasury Department's list of certified bond com-panies, unless the court orders otherwise (a link to this list may be found on the court's website); and (2) confirm the underwriting limitation."); E.D. Va. Local Civil Rule 65(A)(2) (listing, among possible sources of security, "a corporate surety doing business in Virginia and holding a certificate of authority from the Secretary of the Treasury").

personal sureties,[28] or impose other requirements for personal sureties.[29] Other surety-related

[28] *See* E.D. Cal. General Rule 151(g) ("No Clerk, Marshal or deputy marshal, member of the Bar, or other officer or employee of the Court will be accepted as surety in this Court, absent express Court approval."); S.D. Cal. Civil Local Rule 65.1.2(c) ("No clerk, marshal or other employee of the court, nor any member of the bar representing a party in the particular action or proceeding will be accepted as surety on any bond ...."); D. Idaho Civil Rule 65.1.2(a)(3) ("No clerk, marshal, or other employee of the Court nor any member of the bar representing a party in the particular action or proceeding, shall be accepted as surety on any bond or other undertaking in any action or proceeding in this Court."); N.D. Ill. Local Rule 65.1(a) ("No member of the bar nor any officer or employee of this Court shall act as surety in any action or proceeding in this court."); E.D. La. Local Civil Rule 65.1.2 ("No clerk, marshal, member of the bar, or other officer of this court may qualify as surety on any bond or undertaking in any action or proceeding in this court."); M.D. La. Local Civil Rule 65.1.2 ("No clerk, marshal, member of the bar, or other officer of this court will be accepted as surety on any bond or undertaking in any action or proceeding in this court."); W.D. La. Local Civil Rule 65.1.2 (same); D. Maine Civil Rule 65.1(b) ("No Clerk, Marshal, member of the bar, or other officer of this Court shall be approved as surety on any bond or undertaking."); D. Mass. Rule 67.1(a) ("No judge, clerk, marshal, member of the bar or other officer or employee of the court may be surety or guarantor of any bond or undertaking in any proceeding in this court."); W.D. Mich. Local Civil Rule 65.1 ("Attorneys or other officers of this Court shall not serve as sureties."); D.N.M. Local Civil Rule 65.1(a) ("An attorney may not act as a surety for any cost or bond in a case where the attorney has entered an appearance."); N.D.N.Y. Local Rule 65.1.1(d) ("Members of the bar, administrative officers or employees of this Court, the Marshal, or the Marshal's deputies or assistants shall not act as sureties in any suit, action or proceeding pending in this Court."); E.D. Okla. Local Civil Rule 62.2(g) ("Unless a party to the action, no clerk, marshal, member of the bar, or other officer of this Court will be accepted as surety, either directly or indirectly, on any bond or undertaking in any action or proceeding in this Court."); N.D. Okla. Local Civil Rule 62.2(g) (same); W.D. Okla. Local Civil Rule 62.2(g) (same); D.R.I. Local Civil Rule 65.1(c) ("No member of the bar or officer or employee of the Court may be surety or guarantor of any bond or undertaking in any proceeding in this Court."); E.D. Tex. Local Civil Rule 65.1(a) ("No attorney, clerk, or marshal, nor the deputies of any clerk or marshal shall be received as security on any cost, bail, attachment, forthcoming or replevy bond, without written permission of a judge of this court."); E.D. Va. Local Civil Rule 65(B) ("Members of the bar, administrative officers or employees of this Court, and the United States Marshal, his deputies or assistants, shall not act as a surety in any civil action. A member of the bar may execute a bond as attorney-in-fact upon presenting a properly executed power of attorney.").

[29] *See* S.D. Cal. Civil Local Rule 65.1.2(b) (if bond is to be secured by personal surety, requiring that the sureties be "two individual residents of the district, each of whom owns real or personal property within the district of value sufficient to justify the full amount of the suretyship"); D. Idaho Civil Rule 65.1.2(a)(2)(A)(iii) (security can be provided by, inter alios, "two individual residents of the District, each of whom owns real or personal property within the

issues are addressed in caselaw.[30]

B. Stays to permit time to obtain a bond

One district court has a local rule that presumptively extends the automatic stay for an additional period of time (upon the filing of a post-judgment motion or a notice of appeal) to enable the judgment loser to put in place a supersedeas bond.[31] Even absent such a local rule,

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District of sufficient equity value to justify twice the amount of the bond"); N.D. Ill. Local Rule 65.1(b)(3) (one option for securing a bond is an "undertaking or guaranty of two individual residents of the Northern District of Illinois, provided that each individual surety shall file an affidavit of justification" showing, inter alia, ownership of property within the district "valued at no less than twice the amount of the bond"); D. Mass. Rule 67.1(c)(3) (permitting personal surety based on the "guaranty of two (2) individual residents of this district each of whom owns unencumbered real or personal property within the district worth the amount of the bond, in excess of legal obligations and exemptions"); W.D. Mich. Local Civil Rule 65.1 (personal surety must reside within the district and "must qualify as the owner of real estate within this district of the full net value of twice the face amount of the bond"); N.D.N.Y. Local Rule 65.1.1(b) (one option for securing a bond is "the undertaking or guaranty of two individual residents of the Northern District of New York, each of whom owns real or personal property within the District worth double the amount of the bond, undertaking or stipulation, over all the debts and liabilities of each of the residents, and over all obligations assumed by each of the residents on other bonds, undertakings or stipulations, and exclusive of all legal exemptions"); D.R.I. Local Civil Rule 65.1(a)(3) (providing that security can take the form of "the guaranty of an individual resident of this District who owns and pledges as security real property in which such individual has equity that exceeds the amount of the bond"); *id.* Rule 65.1(b) (listing requirements for affidavit by individual surety); E.D. Va. Local Civil Rule 65(A)(3) (permissible sources of security include "sufficient solvent sureties, residents of Virginia, who own real or personal property within the State of Virginia worth double the amount of the bond, undertaking, or stipulation over all debts and liabilities, and over all obligations assumed on other bonds, undertakings or stipulations, and exclusive of all legal exemptions"); *id.* ("A husband and wife may act as surety on a bond, but they shall be considered as only one surety.").

[30] *See, e.g.*, *Aunt Sally's Praline Shop, Inc. v. United Fire & Cas. Co.*, 2008 WL 4776947, at *1 (E.D. La. Oct. 29, 2008) (unreported decision) (rejecting contention "that the supersedeas bond does not constitute appropriate security because United Fire and Indemnity Company is a subsidiary of defendant United Fire and Casualty Company," and reasoning that "[n]either the Federal Rules of Civil Procedure nor the Local Rules of the Eastern District require that the entity posting security be independent of the party for which security is being posted").

[31] *See* S.D. Fl. General Rule 62.1(b) ("If within the fourteen (14) day period established by Federal Rule of Civil Procedure 62(a), a party files any of the motions contemplated in Federal Rule of Civil Procedure 62(b), or a notice of appeal, then unless otherwise ordered by

courts may apply a similar approach in an individual case, as illustrated by one decision concerning a stay under Rule 62(b).[32]

C. Stays under Rule 62(f)

Rule 62(f) provides an alternative means for obtaining a stay of execution. It provides: "If a judgment is a lien on the judgment debtor's property under the law of the state where the court is located, the judgment debtor is entitled to the same stay of execution the state court would give." A literal reading of this provision would indicate that the Rule 62(f) stay is available only when the judgment automatically constitutes a lien on the judgment debtor's property under the relevant state's law. In fact, the caselaw spans a range of views, from taking this very strict position,[33] to determining whether Rule 62(f)'s lien requirement is met by examining how difficult it would be to obtain a lien based on the judgment under state law,[34] to holding that the lien requirement is met by the provision of some other, equivalently protective, form of security,[35] to ignoring the lien requirement altogether.[36] Rule 62(f) does not explicitly

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the Court, a further stay shall exist for a period not to exceed thirty (30) days from the entry of the judgment or order.").

[32] *See Ssangyong (U.S.A.), Inc. v. Innovation Group, Inc.*, 2000 WL 1339229, at *1 (S.D. Iowa Aug. 10, 2000) (unreported decision) ("After consulting with its insurance carriers ... Ssangyong has learned it may be thirty days before the full amount can be posted. In view of the size of the judgments, the Court finds such a delay to be reasonable."); *id.* at *1 n.1 (noting counsel's assurance that the movant "will post either a $100,000 bond, or cash in the same amount, on or before Friday, August 11, 2000 as evidence of its good faith").

[33] *See Acevedo-Garcia v. Vera-Monroig*, 296 F.3d 13, 17 (1st Cir. 2002) ("Since, under Puerto Rico law, a judgment becomes a lien upon property only after the judgment creditor applies to the court and the court issues a writ of attachment ... , Rule 62(f) does not appear to apply.").

[34] *See F.D.I.C. v. Ann-High Associates*, 1997 WL 1877195, at *4 (2d Cir. 1997) (unpublished per curiam decision) ("[I]n order to avoid posting a supersedeas bond a judgment debtor must demonstrate not only (1) that state law entitles it to appeal without a bond and (2) that a judgment can be made a lien against a judgment debtor's property under the state's lien law, but also (3) that the circumstances are such that the judgment creditor can readily establish a lien that will be adequate to secure the judgment."); *Rodriguez-Vazquez v. Lopez-Martinez*, 345 F.3d 13, 14 (1st Cir. 2003) (per curiam) (arguing that *Acevedo-Garcia* "rested on a mistaken premise" concerning Puerto Rico law and suggesting "that where a lien can be procured by minor ministerial acts, this minor burden on the judgment-creditor should not preclude a stay under Rule 62(f)").

[35] In *Castillo v. Montelepre, Inc*., 999 F.2d 931 (5th Cir. 1993), the panel majority held that a medical malpractice fund established under Louisiana law was entitled to a stay under

address whether the value of the property subject to the lien must be as great as amount of the judgment.

IV. Conclusion

As Mr. Newsom pointed out, the topic of stays of execution of money judgments presents a number of interesting questions, the answers to which are more likely to be found in caselaw and local rules than in Civil Rule 62 or Appellate Rule 8. Civil Rule 62 currently affords federal trial judges substantial discretion in these matters; district court local rules provide some guidance to litigants but leave the judge's discretion largely intact. One area of complexity is the interaction between Civil Rule 62 and state law.

Encl.

Civil Rule 62(f) even though the judgment did not constitute a lien on the fund corpus under Louisiana law. *See id.* at 933, 942. The court reasoned that "[i]n this diversity action, great deference must be given to the manifest desire of the Louisiana legislature to allow the Fund to appeal without bond," and that Louisiana's statutory scheme "provides sufficient security to judgment creditors so as to satisfy the purpose behind the Rule 62(f) judgment as a lien requirement." *Id.* at 942. *But see, e.g.*, *Federal Ins. Co. v. County of Westchester*, 921 F. Supp. 1136, 1138-39 (S.D.N.Y. 1996) (reasoning that Rule 62(f) "reflects a federal policy determination that judgment creditors must be afforded security by *all* judgment debtors, not just by those from whom state law requires security, and that the security must take the form of a lien, and not some lesser or different security").

[36] *See Urban Developers, LLC v. City of Jackson*, 227 F.R.D. 464, 465-66 (S.D. Miss. 2005) (reasoning based on *Castillo* that "Defendants / Appellants in this case must be afforded the same treatment that they would receive in Mississippi state court" and holding that a stay was appropriate under Rule 62(f) without analyzing whether the judgment would give rise to a lien under Mississippi law).

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TAB 9B

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Appeal Bond Reform

Many states require defendants to post an appeal bond – sometimes equal to 150 percent of a verdict – in order to secure the right to appeal.

PROBLEM: In an era when billion-dollar verdicts are no longer uncommon, appealing a jury verdict can force an individual, a company, or an industry into bankruptcy.

ATRA's POSITION: ATRA supports appeal bond reform legislation that limits the size of an appeal bond when a company is not liquidating its assets or attempting to flee from justice.

OPPOSITION: The personal injury bar's argument in support of appeal bonds – that appeal bonds secure damages awards owed to a plaintiff – fails to address the hardship imposed by the bonds on defendants who are forced to choose between risking bankruptcy by posting billion-dollar bonds, many of which are ultimately overturned by an appellate court, and forfeiting their right to appeal.

State Reforms | Reforms by Date | Reforms by Constitutionality | ATRA News

Alabama

Appeal Bond Reform: H.B. 220 (2006); Code of Ala. § 6-12-4. Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $125 million.

Appeal Bond Reform: (1987). Repeals Alabama's affirmance fee rule, which assessed a fee of 10% of the judgment against defendants (but not plaintiffs) who appealed cases and lost.

Arkansas

Appeal Bond Reform: HB 1038 (2003); A.C.A. § 16-55-213 Limits the amount a defendant can be required to pay to secure the right to appeal to $25 million.

Arizona

Appeal Bond Reform: S.B. 1212 (2011), A.R.S. § 12-2108 Limits the amount of an appeal bond to the lesser of the total amount of damages awarded excluding punitive damages, 50% of the appellant's net worth, or $25 million.

California

Appeal Bond Reform: AB 1752 (2003) Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $150 million and applies to all judgments in civil litigation regardless of legal theory.

Colorado

Appeal Bond Reform: HB 1366 (2003); Amended C.R.S. 13-16-125 Limits the amount a defendant can be required to pay to secure the right to appeal to $25 million.

Florida

Appeal Bond Reform: SB 2198 (2009) Limits the amount a defendant can be required to pay to secure the right to appeal to $200 million. The limit applies to *Engle* progeny litigation, and creates an overall appeal bond cap for all of these cases combined. The entities covered by the statute include signatories to the Master Settlement Agreement, successors, and affiliates.

Appeal Bond Reform: H.B. 841 (2006); Fla. Stat. § 45.045 Limits the amount a defendant can be required to pay to secure the right to appeal in any civil action, except for certified class actions subject 768.733, to $50 million.

Appeal Bond Reform: S 2826 (2003); Fla. Stat. § 569.23 Limits the amount that signatories to the Master Settlement Agreement are required to pay to secure the right to appeal to $100 million.

Appeal Bond Reform: HB 1721 (2000); Fla. Stat. § 215.56005; Amending Fla. Stat. § 17.41
Limits the amount a defendant can be required to pay to secure the right to appeal

punitive damages awards in class actions to the lesser of 10% of the defendants net worth or $100 million. The reform applies in out of state judgments during the stay period only.

Georgia

Appeal Bond Reform: S.B. 411 (2004) Expands the cap of $25 million on appeal bonds that applied to punitive damages and expanded the cap to cover all forms of judgments in all civil cases.

Appeal Bond Reform: HB 1346 (2000). Limits the amount a defendant can be required to pay to secure the right to appeal a punitive damages award to $25 million.

Hawaii

Appeal Bond Reform Limits the amount a defendant can be required to pay to secure the right to appeal to $25 million. Limits the amount a small business can be required to pay to secure the right to appeal to $1 million.

Iowa

Appeal Bond Reform: S.F. 2306 (2004); Amended Iowa Code § 625A.9. Limits the amount a defendant can be required to pay to secure the right to appeal to $100 million.

Idaho

Appeal Bond Reform: HB 92 (2003). Limits the amount a defendant can be required to pay to secure the right to appeal punitive damages awards in any judgment to only the first of $1,000,000.

Indiana

Appeal Bond Reform: HB 1204 (2002); Ind. Code Ann. § 34-49-5-3. Limits the amount a defendant can be required to pay to secure the right to appeal to $25 million.

Kansas

Appeal Bond Reform: HB 2457 (2005); Amended K.S.A. § 60-2103. Provides that if the appellant proves by a preponderance of the evidence that setting the supersedeas bond at the full amount of the judgment will result in the appellant suffering an undue hardship or a denial of the right to appeal, the court may reduce the amount of the bond as follows: (1) if the judgment is less than or equal to $1 million, the supersedeas bond shall be set at the full amount of the judgment; or (2) if the judgment exceeds $1 million in value, the supersedeas bond shall be set at a total of $1 million plus 25 percent of any amount in excess of $1 million.

Appeal Bond Reform: SB 64 (2003). Limits the amount that signatories to the Master Settlement Agreement are required to pay to secure the right to appeal to $25 million.

Kentucky

Appeal Bond Reform: SB 316 (2000); KRS § 411.187. Limits the amount a defendant can be required to pay to secure the right to appeal a punitive damages award to $100 million.

Louisiana

Appeal Bond Reform: H.B. 1819 (2003); Amended La. R.S. 39:98.6. Broadens 2003 cap to include affiliates of signatories to the Master Settlement Agreement.

Appeal Bond Reform: HB 1524 (2001); Amended La. C.C.P. Art. 2124. Places a $50 million limit on the amount a signatory to the Master Settlement Agreement must post to obtain a bond during the appeals process.

Michigan

Appeal Bond Reform: HB 5151 (2002); MCLS § 600.2607. Limits the amount a defendant can be required to pay to secure the right to appeal to $25 million. Provides that this limit will be adjusted on January 1, 2008 and again on January 1 every five years after that by an amount determined by the state treasurer to reflect the annual aggregate percentage change in the Detroit consumer price index since the

previous adjustment. Provides that a court will rescind the limit if an appellee proves by a preponderance of the evidence that the party for whom the bond to stay execution has been limited is purposefully dissipating or diverting assets outside of the ordinary course of business for the purpose of avoiding ultimate payment of the judgment.

Minnesota

Appeal Bond Reform: H.F. 1425 (2004); Amended Minn. Stat. § 550.36. Limits the amount a defendant can be required to pay to secure the right to appeal to $150 million.

Missouri

Appeal Bond Reform: H.B. 393 (2005); § 512.099 R.S.Mo. Limits the amount a defendant can be required to pay to secure the right to appeal $50 million.

Appeal Bond Reform: S.B. 242 (2003); § 512.085 R.S.Mo. Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $50 million.

Mississippi

Appeal Bond Reform: Rule 8 (2001). By rule, the Mississippi Supreme Court imposed a limit on the amount that defendants can be required to post to secure a bond to appeal a punitive damages award to the lesser of: (1) 125 percent of the judgment; (2) 10 percent of the defendants net worth; or (3) $100 million.

North Carolina

Appeal Bond Reform: SB 33 (2011). The amount of the undertaking that shall be required by the court shall be an amount determined by the court after notice and hearing proper and reasonable for the security of the rights of the adverse party, considering relevant factors, including the following: (1) The amount of the judgment; (2) the amount of the limits of all applicable liability policies of the appellant judgment debtor; and (3) The aggregate net worth of the appellant judgment debtor.

Appeal Bond Reform: S. 784 (2003); Amended N.C. Gen. Stat. § 1-289. Limits the amount a defendant can be required to pay to secure the right to appeal all judgments to $25 million regardless of legal theory. Provides that foreign judgments cannot be executed in North Carolina if appeal is pending in a foreign jurisdiction or the judgment has been stayed by the court that rendered it and a bond has been posted.

Appeal Bond Reform: SB 2 (2000); Amended N.C. Gen. Stat. § 1C-1750. Places a $25 million limit on bond requirements in punitive damages awards during the appeal process. Provides that limits on bond appeals for out-of-state judgments apply during the stay period only.

North Dakota

Appeal Bond Reform: SB 2273 (2005); N.D. Cent. Code, § 28-21-25. Limits the amount a defendant can be required to pay to secure the right to appeal to $25 million.

Nebraska

Appeal Bond Reform: L.B. 1207 (2004); Amended R.R.S. Neb. § 25-1916. Limits the amount a defendant can be required to pay to secure the right to appeal to the lesser of the amount of the judgment, 50 percent of the appellant's net worth, or $50 million.

New Jersey

Appeal Bond Reform: SB 2738 (2003); N.J. Stat. § 52:4D-13 Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $50 million.

Nevada

Appeal Bond Reform: AB 576 (2001); Nev. Rev. Stat. Ann. § 20.035. Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $50 million.

Ohio

Appeal Bond Reform: HB 161 (2002); ORC Ann. 2505.09. Limits the amount a defendant can be required to pay to secure the right to appeal to $50 million.

Oklahoma

Appeal Bond Reform: HB 1603 (2009); 12 Okl. St. § 990.4. Limits the amount a defendant can be required to pay to secure the right to appeal to $25 million. Eliminates bonding requirement to appeal a punitive damages judgment.

Appeal Bond Reform: HB 2661 (2004). The court is given discretion to lower the bond if the judgment debtor can show that it is likely to suffer substantial economic harm if required to post a bond in the amount required by statute (which is double the judgment). Applies to all cases except those involving signatories to the Master Settlement Agreement.

Appeal Bond Reform: SB 372 (2001). Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $25 million.

Oregon

Appeal Bond Reform: H.B. 2368 (2003). Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $150 million.

Pennsylvania

Appeal Bond Reform: H.B. 1718 (2003). Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $100 million.

Rhode Island

Appeal Bond Reform- S.B. 2509 (2008); R.I. Gen. Laws § 42-133-11.1. Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $50 million.

South Carolina

Appeal Bond Reform: H. 4823 (2004). Provides that judgments are to be stayed during the appeal of a judgment by signatories to the Master Settlement Agreement. Such defendants are not required to post an appeal bond.

South Dakota

Appeal Bond Reform: Sup. Ct. Rule 03-13 (2003). The South Dakota Supreme Court promulgated a rule which limits the amount a defendant can be required to pay to secure the right to appeal to $25 million.

Tennessee

Appeal Bond Reform: HB 2008 / SB 1522 (2011); Tenn. Code Ann. § 27-1-124.
Lowers the amount a defendant can be required to pay to appeal a decision from $75 million to $25 million not to exceed 125% of the judgment.

Appeal Bond Reform: SB 1687 (2003). Limits the amount a defendant can be required to pay to secure the right to appeal to $75 million.

Texas

Appeal Bond Reform: HB 4 (2003). Limits the amount a defendant can be required to pay to secure the right to appeal to the lesser of 50% of a defendant's net worth or $25 million. Provides that defendants are no longer required to post a bond to appeal punitive damages. Provides that foreign judgments cannot be executed in Texas if appeal is pending in a foreign jurisdiction and a bond has been or will be posted.

Utah

Appeal Bond Reform: Sup. Ct. Order 2005-03-22 (2005). The Utah Supreme Court imposed a limit on the amount a defendant can be required to pay to secure the right to appeal by amending UCRP governing appeal bonds. The limitations are: (1)

$25 million for compensatory damages, applied to class actions and actions involving multiple plaintiffs where damages are not proved for each plaintiff individually; (2) $0 for punitive damages, applied to all actions and eliminates bond requirements for appealing a punitive damage award.

Virginia

Appeal Bond Reform: H.B. 430/S.B. 172 (2004). Expands limit of $25 million on appeal bond amounts for punitive damages to apply to appeal bond amounts for all forms of damages.

Appeal Bond Reform: HB 1547 (2000). Limits the amount a defendant can be required to pay to secure the right to appeal a punitive damages award to $25 million. Applies in out of state judgments during the stay period only.

Washington

Appeal Bond Reform: S.B. 6541 (2006). Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $100 million.

Wisconsin

Appeal Bond Reform: A.B. 548 (2003). Limits the amount a defendant can be required to pay to secure the right to appeal to $100 million.

West Virginia

Appeal Bond Reform: SB 671: (2004). Broadens the $100 million limit from 2001 to include punitive damage awards.

Appeal Bond Reform: SB 661 (2001). Limits the amount a signatory to the Master Settlement Agreement can be required to pay to secure the right to appeal to $100 million. This limit applies to all damages except punitive damages.

Wyoming

Appeal Bond Reform: H.B. 196 (2007). Limits the amount a defendant can be required to pay to secure the right to appeal to $25 million. For small businesses, defined as having 50 or fewer employees, limits the amount to secure the right to appeal to $2 million.

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TAB 10

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MEMORANDUM

DATE: August 29, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-E

At our spring 2012 meeting, Neal Katyal asked why Appellate Rule 35(b)(2) sets the length limit for a petition for rehearing en banc in pages rather than words.

Before the 1998 amendments, prior Rule 28(g) set the length limit for briefs in pages (50 pages for principal briefs and 25 pages for reply briefs). In 1998, the Committee relocated this limit to Rule 32(a)(7) and put in place Rule 32(a)(7)(B)'s type-volume limits (plus Rule 32(a)(7)(A)'s safe harbor, denoted in pages).

Prior to 1998, the Appellate Rules did not set length limits for petitions for rehearing en banc, though they did set such limits for petitions for panel rehearing.[1] As part of the 1998 amendments, a 15-page limit was added to Rule 35(b)(2). Rule 40(b) was restyled but its existing 15-page limit was retained. The 1998 Committee Note to Rule 35(b)(2) explains the reason for the Committee's decision to use page limits rather than a type-volume/safe-harbor system:[2]

> Paragraph (2) of this subdivision establishes a maximum length for a petition. Fifteen pages is the length currently used in several circuits. Each request for en banc consideration must be studied by every active judge of the court and is a serious call on limited judicial resources. The extraordinary nature of the issue or the threat to uniformity of the court's decision can be established in most cases in less than fifteen pages. A court may shorten the maximum length on a case by case basis but the rule does not permit a circuit to shorten the length by local rule. The Committee has retained page limits rather than using word or line counts

[1] Original Rule 40(b) set a limit of "10 pages of standard typographic printing or 15 pages of printing by any other process of duplicating or copying." In 1979, that was simplified to a limit of "15 pages."

[2] This Committee Note discussed petitions for rehearing en banc, but the reasoning presumably applied to petitions for rehearing as well.

> similar to those in amended Rule 32 because there has not been a serious enough problem to justify importing the word and line-count and typeface requirement that are applicable to briefs into other contexts.

This explanation also appears in the minutes of a meeting at which the Advisory Committee discussed the proposed amendments to Rule 35: "There was discussion of the retention of 'page' limits in this rule as contrasted with the proposed limits in Rule 32 that are based upon word or character counts. The consensus was that the additional complications of the Rule 32 methods, including attorney certification of the length, are not necessary in this context." Minutes of the Meeting of the Advisory Committee on Appellate Rules 7 (April 15, 1996).

The Committee has had similar discussions about the use of page limits in other provisions in the Appellate Rules.[3] Rule 5(c) sets a 20-page limit for petitions for permission to appeal (and answers in opposition to the petition). Rule 21(d) sets a 30-page limit for petitions for a writ of mandamus or prohibition (and answers thereto). Rule 27(d)(2) sets a 20-page limit for motions and responses, and sets a 10-page limit for replies to responses. When the Committee was considering the proposal that would become the 2002 amendment to Rule 5(c) (setting the length limit), it discussed but rejected the idea of using a word limit instead of a page limit:

> A member said that she was inclined to agree with those commentators who argued that the limit on the size of Rule 5 papers should be expressed in words rather than in pages. Other members expressed reservations about using word limits. A member said that abuses such as manipulating font size or margins were a real problem with briefs, but have never been much of a problem with such things as Rule 5 papers. That is why, when the D.C. Circuit adopted word limits on briefs, it did not adopt word limits on motions or other papers.
>
> The Reporter asked about enforcement. Unless this Committee requires a certificate of compliance to be filed with every Rule 5 paper, a word limit could be enforced only if the clerks counted every word of every paper. Mr. Fulbruge said that, in the Fifth Circuit, about half of all petitions and motions are handwritten and filed by pro se litigants (usually prisoners). Word limits cannot effectively be enforced against such papers; page limits provide at least some restraint.

Minutes of Spring 2001 Meeting of Advisory Committee on Appellate Rules 24-25 (April 11, 2001). At its next meeting a year later, the Committee returned to this topic:

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[3] When Rule 28(j) was amended in 2002 to impose a limit on the length of letters concerning supplemental authorities, the rulemakers chose to use a word limit (350 words), presumably because the short length of such submissions made a word limit more useful than a page limit.

> The Reporter stated that, at the last meeting of the Committee, members had discussed a proposal that all of the page limits in the Appellate Rules — including those in Rules 5(c), 21(d), 27(d)(2), 35(b)(2), and 40(b) — be replaced with word limits. Although several members had spoken in opposition to the proposal, the Committee had not taken any formal action. The Reporter recommended that this item be removed from the study agenda, largely for the reasons given at the April 2002 [*sic*] meeting.
>
> A member moved that Item 01-02 be removed from the study agenda. The motion was seconded. The motion carried (unanimously).

Minutes of Spring 2002 Meeting of Advisory Committee on Appellate Rules 27 (April 22, 2002).

Although the contrast between the approaches to length limits in Rules 28.1[4] and 32 (on the one hand) and Rules 5, 21, 27, 35 and 40 (on the other) is odd at first glance, the Committee's reasoning seems sensible. And a look at two leading practice guides reveals no reference to difficulties in the administration of the length limits set by Rules 35 and 40.[5]

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[4] Rule 28.1, concerning briefing for cross-appeals, tracks Rule 32's approach to length limits. *See* Rule 28.1(e).

[5] *See* DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 34:7 (5th ed.) (discussing 15-page limit on petition for panel rehearing); *id.* § 34:8 (same, with respect to petition for rehearing en banc); MICHAEL E. TIGAR & JANE B. TIGAR, FEDERAL APPEALS JURISDICTION AND PRACTICE § 11:3 (3d ed.) (same, with respect to petition for panel rehearing); *id.* § 11:4 (same, with respect to petition for rehearing en banc).

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TAB 11

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August 22, 2012

The Honorable Jeffery S. Sutton
Chair, Advisory Committee on Appellate Rules
260 Joseph P. Kinneary U.S. Courthouse
85 Marconi Boulevard
Columbus, OH 43215

Re: Proposed Amendment to Appellate Rule 42

Dear Judge Sutton:

We are writing to urge the Advisory Committee on the Appellate Rules to consider an amendment to Appellate Rule 42. The amendment would bar class action objectors from dropping their appeals of district court approvals of class action settlements and fee awards in exchange for money from class counsel or the defendant. As has been documented by courts and commentators, the prospect of receiving this money has encouraged class members to file non-meritorious objections and appeals to delay settlements until it becomes rational for class counsel and the defendant to pay them to go away. This practice is known as "objector blackmail." *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Objector blackmail not only financially taxes class counsel and defendants without reason, but it also tarnishes legitimate objectors and delays the distribution of settlement proceeds to class members. Our proposed amendment would bar these side payments to objectors from class counsel and the defendant. District courts would continue to exercise their authority to

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compensate counsel for class members when their objections created value for the class. The text of our proposed amendment is appended to this letter.

Class members who object legitimately to settlements and fee petitions serve a vital role in class action litigation. Because both class counsel and the defendant, by definition, support class settlements, the only adversarial testing in either the district court or the court of appeals of settlements and fee petitions usually comes from objections litigated by absent class members. For this reason, it is important to ensure that class members who wish to improve settlements and cause closer scrutiny of fee awards have the means and opportunity to do so through objections.

But we now know that some class members and their counsel file objections not because they want to improve settlements or reduce extravagant fee awards, but, rather, because they want to delay settlements and extract private benefit for themselves. Objectors can cause delay because they have the right to file appeals in the courts of appeals when district courts overrule their objections and approve class action settlements and fee awards. These delays impose costs on class members, class counsel, and the defendant. Not only does it take time and money to file briefs even in frivolous appeals, but even frivolous appeals can significantly postpone the distribution of settlements to class members, the distribution of fee awards to class counsel, and the finality for which the defendant has agreed to pay. These costs and delays can become so significant that it becomes rational for class counsel (most commonly) or the defendant to pay the objectors to drop their appeals. In essence, current law permits one class member to hold everything up for everyone else, and, thereby, extract money from those affected by the delay.

The prospect of these side deals has encouraged, we are told, ever more class members to file objections and appeals to collect the blackmail payments. As a result, the Federal Judicial Center has warned judges to "[w]atch out . . . for canned objections filed by professional

objectors" and to "be wary of self-interested professional objectors who often present rote objections to class counsel's fee requests and add little or nothing to the fee proceedings." Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, at 15, 31 (Federal Judicial Center, 2d ed. 2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/classgd2.pdf/$file/classgd2.pdf. Many courts have also commented on the blackmail problem. *See, e.g.*, *Vaughn v. Am. Honda Motor Co., Inc.*, 507 F.3d 295, 300 (5th Cir. 2007) ("In some circumstances objectors may use an appeal as a means of leveraging compensation for themselves or their counsel."); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 6 (1st Cir. 2001) (noting that appeals from objections can become "extortive legal proceedings"); *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 709 (7th Cir. 2001) (noting that class members sometimes appeal "solely to enable themselves to receive a fee"); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) (noting "objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests"); *Barnes v. FleetBoston Fin. Corp.*, 2006 U.S. Dist. LEXIS 71072, at *3 (D. Mass. Aug. 22, 2006) (noting that blackmail-minded objectors "can levy what is effectively a tax on class action settlements"); *Snell v. Allianz Life Ins. Co.*, 2000 WL 1336640, at *9 (D. Minn. Sept. 8, 2000) (noting objectors who "maraud proposed settlements—not to assess their merits—but in order to extort the parties").

A number of solutions to this problem have been tried, but all of them, in our view, have failed. These failed efforts have been catalogued in Fitzpatrick, *supra*, and we will not repeat here what was said there. Suffice it to say that the other potential solutions—sanctions for frivolous objections and appeals, requiring objectors to post appellate bonds, and provisions in settlement agreements that accelerate the payment of fees for class counsel—are either

incomplete solutions to the problem or create cures that are worse than the disease because they chill legitimate objectors as well as blackmail-minded ones (or, in some cases, *only* legitimate objectors and *not* blackmail-minded ones).

What is needed is a way to clearly separate class members who file objections for the purpose of improving settlements from class members who file objections for the purpose of collecting side deals. We believe the best way to do this is the proposal made in Fitzpatrick, *supra*: to prohibit objectors from unilaterally dropping their appeals in exchange for something of value from class counsel or the defendant. With such a rule, only objectors who actually care about the merits of their objections and appeals will file objections and appeals; objectors who are in it only for the side deals will no longer bother. In short, such a rule will effectively screen out blackmail-minded objectors but preserve access for objectors with legitimate bases for an appeal.

Our proposed rule would prohibit even legitimate objectors with meritorious objections from dropping their appeals for something of value for themselves. Although at first blush it might seem strange to prevent someone who has brought a meritorious appeal from settling it, in the special context of class-action objections, private settlements that are kept secret and not presented to judges for approval are never socially beneficial. Any meritorious objection brought by a class member should, if vindicated, benefit not only the objector but other class members as well; if an objector is permitted to settle the objection in a side deal, however, only the objector benefits—none of the similarly-situated class members do. *See, e.g., Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983) (indicating that similarly-situated class members should be treated alike unless "rebutted by a factual showing that the higher allocations to certain parties are rationally based on legitimate considerations"). That is, the

positive benefits to other class members that may have been derived from the objections and appeals are lost. For example, if an objector objects to the manner in which a settlement is allocated among class members, all class members who are similarly situated to the objector stand to benefit from the objection. *See, e.g, Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011) (settlement objection litigated to final judgment benefited all similarly situated class members). But only the objector will benefit if the appeal is dropped in a side deal. For this reason, some commentators believe that private settlements with objectors are unethical as a general matter. *See* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 Hofstra L. Rev. 129, 132 (2001); Katherine Ikeda, Note, *Silencing the Objectors*, 15 Geo. J. L. Ethics 177, 203-04 (2001). Thus, nothing is lost—and, indeed, much gained—when even class members with legitimate objections cannot drop their appeals in exchange for payments from class counsel or the defendant.

In 2003, in response to some of these concerns, Federal Rule of Civil Procedure 23 was amended to require district courts to approve the withdrawal of any objections to class action settlements. *See* Rule 23(e)(5). When this amendment was under consideration, the Civil Rules Advisory Committee considered extending it to require district court approval even if an objection was dropped on appeal. *See* Civil Rules Advisory Committee Meeting Minutes, October 2000, at 9. But the extension was dropped over concern that the district court no longer had jurisdiction over such matters once an appeal was filed. *See* Report of the Civil Rules Advisory Committee, May 20, 2002. As a result, a loophole was created: objectors who wish to blackmail class counsel or the defendant simply wait for the appeal. For this reason, we are asking you to revise Federal Rule of Appellate Procedure Rule 42 to do for objector appeals what Civil Rule 23(e)(5) does for objections before the district court: require permission before a class

member can withdraw. Moreover, in light of what we now know about both the lack of benefit of any settlement in the special context of class-action objections as well as what we are told is the ever-growing blackmail tax levied on class members, class counsel, and defendants, we further believe that Appellate Rule 42 should make clear that no court should grant permission to withdraw unless the objector and counsel for all the parties certify that they have neither given nor received anything of value in return.

We will close by noting that we do not believe that class members who file objections should *never* receive any compensation that other class members do not. Class members who file legitimate objections often must hire lawyers to do so, and, like any other counsel, these lawyers need some economic incentive to participate in the litigation. As such, we believe class members with legitimate objections ought to be able to recoup their attorney's fees. But we further believe that, when objectors recoup these fees, it should only be for successful objections that have created value for other class members (not objections that have failed or were never considered), and it should only come by way of district court approval (not by way of a secret side deal with class counsel or the defendant). Federal courts already widely recognize the authority of district courts to award objectors attorney's fees when their objections create value for the class—for example, when an objection causes the district court to reduce class counsel's fee request or when an objection causes class counsel and the defendant to revise the terms of the settlement—by compensating them from the settlement proceeds or class counsel's fee award. *See, e.g.*, *Rodriguez v. Disner*, --- F.3d ----, 2012 WL 3241334, at *9 (9th Cir., Aug. 10, 2012). Nothing in our proposed amendment would change this authority.[1]

[1] A district court can exercise this authority even when class counsel and the defendant renegotiated a settlement on account of an objection only after the district court approved the settlement and the settlement is on appeal. In this circumstance, the objector-appellant could use Civil Rule 62.1 and Appellate Rule 12.1 to hold the appeal of the original settlement in abeyance while the district court considers the new settlement. If the original settlement was

Although our proposal will mean that only litigated objections will be permissible, we do not believe that this will create more work for federal courts. Quite the contrary. Class members with legitimate objections already pursue their objections in adversary litigation. The objections that concern us are those that are blackmail minded, and those objections will be eliminated by our proposal because they will no longer be profitable, saving the time and resources of both district courts and the courts of appeals alike.

Thank you for your consideration.

Sincerely,

Brian T. Fitzpatrick, Vanderbilt Law School

Brian Wolfman, Georgetown University Law Center

Alan B. Morrison, George Washington University Law School

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thereafter vacated by the district court and the new settlement approved to the satisfaction of the objector, the objector could then dismiss its original appeal under our proposed Appellate Rule 42 and apply to the district court for an award of attorney's fees for improving the settlement.

PROPOSED AMENDED APPELLATE RULE 42
(new language underlined)

Rule 42. Voluntary Dismissal

(a) Dismissal in the District Court.

Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals.

The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(c) Dismissal of Class Action Appeals.

No appeal from a judgment approving a class action settlement or awarding attorney's fees and expenses to class counsel may be dismissed without approval by the court of appeals. The court of appeals may not approve the dismissal unless the appellant and counsel for all parties have certified that neither they nor any other person will give or receive anything of value in exchange for dismissing the appeal.

TAB 12

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MEMORANDUM

DATE: August 29, 2012

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Matters raised in recent petitions for certiorari

This memo provides an overview of recent certiorari petitions that raised questions relating to the Appellate Rules.[1] Part I discusses a question relating to the nature of a deadline for filing a petition seeking review of an agency decision, while Part II discusses a question relating to time computation under Appellate Rule 26(a). Part III discusses two cases that raise issues concerning the imposition of sanctions under Appellate Rule 38. Part IV describes a pair of cases in which litigants have challenged methods for summary disposition of appeals. And Part V briefly notes three other cases in which Supreme Court filings mentioned appellate procedure but that do not appear to warrant the Committee's attention.

I. Jurisdictional deadlines: *Lara v. Office of Personnel Management*

The petition for certiorari that the Court denied in *Lara v. Office of Personnel Management*, 132 S. Ct. 2121 (2012), raised two issues. One was whether the 60-day deadline set by 5 U.S.C. § 7703(b)(1) for seeking Federal Circuit review of a decision by the Merit Systems Protection Board is jurisdictional. Lara's petition for review[2] was received by the Clerk's Office two days after the 60-day deadline ran out, apparently because weather delayed the mail. *See* Petition for Writ of Certiorari at 3, *Lara v. Office of Personnel Management* (No. 11-915). The Federal Circuit applied circuit precedent holding that equitable tolling was unavailable because Section 7703(b)(1)'s deadline is jurisdictional. *See Lara v. Office of Personnel Management*, 421 F. App'x 978, 978-79 (Fed. Cir. 2011) (unpublished per curiam order).

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[1] To locate these petitions, I performed the following search in Westlaw's SCT-PETITION database: ad(aft 8/1/2011) & (("question presented" "questions presented") /100 (frap "appellate rules" "appellate procedure" "f.r.a.p." "fed.r.app.p." "fed.r.app.proc.")).

[2] *Lara* involved multiple petitioners, but the issues raised by each were identical. *See* Petition for Writ of Certiorari at 3 n.3, *Lara v. Office of Personnel Mgmt.* (No. 11-915). For the sake of simplicity, I will refer only to Mr. Lara.

Lara's certiorari petition pointed out the Court's recent interest in distinguishing non-jurisdictional from jurisdictional deadlines, and argued that Section 7703(b)(1) did not meet the clear statement rule set by *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006).[3] *See* Petition for Writ of Certiorari at 4-5.

The government, in response, cited a 1985 Supreme Court decision that, construing a similar prior version of Section 7703(b)(1), held that Section 7703(b)(1) constitutes a jurisdictional grant. *See* Brief for the Respondent in Opposition at 4, *Lara v. Office of Personnel Management* (No. 11-915) (quoting *Lindahl v. Office of Personnel Management*, 470 U.S. 768, 793 (1985)). The government acknowledged that *Lindahl* did not focus on the nature of Section 7703(b)(1)'s appeal deadline, but argued that the provision's sentence concerning timing is analytically inseparable from the provision's sentence allocating jurisdiction to the Federal Circuit. In making this argument, the government distinguished the structure of Section 7703(b)(1) – which contains both the jurisdictional grant and the timing provision in one statutory subsection[4] – from the structure of 28 U.S.C. § 2253(c) – which places in separate subsections the requirement that a habeas petitioner obtain a certificate of appealability (COA) and the requirement that the COA specify the issues that meet the statutory criteria for issuance of a COA. The government noted that the Court in *Gonzalez v. Thaler*, 132 S. Ct. 641 (2012), relied in part on that structural separation when it held that Section 2253(c)(3)'s issue-specification requirement is non-jurisdictional.[5] The government also argued that treating Section 7703(b)(1)'s 60-day deadline as jurisdictional accords with the Court's other relevant precedents. *See* Brief for the Respondent in Opposition at 5-6 (citing *Bowles v. Russell*, 551 U.S. 205 (2007), *Stone v. INS*, 514 U.S. 386 (1995), and *Henderson v. Shinseki*, 131 S. Ct. 1197, 1204 (2011)). In addition, the government argued that Appellate Rule 26(b)(2)'s bar on extensions of the time to file petitions seeking review of agency orders[6] "provide[s] further

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[3] *See Arbaugh*, 546 U.S. at 515-16 ("If the Legislature clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, ... then courts and litigants will be duly instructed .... But when Congress does not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character.").

[4] *See* 5 U.S.C. § 7703(b)(1) ("Except as provided in paragraph (2) of this subsection, a petition to review a final order or final decision of the Board shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed within 60 days after the date the petitioner received notice of the final order or decision of the Board.").

[5] *See Gonzalez*, 132 S. Ct. at 649 (holding that "the only 'clear' jurisdictional language ... appears in § 2253(c)(1)"); *id.* at 651 ("Congress set off the requirements in distinct paragraphs and, rather than mirroring their terms, excluded the jurisdictional terms in one from the other.").

[6] Appellate Rule 26(b)(2) provides that "the court may not extend the time to file ... a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States,

support for treating time limits on court-of-appeals review of administrative decisions as jurisdictional." Brief for the Respondent in Opposition at 6.

To assess the nature of Section 7703(b)(1)'s deadline, it seems worthwhile to consider a few additional points. From a textual perspective, the language setting Section 7703(b)(1)'s deadline is not as peremptory as the jurisdictional portion of Section 2253(c). Section 2253(c)(1) provides that "unless" a judge issues a COA "an appeal may not be taken." By contrast, Section 7703(b)(1) states that "[n]otwithstanding any other provision of law, any petition for review must be filed within 60 days [etc.]." Although "must" clearly qualifies the 60-day deadline as mandatory, that does not necessarily make the deadline jurisdictional.[7] In fact, the "must" in Section 7703(b)(1) might seem more similar to the "shall" in Section 2253(c)(3). *See Gonzalez*, 132 S. Ct. at 651 ("[T]he State seizes on the word 'shall' in § 2253(c)(3), arguing that an omitted indication renders the COA no COA at all. But calling a rule nonjurisdictional does not mean that it is not mandatory or that a timely objection can be ignored.").

Moreover, it is worth considering the possible distinctions between deadlines for taking appeals from one court to another and deadlines for initiating a proceeding in the court of appeals for review of an agency determination. In *Henderson* ex rel. *Henderson v. Shinseki*, 131 S. Ct. 1197, 1200 (2011), the Court held that the 120-day deadline set by 38 U.S.C. § 7266(a) for filing a notice of appeal in the United States Court of Appeals for Veterans Claims is non-jurisdictional. Justice Alito, writing for the Court, distinguished *Bowles* as addressing "an appeal from one court to another court," *id.* at 1203, and stressed that *Henderson*, by contrast, involved "review by an Article I tribunal as part of a unique administrative scheme," *id.* at 1204. The Court treated *Arbaugh*, not *Bowles*, as the governing precedent: "The question here, therefore, is whether Congress mandated that the 120-day deadline be 'jurisdictional.' .... Under *Arbaugh*, we look to see if there is any 'clear' indication that Congress wanted the rule to be 'jurisdictional.'" *Id.* at 1203 (quoting *Arbaugh*, 546 U.S. at 515). Reviewing a number of factors, the Court found no such clear indication concerning the deadline at issue in *Henderson*.

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unless specifically authorized by law."

[7] For similar reasons, the government's reliance on Appellate Rule 26(b)(2) as evidence that Section 7703(b)(1)'s deadline is jurisdictional seems unpersuasive. Appellate Rule 26(b)(1) likewise bars extensions of "the time to file ... a notice of appeal (except as authorized in Rule 4)," but that has not prevented courts of appeals, post-*Bowles*, from holding that the appeal deadline set by Appellate Rule 4(b)(1)(A) is non-jurisdictional. *See, e.g.*, *United States v. Gaytan-Garza*, 652 F.3d 680, 681 (6th Cir. 2011) (concluding in a case involving the deadline for a criminal defendant's appeal that "Rule 4(b), unlike Rule 4(a), is not established by statute, and it is now clear that Rule 4(b) is not jurisdictional," and observing that this conclusion "is consistent with the holdings and reasoning of several of our sister circuits").

The provision setting the deadline does not refer to jurisdiction[8] and is located (within the overall legislation) outside the subchapter whose title refers to jurisdiction. *See id.* at 1205. "[M]ost telling[ly]" in the Court's view, the statutory scheme is markedly pro-claimant and non-adversarial. *Id.* Additionally, the Court cited "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 1206 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221 n.9 (1991)).

The *Henderson* Court's mode of distinguishing *Bowles* – as a case that concerned court/court review – might leave the door open in future cases for the argument that *Bowles* does not govern the nature of deadlines for seeking court of appeals review of an administrative agency decision. On the other hand, a court/court versus agency/court distinction might rest in tension with *Stone v. INS*, 514 U.S. 386 (1995), in which the Court held that the then-applicable statutory provision delineating the procedure for petitioning for court of appeals review of a final deportation order by the Board of Immigration Appeals was jurisdictional, *see id.* at 406. The *Henderson* Court characterized its holding in *Stone* as expressed "without elaboration," *Henderson*, 131 S. Ct. at 1204. Apart from *Stone*, the Court also observed "that lower court decisions have uniformly held that the Hobbs Act's 60-day time limit for filing a petition for review of certain final agency decisions, 28 U.S.C. § 2344, is jurisdictional." *Id.* But the Court did not attempt in *Henderson* to analyze systematically the nature of court of appeals review of agency decisions. Although the Court did not take the opportunity to address this question in *Lara*, perhaps it will do so in the future.

II. Time computation under Rule 26(a): *Lara v. Office of Personnel Management*

Lara also presented a question concerning the interpretation of Appellate Rule 26(a)(3)(A), which extends filing deadlines "if the clerk's office is inaccessible ... on the last day for filing under Rule 26(a)(1)." Lara's petition for review was mailed to the Federal Circuit six days prior to the due date, but "on the approaches ... to Washington D.C., the weather delayed the mailing." Petition for Writ of Certiorari at 8, *Lara v. Office of Personnel Management* (No. 11-915).

The government noted that Lara had failed to invoke Rule 26(a)(3)(A) in the Federal Circuit, and also observed that he "cite[s] no authority for the proposition that severe weather outside the vicinity of the courthouse renders the courthouse 'inaccessible' for purposes of Rule 26(a)(3)." Brief for the Respondent in Opposition at 10, *Lara v. Office of Personnel Management* (No. 11-915).

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[8] Section 7266(a) provides: "In order to obtain review by the Court of Appeals for Veterans Claims of a final decision of the Board of Veterans' Appeals, a person adversely affected by such decision shall file a notice of appeal with the Court within 120 days after the date on which notice of the decision is mailed pursuant to section 7104(e) of this title."

The applicability of Rule 26(a)(3)'s inaccessibility provision to a situation like Lara's is not entirely clear. During the Time-Computation Project that culminated in the 2009 amendments to Appellate Rule 26(a) and to the corresponding time-counting provisions in the other sets of national rules, the rulemakers chose to leave the concept of "inaccessibility" to further caselaw development rather than attempting to define it in the national rules. (Most of the discussions, during the Time-Computation Project, on the topic of inaccessibility focused on whether and how to define inaccessibility for purposes of electronic filing.)

The history of the inaccessibility provisions clearly supports the idea that weather can render a clerk's office inaccessible.[9] And local weather conditions can ground a finding of inaccessibility even if the courthouse itself is open.[10] But, as the government points out, when the weather problems occur elsewhere in the country – rather than in the immediate area of the courthouse – the matter is less clear. Likewise, courts appear to be less likely to find inaccessibility when the weather problem delays mail or express delivery service but does not close the clerk's office.[11]

Despite the indeterminacy of the caselaw on this question, the problem that arose in *Lara* may be less likely to arise in an acute form in most other contexts, for two reasons. First, when the late filing is a notice of appeal from a district court judgment, then even if the weather-induced mail delay is not a ground for finding inaccessibility under Rule 26(a)(3), it may be a ground for extending the time to file the notice of appeal under Rule 4(a)(5) or Rule 4(b)(4) (as applicable).[12] (This safety valve, though, will not apply in the context of petitions seeking

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[9] *See* 1989 Committee Note to Appellate Rule 26(a) ("The proposed amendment brings Rule 26(a) into conformity with the provisions of Rule 6(a) of the Rules of Civil Procedure, Rule 45(a) of the Rules of Criminal Procedure, and Rule 9006(a) of the Rules of Bankruptcy Procedure which allow additional time for filing whenever a clerk's office is inaccessible on the last day for filing due to weather or other conditions."); 2009 Committee Note to Appellate Rule 26(a)(3) ("The reference to 'weather' was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system.").

[10] *See, e.g.*, *U.S. Leather, Inc. v. H & W P'ship*, 60 F.3d 222, 226 (5th Cir. 1995) ("An ice storm that temporarily knocks out an area's power and telephone service and makes travelling dangerous, difficult or impossible, thereby rendering the federal courthouse inaccessible to those in the area near the courthouse, is enough to come within Rule 6(a)'s weather exception.").

[11] *See Chao Lin v. U.S. Att'y Gen.*, 677 F.3d 1043, 1045-46 (11th Cir. 2012) (holding that clerk's office was not inaccessible where weather delayed clerk's office opening until mid-morning on filing deadline and where weather delayed Federal Express delivery by one day).

[12] *See, e.g.*, 2002 Committee Note to Appellate Rule 4(a)(5)(A)(ii) (Rule 4(a)(5)'s "good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension.").

review of agency action; Rule 15 contains no authorization for extensions of time to file such petitions, and Rule 26(b)(2) (as noted above) bars such extensions "unless specifically authorized by law.") Second, in a circuit that permits electronic filing of the petition for review, litigants can file electronically if they learn that the weather has delayed the mail or delivery service that they initially employed.[13] (This was not an option for Lara, because at the time of his deadline the Federal Circuit had not yet enabled electronic filing.)

It is also worth noting that a rulemaking response to this issue would call for coordinated consideration of all four sets of national Rules that contain time-computation provisions. As a result of the 2009 time-computation amendments, those provisions all follow the same template. Accordingly, further changes to one of those provisions would presumably entail consideration of similar changes to the others.

III. Sanctions under Rule 38

A petition currently pending in the Supreme Court seeks clarification of the standard for determining when to impose a sanction under Rule 38. A petition recently denied by the Court raised questions about the size of a Rule 38 sanction.

A. Rule 38 and the decision whether to impose sanctions: *Veale v. United States Court of Appeals for the Second Circuit*

In *Veale v. United States Court of Appeals for the Second Circuit* (No. 11-1325), two attorneys seek review of sanctions imposed on them by the court of appeals.[14] The court of appeals had held that the appeal from the dismissal of a lawsuit alleging "that on September 11, 2001, a bomb was detonated inside the Pentagon, that no plane hit the Pentagon, and that various identified United States civilian and military leaders knew about the 9/11 attacks in advance, assisted in their planning, and subsequently covered up the government's involvement," was frivolous. *Gallop v. Cheney*, 660 F.3d 580, 583 (2d Cir. 2011). The court of appeals admonished the nonlawyer plaintiff rather than sanctioning her, because she "did not spearhead her litigation strategy, but rather relied heavily upon her attorneys to draft the relevant documents and provide advice in pursuing this litigation." *Id.* at 583-84. But her lawyers, who "repeatedly and in bad faith accused the Court of bias, malice, and general impropriety," were ordered to "pay the government double costs in addition to damages in the amount of $15,000, for which they are jointly and severally liable," and were required to seek permission for any

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[13] *Cf. Chao Lin*, 677 F.3d at 1046 ("The Lins offer no evidence or assertion that the weather made it impossible for them to access the Clerk's office, nor do they contend that they lacked internet access to file their petition electronically.").

[14] My description of the court of appeals' sanctions orders in this case is adapted from my discussion of this topic in 16AA FED. PRAC. & PROC. JURIS. § 3984.1.

future court filings "unless such payment is timely made." *Id.* at 584. As authority for those sanctions, the court cited Rule 38, Section 1927, and its inherent power. *See id.* In addition, finding that one of those lawyers "acted in bad faith in demanding the recusal of the three panel members 'and any like-minded colleagues,'" the court of appeals required him "for a period of one year from the date of entry of this order, to provide appropriate notice of the sanctions imposed upon him in this case to any federal court in this Circuit before which he appears or seeks to appear." *Id.* at 586. Plaintiff's lead counsel had not signed the recusal motion, but asserted that he was the primary author of all the plaintiff's papers; the court of appeals ordered him to show cause "why he should not be separately sanctioned by being required to provide appropriate notice to any federal court before which he appears or seeks to appear of the sanctions imposed against him in connection with this appeal." *Id.* A subsequent order imposed this notice requirement on lead counsel for a one-year period with respect to any litigation within the Second Circuit, and also vacated the $15,000 sanction against local counsel due to his relative lack of involvement in the case. *See* Gallop v. Cheney, 667 F.3d 226, 230-31 (2d Cir. 2012) (per curiam).

The two sanctioned attorneys argue that the Court should grant their petition "first because it presents an opportunity to give the lower courts much needed guidance regarding what constitutes a sanctionable 'bad faith' filing and, secondly, because the court's imposition of sanctions in this case unquestionably will chill unpopular advocacy by attorneys, particularly those who would contemplate taking on politically sensitive or unpopular cases." Petition for a Writ of Certiorari at 18, *Veale v. United States Court of Appeals for the Second Circuit* (No. 11-1325). The Second Circuit waived its right to file a response to the petition.

It is true that the Supreme Court has not spoken at any length about the standards for imposing sanctions under Appellate Rule 38. The Court has observed that "Rule 38 affords a court of appeals plenary discretion to assess 'just damages' in order to penalize an appellant who takes a frivolous appeal and to compensate the injured appellee for the delay and added expense of defending the district court's judgment,"[15] but has not stated any guidelines for the exercise of that discretion. As I observed in Part IV.B of last year's memo on Appellate-Rules-related certiorari petitions,[16] there is some indeterminacy in the appellate caselaw concerning the

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[15] *Burlington Northern R. Co. v. Woods*, 480 U.S. 1, 6-7 (1987); *see also id.* at 2, 8 (holding in a diversity case that Rule 38 occupied the field and that a state provision "impos[ing] a fixed penalty on appellants who obtain stays of judgment pending unsuccessful appeals" was inapplicable).

[16] That memo can be found among the fall 2011 agenda materials, which are posted online at http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/ResearchingRules/AgendaBooks.aspx.

standard for sanctions under Appellate Rule 38.[17]

B. Rule 38 and the selection of the amount of sanctions: *Crowley v. United States*

The petition for certiorari denied in *Crowley v. United States*, 132 S. Ct. 1550 (2012), challenged the imposition by the Federal Circuit of an $8,000 sanction on an appellant's attorney under Appellate Rule 38. The sanctions stemmed from the conduct of an appeal from a judgment of the United States Court of Federal Claims dismissing the plaintiff's takings claim concerning a dam that the plaintiff had constructed on federal land. The Court of Federal Claims had held that the plaintiff was precluded from asserting a property interest in the land (for purposes of the takings claim) because of a prior judgment by the Interior Board of Land Appeals that "there was no right-of-way authorizing the construction or maintenance of the diversion structure on federal land." *Underwood Livestock, Inc. v. United States*, 89 Fed. Cl. 287, 290 (2009), *aff'd*, 417 F. App'x 934 (Fed. Cir. Mar 31, 2011) (unpublished opinion). Before the Federal Circuit, Underwood Livestock raised eight main issues in its principal brief. The court of appeals agreed with the Court of Federal Claims' holding on issue preclusion and reasoned that the finding of issue preclusion disposed of five of the eight issues on which the appellant's brief focused; the other three contentions, the court of appeals held, were meritless. *See Underwood Livestock, Inc.*, 417 F. App'x at 937, 939.

The court of appeals then directed the appellant and its counsel (Crowley) to show cause why the court should not find the appeal frivolous and impose sanctions. After receiving a somewhat belated response to that order, it decided to sanction Crowley and ordered the government to submit a claim for its attorney fees and expenses. The government "filed a request for $22,454.24 in attorney fees and costs," composed of "$7,897.22 in direct labor costs and $14,557.02 in indirect costs." *In re Violation of Rule 38*, 647 F.3d 1370, 1371 (Fed. Cir. 2011). (The figure was based on "167 hours of attorney and non-attorney work" on the appeal. *Id.* at 1372.) The court of appeals acknowledged that "the government's brief largely track[ed] the opinion of the Claims Court," but noted that "the government also had to respond to the eight additional issues raised by Crowley on appeal, none of which played a role in the Claims Court's decision and each of which supported this court's determination that Crowley's appeal was both frivolous as filed and frivolous as argued." *Id.* at 1373. The court of appeals, citing "the practice

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[17] Last year's memo discussed the petition for certiorari that was denied in *Busson-Sokolik v. Milwaukee School of Engineering*, 131 S. Ct. 3039 (2011). That petition had focused on whether the standard for frivolousness under Appellate Rule 38 (and Bankruptcy Rule 8020) is objective or subjective. Based on a review of the court of appeals caselaw, I concluded that there is some degree of inter- and intra-circuit variation concerning the standard for imposing Rule 38 sanctions, though the majority approach appears to be that an objectively frivolous appeal qualifies for such sanctions regardless of good or bad faith. But even under the majority approach, some courts will take bad faith (or its absence) into account in exercising their discretion.

of our sister circuits," awarded "a lump-sum amount" of $ 8,000 – an amount that it found "is ... an appropriate sanction for the bringing of this frivolous appeal, will serve as an effective deterrent to the bringing of future frivolous appeals, and reasonably compensates the government for the cost of its defense." *Id.*

Though Crowley argued somewhat half-heartedly that the court of appeals erred in finding the underlying appeal to be frivolous, he focused his certiorari petition on the size of the sanctions award. *See* Petition for Writ of Certiorari at 3-4, 12, 17, *Crowley v. United States* (No. 11-688). Although Crowley asserted that he was not on notice of the possibility of such an award, *see id.* at 14, the Federal Circuit's Practice Notes to Appellate Rule 38 state in part:

> WARNING AGAINST FILING OR PROCEEDING WITH A FRIVOLOUS APPEAL OR PETITION. The court's early decision in *Asberry v. United States*, 692 F.2d 1378 (Fed. Cir. 1982), established the policy of enforcing this rule vigorously. Since then, many precedential opinions have included sanctions under the rule. Damages, double costs, and attorney fees, singly or in varying combinations, have been imposed on counsel, parties, and pro se petitioners for pursuing frivolous appeals.

It is true that the $ 8,000 awarded against Crowley is larger than some (though not all) of the other awards that have been imposed under Rule 38 during the past decade.[18] And it is also

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[18] *See, e.g.*, *Gittinger v. Commissioner*, 448 F.3d 831, 833 (5th Cir. 2006) (awarding lump sum of $ 6,000 in a tax-protest case); *Stearman v. Commissioner*, 436 F.3d 533, 539-40 (5th Cir. 2006) (granting motion for $ 6,000 in sanctions, and then doubling that sanction, where court found that tax protester "insulted this court, the Tax Court, and the opposing party"); *Miller v. Toyota Motor Corp*., 554 F.3d 653, 655 (6th Cir. 2009) (granting $ 7,002.85 in costs and attorney fees where the court was "was doubly without jurisdiction over" the appeal); *Szopa v. United States*, 460 F.3d 884, 886 (7th Cir. 2006) (adopting "a presumptive sanction of $4,000 for a frivolous tax appeal" but doubling that in the case of a "recidivist"); *Maxwell v. KPMG, LLP*, 2008 WL 6140730, at *4 (7th Cir. Aug. 19, 2008) (unpublished order) (imposing more than $ 233,000 in Rule 38 sanctions on a bankruptcy trustee's counsel); *Wheeler v. Commissioner*, 528 F.3d 773, 784-85 (10th Cir. 2008) (awarding "a lump-sum sanction of $4,000" in a tax-protest case); *Kyler v. Everson*, 442 F.3d 1251, 1254 (10th Cir. 2006) (awarding $8,000 in sanctions in a tax-protest case).

In appeals from the Tax Court, 26 U.S.C. § 7482(c)(4) provides additional sanctioning authority: "The United States Court of Appeals and the Supreme Court shall have the power to require the taxpayer to pay to the United States a penalty in any case where the decision of the Tax Court is affirmed and it appears that the appeal was instituted or maintained primarily for delay or that the taxpayer's position in the appeal is frivolous or groundless." (With the exceptions of *Szopa* and *Kyler* (both of which involved appeals from a district court) the tax-protester cases mentioned in this footnote would have come within the scope of this provision.)

true that some courts might have scrutinized more closely the government's claim that it took 167 hours of government lawyer and non-lawyer time to brief the appeal.[19] But it is not clear that this topic warrants a rulemaking response.

IV. Summary appellate procedures: *Mayfield v. Cooper* and *Sibley v. Sibley*

The petition for certiorari that the Court denied in *Mayfield v. United States*, 132 S. Ct. 2113 (2012), challenged the validity of Fifth Circuit Rule 42.2, which provides: "If upon the hearing of any interlocutory motion or as a result of a review under 5TH CIR. R. 34, it appears to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed." The petition for certiorari that the Court denied in *Sibley v. Sibley*, 132 S. Ct. 1930 (2012), challenged the validity of the D.C. Circuit's summary-affirmance practice. These petitions made different arguments, but their challenges fail for similar reasons; thus I will address them together.

Citing 28 U.S.C. § 2106, Mayfield contended that "the proper disposition of an appeal found to be without merit is to affirm, not dismiss it." Petition for a Writ of Certiorari at 5, *Mayfield v. Cooper* (No. 11-1163). In addition, Mayfield argued that it "can be seen from a review of Rules 33, 34(a)(2) and 38 of the Federal Rules of Appellate Procedure [that] the sole penalty for a purportedly frivolous appeal is the assessment of just damages and costs under Rule 38." *Id.* The *Mayfield* petition leaves somewhat unclear the precise nature of Mayfield's challenge, but presumably his criticism of the Fifth Circuit's summary dismissal of his appeal centered on the fact that it occurred without full briefing and oral argument.[20]

Sibley raised a distinct set of challenges, arguing that the D.C. Circuit's "summary

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[19] *See, e.g.*, *B & H Medical, L.L.C. v. ABP Admin., Inc.*, 534 F.3d 801, 803 (6th Cir. 2008) (reviewing request for over $ 152,000 in appellate attorney fees and awarding $ 10,000 as "a reasonable measure of the costs required to prevail in this case against [a] manifestly frivolous appeal"); *Szopa v. United States*, 460 F.3d 884, 886 (7th Cir. 2006) ("The district judge required less than one page to dispose of the litigation.... Yet the Tax Division tells us that it *still* took 53 hours of tax specialists' time to prepare and review a 15-page brief. That cannot be understood as an investment necessary to translate a tax protester's gibberish into legal English."); *Budget Rent-A-Car System, Inc. v. Consolidated Equity LLC*, 428 F.3d 717, 718 (7th Cir. 2005) (vacating prior order awarding fees and costs, and instead denying them, because the claimed fees – of $ 4,626.50 for a "four-page jurisdictional memo" and $ 4,354 for the sanctions motion and fee application – were "exorbitant").

[20] The fact that the court of appeals dismissed the appeal – rather than affirming the judgment below – would not seem likely to have any significant effect on the petitioner's rights in this case. And the petitioner surely could not be complaining about the court's failure to sanction him under Appellate Rule 38.

affirmance procedure violates both Fed. R. App. P. 47(a)(1) and the Rules Enabling Act, 28 U.S.C. §2072." Petition for Writ of Certiorari at 8, *Sibley v. Sibley* (No. 11-1065). Sibley argued that the D.C. Circuit's failure to promulgate its summary-affirmance practice as a local rule through notice-and-comment rulemaking violates Appellate Rule 47(a)(1)'s directive that "[a] generally applicable direction to parties or lawyers regarding practice before a court must be in a local rule rather than an internal operating procedure or standing order." He contended that Appellate Rules 10 and 28 confer an entitlement "to file a timely brief and to present the record on appeal." And he asserted that the denial of this entitlement interfered with a "substantive right" within the meaning of the Rules Enabling Act. Petition for Writ of Certiorari at 13-14.

It has long been the case that courts – seeking to deal with docket pressures – have employed summary disposition techniques to deal with manifestly insubstantial appeals. More than two decades ago, the Federal Courts Study Committee reported:

> The courts of appeals have raised their productivity over the last half century by hard work and a series of personnel and procedural changes that have limited but hardly stopped their growth: three law clerks per judge, not one; "central" staff attorneys; reducing the length of oral argument, or eliminating it; early identification and summary disposition of weaker cases, and pre-hearing innovations, like settlement programs, for others. Many worry that these palliatives threaten the appellate ideal of individual attention to individual cases. Without them, however, the appellate courts would be in serious difficulty, rather than current, as now.[21]

In fact, the Fifth Circuit's summary dismissal procedure dates back to the 1960s. *See Murphy v. Houma Well Service*, 409 F.2d 804, 806 (5th Cir. 1969) ("[T]he Court has established four main classifications. The first covers cases so lacking in merit as to be frivolous and subject to dismissal or affirmance without more.").

Currently, the local circuit provisions in a number of other circuits provide for summary disposition of plainly meritless appeals.[22] Though the Supreme Court has not recently had

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[21] Report of the Federal Courts Study Committee 114 (April 2, 1990).

[22] Fourth Circuit Rule 27(f) provides:

> Motions for summary affirmance, reversal or dismissal are reserved for extraordinary cases only and should not be filed routinely. Counsel contemplating filing a motion to dispose summarily of an appeal should carefully consider whether the issues raised on appeal are in fact manifestly unsubstantial and appropriate for disposition by motion. Motions for summary affirmance or reversal are seldom granted.
>
> Motions for summary disposition should be made only after briefs are

occasion to address the practice, it has praised the usefulness of summary disposition in at least one instance. After holding that a pretrial rejection of a defendant's claim of double jeopardy qualifies for immediate appeal under 28 U.S.C. § 1291, the Court observed that the courts of appeals had tools available to control frivolous double-jeopardy appeals:

> Admittedly, our holding may encourage some defendants to engage in dilatory appeals as the Solicitor General fears. However, we believe that such problems of delay can be obviated by rules or policies giving such appeals expedited treatment. It is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of former jeopardy.

Abney v. United States, 431 U.S. 651, 662 n.8 (1977).

In sum, the summary-dismissal procedure employed by the Fifth Circuit in *Mayfield* is long-established and similar to practices in other circuits. And its application in *Mayfield* does

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> filed. If such motions are submitted before the completion of the briefing schedule, the Court will defer action on the motion until the case is mature for full consideration.
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> Motions to dismiss based upon the ground that the appeal is not within the jurisdiction of the Court or for other procedural grounds may be filed at any time. The Court may also sua sponte summarily dispose of any appeal at any time.

Eighth Circuit Rule 47A(a) provides:

> The court on its own motion may summarily dispose of any appeal without notice. However, in an in forma pauperis appeal in which a certificate of appealability has been issued, the court will afford 14 days' notice before entering summary disposition if the briefs have not been filed.
>
> The court will dismiss the appeal if it is not within the court's jurisdiction or is frivolous and entirely without merit. The court may affirm or reverse when the questions presented do not require further consideration.

Eleventh Circuit Rule 42-4 provides: "If it shall appear to the court at any time that an appeal is frivolous and entirely without merit, the appeal may be dismissed."

Seventh Circuit Rule 22(d)(3) provides that in death penalty cases "[t]he merits of an appeal may be decided summarily if the panel decides that an appeal is frivolous. In such a case, the panel may issue a single opinion deciding both the merits of the appeal and the motion for a stay of execution."

not seem erroneous.[23] Likewise, the D.C. Circuit's summary affirmance in *Sibley* accorded with that court's precedents. *See Sibley v. Sibley*, 2011 WL 4920955, at *1 (D.C. Cir. Sept. 27, 2011) (unpublished per curiam order) (citing *Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987)); *Taxpayers Watchdog*, 819 F.2d at 297-98 ("A party seeking summary disposition bears the heavy burden of establishing that the merits of his case are so clear that expedited action is justified.... To summarily affirm an order of the district court, this court must conclude that no benefit will be gained from further briefing and argument of the issues presented.").

Sibley's challenges, like Mayfield's, fail. Although, as noted above, some circuits have chosen to memorialize their summary-disposition practices in a local rule, Rule 47(a)(1)'s distinction between local rules and internal operating procedures (IOPs) or standing orders does not appear to require that choice. Rule 47(a)(1) addresses "direction[s] to parties or lawyers regarding practice before a court" – language that suggests the local-rule requirement is focused on ensuring that provisions requiring action by a litigant are placed in the local rules rather than in IOPs or standing orders. A court's summary-disposition procedure does not impose any particular requirement upon a litigant. Although the existence of such a procedure provides added reason for a litigant to articulate a substantial ground for the appeal in its opening brief, the litigant must do so in any event in order to comply with Appellate Rule 28(a)(9). It is true that addressing a court's summary-disposition practices in a local rule may increase the visibility of those practices and would afford an opportunity for the public to comment on them.[24] And it is also true that a court's summary-disposition procedures have a considerably greater impact on litigants than a number of the plainly internal court arrangements that have been recognized as suitable for treatment in standing orders.[25] But summary-disposition practices do not constitute a

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[23] It appears from Mayfield's petition that the underlying issue, on appeal, concerned Mayfield's effort to obtain a remand to state court on the ground that the government's notice of removal was untimely – and that Mayfield did not raise this timeliness objection within the 30-day period set by 28 U.S.C. § 1447(c). *See* Petition for a Writ of Certiorari at 6.

[24] As Judge Easterbrook has noted:

> [Local] rules must be reviewed by an advisory committee. See 28 U.S.C. § 2077(b).... [R]ules may be adopted only after public notice and opportunity for comment. 28 U.S.C. § 2071(b).... [R]ules adopted by district courts must be submitted to the judicial council of the circuit for review. 28 U.S.C. § 2071(c). Finally, all local rules must be sent to the Director of the Administrative Office, who ensures their public availability. 28 U.S.C. § 2071(d).

In re Dorner, 343 F.3d 910, 913-14 (7th Cir. 2003).

[25] In 2009, the Standing Committee issued a Report and Recommended Guidelines on Standing Orders in District and Bankruptcy Courts. The guidelines noted:

"direction to parties or lawyers" and therefore fall outside the ambit of Rule 47(a)(1)'s requirement concerning local rules.

Sibley's other challenges also fail. Rules 10 and 28 do not confer on litigants a right to full briefing. To the contrary, Appellate Rule 2 provides for the suspension of those rules "in a particular case" in order, inter alia, "to expedite [the] decision." Rule 2's reference to "particular case[s]" indicates that the suspension of the briefing rules should be warranted by the circumstances of a specific case. A practice that imposes on the litigant seeking summary disposition a "heavy burden of establishing that the merits of his case are so clear that expedited action is justified," *Taxpayers Watchdog*, 819 F.2d at 297, would seem to meet this test. Nor does a practice of summary disposition violate the Rules Enabling Act. For one thing, the Enabling Act's provision concerning substantive rights[26] pertains only to rules promulgated pursuant to the Enabling Act; it does not address court practices set through decisional law. Without digressing into an investigation of the sources and scope of the federal courts' power to

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> Standing orders are most useful and appropriate to address matters of internal administration. For such matters, notice and public comment are not necessary and in some cases not justified. Examples of matters of internal administration properly covered by standing orders include the following:
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> - Court security
> - Planning for emergencies
> - Using nonappropriated funds
> - General procedures for funds in court registry
> - Directives to court personnel
> - Division of workload
> - Referral to magistrate judges
> - Using resources
> - Juror wheels
> - Setting dates for naturalization hearings
> - Court implementation ofjudicial resources for initial appearances
> - General scheduling of motions, such as on a particular day ofthe week
> - Appointments, such as to Criminal Justice Act Panel
> - PACER fee exemptions
> - Closing or staffing courts on or after holidays

Guidelines for Distinguishing Between Matters Appropriate For Standing Orders and Matters Appropriate for Local Rules and for Posting Standing Orders on a Court's Web Site ¶ I(1). Although these guidelines focused on practice in the district courts, the relevant considerations with respect to practice in the courts of appeals seem similar.

[26] *See* 28 U.S.C. § 2072(b) (providing that rules promulgated pursuant to the Enabling Act "shall not abridge, enlarge or modify any substantive right").

make common-law rules, it suffices to note that the scope of that power includes the authority to make rules that affect substantive rights in a variety of areas. More to the point, a practice of summary disposition of appeals would not abridge the Rules Enabling Act's scope limitation even if that practice were adopted in a rule promulgated under the Enabling Act. Although the nature of the Enabling Act's scope limitation is not well-defined,[27] a provision curtailing appellate briefing in instances where the court finds the merits so clear that it "conclude[s] that no benefit will be gained from further briefing and argument," *Taxpayers Watchdog*, 819 F.2d at 298, would fall well within the outer bounds of the rulemakers' authority.

IV. Other petitions

The Supreme Court filings in three other cases mentioned appellate procedure but raise no issues that would warrant consideration by the Committee.

The petition for rehearing that the Court denied in *Poles v. Sikowitz*, 132 S. Ct. 869 (2011), asserted that the court of appeals had violated, inter alia, "multiple Federal Rules of Appellate Procedure ['FRAP' Rules 26, 27, 35, 41, and 45] (and the subsidiary elements of the 2nd Circuit's Local Rules and its Internal Operating Procedures)." Petition for Rehearing of an Order Denying a Petition for a Writ of Certiorari at i, *Poles v. Sikowitz* (No. 11-203). The core of the petitioner's argument in seeking rehearing in the Supreme Court was that the requests for reconsideration that the petitioner filed on and after the date that the court of appeals' mandate issued in his appeal should have been considered by the appellate panel rather than being disposed of by the clerk. *See id.* at 7, 11. The filings and docket in the court of appeals, however, indicate that the court's actions were consistent with the Appellate Rules. On November 4, 2010, the court of appeals entered an order denying Poles' motions to proceed in forma pauperis and for appointment of counsel, and dismissed the appeal (pursuant to 28 U.S.C.

[27] In the Court's most recent discussion of this question, a plurality of Justices stated that the test for a Rule's validity under the Enabling Act is simply whether the Rule "really regulat[es] procedure." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1444 (2010) (plurality opinion) (quoting *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1941)). Justice Stevens, by contrast, argued that in some instances the fact that a federal Rule operated in a diversity case to displace a state rule that was bound up with state substantive rights could affect the Rule's validity as applied in that case. *See id.* at 1450, 1452 (Stevens, J., concurring in part and in the judgment). The four dissenting Justices did not have to address the question of Civil Rule 23's validity under the Enabling Act because they found that Rule 23 did not govern the issue that was under dispute. *See id.* at 1469 (Ginsburg, J., joined by Kennedy, Breyer, & Alito, JJ., dissenting).

§ 1915(e))[28] "because it lacks an arguable basis in law or fact." Order, Nov. 4, 2010, *Poles v. Sikowitz*, No. 10-2959 (2d Cir.). On January 14, 2011, the panel denied Poles' motion for reconsideration. Order, Jan. 14, 2011, *Poles v. Sikowitz*, No. 10-2959 (2d Cir.). On January 21, 2011, the court of appeals issued the mandate. *See* Docket Entry No. 41, *Poles v. Sikowitz*, No. 10-2959 (2d Cir.). Poles' challenge stems from the fact that the further requests for reconsideration that he filed starting on January 21 were returned to him by the Clerk's Office because of the issuance of the mandate. That action by the Clerk's Office, however, was entirely proper. By January 21, the time for seeking rehearing or rehearing en banc had long expired[29] and the panel had already denied reconsideration. Poles had no right to request a further reconsideration of the disposition, and would have had no ground at all for seeking the extraordinary relief of recall of the court's mandate once it issued on January 21.

One of the Questions Presented in *Diana v. Oliphant*, 132 S. Ct. 1557 (2012), referred to appellate procedure: "Whether this Court should clarify appellate procedures affecting the rights of litigants in the nation's federal appellate courts?" Petition for Writ of Certiorari at i, *Diana v. Oliphant* (No. 11-720). However, a review of the petition discloses no specific issue relating to the Appellate Rules. The closest the petition comes to raising an issue concerning appellate procedure is to assert that the court of appeals misread the record on appeal. *See id.* at 9 ("The Panel used its misapprehension of basic material facts and evidence to supplant the jury, and the trial judge's interpretation of the facts ....").

The litigants whose petition for certiorari was denied in *Smith v. Atlantic Southern Bank*, 132 S. Ct. 769 (2011), challenged the court of appeals' dismissal of their appeal for lack of jurisdiction. *See* Petitioners' Reply to Brief in Opposition at ii, 2, *Smith v. Atlantic Southern Bank* (No. 11-374). Evidently, the Smiths had sought review in the district court of a non-final bankruptcy court order "denominating pleadings as amendments to [the] complaint and requiring re-issuance of [the] summons." Order, Oct. 19, 2010, *Smith v. Atlantic Southern Bank*, No. 10-13743 (11th Cir.). The district court dismissed that appeal as frivolous, and the Smiths appealed that dismissal to the court of appeals. *See id.* The court of appeals, holding that the bankruptcy court order "was not a final order," dismissed the appeal *sua sponte* for lack of jurisdiction. *Id.* at 1-2. The Smiths' filings in the Supreme Court provide no reason to think that this disposition was erroneous.

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[28] Section 1915(e)(2), concerning appeals in forma pauperis, provides in part that "the court shall dismiss the case at any time if the court determines that ... (B) the action or appeal – (i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief against a defendant who is immune from such relief."

[29] The court of appeals had extended to November 26, 2010, the deadline for Poles to move for reconsideration of the order dismissing the appeal. *See* Docket Entry No. 35, *Poles v. Sikowitz*, No. 10-2959 (2d Cir.).

TAB 13

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Case Management Procedures in the Federal Courts of Appeals

Second Edition

Laural Hooper, Dean Miletich, and Angelia Levy

FEDERAL JUDICIAL CENTER
2011

NOTE

The caseload data included in this report were collected in December 2010. More recent data are available at www.uscourts.gov/Statistics/FederalCourtManagementStatistics.aspx.

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- Cathy Catterson, Circuit and Court of Appeals Executive, and Susan Soong, Chief Deputy Clerk, U.S. Court of Appeals for the Ninth Circuit;
- Dave Tighe, Circuit Executive, and Betsy Shumaker, Clerk of Court, U.S. Court of Appeals for the Tenth Circuit;
- James Gerstenlauer, Circuit Executive, and John Ley, Clerk of Court, U.S. Court of Appeals for the Eleventh Circuit; and
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Introduction

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The Federal Rules of Appellate Procedure provide a generally unified scheme of appellate practice and procedure for the courts of appeals. Yet, the courts of appeals, with their unique traditions and circumstances, use a variety of procedures to manage their dockets and to ensure high-quality and consistent appellate decisions.[1] The Judicial Conference of the United States recognized that circuit-based experimentation with case management could provide an abundant source of ideas for improving the appellate courts' practices and procedures. In its 1995 *Long Range Plan for the Federal Courts*, the Conference stated, "It is important that the appellate courts take advantage of the varied experiences of other circuits by exchanging information about the operation and results of the use of particular case management techniques and systems."[2] In addition, the Conference recommended that the federal court system "collect and analyze information on various courts of appeals' case management practices."[3]

The Judicial Conference's charge to the courts of appeals in the mid-1990s to exchange information about case management practices is no less important today. Over the last decade, the courts of appeals have experienced many changes, including the adoption of an electronic case filing system and significant increases in bankruptcy appeals and pro se filings. The courts have also had to deal with the challenges of multiple and prolonged judicial vacancies. All of these changes have had an impact on how the courts of appeals conduct their business.

In this second edition of *Case Management Procedures in the Federal Courts of Appeals*, we present information on the case management practices of the courts of appeals that were in effect in 2010 and 2011. In order to describe how the courts of appeals do their work, we reviewed the Federal Rules of Appellate Procedure, the circuit courts' local rules and internal operating procedures, practitioner handbooks, published articles, and other supplemental information provided by court staff. Using these materials, we prepared for each court's review a profile of that court's case management practices. These profiles were refined as additional information was obtained. Some courts supplied information with a high level of detail; others provided summaries of their courts' operations. We distilled this information in an effort to present a balanced view of how the appellate courts operate without restating each circuit's entire body of local rules and internal operating procedures.

This publication has two parts. Part I highlights key areas in which case management approaches of the courts of appeals vary. Part II comprises circuit-by-circuit descriptions of how the courts of appeals manage their caseloads.

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1. *See generally* Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts,* 61 Duke L.J. 315 (2011). The author analyzes the practices of five circuit courts using qualitative research from a series of interviews of appellate judges, clerks of court, court mediators, and staff attorneys. Variations across the five circuits are described. The author concludes that disuniformity in case management is more defensible in the appellate courts than in substantive and procedural law, but that current practices can and should be improved through increased transparency and information sharing among the circuits.

2. Judicial Conference of the U.S., Long Range Plan for the Federal Courts, Dec. 1995, Recommendation 35, at 67, http://www.uscourts.gov/uscourts/FederalCourts/Publications/FederalCourtsLongRangePlan.pdf.

3. *Id.*, Recommendation 36, at 67.

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Part I: Key Variations

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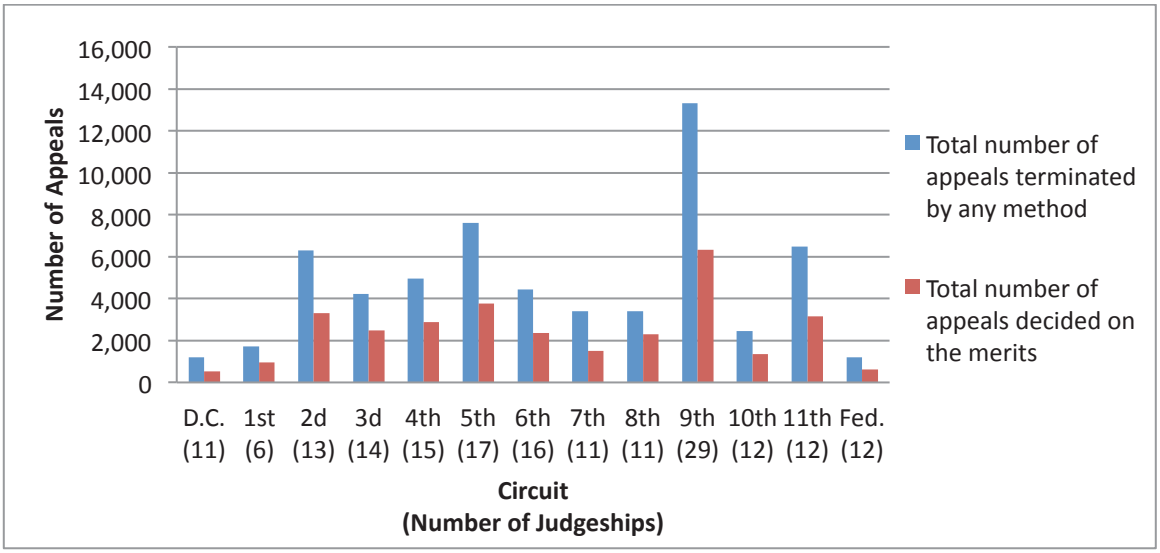
In this part we describe generally major aspects of case management in the courts of appeals. In a number of instances we give examples of a court's case management approach with particular types of cases, such as bankruptcy appeals. We have not attempted to be exhaustive, and if a court is not mentioned in connection with a particular practice, that does not mean the court is not following that practice. Typically, the mention of a court reflects the fact that the court's published rules or internal operating procedures specifically describe the practice. Because courts' operating procedures vary in specificity, some courts may use practices that are not described in official publications.

The following figures and tables present information about the caseloads of the courts of appeals,[4] including data on appeals terminated on the merits, resident judge complement, type of judge participating in case dispositions, and median times from the filing of the notice of appeal to disposition of the case. The appellate case management practices summarized here, and set out in more detail in the circuit profiles in Part II of this report, reflect, to some degree, how the courts processed the more than 59,000 appeals terminated during the 12-month period ending September 30, 2010.

Figure 1 contains summary information about the total number of appeals that were terminated in FY 2010 and the total number of appeals that were decided on the merits.

Figure 1: Appeals Terminated by Circuit During the 12-Month Period Ending September 30, 2010



Sources: Admin. Office of the U.S. Courts, 2010 Federal Court Management Statistics, at 26. Data for the U.S. Court of Appeals for the Federal Circuit come from its website at http://www.cafc.uscourts.gov/the-court/statistics.html.

4. *See* Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: Annual Report of the Director 14 (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/judicialbusinespdfversion.pdf [hereinafter Admin. Office of U.S. Courts 2010 Annual Report].

Table 1 focuses on merits terminations in greater detail. During the 12-month period ending September 30, 2010, a little over half (52%) of the courts of appeals' cases were terminated on the merits. In seven circuits (the First, Second, Third, Fourth, Sixth, Eighth, and Tenth), the percentage of terminations on the merits exceeded this overall average. In five other circuits, the majority of appeals were terminated by procedural judgments.[5]

Table 1: Appeals Terminated on the Merits by Circuit During the 12-Month Period Ending September 30, 2010

Circuit	Total Appeals Terminated[a]	Percentage of Total Terminations on the Merits	Total on the Merits Appeals Terminated	Affirmed/ Enforced[b]	Dismissed	Reversed	Remanded	Other
All Circuits	59,526	51.9	30,914	24,588	2,751	2,372	574	629
D.C.	1,189	43.7	520	399	36	75	9	1
1st	1,706	56.6	965	820	50	86	9	—
2d	6,300	52.4	3,304	2,579	434	221	70	—
3d	4,235	58.6	2,483	2,112	94	202	73	2
4th	4,951	58.5	2,894	2,545	148	146	48	7
5th	7,624	49.5	3,773	2,679	751	261	82	—
6th	4,440	52.9	2,350	2,028	60	208	54	—
7th	3,398	44.5	1,512	1,088	145	208	42	29
8th	3,397	67.5	2,293	2,011	161	103	10	8
9th	13,340	47.4	6,324	4,688	404	566	98	568
10th	2,448	55.3	1,353	996	212	74	71	—
11th	6,498	48.4	3,143	2,643	256	222	8	14

Source: Admin. Office of U.S. Courts 2010 Annual Report, at 111–14 tbl.B-5.
Note: Data for the U.S. Court of Appeals for the Federal Circuit are not included.
a. Totals include reopened and remanded appeals as well as original appeals.
b. Affirmed includes merit terminations affirmed in part and reversed in part.

A. Court Organization and Staffing

1. Types of judicial panels

In addition to regularly constituted three-judge panels that hear orally argued cases, courts use various other types of judicial panels. These panels are described in detail in the individual circuit profiles in Part II of this report. Specially constituted panels, which may be standing or rotating, include motions panels, death penalty panels, and "screening" or "conference calendar" panels that decide nonargued cases. These panels and other

5. See Admin. Office of U.S. Courts 2010 Annual Report, *supra* note 4, at 115 tbl.B-5A, for a breakdown of procedural terminations, including but not limited to jurisdictional defects, Fed. R. App. P. 42(b) (voluntary dismissal), and defaults.

techniques used to process the appellate caseload are described in more detail in later sections of this report.

2. Available judges and use of visiting judges

Courts of appeals can compose panels from three categories of judges—active judges, senior judges of the court, and judges from outside the court.[6] Resident senior judges are classified as "sitting" judges if they handle at least 25% of the caseload of an active judge. Courts differ both in the number of available judges and in how they supplement them with judges from outside the court. Table 2 provides information on judgeships and sitting senior judges in each court of appeals during the 12-month period ending September 30, 2010. Two circuits (the Second and Ninth) have 12 or more sitting senior judges who assist the court in managing its caseload.

Table 2: Selected Judge Information by Circuit During the 12-Month Period Ending September 30, 2010

	D.C.	1st	2d	3d	4th	5th	6th	7th	8th	9th	10th	11th
Judgeships	11	6	13	14	15	17	16	11	11	29	12	12
Sitting senior judges	4	2	12	9	1	5	9	6	6	20	9	5
Vacant judgeship months[a]	24	5.5	42.3	10.9	40.4	12	12	10.3	0	35.2	15	4.7

Source: Admin. Office of the U.S. Courts, 2010 Federal Court Management Statistics, at 27.
Note: Data for the U.S. Court of Appeals for the Federal Circuit are not included.
a. Vacant judgeship months are the total number of months that vacancies occurred in any judgeship position in a circuit.

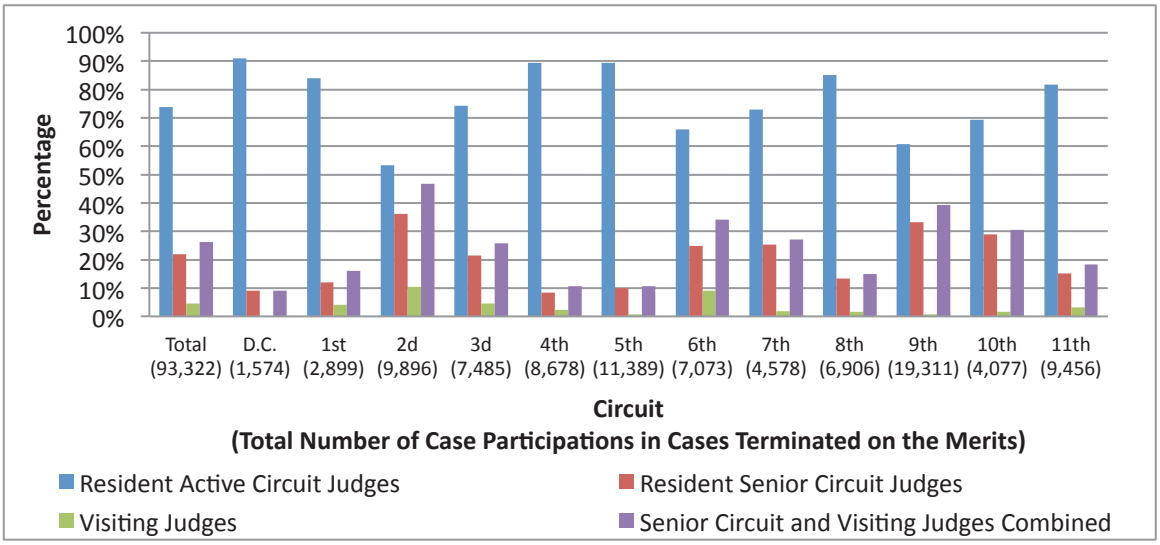
Figure 2 presents information on how frequently each type of judge participated in cases terminated on the merits after oral hearings or submissions on the briefs. Overall, the data show that approximately 26% of the work in the courts of appeals is performed by senior and visiting judges. Visiting judges can include circuit judges from another circuit as well as district judges from the same or another circuit.

In some circuits, the use of senior and visiting judges is substantial. For example, in the Second Circuit, resident senior judges participated in approximately 36% of cases terminated on the merits in FY 2010. Visiting judges participated in about 11% of cases terminated on the merits. Similarly, in the Ninth Circuit, senior judges participated in over a third of these cases. The Second and Ninth Circuits are also circuits with some of the highest numbers of vacant judgeship months: 42.3 months and 35.2 months, respectively (see Table 2).[7]

6. Judges from outside the court may be active or senior circuit or district judges or, on occasion, retired Supreme Court justices.

7. Vacant judgeship months are months in which the court was short an active judge.

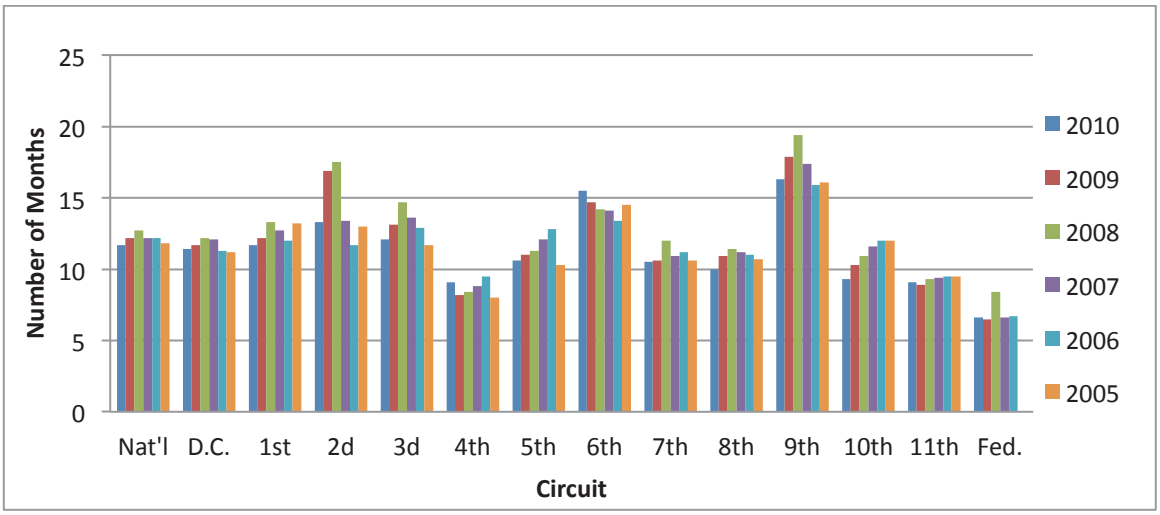
Figure 2: Judge Participations in Cases Terminated on the Merits After Oral Hearings or Submission on the Briefs by Circuit During the 12-Month Period Ending September 30, 2010



Source: Admin. Office of U.S. Courts 2010 Annual Report, at 45 tbl.S-2.
Note: Data for the U.S. Court of Appeals for the Federal Circuit are not included.

Figure 3 shows that during FY 2010, a case took an average of 11.7 months to move through the appellate court system. This represents a slight decrease from the averages for 2008 and 2009. Consistent with this trend, FY 2010 data show that 9 of the 13 courts of appeals saw a decline from the previous year in the length of time from the filing of the notice of appeal to disposition. In contrast, 4 circuits (the Fourth, Sixth, Eleventh, and Federal) experienced increases in median disposition times during FY 2010.

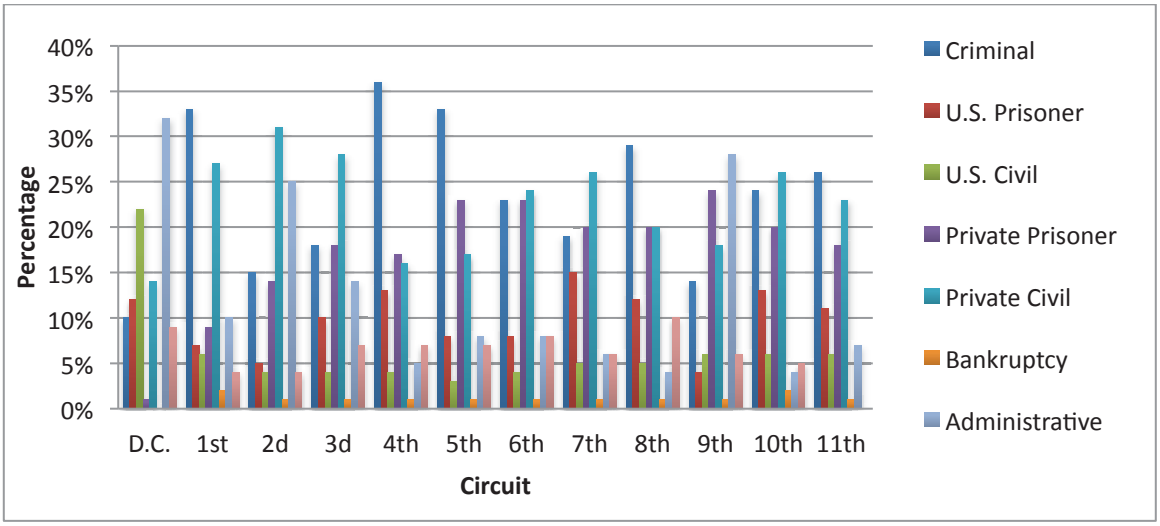
Figure 3: Median Time from Filing Notice of Appeal to Disposition by Circuit for the Years 2005–2010



Source: 2010 Federal Court Management Statistics, at 3–25.
Note: The Federal Circuit characterizes these numbers as "median time from docketing to disposition." Federal Circuit, Statistics, Caseload Analysis, *available at* http://www.cafc.uscourts.gov/the-court/statistics.html. Data for FY 2005 are not available for this circuit.

Figure 4 gives a snapshot of the filings in the courts of appeals for FY 2010. Variations of note include high percentages of administrative and U.S. civil cases in the District of Columbia Circuit, a high percentage of criminal cases in the First, Fourth, and Fifth Circuits, and a low percentage of private prisoner cases in the District of Columbia Circuit. Data on original proceedings are not available for the Eleventh Circuit.

Figure 4: Case Types as a Percentage of All Appellate Filings by Circuit During the 12-Month Period Ending September 30, 2010



Source: Admin. Office of U.S. Courts 2010 Annual Report, at 84 tbl.B-1.
Note: The figure includes original appeals as well as appeals reopened. The figure does not include data for the U.S. Court of Appeals for the Federal Circuit. Data on original proceedings are not available for the Eleventh Circuit.

B. Organization and General Duties of Nonjudicial Staff

In each court of appeals, staff who are not assigned to chambers, typically staff attorneys, clerks, and circuit mediators (who may have other titles, such as "conference attorney"), play a major role in processing cases. The Ninth Circuit is alone in employing an appellate commissioner who handles, among other things, those motions that were formerly handled by the single-duty judge and who serves as a special master for the court. The Seventh Circuit's nonjudicial staffing is distinctive in that its circuit executive—a statutory employee of the judicial council and a former staff attorney—performs several functions typically delegated to the staff attorneys' office in other circuits, including jurisdictional and nonargument screening. Staff law clerks in the Seventh Circuit assist judges with motions work and cases for disposition on the merits. In addition, they occasionally work directly for judges who need additional assistance with their chambers work.

Generally, the authorized number of staff attorneys in the courts of appeals is set by a formula that uses total appeals filed as its basis, but the courts utilize their allocations in different ways. Some augment other positions with their allocations; others do not employ the full number of staff attorneys allocated.

Courts also differ in how they organize and use their staff attorneys. Staff attorneys are generally centralized at circuit headquarters, such as Boston, New York, St. Louis,

and Denver. In most courts, the staff attorneys operate under the supervision of a chief staff attorney or a senior staff attorney in the Office of Staff Counsel, Office of Legal Counsel, or similarly titled division.

In general, staff attorneys assist the courts of appeals by screening appeals and preparing cases for disposition without argument.[8] In some courts, they concentrate on pro se cases, and in others they work on most civil and criminal appeals, if only to make a preliminary determination about whether the case should be set for oral argument.

In the Sixth Circuit, the primary function of the staff attorneys' office is to assist the court in processing all pro se appeals that do not require oral argument.

In the Fifth Circuit, staff attorneys perform initial screening, placing cases into categories ranging from "Class I" to "Class IV." The class designation affects whether a case is placed on the oral argument calendar. For example, the court has designated Class I cases as so lacking in merit as to be deemed frivolous and subject to dismissal. Class III and IV cases make up the court's oral argument calendars.

Similarly, in the Ninth Circuit, staff attorneys responsible for case management perform an "inventory" by weighing cases by type, issue, and difficulty after briefing is complete. The weight of a case indicates generally the amount of judicial time that will be required to dispose of the case. This inventory process allows the court to balance judges' workloads and to hear at a single session unrelated appeals involving similar legal issues.

In addition to their primary duties, which are described more fully in the detailed circuit profiles, staff attorneys may perform various other tasks. In the First Circuit, staff attorneys sometimes assist in drafting local rules and work with other court units on policy matters. In the Eighth Circuit, staff attorneys undertake special assignments at the direction of the judges.

In recent years, some courts have changed their policies with respect to the nature of the staff attorney's position. Typically, supervisory staff attorney positions have been career positions, and line staff attorneys have had limited terms or presumptive terms that could be extended under certain circumstances.[9] However, some courts, including the Fifth and Tenth Circuits, have made specific line staff attorneys eligible for permanent employment.

C. Electronic Filing

In January 1996, the Administrative Office of the U.S. Courts began development of its Case Management/Electronic Case Filing (CM/ECF) system. CM/ECF is a comprehensive case management system that allows courts to maintain electronic case files and offer electronic filing over the Internet. Courts can make all case information immediately available electronically through CM/ECF. Some of the benefits of adopting an electronic filing system are

- reducing reliance on paper records;

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8. *See generally* Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Ariz. St. L.J. 1 (2007) (discussing the role of staff attorneys and the impact of their work—memoranda and draft dispositions—on the decision-making process).

9. For example, several courts have presumptive two- or three-year terms for staff attorneys; the Ninth Circuit has a five-year limit.

- enhancing the accuracy, management, and security of records;
- reducing delays in the flow of information; and
- reducing costs for the judiciary, the bar, and litigants.

In 2006, an amendment to Federal Rule of Appellate Procedure 25(a)(2)(D) authorized the courts of appeals to promulgate local rules governing electronic filing. In addition, any local rule had to contain an opt-out provision for parties when electronic filing would impose a hardship or when there are exceptional circumstances.[10] In the following sections, we describe generally the courts of appeals' progress in adopting CM/ECF procedures and their requirements regarding electronic filing.

1. Which appellate courts use electronic filing?

As of May 2012, all of the courts of appeals fully use electronic filing (CM/ECF). Only the Eleventh Circuit hasn't adopted mandatory electronic filing for attorney filers in its circuit.

2. Who qualifies to file electronically in the appellate courts?

Attorneys must file electronically in all the appellate courts except the Eleventh Circuit unless exempted by local rule. In the courts of appeals with mandatory electronic filing, with the exception of the Seventh and Eighth Circuits, attorney filers must be members of the bar of the court in order to register as an electronic filer. Attorneys in the Eighth Circuit do not have to be members of the circuit's bar in order to register or file a document in a case. The Seventh Circuit stipulates that attorneys admitted pro hac vice and attorneys authorized to represent the United States without being admitted to the Seventh Circuit bar may register as attorney users of the court's electronic filing system.

Pro se filers are handled differently across the circuits. The Fifth, Sixth, and Eleventh Circuits do not allow pro se litigants to file electronically. The First Circuit limits electronic filing to pro se litigants who are not incarcerated. The Second, Third, Fourth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits allow pro se litigants to file electronically, but these litigants typically must file a motion requesting permission to file electronically in a specific case.

3. What are the appellate courts' requirements for using CM/ECF?

In addition to requiring bar membership, a number of circuits require registrants to complete mandatory introductory training before granting them electronic filing privileges. The First Circuit requires potential electronic filers to complete two series of lessons that are 30 to 35 minutes in length. These lessons demonstrate how to file an appearance form, a motion, a response, and a brief, as well as provide filing tips and advice on how to avoid common errors.

The Fourth Circuit requires registrants to successfully complete online training before using CM/ECF. The training consists of two parts: (1) the Fourth Circuit Court of

10. Specifically, Fed. R. App. P. 25(a)(2)(D) states:

> Electronic filing. 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.

Appeals Attorney ECF Training Electronic Learning Module, which is 30 minutes in length, and (2) the Review and Certification Form. Registrants must then answer at least 8 out of 10 questions correctly before their ECF account will be activated. In addition to requiring mandatory training, the Fourth Circuit requires registrants to complete the court's electronic case filing registration form.

The Fifth Circuit requires registrants to complete at least two interactive electronic learning modules, which are available on the court's website. At the end of each module, registrants are prompted to send an e-mail to the court that includes their name, CM/ECF user name, and the name of the module.

4. What additional training do the appellate courts offer for CM/ECF?

Although most of the courts do not require extensive CM/ECF training, all courts with mandatory electronic filing offer some type of training for CM/ECF. The most common training offered by the courts for CM/ECF entails electronic learning modules or video tutorials on various aspects of the CM/ECF system. Public Access to Court Electronic Records (PACER) offers three training videos: *Windows Navigation, An Introduction to CM/ECF,* and *PACER Report*. The courts often include these PACER modules with their own training videos or electronic learning modules on their websites.

Another CM/ECF training tool on the courts' websites is a practice database, on which individuals can perform a sample log-in and enter mock case numbers in order to familiarize themselves with the CM/ECF system. The Third, Fourth, Sixth, Seventh, and D.C. Circuits have practice CM/ECF databases on their websites that allow individuals to practice filing documents by using test cases and sample events.

Several circuit courts offer detailed training manuals and in-person training opportunities. The Second, Fifth, and Sixth Circuits offer detailed training manuals on their websites. The Third and Ninth Circuits provide in-person training for using CM/ECF. The Third Circuit offers quarterly training on CM/ECF, which includes a general introduction to CM/ECF, group instruction on electronic filing, hands-on training, and practice with electronic filings. The Ninth Circuit offers monthly in-person training for electronic case filing. The training session lasts one hour and is approved by the State Bar of California as one hour of Minimum Continuing Legal Education (MCLE) credit.

5. User feedback about CM/ECF

The First and Third Circuits have on their websites surveys for electronic filers to evaluate CM/ECF. The First Circuit asks respondents to evaluate the efficiency and ease of use of CM/ECF. The Third Circuit offers a CM/ECF Next Generation survey on its website that is designed to help the Administrative Office of the U.S. Courts identify and recommend improvements in the next generation of the CM/ECF system. This survey is similar, but not identical, to the survey used by the First Circuit.

6. Impact of electronic case filing

A number of circuits report that the adoption of an electronic case management system has greatly improved the administration of specific types of cases. For example, the Ninth Circuit's 2009 Annual Report noted that the electronic case management system

> allows for the use of form-generated orders for greater efficiency and uniformity. The system is being used to produce many of the initial orders issued in pro se appeals, such as orders to show cause relating to jurisdiction, fees and summary disposition. In addi-

> tion, the court can now use the same system for filing pleadings and tracking cases within the court, instead of a separate system.
>
> Finally, the court is now scanning all paper filings, including *pro se* filings, so that everything in every *pro se* case is now available for judges, court staff, and litigants to view on . . . [the] PACER . . . system.[11]

D. Case Management

1. Starting the appellate process

To facilitate screening, mediation, and other pre-decision phases of appellate case management, most courts have adopted formal requirements for the format and content of information to be submitted in the early stages of an appeal. The most common screening tool is the "docket statement," in which the filer states the basis of the court's jurisdiction, identifies related cases, and provides certain information about the issues and procedural posture of the case. In the Second Circuit, this form is called the "Civil Appeal Pre-Argument Statement," while in the Eighth Circuit it is titled the "Appeal Information Form." Information on these forms assists court staff in determining, for example, whether the case is suitable for an appellate mediation program, whether it is likely to require oral argument, or whether the transcript procurement process is on track.

2. Preargument conferencing, mediation, or settlement programs

Pursuant to Federal Rule of Appellate Procedure 33,

> [t]he court may direct the attorneys—and, when appropriate, the parties—to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

All of the courts of appeals have some form of appellate mediation or conference program for resolving appeals by settlement with little or no judicial intervention.[12] In general, the mediation or settlement programs operate separately from the court's decisional processes. In most of the courts, referrals of eligible cases to settlement programs occur either after docketing or before the parties have filed their briefs. Unless settlement is actively pursued immediately after appeal, the passage of time may interfere with any realistic settlement possibility. In some instances, parties may confidentially request mediation, but the mediation program director will ultimately determine which cases are appropriate for mediation.

Eligibility for mediation varies across the circuits. In some circuits, the majority of counseled civil appeals are eligible, including bankruptcy appellate panel cases in the Sixth Circuit and immigration cases with specific characteristics in the Ninth Circuit.

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11 . 2009 Ninth Circuit Ann. Rep. 18, available at http://www.ce9.uscourts.gov/publications/AnnualReport2009.pdf.

12. The courts of appeals' settlement programs are described comprehensively in Robert J. Niemic, Mediation & Conference Programs in the Federal Courts of Appeals: A Sourcebook for Judges and Lawyers (Federal Judicial Center, 2d ed. 2006).

Additionally, in the Ninth Circuit, mediation is not necessarily limited to the case that is in that circuit. The rules allow that as long as all parties are in agreement, discussions may include additional parties and related cases in other courts, as well as parties that are not part of any litigation. In other circuits, only specific types of civil appeals are selected for mediation. For example, in the D.C. Circuit, fully counseled civil cases are not automatically directed to its mediation program. Rather, cases are reviewed individually for their settlement potential. Generally, in all of the circuits, pro se, prisoner rights, social security, 28 U.S.C. § 2255 (federal custody), and habeas corpus cases are not eligible for settlement or mediation conferences.

Most of the courts of appeals use staff attorneys as mediators. In contrast, the D.C. Circuit uses volunteers from the local bar, and a few courts use retired or senior state or federal judges. The Third Circuit recently introduced a program to appoint pro bono counsel for pro se litigants for purposes of mediation only. If mediation is unsuccessful, the representation may continue if pro bono counsel and the party agree, or the party may continue to proceed pro se. The Ninth Circuit allows parties to stipulate to having one or more issues in their appeal referred to an appellate commissioner for a binding determination. In some cases, abbreviated and accelerated briefing may occur along with a guarantee of oral argument before the appellate commissioner.

Table 13, at the end of Part I of this report, summarizes some of the key features of and essential information about these mediation and conference programs. More detailed information can be found in the individual circuit profiles in Part II.

3. Case screening

The term "screening" has different meanings in different courts. At one time screening meant diverting a case from the oral argument track to a nonargument track. Accordingly, "screened cases" typically referred to those cases decided by a three-judge panel without oral argument. Here, we use the term more broadly; screening means the process by which a court determines what treatment an appeal will receive and what path it will follow.

Appeals are screened for various purposes, but the most important screening function is to determine whether the case will undergo oral argument or will be decided without argument. Screening models vary on two important dimensions: (1) who does the screening; and (2) what case types are screened into or out of the argument track.

Generally, circuit judges decide whether a case will be orally argued. Federal Rule of Appellate Procedure 34 permits a case to be decided without oral argument only if the panel unanimously agrees that the case does not need oral argument. As a practical matter, in almost all courts, cases that are screened into the argument or nonargument track by staff are subject to panel review. Also, except in the Second Circuit, courts seldom or never allow pro se litigants to argue orally. Initial screening in some courts means finding out whether the parties are represented by counsel—if not, the case goes into the nonargument track.

a. Screening by staff. In the majority of courts, staff play a critical role in screening for jurisdictional defects. In the D.C. and First Circuits, the Clerk's Office initially screens appeals for jurisdiction, while in the Fifth Circuit, a staff attorney conducts an initial jurisdictional review. In the Third Circuit, jurisdictional screening is performed either

by the Clerk's Office or by the Staff Attorneys' Office. In the Ninth Circuit, staff attorneys assigned to the motions and pro se units screen all appeals for jurisdictional defects.

As noted earlier, some staff attorneys screen appeals into an argument or nonargument track. However, certain types of appeals (e.g., direct criminal appeals raising issues other than sentencing guideline application and capital cases) are not subject to staff screening but go directly to the argument track or to a judge for screening. Staff used to perform screening may be central staff attorneys, attorneys in the Clerk's Office, or (in one court) the circuit executive. There is some variation in whether the screening for argument occurs as soon as the appellant's brief is filed or after the case is fully briefed. Typically, courts that utilize a staff screening model have central staff attorneys screen cases to determine whether the court would benefit from oral argument; in several courts, staff attorneys also recommend a decision on the merits of the case and draft an order or proposed opinion.

b. Screening by judges. In a few courts, judges have a primary role in case screening. In the Tenth Circuit, judges perform all screening. Each active judge is on a three-judge "screening panel" (these panels are reconstituted annually), and each member of the panel has primary responsibility for one-third of the cases assigned to that panel. The screening judge makes a preliminary decision to (a) set the case for argument; (b) set it for nonargument disposition with staff workup; or (c) hold it in chambers and prepare a merits disposition for the rest of the screening panel to consider. One or both of the other judges on the panel may disagree with decision (b) or (c) and call for argument. In the Third Circuit, judges similarly screen counseled cases for argument or nonargument disposition, but they do not sit on separate screening panels. Argument panels receive the briefs and other materials, and the panel members determine which cases will be argued (pro se cases are not argued). The Fifth Circuit also has a "jurisdiction calendar" that meets every month to dispose of cases with jurisdictional defects. Some courts perform the same function with motions panels.

Table 3 shows for each court the persons primarily responsible for initial screening of cases for argument or nonargument disposition.

Table 3: Initial Screeners for Argument or Nonargument Disposition by Circuit

Screeners	D.C.	1st	2d	3d	4th[a]	5th	6th	7th	8th[b]	9th[c]	10th	11th
Judges			•	•		•			•		•	
Central Staff	•	•			•		•			•		•
Clerk's Office												
Circuit Executive								•				

a. In the Fourth Circuit, counsel located in the Clerk's Office perform initial screening.
b. In the Eighth Circuit, the chief judge may appoint the clerk, senior staff attorney, or a panel or panels of judges to screen cases.
c. In the Ninth Circuit, this process is referred to as "inventory."

4. What cases are granted oral argument?

Standards for granting oral argument in the courts of appeals are fairly uniform. Local rules and internal operating procedures generally restate in more or less detail the minimum standard set forth in Federal Rule of Appellate Procedure 34(a)(2): Oral argument must be allowed unless a three-judge panel unanimously determines that "(A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and the record, and the decisional process would not be significantly aided by oral argument." Any judge on the panel may decide that the case should be orally argued and direct the clerk to place it on the oral argument calendar.

Case characteristics that are likely to favor oral argument include presence of counsel, novel issues, complex issues, extensive records, and numerous parties.

5. What other assessments are made during the screening process?

When screening new appeals to determine whether oral argument should be heard, many courts also make the following assessments:

- whether the appeal has jurisdictional defects warranting dismissal without determination on the merits by a three-judge panel;
- the appeal's suitability for assignment to the court's settlement or mediation program;
- whether counsel should be appointed for an unrepresented party;
- whether the litigants have complied with the court's requirements regarding brief format and other procedural matters;
- whether a certificate of appealability should issue in habeas corpus cases;
- whether an appeal in a habeas corpus matter is successive;
- whether a pro se appeal is frivolous;
- indicators of the amount of judge time required to dispose of the appeal, that is, the "weight" that should be attached to the appeal in light of the complexity or novelty of the issues;
- whether an appeal presents an issue already being considered by a panel of the court, and therefore should be routed to that panel or stayed pending the decision;
- whether the appeal presents an issue that is currently before the Supreme Court and should therefore be stayed pending the Court's decision; and
- how much time should be allotted for oral argument.

6. Decisions without arguments

The decision to allow oral argument is closely tied to the screening process. Courts use one, or a combination, of two fundamental processes: (a) contemporaneous, collegial deliberation and (b) serial review by the panel judges. In the First, Second, and Third Circuits, the nonargument panels do not meet. The judges review the materials and then vote.

The Fifth Circuit uses summary calendars and electronic conference calendars. The summary calendar is operated in a serial, or round-robin, fashion. When all judges have agreed that no oral argument is warranted, the decision is filed; if any judge believes argument is necessary, the case is sent to the next available oral argument calendar. The

court also holds an electronic conference calendar to consider cases designated for conference by the Staff Attorneys' Office. The conference panel conducts its review electronically over a 10-day period. All three judges must agree to either affirm the judgment of the district court or dismiss the appeal; otherwise, the case is removed from the conference calendar and sent to the screening panel for further screening.

In the Eighth Circuit, cases screened by staff for nonargument disposition are sent to a nonargument screening panel accompanied by a staff memorandum. If a party objects to the nonargument classification, the screening panel rules on the objection and then determines whether the case should be decided without argument.

Across the courts of appeals, the role of staff in determining nonargument cases varies. Table 4 shows the roles of staff and their work products in support of this decision-making process. In most courts, the staff attorneys draft memoranda and propose dispositions of some type. Several courts have the staff attorney prepare a neutral memorandum. Some courts have the attorney draft an order that will, if adopted, dispose of the case and, when necessary, an opinion explaining the order. In a few courts, the staff attorney works with one judge to draft a disposition for the remaining two judges to review. In several courts, the staff attorneys present cases to the merits panel, in person or by telephone.

Table 4: Staff Role and Materials Prepared in Nonargument Decision Making by Circuit

Circuit	Staff-prepared materials distributed to judges	Staff role in panel consideration
D.C.	Memorandum and proposed judgment	Staff present case and discuss it with panel
1st	For pro se cases and fully briefed cases retained in the staff attorneys' office: memorandum and draft disposition or opinion	None
2d	For pro se prisoner cases: staff attorney draft bench memorandum	None
3d	None	None
4th	Proposed decisions	None
5th	Summary calendar: for many cases, in-depth research memorandum and proposed disposition Conference calendar: memorandum and short per curiam opinion	None
6th	Research memorandum and proposed dispositive order	None
7th	Staff attorney memorandum and proposed order (not bench memorandum)	Staff meet with full panel, then work with authoring judge
8th	Staff attorney memorandum	None
9th	Draft memorandum disposition	Staff orally present case and discuss it with merits panel
10th	Draft dispositional document (usually order and judgment) and detailed analytical memorandum; these are approved by "mentor judge" before distribution to other panel members	Staff attorney meets with "mentor judge," then meets with full panel
11th	Memorandum	None

E. Motions Management

Depending on their nature, motions may be decided by three-judge panels, by one or two judges, or by staff. In most courts of appeals, motions in cases scheduled for argument are sent directly to the merits panel for decision. Motions in uncalendared cases go to a motions panel or to individual judges.

Courts often delegate initial decision-making authority for certain types of procedural motions to the Clerk's Office or central staff. For example, in the Ninth and Eleventh Circuits, the clerk or deputy clerk is authorized to act on procedural motions, such as motions to extend time for filing briefs, to supplement or correct records, or to file oversized or consolidated briefs. In the Federal Circuit, the clerk may also act on motions to which the parties consent or which are unopposed. Examples of these are a request to proceed in forma pauperis or to stay issuance of a mandate pending application to the Supreme Court for a writ of certiorari. In the Third Circuit, the clerk may dispose of any motion that can ordinarily be disposed of by a single judge, provided the motion is ministerial, addresses the preparation or printing of the appendix and briefs on appeal, or relates to calendar control. Any action taken by the clerk may be reviewed by a single judge or by a panel of the court.

For other motions, staff attorneys review the papers submitted and perform any necessary legal research before presenting the motions to judges by memorandum or, in some courts, by telephone or in person. Most prepare proposed dispositions for the judges.

1. Panel types

Motions duties are principally carried out by rotating three-judge panels of randomly assigned judges. The nomenclature for motions panels varies—for example, the D.C. Circuit labels them "special panels," while the Tenth Circuit refers to them as "special proceedings panels." In most courts, both active and senior judges serve on motions panels. An active judge is typically designated the "lead," "duty," "presiding," or "initiating" judge of the motions panel.

In some circuits (e.g., the Third and Fifth), motions panels are constituted for the entire year. In the Eleventh Circuit, composition of the motions panels is changed at the beginning of each fiscal year in October and after a change in the court's membership. In the First, Seventh, Ninth, and Federal Circuits, motions panels change composition every week or every month. In some courts, the regular merits panels also serve as motions panels; in others, the motions panels are the same as the nonargument screening panels.

Periodically, the chief judge of the Tenth Circuit assigns two judges to serve on a "clerk's panel" to decide procedural motions that require judicial action but do not require three judges. Members of the clerk's panel may request the assistance of a third judge for difficult or important issues, or to break a tie vote.

The Eleventh Circuit maintains several assignment logs for the random assignment of interim matters to judges and court panels. These assignment logs include an administrative motions log, a capital case log, and a summer panels log.

Monthly, the D.C. Circuit uses a "backlog prevention/reduction panel" (consisting of the chief judge and two other judges) to handle matters that are routine or simple enough to warrant disposition without a full memorandum from the staff attorney. Some of these matters are habeas corpus cases filed in the wrong jurisdiction, unwarranted denials of

motions for summary affirmance with summary disposition, and frivolous motions or appeals. Staff attorneys prepare proposed orders or judgments for these matters.

2. Panel operations

The courts of appeals differ in how their motions panels confer. In some courts, the panel deciding motions confers in person, often with a staff attorney present. In addition to conferring in person, motions panel judges in the Ninth Circuit may confer by video-conference. In the First, Fifth, and Eleventh Circuits, nonemergency motions are considered seriatim. The staff transmits a single set of motions materials to the first judge, who reviews them and then passes the set on to the second judge with a proposed disposition. The second judge reviews the materials and then notes agreement or disagreement with the first judge and passes the materials on to the third judge, who reviews and then returns them with the written disposition to the Clerk's Office.

3. Motions decided by a single judge

Nearly all courts provide for single judges to decide certain motions. That judge is usually the duty judge, or presiding judge, of the motions panel at the time the motion is ready for decision. The Fifth Circuit assigns single-judge motions by rotation to all active judges on a routing log.

Motions typically decided by single judges include

- motions for extension of time or to exceed the word limit in briefs;
- motions for extension of time to file petitions for rehearing or for leave to file petitions for rehearing out of time;
- motions for approval of fees under the Criminal Justice Act;
- motions for ordering a temporary stay;
- opposed motions that the clerk could rule on if unopposed; and
- post-decision motions for stay or recall of the mandate pending a writ of certiorari.

For motions that are not expressly categorized as single-judge matters, several courts authorize an individual judge to rule on them. For example, the Seventh Circuit authorizes individual judges to decide motions ordinarily decided by more than one judge if it is in the interest of expediting a decision or otherwise for good cause. The Fourth Circuit gives individual judges discretion to entertain emergency motions, but also provides that an individual judge may not dismiss or otherwise ultimately determine an appeal.

4. Motions generally decided by more than one judge

The courts of appeals generally require three-judge panels to dispose of substantive motions and all motions to dismiss appeals unless the parties stipulate to an alternative disposition. In addition to requiring three-judge panels to act on substantive motions and motions to dismiss, the D.C. Circuit mandates that three-judge panels must decide opposed motions and mandamus petitions. The Seventh Circuit requires three-judge panels to deny a motion to expedite an appeal when the denial may result in the mooting of the appeal.

In most courts, standing three-judge motions panels also decide emergency motions, giving them priority over nonemergency procedural and substantive motions. In the Elev-

enth Circuit, however, a specially constituted emergency motions panel is drawn by rotation from an emergency routing log.

5. Argument and case-assignment practices

Circuit geography, tradition, and policy choices about panel construction have led to differences in the arrangement of argument schedules. A shortage of judges and multiple and prolonged judicial vacancies, which reduce the opportunity for active judges of the court to interact, also influence the assignment of cases.

Table 5 presents the basic models the courts of appeals follow in the operation of their argument panels. The number of sittings and number of cases are the courts' estimates or come from published materials. For simplicity of presentation, some details presented in the individual circuit profiles in Part II of this report (such as extra sittings for complex, capital, or en banc cases) have been omitted in the table.

Table 5: Models for Argument Panel Operations by Circuit

Circuit	Typical number of sittings for active judges per term or year	Number of cases argued/decided	Typical argument time per side
D.C.	Eight 5-day sittings	At least 3 per day	No set argument time; 15 min. is common; can move for additional time, but rarely granted
1st	Ten 5-day sittings	Up to 6 per day	Up to 15 min.
2d	Eight 5-day sittings + 2 pro se panels	30 per week	15–20 min.; more for complex multiparty cases
3d	Six 4-day sittings	35–38 calendared; approximately one-third argued	15–20 min.; 30 min.+ granted if warranted; a request for oral argument beyond 20 min. per side is determined by a majority of the panel
4th	Six 4–5-day sittings	4 per day	20 min.; 15 min. for social security disability, black lung, some labor cases, and criminal appeals on sentencing guidelines
5th	Seven 4-day sittings	5 per day	20 min. for Class III cases; 30 min. for Class IV cases
6th	Seven 4-day sittings; court's active judges are divided into two groups, so that there are oral arguments held 14 weeks throughout the year	6 per day	15 min.
7th	34 panels per year	6 per day	10–20 min.
8th	Ten 5-day sittings	Usually 5–6 per day	10–20 min.; 30 min. or more if warranted
9th	32 days of oral arguments	Usually 5–6 per day	10–20 min.

Table 5: Models for Argument Panel Operations by Circuit (cont.)

Circuit	Typical number of sittings for active judges per term or year	Number of cases argued/decided	Typical argument time per side
10th	Four 5-day sittings	Usually 5–6 per day	15 min.; more if warranted
11th	Fixed number of weeks for each active judge and the available sittings from the court's senior judges, visiting circuit judges, and visiting district judges	Up to 6 per day	Up to 15 min.; 30 min. in complex cases
Fed.	30–40 panels per year for active judges; senior judges sit on a third of the panels; judges sit 10 months out of 12 months	Usually 6 per day	15 min.; 30 min. maximum allotment

To ensure that each panel has a range of matters and to equalize workloads, some courts attempt to distribute cases across panels, either based on staff assessments of case difficulty or according to case type. Beyond that, most case assignments are random, and case assignment is separate from panel selection to maintain the integrity of the process. For example, in capital appeals, the clerk in the Tenth Circuit creates a list of randomly selected active judges for assignment to cases. If no execution date has been set or the case does not otherwise require immediate judicial attention, the case is scheduled for oral argument after briefing.

6. Timing of disclosure of panel members' identities

The courts of appeals also differ in how they construct their panels and when they announce the composition of the panel to litigants. Some courts announce it early, while others withhold panel members' identities so that attorneys do not spend time and effort tailoring arguments in their briefs to the anticipated panel. In the First Circuit, panel members' identities are disclosed 7 days before oral argument; in the Ninth and Tenth Circuits, attorneys are notified of the identities of panel members on the Monday prior to the week of oral argument. In the Second Circuit, panel members' identities are disclosed at noon on Thursday of the week before the panel sits. The Sixth Circuit identifies the panel members 14 days before oral argument. In contrast, in the Seventh and Federal Circuits, the identities of panel members are not revealed until the morning of the argument. Most courts do not allow party-initiated continuances once the panel has been announced.

F. Use of Bankruptcy Appellate Panels

Bankruptcy Appellate Panels (BAPs) were originally established under the Bankruptcy Reform Act of 1978.[13] That Act authorized the establishment of BAPs on a circuit-by-circuit basis, to serve as an alternative forum to the district courts for hearing bankruptcy

13. Pub. L. No. 95-598, 92 Stat. 2549 (1978).

appeals.[14] Pursuant to 28 U.S.C. § 158 (b)(6), district judges must authorize appeals to the BAP from their district. Under the Bankruptcy Reform Act, appeals from dispositive orders of bankruptcy judges may be taken to the district court or to the circuit BAP (if one has been established and the district has chosen to participate), as well as to the court of appeals for the circuit.

The Ninth Circuit established the first Bankruptcy Appellate Panel in 1979,[15] and the First Circuit followed in 1980. In 1982, the First Circuit's panel was dissolved[16] after the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[17] In *Northern Pipeline*, the Court struck down the 1978 Bankruptcy Reform Act's broad vesting of judicial power in the bankruptcy courts, holding that the Act unconstitutionally conferred judicial power on non-Article III bankruptcy judges. Shortly thereafter, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984, in which Congress noted the discretionary authority of each of the circuits to establish a bankruptcy appellate panel.[18] In 1994, Congress enacted the Bankruptcy Reform Act of 1994,[19] which mandated that the judicial council of each federal circuit establish a BAP unless (1) the circuit does not possess sufficient judicial resources to support a BAP, or (2) the circuit's establishment of a BAP would result in undue delay and increased cost to the parties.[20]

At present, five circuits have a BAP: the First, Sixth,[21] Eighth, Ninth, and Tenth.[22] A BAP consists of bankruptcy judges appointed from the circuit's districts, and occasionally, bankruptcy judges from other circuits sitting by designation. BAP judges typically sit in three-judge panels, hearing appeals from the decisions of the bankruptcy court in their districts. BAP judges are precluded from hearing appeals arising from their own district.

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14. One legal academic has argued against the need for BAPs, stating that they are neither useful nor necessary to the efficient operation of the bankruptcy system and that the "opt out" provision the Act contains is unconstitutional under *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). Specifically, the BAP structure is incompatible with Article III requirements that appellate courts retain a certain degree of control over "adjunct" courts. *See* Thomas A. Wiseman, Jr., *The Case Against Bankruptcy Appellate Panels,* 4 Geo. Mason L. Rev. 1, 15 (1995).

15. The Judicial Council of the Ninth Circuit originally established its circuit BAP in 1979. Following the Supreme Court's decision in *Northern Pipeline,* 458 U.S. 50 (1982), and passage of the 1984 Bankruptcy Amendments and Federal Judgeship Act, it was reestablished in 1985.

16. In 1996, the Judicial Council of the First Circuit reestablished its BAP.

17. 458 U.S. 50 (1982).

18. Pub. L. No. 98-353, § 104(a), 98 Stat. 333, 336–42 (1984).

19. Pub. L. No. 103-394, 108 Stat. 4106 (1994).

20. *Id.* § 104(c), 108 Stat. at 4109.

21. The Sixth Circuit's Judicial Council authorized the creation of a BAP on October 1, 1996; however, not all districts in the circuit utilize a BAP. For example, in appeals arising out of the Western District of Michigan, parties have the option of having their appeals determined either by the Sixth Circuit BAP or by the district court. Parties filing in the Eastern District of Michigan do not have this option.

22. On February 6, 1996, the Judicial Council of the Tenth Circuit authorized the creation of the BAP for an initial three-year period commencing July 1, 1996, and ending June 30, 1999. On March 8, 1999, the Judicial Council of the Tenth Circuit voted to authorize the permanent establishment of the BAP in the Tenth Circuit. *See* Blaine F. Bates, Clerk of Court, Introduction to the Bankruptcy Appellate Panel (rev. June 1, 2011), http://www.bap10.uscourts.gov/guide/historyBAP.pdf.

According to the Administrative Office, in FY 2010, "BAP filings rose in four of those five circuits [having a BAP], and overall BAP filings increased 13 percent . . . ."[23] Specifically, "[f]ilings grew 8 percent (6 cases) in the First Circuit, 40 percent (29 cases) in the Eighth Circuit, 17 percent (71 cases) in the Ninth Circuit, and 1 percent (1 case) in the Tenth Circuit. Only the Sixth Circuit experienced a decline in filings, a drop of 9 percent (down 9 cases)."[24]

The number of bankruptcy judges who serve on a BAP varies across the circuits; the range is from 5 to 11 judges. In the Ninth Circuit, 6 bankruptcy judges currently serve and are appointed for a seven-year term, which is renewable for one additional three-year term. By majority vote, these 6 BAP members select one member to serve as chief judge with authority to appoint the clerk, staff attorneys, and other necessary staff to carry out the work of the BAP. In addition, the Ninth Circuit also routinely utilizes pro tem judges in order to give appellate experience to other bankruptcy judges within the circuit. Pro tem judges sit for one-day merits calendar assignments and have equal votes with the regular BAP judges. Nine judges serve on the Tenth Circuit's BAP and, upon the completion of a term, each is eligible for a renewable five-year term. Currently, all districts in the Tenth Circuit participate in the BAP, and personnel for the BAP's Clerk's Office consist of the clerk of the BAP, a staff attorney, and a deputy clerk. In the First Circuit, 11 judges currently serve on the BAP. In the Eighth Circuit, 6 judges serve on the BAP and are appointed for a term of seven years, but the judicial council may appoint bankruptcy judges to sit as pro tem members of a panel as the need arises. The clerk of the court of appeals also serves as the clerk for the BAP. Finally, in the Sixth Circuit, 5 judges serve on the BAP.

The Sixth Circuit's BAP Rule 8080-2 authorizes preargument conferences to assist the parties in exploring the possibility of settlement or simplification of the issues. The preargument conference is conducted by one of the circuit mediation attorneys or by a panel judge designated by the chief judge. Judges who participate in a conference will not later sit on a panel that considers any aspect of the appeal.

Table 6 provides a snapshot of the types of appeals terminated in FY 2010 in the five circuits with BAPs. Nonbusiness appeals were the most common appeals terminated in the First, Sixth, and Ninth Circuits, whereas business appeals were the most common appeals terminated in the Eighth Circuit. Approximately the same number of business and nonbusiness appeals were terminated in the Tenth Circuit.

23. Admin. Office of U.S. Courts 2010 Annual Report, *supra* note 4, at 17.

24. *Id.*

Table 6: Bankruptcy Appellate Panels—Appeals Terminated During the 12-Month Period Ending September 30, 2010

	1st Cir.	6th Cir.	8th Cir.	9th Cir.	10th Cir.
Judgeships	11	5	6	6[a]	9
Total appeals terminated	79	87	93	410	99
Total business	9	17	38	100	35
Total nonbusiness	41	38	27	189	34
Total adversarial	29	31	26	121	29
Total other	0	1	2	0	1
Appeals decided on the merits, per authorized judgeship	7.2	17.4	15.5	68.3	11

a. The Ninth Circuit Judicial Council has authorized seven bankruptcy judges to serve on the BAP; however, only six bankruptcy judges serve. The seventh position has been "left vacant to reflect the BAP's reduced filing numbers and to allow opportunities for *pro tem* judge participation." Appeals Before the Bankruptcy Appellate Panel of the Ninth Circuit, Dec. 2010, at 3.

1. Motions practice

In the five circuits with BAPs, the clerk of the BAP is authorized generally to act on certain procedural motions without submitting them to the BAP, including motions relating to the production or filing of the record; motions for extensions of time; motions for voluntary dismissal; and motions to withdraw or substitute counsel. In the First and Sixth Circuits, the clerk may also act on any other motion that the BAP may designate and that is subject to disposition by a single judge. The Ninth Circuit BAP clerk is authorized only to act on motions that are subject to disposition by a single judge, on the condition that the order entered on the motion does not dispose of the appeal or resolve a motion for stay pending appeal.

2. Oral argument practice

In general, BAPs have the discretion to decide appeals with or without oral argument. When necessary, oral argument may be conducted by videoconference or telephone. In the Ninth Circuit, oral argument may be held in any district within the circuit, regardless of an appeal's district of origin. However, when economical and feasible, most appeals will be set for hearing in the district in which the appeal originated. Similarly, in the Tenth Circuit, the BAP generally schedules oral argument in the district in which the appeal arose, and the appeal will be placed on the first available calendar for that district. The First Circuit typically conducts oral arguments in two locations: Boston and San Juan, Puerto Rico. In some instances, if travel costs are a factor, the panel will travel to the district in which the appeal originated. In the Eighth Circuit, it is common practice for the panel to travel to the district in which the case arose to hear argument. The court strives to hear oral argument within 60 days of the filing of the appellee's brief.

3. Disposition of appeals

Various case processing measures can provide useful information regarding the length of time it takes for a bankruptcy appeal to move through the system. Common case processing measures include the date from the filing of the notice of appeal to the filing of the last brief and the date from the hearing to the final disposition. Table 7 provides a snapshot of the median time from the filing of the notice of appeal to the date of the entry of the final disposition in the appeal by the BAP in the five circuits with BAPs. In general, it takes less than a year for most BAP appeals to be resolved by the circuits; median times range from 4.8 months in the Eighth Circuit to 9.2 months in the Sixth Circuit.

Table 7: Bankruptcy Appellate Panels—Median Time Intervals in Cases Terminated After Hearing or Submission During the 12-Month Period Ending September 30, 2010

Circuit	Total Number of Cases	Median Time from Filing Notice of Appeal to Final Disposition, in Months
1st	21	7.2
6th	26	9.2
8th	25	4.8
9th	107	8.2
10th	28	8.8

Source: Admin. Office of the U.S. Courts, Judicial Business of the United States Courts tbl.B-14 (unpublished table titled "U.S. Bankruptcy Appellate Panels Median Time Intervals in Cases Terminated After Hearing or Submission, by Circuit During the 12-Month Period Ended Sept. 30, 2010," on file with the Center's Information Services Office).

Table 8 shows that, in FY 2010, a significant number of appeals were terminated as a result of procedural rulings. Of the total appeals terminated, procedural terminations in the circuits range from a low of 44% (41 of 93 appeals) in the Eighth Circuit to a high of 66% (52 of 79 appeals) in the First Circuit. In the Sixth and Tenth Circuits, the majority of procedural terminations were done by staff, while in the Ninth Circuit the majority of such terminations were handled by judges.

Table 8: Bankruptcy Appellate Panels—Methods of Disposing of Appeals During the 12-Month Period Ending September 30, 2010

	1st Cir.	6th Cir.	8th Cir.	9th Cir.	10th Cir.
Total appeals terminated	79	87	93	410	99
By consolidation	0	7	24	5	1
Elections	6	7	3	85	18
Procedural	52	47	41	213	52
By judge	27	8	20	149	19
By staff	25	39	21	64	33
On the merits	21	26	25	107	28
After oral hearing	16	18	14	97	12
After submission on the briefs	5	8	11	10	16

Source: Admin. Office of U.S. Courts, 2010 Annual Report, at 134–37 tbl.B-11.

4. Opinion and publication practices

What is the publication rate of BAPs regarding cases terminated on the merits? Administrative Office data show that during the 12-month period ending September 30, 2010, the five circuits with BAPs entered a total of 207 opinions or orders. The Ninth Circuit accounted for approximately half of the total.[25] Of the 207 opinions or orders issued, 54% were unpublished. The Eighth Circuit published all of its opinions or orders, whereas the Ninth Circuit published 69% and the First Circuit published 24%.

Some circuits provide additional information on their bankruptcy appellate panels. In its yearly statistical report, the Eighth Circuit Court of Appeals provides data on the outcome of panel opinions and information on the nature of appeals to the Eighth Circuit.[26] Specifically, the Eighth Circuit report notes that of the 33 BAP opinions issued in 2010, 25 (75%) affirmed the bankruptcy court's decision, while 7 (21%) reversed the decision.[27] In addition, the report states that "[a] total of twenty bankruptcy appeals were taken to the [Eighth Circuit] Court of Appeals in 2010. Of those appeals, seven were from District Court decisions and thirteen were from Bankruptcy Appellate Panel decisions."[28]

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25. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts tbl.B-19 (unpublished table titled "U.S. Bankruptcy Appellate Panels Type of Opinion or Order Filed in Cases Terminated on the Merits After Oral Hearing or Submission on Briefs During the 12-Month Period Ended Sep. 30, 2010," on file with the Center's Information Services Office).

26. U.S. Bankr. Appellate Panel for the Eighth Circuit, 2010 Stat. Rep., available at http://www.ca8.uscourts.gov/newbap/bapFrame.html.

27. *Id.* at 3.

28. *Id.* at 4.

G. Management of Immigration Cases

In 2002, the Department of Justice implemented specific "procedural reforms" concerning its Board of Immigration Appeals (BIA), which reviews decisions of immigration judges in exclusion, deportation, and remand cases. These procedures were designed to increase the efficiency of immigration appeals and to reduce the backlog of pending immigration cases.

The change in processing BIA cases had an immediate impact on the federal courts of appeals, and most notably on the Second and Ninth Circuits. In fact, it was reported that "in the summer of 2004 the Second and Ninth Circuits received about 70 percent of the petitions challenging BIA decisions."[29]

1. Second Circuit Court of Appeals

In 2003, the Second Circuit, recognizing the challenges posed by the increase in immigration appeals, authorized its "Backlog Reduction Committee" to develop a case management strategy to address the backlog of cases that was due to the increase in asylum cases.[30] After considerable debate and discussion, the committee proposed an expedited procedure for asylum cases. Specifically, the committee established a special nonargument calendar (NAC) for all cases involving a challenge to the BIA's denial of an asylum claim.[31] One unique aspect of the NAC is the use of sequential voting by a panel of three judges. To assist the panel in its review, each member receives a copy of the briefs, the record from the BIA, a memorandum prepared by a law clerk in the staff attorneys' office, a draft summary order with a recommended disposition, and a voting sheet.[32]

How the panel conducts its review as well as its voting procedure are explained more fully in the detailed profile for the Second Circuit in Part II of this report. In describing the impact of the NAC on the court's workload, one judge indicated that the court's use of the NAC has been successful in reducing the court's backlog of petitions challenging the BIA's denials of asylum claims while enabling the court to dispose of its other cases in a timely manner.[33]

2. Ninth Circuit Court of Appeals

The Ninth Circuit provides a number of immigration practice resources for attorneys on its website, including the *Ninth Circuit Immigration Outline*[34] and a copy of the American Immigration Council's *Practice Advisory on How to File a Petition for Review.*[35] The *Ninth Circuit Immigration Outline* provides a comprehensive up-to-date synthesis of Ninth Circuit immigration law and information about, for example, relief from removal

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29. Jon O. Newman, *The Second Circuit's Expedited Adjudication of Asylum Cases: A Case Study of a Judicial Response to an Unprecedented Problem of Caseload Management,* 74 Brook. L. Rev. 429, 431 (2009).

30. *Id.* at 433.

31. *Id.* at 433–34.

32. *Id.* at 434.

33. *Id.* at 435.

34. http://www.ca9.uscourts.gov/guides/immigration_outline.php.

35. http://www.ca9.uscourts.gov/datastore/uploads/guides/petition/lac_pa_041706.pdf.

(asylum, cancellation of removal, adjustment of status), motions to reopen or reconsider immigration proceedings, and criminal issues in immigration.

In addition, the court has adopted specific case management measures to address the surge in asylum cases. Specifically, the court uses its mediation program to help resolve some types of immigration cases. Although petitioners are not required to file a mediation questionnaire, when it is filed, the court finds it useful in assessing the suitability of a case for mediation, especially when a petitioner is able to adjust status (e.g., change from one nonimmigrant status to another) or when a change in the law clearly requires remand.

H. Opinion and Publication Issues

In the 1970s, the Judicial Conference encouraged the courts of appeals to adopt criteria for the publication of precedential opinions. Similarly, the Judicial Conference's Long Range Plan recommended that the courts adopt internal procedures to maintain the consistency of circuit law. The Judicial Conference noted that "[o]pinions should be restricted to appellate decisions of precedential import," and it stated that "[a] uniform set of procedures and mechanisms for access to court of appeals opinions, guidelines for publication or distribution, and clear standards for citation should be developed."[36]

Over the years, amid growing concern about the proliferation of opinions, many courts adopted policies, internal rules, and publication plans to discourage unnecessary publication. In the next section, we describe the variation in the publication of opinions in the courts of appeals.

Judges have three basic options regarding how a decision of the court is provided to the public: (1) a signed published opinion; (2) a per curiam opinion; or (3) an unpub lished nonprecedential opinion or order. National data show that during FY 2010, 30,914 opinions or orders were filed in cases terminated on the merits after oral hearings or submissions on the briefs (see Table 9). Of this total, 84% of the opinions or orders were unpublished. The percentage of unpublished opinions or orders ranges from 59.8% in the Seventh Circuit to 93% in the Fourth Circuit. Some of the variation in publication practices can be attributed to circuit culture, docket size, and whether an appeal was argued.

A number of the circuits' local rules explain their publication practice by noting that the publication of opinions that merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession. For example, the Eleventh Circuit's published material indicates that its preference is not to engage in the proliferation of published opinions because it tends to impede the development of a cohesive body of law. Similarly, in the Federal Circuit, the court's view is that its heavy workload precludes preparation of precedential opinions in all cases and that unnecessary full precedential opinions only impede the rendering of decisions and the preparation of precedential opinions in cases that merit that effort.

36. Judicial Conference of the U.S., Long Range Plan for the Federal Courts, *supra* note 2, Implementation Strategy 37d, at 69.

Table 9: Unpublished Opinions and Orders in Cases Terminated on the Merits After Oral Hearings or Submission on Briefs by Circuit During the 12-Month Period Ending September 30, 2010

Circuit	Total Number of Opinions or Orders Filed in Cases Terminated on the Merits	Percentage of Unpublished Opinions or Orders in Cases Terminated on the Merits
Total	30,914	84.0
D.C.	520	62.3
1st	965	65.1
2d	3,304	88.3
3d	2,483	89.8
4th	2,894	93.0
5th	3,773	87.4
6th	2,350	83.6
7th	1,512	59.8
8th	2,293	71.8
9th	6,324	86.9
10th	1,353	77.5
11th	3,143	89.6

Source: Admin. Office of U.S. Courts, 2010 Annual Report, at 46 tbl.S-3.
Note: Total does not include data for the U.S. Court of Appeals for the Federal Circuit.

In the Fourth Circuit, the court publishes opinions only in cases that were fully briefed and orally argued. The opinions in these cases are seen as making a meaningful contribution to the circuit's body of law. Opinions in such cases are published if the author (or a majority of the judges) believes the opinion satisfies one or more of the circuit's standards for publication and all members of the court have acknowledged in writing their receipt of the proposed opinion.

In the Tenth Circuit, the court may dispose of an appeal by way of an unpublished order and judgment when the case does not involve new points of law that would make the decision a valuable precedent.

In the Ninth Circuit, all opinions are published, but not such dispositions as memoranda or orders, except by order of the court. Within 60 days of issuance of an unpublished disposition, however, publication may be requested by a letter addressed to the clerk, stating concisely the reasons supporting publication. If the request is granted, the unpublished disposition will be redesignated an opinion and published.

In the Third Circuit, an opinion, whether signed or per curiam, that appears to have value only to the trial court or the parties is designated as not precedential and is generally posted on the court's website.

Finally, in the Seventh Circuit, unpublished orders are issued in frivolous appeals and in appeals that involve only factual issues or concern the application of recognized rules of law. Opinions in cases decided on a divided vote are usually published.

In some courts, the issuance of a separate opinion (either dissenting or concurring) will trigger publication of an opinion (at least if the concurring or dissenting judge wants to publish it). The preparation of a separate opinion makes it more likely that an opinion will be published, but this is not a thoroughly reliable predictor. Table 10 provides an overview of some of the formal criteria that courts indicate govern their decisions about what to publish.

Table 10: Criteria for Opinion Publication by Circuit

Publication generally ordered if opinion:	D.C.	1st	2d[a]	3d	4th	5th	6th	7th[b]	8th	9th	10th[c]	11th	Fed.
is of general public interest[d]	•	•			•	•	•		•	•			•
has precedential or institutional value (general)				•			•				•	•	•
establishes, alters, modifies, or significantly clarifies a rule of law (including "first impression")	•	•	•		•	•	•		•	•			•
calls attention to an existing rule of law that appears to have been generally overlooked	•					•				•			•
criticizes or questions existing law	•				•	•			•	•			•
resolves an apparent conflict within the circuit or creates a conflict with another circuit	•				•	•	•		•				•
applies an established rule of law to a factual situation significantly different from that in published opinions						•			•				•
constitutes a significant and nonduplicative contribution to legal literature by a historical review of law, or by describing legislative history					•	•			•				
is rendered in a case that has been reviewed previously and its merits have been addressed by an opinion of the U.S. Supreme Court, or if the Supreme Court reversed or remanded the case						•	•		•	•			•

Table 10: Criteria for Opinion Publication by Circuit (cont.)

Publication generally ordered if opinion:	D.C.	1st	2d[a]	3d	4th	5th	6th	7th[b]	8th	9th	10th[c]	11th	Fed.
is accompanied by a an opinion which, concurring or dissenting, reverses the decision below, or affirms the decision on different grounds, and the author may or may not have requested publication		•				•	•			•			
addresses a published opinion by a lower court or admin. agency (in 9th Cir.—unless panel determines publication is unnecessary for clarifying the panel's disposition of the case)							•			•			
reverses a published agency or district court decision, or affirms a decision of a district court on grounds different from those set forth in the district court's published opinion	•												
Publish if case decided en banc		•											
Publish only if orally argued					•								

Note: Absence of an entry denotes omission of criterion from published rules and procedures, not necessarily non-applicability of criterion.

a. The Second Circuit rules provide that in cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition will be made by summary order. 2d Cir. R. § 0.23.

b. The Seventh Circuit lists no criteria, but the local rules provide this instruction: "it is the policy of the circuit to avoid issuing unnecessary opinions." 7th Cir. R. 32.1.

c. When the opinion of the district court, an administrative agency, or the Tax Court has been published, the Tenth Circuit ordinarily designates its disposition for publication. 10th Cir. R. 36.2.

d. Formulations vary: "it involves a legal issue of continuing public interest" (4th Cir. R. 36(a)); "concerns or discusses a factual or legal issue of significant public interest" (5th Cir. R. 47.5.1); "involves a legal or factual issue of unique interest or substantial public importance" (9th Cir. R. 36-2(d)); "a legal issue of substantial public interest, which the court has not sufficiently treated recently, is resolved" (Fed. Cir. IOP 10).

I. En Banc Rehearings and Other Efforts to Maintain Consistency

En banc rehearing enables all judges of a circuit to play a role in setting circuit precedent. There are both advantages and disadvantages to having a court hear cases en banc. Advantages include, for example, the court speaking in a single voice to protect the integrity of circuit law and reinforcing institutional legitimacy by ensuring consistency and conformity in decision making.[37] Disadvantages include (1) delay in the ultimate resolution of the case; (2) increased resources expended by both the litigants and the judiciary; and (3) an increase in litigants seeking such review.[38] In addition, some legal commentators believe that such hearings could potentially lead to "intracourt acrimony, ideological polarization, and lost collegiality."[39]

1. Grounds for and frequency of en banc rehearings

En banc practices in the 13 courts of appeals are fairly similar. Federal Rule of Appellate Procedure 35 sets the basic criteria for determining when a hearing or rehearing en banc may be ordered:

> [a] majority of the circuit judges who are in regular active service and who are not disqualified may order that an appeal or other proceeding be heard or reheard by the court of appeals en banc.
>
> An en banc hearing or rehearing is not favored and ordinarily will not be ordered unless:
>
> (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or
> (2) the proceeding involves a question of exceptional importance.[40]

However, in two circuits, the Fourth and the Federal, the courts' local rules state that the court may also consider granting an en banc rehearing to resolve intercircuit conflicts. In the Eleventh Circuit, alleged errors in a panel's determination of state law or in the facts of the case, and errors asserted in the panel's misapplication of correct precedent to the case are matters for rehearing before the panel but not for en banc consideration. No matter what the standard, rehearing cases en banc does not occur very often (see Table 11).

Data from the U.S. Court of Appeals for the Federal Circuit show that for FY 2010, seven en banc petitions were granted, compared with six in FY 2009.[41] These figures represent en banc rehearings granted on Combined and En Banc Rehearing Petitions. In addition, during FY 2010, there was one en banc hearing and rehearing granted sua sponte.[42]

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37. Fed. Bar Council, En Banc Practices in the Second Circuit: Time for a Change? 11 (2d Cir. Courts Comm. July 2011), available at http://www.federalbarcouncil.org/vg/custom/uploads/pdfs/En_Banc_Report.pdf.

38. *Id.* at 11–13.

39. *Id.* at 12.

40. Fed. R. App. P. 35(a).

41. The Federal Circuit Court of Appeals: Statistics: Panel and En Banc Petitions for Rehearing, available at http://www.patentlyo.com/files/panel_and_en_banc_petitions_for_rehearing_2001-20102.pdf.

42. *Id.*

Table 11: Number of En Banc Rehearings After Oral Hearings or Submission on Briefs by Circuit, FY 2006–2010

FY	D.C.	1st	2d[a]	3d	4th	5th	6th	7th	8th	9th	10th	11th
2006	2	3	—	1	8	2	5	1	6	22	7	8
2007	3	1	—	2	1	9	9	2	6	16	5	2
2008	1	—	—	3	1	1	5	2	8	14	1	5
2009	1	3	—	4	2	4	5	3	6	12	5	2
2010	2	1	—	3	—	6	2	7	3	15	2	3

Source: Table S-1 U.S. Courts of Appeals—Appeals Terminated on the Merits After Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2006–2010. Data for Table 11 are compiled from Table S-1 published across multiple volumes of Admin. Office of the U.S. Courts, Judicial Business of the United States Courts: Annual Report of the Director.

a. Even though data from the Administrative Office of the U.S. Courts reflect that no en banc hearings were granted in the Second Circuit from 2006 to 2010, a Westlaw search revealed that several cases have been heard en banc. *See, e.g.,* Lin v. United States Dep't of Justice, 494 F.3d 296 (2d Cir. 2007) (en banc); United States v. Cavera, 550 F.3d 180 (2d Cir. 2008) (en banc); Arar v. Ashcroft, 585 F.3d 559 (2d Cir. 2009) (en banc). For a thorough discussion on the number of en banc decisions in the Second Circuit, see Fed. Bar Council, En Banc Practices in the Second Circuit: Time for a Change? (2d Cir. Courts Comm. July 2011), at 15 (". . . in the 11-year period from 2000 through 2010, the court heard only eight cases en banc—a decline from an average of about 1.2 cases per year from 1979 through 1993 to a rate of about 0.7 cases per year from 2000 through 2010.")

Currently, only the Ninth Circuit uses a limited en banc, although two other courts are authorized to do so.[43] In the Ninth Circuit, the limited en banc court consists of the chief judge and 10 additional judges drawn by lot from the active judges of the court. In the absence of the chief judge, an eleventh judge is drawn by lot, and the most senior active judge on the panel presides. Because only 11 of the court's judges participate in the en banc proceeding, a majority of the court's active judges may vote to have the case re-heard by the full court after the en banc court acts. In addition, the Ninth Circuit is the only circuit that has an en banc coordinator,[44] who is an active or senior judge appointed by the chief judge to supervise the en banc process. The coordinator is responsible for recording the en banc votes and circulating the final tally to the court. Additional responsibilities include circulating periodic reports on the status of en banc cases and, when appropriate, suspending en banc proceedings.

43. The 1978 Omnibus Judgeship Act authorized courts with more than 15 active judges to perform their en banc functions with fewer than all the court's active judges. Section 6 of the Act provided, inter alia, "[a]ny court of appeals having more than 15 active judges . . . may perform its en banc function by such number of members of its en banc courts as may be prescribed by rule of the court of appeals." Act of Oct. 20, 1978, Pub. L. No. 95-486, § 6, 92 Stat. 1629, 1633. The Ninth Circuit adopted the limited en banc procedure in 1979. The other two circuits that are currently eligible are the Fifth and Sixth Circuits.

44. *See generally* Stephen L. Wasby, *"A Watchdog for the Good of the Order": The Ninth Circuit's En Banc Coordinator,* 12 J. App. Prac. & Process 91 (2011) (describing the origins and development of the en banc coordinator position and the process leading to granting rehearing en banc in the Ninth Circuit).

In some instances, the Second Circuit has used an informal process, a "mini-en banc," when issuing a panel decision that may conflict with prior panel opinions.[45] Specifically, "[t]hese mini en banc decisions state that the panel has circulated the opinion to all active judges prior to filing, and that no judge objected to the decision."[46] One scholar noted that the use of this procedure is perhaps one explanation for the significantly lower en banc rate in the Second Circuit.[47]

2. Effect of grant

The courts describe a variety of immediate effects of a grant of rehearing. In a few circuits (the First, Third, and Fourth), when a petition for rehearing is granted, the original panel opinion and the judgment are vacated. In the Seventh and Eleventh Circuits, the panel opinion is vacated and the mandate is stayed.

3. Procedures employed to minimize intracircuit and intercircuit conflicts

Without exception, the courts of appeals require counsel seeking rehearing to identify the conflicting precedent or important question on a special form or in a special section of the brief or motion. In addition, the courts employ a variety of procedures, both formal and informal, to minimize conflicts without convening en banc.

The Third Circuit's position is that the holding of a panel in a precedential opinion is binding on subsequent panels. Thus, no subsequent panel overrules the holding of a precedential opinion of a previous panel. A decision by the court en banc is required to do so.

In the D.C. Circuit, the court may make special mention that the panel's interpretation of a particular issue has been separately considered by all the judges and resolves an apparent conflict between two prior decisions of the court or overrules a prior precedent of the court. Such a decision is called an *Irons*[48] footnote and must be approved by the full court before it becomes the law of the circuit.[49]

In the First Circuit, staff attorneys screening briefs for oral argument or summary affirmance try to identify cases that present similar issues so that these cases may be assigned to the same panel or so that other panels may be alerted that the same issue is being considered simultaneously by multiple panels.

During the 10-day prefiling circulation of opinions for publication in the Tenth Circuit, nonpanel judges may raise questions or suggest changes to the authoring judge. In addition, judges who have opinions pending that are likely to conflict with the circulated opinion may call for an en banc proceeding to avert the conflict.

Similarly, in the Ninth Circuit, in addition to an issue-tracking process, the court has procedures to give nonpanel judges an opportunity to suggest amendments to panel opinions, either sua sponte or in response to a petition for rehearing. A prepublication

45. Fed. Bar Council, *supra* note 37, at 2.

46. *Id.*

47. *Id.* at 15.

48. Irons v. Diamond, 670 F.2d 265 (D.C. Cir. 1981).

49. U.S. Court of Appeals for the District of Columbia Circuit, Policy Statement on En Banc Endorsement of Panel Decisions, Jan. 17, 1996, http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Irons%20Footnote/$FILE/IRONS.PDF.

report is circulated which summarizes opinions that will be filed in two days and describes how issues resolved in those opinions may affect pending cases.

In the Seventh Circuit, cases in a closely related area of the law but with different issues and different parties are scheduled for the same day before the same panel of judges. Multiple appeals from the same district court case are usually consolidated for argument, but sometimes they are argued separately on the same day before the same panel. If a case presents the same issue as a case pending before the court or before the Supreme Court, the later case is held pending the decision in the controlling case. After the controlling case is decided, the court asks the parties to file supplemental statements in light of the decision.

In the Second Circuit, judges prepare a list of "significant issues" to alert other judges or panels to issues that may soon be decided.

Finally, in the Federal Circuit, the court may order, sua sponte, that a case be heard en banc following a hearing by the panel, but before the entry of judgment and issuance of any opinions by the panel members.

J. Special Procedures for Pro Se Cases

Appeals filed by unrepresented litigants continue to make up a large part of appellate court filings (more than 48% in 2010). The majority of pro se appeals fall into one of two categories: criminal matters and prisoner petitions. Table 12 lists the sources of these appeals for 2009 and 2010.

Table 12: U.S. Courts of Appeals—Sources of Pro Se Appeals During the 12-Month Periods Ending September 30, 2009 and 2010

Source	2009		2010		Pro Se Appeals Percentage Change 2009–2010
	Total	Pro Se	Total	Pro Se	
Total	57,740	27,805	55,992	27,209	–2.1
U.S. District Courts					
Criminal	13,710	2,375	12,797	2,119	–10.8
Civil	30,967	19,333	30,940	19,264	–0.4
Prisoner Petitions	16,249	14,513	15,789	14,067	–3.1
U.S. Civil	2,943	1,249	2,835	1,147	–8.2
Private Civil	11,775	3,571	12,316	4,050	13.4
Bankruptcy Court	793	314	678	206	–34.4
Administrative Agency	8,570	2,406	7,813	2,173	–9.7
Original Proceedings	3,700	3,377	3,764	3,447	2.1

Source: Admin. Office of U.S. Courts 2010 Annual Report, at 47 tbl.S-4.
Note: Data for the U.S. Court of Appeals for the Federal Circuit are not included.

As one would expect, appeals by pro se litigants pose special case management challenges for the courts of appeals. Courts have devised various ways to help pro se litigants with meritorious claims pursue their appeals and to expedite disposition of nonmeritorious appeals. In general, courts use their staff attorneys extensively in this process and occasionally appoint counsel for indigent pro se litigants. In addition, some courts will accept informal briefs or handwritten briefs from pro se litigants, typically prisoners.

In the First, Third, and D.C. Circuits, the Clerks' Offices, not the Staff Attorneys' Offices, handle pro se mail. However, in the Third Circuit, staff attorneys and administrative assistants handle pro se mail in habeas cases. In the D.C. Circuit, procedural questions raised by pro se litigants are referred generally to special counsel to the clerk or to other staff in the Clerk's Office. Attorneys in the Clerk's Office will schedule in-person meetings with pro se litigants on request.

In the First Circuit, pro se litigants who want counsel appointed on appeal must first apply for in forma pauperis (IFP) status at the district court level and then make a motion. Only after obtaining IFP status from the district court may pro se litigants move for appointment of counsel on appeal. If a criminal defendant had IFP status in the district court and was represented by court-appointed counsel, the litigant does not have to reapply for appointment of counsel on appeal. In the Third Circuit, the clerk, on recommendation of a staff attorney, may appoint pro bono counsel in civil cases without an order from a judge.

Staff attorneys in the D.C. Circuit may recommend to a special panel that an attorney or amicus curiae be appointed in a civil or agency case. If the panel agrees, the Clerk's Office selects the attorney or amicus curiae, subject to the panel's approval. In the Tenth Circuit, most pro se cases are decided by screening panels. In many of these cases, because the court prefers disposition on the merits, if a pro se appellant's papers appear to reflect a good faith effort, the appeal is submitted rather than dismissed for procedural irregularities.

In the Fourth and Ninth Circuits, an attorney will be appointed for formal briefing and oral argument if the court determines that a pro se appeal warrants argument—for example, if the appeal raises a novel or unresolved issue. A supervising attorney in the Ninth Circuit's pro se unit coordinates the court's pro bono counsel program. When it appears that a pro se case should be argued, the supervising attorney will arrange for oral argument by a volunteer attorney. The supervising attorney also coordinates communication with pro se law clerks in the district courts and maintains a substantive outline for use at the district court level.

The Ninth Circuit has also developed and implemented the Pro Se "Three Strikes" Database,[50] which was designed to make it easier to identify pro se litigants who file cases found to be without merit. To discourage frivolous filings, the court requires those with three or more "strikes" to pay filing fees rather than proceeding in forma pauperis. The database has been online since March 2007. In addition, the Ninth Circuit offers regular educational and training opportunities for court staff and judges regarding, among

50. 2008 Ninth Circuit Ann. Rep. 30, available at http://www.ce9.uscourts.gov/publications/AnnualReport2008.pdf.

other subjects, alternative case management practices for pro se litigants and how to streamline the initial review process.

K. Mediation and Conference Programs

Table 13 summarizes the various features of the appellate courts' mediation and conference programs in 2011. For the most current information, the reader should consult each circuit's local rules and internal operating procedures.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	Who participates in conferences	Who conducts conferences	Program's involvement with briefing and other procedural matters
D.C.	Appellate Mediation Program, implemented 1987.	Fully counseled civil cases, including petitions for review of agency action and original actions (though pro se cases are rarely granted mediation).	Cases reviewed individually, taking into account several factors, including nature of the underlying dispute, relationship of the issues on appeal to the underlying dispute, susceptibility of these issues to mediation, possibility of effectuating a resolution, and number of parties. Parties may also request mediation by submitting a form to the Clerk's Office.	Mandatory	Attorneys with settlement authority. Clients strongly encouraged, but not required, to attend. For cases involving U.S. government or D.C. government, senior attorneys on either side of the case may attend mediation sessions so long as someone with settlement authority can be reached by telephone during conference sessions. Requirement may be waived in certain circumstances involving high-ranking officials.	Trained volunteer attorney–mediators, who are experienced litigators, senior members of the bar, and law school professors. Director of dispute resolution employed by the court.	Joint motions for extension of the briefing schedule must be filed with the Clerk's Office. Parties must represent in the motion that the mediator (not identified by name) concurs in the request.
1st	Civil Appeals Management Program (CAMP), implemented 1992 (1993 for Puerto Rico).	Fully counseled civil cases and review of administrative orders, except original proceedings (such as petitions for mandamus), prisoner petitions, habeas corpus petitions, summary enforcement actions of the NLRB, or any pro se cases.	Every CAMP-eligible case, unless in settlement counsel's opinion, there is no reasonable likelihood of settlement. In addition, any matter referred at any time by a circuit judge or hearing panel (by motion or sua sponte).	Mandatory	Attorneys with full settlement authority. Clients are generally required to attend.	Two settlement attorneys, one located in Boston, Mass., and the other in San Juan, P.R.; or a judge designated by the chief judge.	Settlement counsel also aid disposition of appeal by attempting to resolve open procedural matters and identifying meritless appeals.
2d	Civil Appeals Management Plan (CAMP), implemented 1974.	Fully counseled civil cases, including appeals from Administrative Agency Orders and Tax Court decisions and non-asylum immigration cases (but not petitions for writs of mandamus or prohibition, habeas corpus cases, and proceedings brought under 28 U.S.C. § 2255).	Nearly all CAMP-eligible cases, including all civil appeals, petitions for review, and applications for enforcement.	Mandatory	Attorneys with appropriate settlement authority, usually without clients. During the conference, the client must be available by telephone.	Three staff attorneys and one senior staff attorney employed by the court in its Office of Staff Counsel.	Staff attorneys have authority to dispose of certain procedural motions, including consolidation of appeals, expediting appeals, and enlargements of the briefing schedule.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals (cont.)

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	Who participates in conferences	Who conducts conferences	Program's involvement with briefing and other procedural matters
3d	Appellate Mediation Program, implemented 1995.	Fully counseled civil cases and petitions for review or for enforcement of agency action (but not original proceedings, such as mandamus; appeals or petitions in social security, immigration or deportation, or black lung cases; prisoner petitions; and habeas corpus petitions). Court recently introduced a program to appoint counsel for pro se litigants for mediation only.	Chief circuit mediator exercises judgment and discretion, based on nature of the case, issues involved, and prior experience. In appropriate cases, program director may ask counsel to represent pro se litigants for mediation only.	Mandatory	Attorneys with settlement authority.	Chief circuit mediator, a senior judge of the court of appeals, a senior judge of a district court, or a conference attorney.	Clerk's Office generally does not issue a briefing order until after a case leaves the program. If scheduling of additional mediation sessions will affect the briefing schedule in a case, the clerk postpones issuance of the briefing order on the mediator's recommendation.
4th	Office of the Circuit Mediator, implemented 1994.	Fully counseled civil cases (but not habeas corpus petitions and some government agency cases).	Cases selected by the program's chief circuit mediator from those eligible for the program, with consideration given to settlement potential, cases referred by hearing panels, and most cases in which counsel requests a conference.	Mandatory	Lead counsel with settlement authority. Clients are permitted, but generally not required, to attend.	Three circuit mediators are employed by the court. Most mediation conferences take place by telephone, but in-person mediation sessions may be held and are screened carefully due to a limited budget.	Circuit mediator may recommend extensions to the briefing schedule if all parties consent. Circuit mediator may also send to the clerk recommendations for other consent orders that control the course of proceedings in the case or that may dispose of the case.
5th	Appellate Conference Program, implemented 1996.	Fully counseled civil cases (but not prisoner, pro se, habeas corpus, social security, or immigration cases, or cases with unresolved jurisdictional problems).	Cases selected by the conference attorneys after initial jurisdictional review process, cases referred by the court, and most cases in which counsel requests a conference.	Mandatory	Lead counsel; conference attorney may require attendance by the parties.	Three attorney–mediators employed by the court. Most initial conferences are by telephone.	Assignment to the conference program does not affect deadlines already set by the court. But if settlement discussions are making progress, extensions of briefing schedules may be arranged.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals (cont.)

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	Who participates in conferences	Who conducts conferences	Program's involvement with briefing and other procedural matters
6th	Office of the Circuit Mediators, implemented on a trial basis in 1981 and permanent basis in 1983.	Fully counseled civil cases and bankruptcy appellate panel (BAP) cases (but not prisoner, tax cases, and most federal agency cases).	Cases selected randomly from a pool of new fully counseled civil appeals; cases referred by hearing panels; and most cases in which a party requests a conference.	Mandatory	Lead counsel with settlement authority. Generally, clients are not required to attend, although participation is welcome. If clients do not attend, it may be advisable to have them available by telephone.	One chief circuit mediator and 3 circuit mediators, all in Cincinnati. A circuit judge may also conduct the conference. Most initial mediation conferences are done by telephone unless counsel work within 50 miles of the court.	A circuit judge or clerk of court at the behest of the mediation attorney may enter an order or orders controlling the course of the proceedings or implementing any settlement agreement.
7th	Settlement Conference Program, implemented 1994.	Fully counseled civil cases (but not certain agency cases, including immigration and social security appeals, prisoner civil rights cases, habeas corpus petitions, mandamus appeals, sentencing cases, and pro se cases).	Court notices most eligible appeals for Rule 33 conferences.	Mandatory	Attorneys with appropriate settlement authority. Clients generally are not required to attend, but clients with full settlement authority must be available by telephone for duration of the conference.	Three conference attorneys employed by the court's Settlement Conference Office.	Briefing is usually postponed until after the initial conference. If further modification of the briefing schedule would be conducive to settlement, an order to that effect may later be entered.
8th	Preargument Settlement Conference Program, implemented 1981.	Fully counseled civil cases (but not petitions for post-conviction relief; social security cases; cases dismissed for lack of jurisdiction; interlocutory appeals certified under 28 U.S.C. § 1292(b); cases appealed under 28 U.S.C. § 1292(a)(1); and federal income tax cases).	Cases selected by the program director from those eligible for the program, with consideration given to settlement potential.	Voluntary; however, court strongly encourages participation.	Court encourages counsel and clients to attend settlement conferences.	Settlement conferences are conducted by the director of the program or by a senior district judge on special assignment from the chief judge. Contact with counsel is by telephone and in personal conferences held in several cities throughout the circuit.	Clerk's Office, not the mediator, handles all motions for extension of briefing schedules and other case-management matters.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals (cont.)

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	Who participates in conferences	Who conducts conferences	Program's involvement with briefing and other procedural matters
9th	Circuit Mediation Program, implemented 1984.	Fully counseled civil cases (but not appeals from an action filed under 28 U.S.C. §§ 2241, 2254, 2255, or petitions for a writ under 28 U.S.C. § 1651).	Cases selected after circuit court mediators review Mediation Questionnaire for all eligible cases, with consideration given to settlement potential. Cases also referred from panels of judges after oral argument and from appellate commissioner, who refers matters related to attorneys' fees. Counsel may also request mediation.	Mandatory	Attorneys, sometimes with clients at the mediator's direction. Clients are generally discouraged from participating in initial assessment.	Chief circuit mediator and 8 circuit court mediators employed by the court. Eight are in San Francisco and one is in Seattle.	Briefing schedule established by the Clerk's Office at the time the appeal is docketed remains in effect unless adjusted by a court mediator to facilitate settlement, or by the Clerk's Office pursuant to 9th Cir. R. 31-2.2. Circuit mediators are authorized to rule on certain procedural matters, including vacating or resetting the appeal schedule, if all counsel are in agreement.
10th	Circuit Mediation Office, implemented 1991.	Fully counseled civil cases except pro se, prisoners' rights, social security, and habeas corpus appeals; also, mediation is not routinely scheduled in cases involving social security claims or immigration matters, although the office will mediate them occasionally.	Cases randomly selected by circuit mediators from cases eligible for the program; cases referred by hearing panels; and cases in which a party requests a conference.	Mandatory	Lead counsel with settlement authority. Circuit mediator may permit or require client to attend.	Three circuit mediators and one conference attorney employed by the court.	Appellate process is not automatically stayed during the mediation process. However, the mediator may abate the preparation of the transcript or extend or abate the briefing schedule to accommodate the mediation process.
11th	Kinnard Mediation Center, implemented 1992.	Fully counseled civil cases (but not appeals in which any party is incarcerated, immigration or pro se cases, and appeals from habeas corpus actions).	Eligible cases referred by a hearing panel or circuit judge, either before or after oral argument.	Mandatory, but case may be removed from the program on request of a party and consent of the circuit mediator.	Counsel with full settlement authority, client, and a representative of any person or entity directly affected financially by the outcome of the litigation. Sometimes insurers and government entities. Client should be available during mediation.	Court employs five full-time mediators located in Atlanta and Miami. Parties may also hire their own mediator, at their own cost, with court approval.	Appellate proceedings are not stayed. Due date for briefing may be extended by the Kinnard Mediation Center if there is substantial probability that the appeal can settle via mediation, extension will save time and money, and other certain conditions are met.

Table 13: Mediation and Conference Programs in the Federal Courts of Appeals (cont.)

Circuit	Program name, year it began	Case types eligible for selection for a conference	Cases selected for conferences	Mandatory or voluntary	Who participates in conferences	Who conducts conferences	Program's involvement with briefing and other procedural matters
Fed.	Appellate Mediation Program, implemented in 2005 by en banc order; program guidelines revised in May 2008.	Fully counseled civil cases.	For all cases covered by Fed. Cir. R. 33, circuit mediation officers contact principal counsel to determine if the case is a good candidate for mediation and to seek opinion of counsel regarding participation in the program. Counsel may jointly request that the case be included in the mediation program.	Mandatory for all cases selected for participation in program that were docketed after Sept. 18, 2006.	Lead counsel attend all sessions. At initial session, a party representative with actual settlement authority must also attend. Counsel for parties are required to schedule and conduct settlement discussions. After discussions, parties must file either a joint statement of compliance with the settlement discussion rule or a statement of agreement of dismissal in the case.	Chief circuit mediator or the circuit mediation officer. In some cases, an outside mediator from the court's roster may be used.	Cases in mediation remain subject to normal scheduling for briefs and oral argument by the clerk of court, but counsel may file a consent motion for an extension of time. Motions for additional extensions will be referred to circuit mediators, who are authorized to grant motions for extensions up to a date that is generally no more than 150 days after the case is referred to a mediator.

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