ADVISORY COMMITTEE
ON
APPELLATE RULES

Washington, DC
April 22-23, 2013

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April 22 and 23, 2013
Washington, DC

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Members	Position	District/Circuit	Start Date	End Date
Steven M. Colloton Chair	C	Eighth Circuit	2012	2015
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	2015
Neal K. Katyal	ESQ	Washington, DC	2011	2014
Kevin C. Newsom	ESQ	Alabama	2011	2014
Richard G. Taranto	ESQ	Washington, DC	2009	2015
Donald B. Verrilli, Jr.*	DOJ	Washington, DC	----	Open
Catherine T. Struve Reporter	ACAD	Pennsylvania	2006	Open
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TAB 1

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TAB 1A

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Advisory Committee on Appellate Rules
Table of Agenda Items — March 2013

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 Approved by Judicial Conference 09/12

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 Discussed and retained on agenda 09/12
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 Approved by Judicial Conference 09/12
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

FRAP Item	Proposal	Source	Current Status
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
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 Approved by Judicial Conference 09/12
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

FRAP Item	Proposal	Source	Current Status
10-AP-H	Consider issues relating to appellate review of remand orders	Committee on Federal-State Jurisdiction	Discussed and retained on agenda 10/10
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 Discussed and retained on agenda 09/12
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)	Discussed and retained on agenda 09/12
12-AP-D	Consider the treatment of appeal bonds under Civil Rule 62 and Appellate Rule 8	Kevin C. Newsom, Esq.	Discussed and retained on agenda 09/12
12-AP-E	Consider treatment of length limits for petitions for rehearing en banc under Rule 35	Professor Neal K. Katyal	Discussed and retained on agenda 09/12
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12
13-AP-A	Amend FRAP 29(a) to require party consent or court leave for all amicus filings	Dr. Roger I. Roots	Awaiting initial discussion.
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Awaiting initial discussion
13-AP-C	Consider possible rules for expediting proceedings under Hague Convention on the Civil Aspects of International Child Abduction	Hon. Steven M. Colloton	Awaiting initial discussion

TAB 1B

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Minutes of Fall 2012 Meeting of
Advisory Committee on Appellate Rules
September 27, 2012
Philadelphia, Pennsylvania

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, September 27, 2012, at 10:10 a.m. at the University of Pennsylvania Law School in Philadelphia, Pennsylvania. The following Advisory Committee members were present: Judge Michael A. Chagares, Judge Robert Michael Dow, Jr., Justice Allison H. Eid, Judge Peter T. Fay, Professor Amy Coney Barrett, Professor Neal K. Katyal, Mr. Kevin C. Newsom, and Mr. Richard G. Taranto. Mr. H. Thomas Byron III, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Steven M. Colloton, the incoming Chair of the Committee; Judge Adalberto Jordan, liaison from the Bankruptcy Rules Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee; Mr. Jonathan C. Rose, Rules Committee Officer in the Administrative Office ("AO"); Mr. Benjamin Robinson, Deputy Rules Committee Officer and Counsel to the Rules Committees; Mr. Leonard Green, liaison from the appellate clerks; Ms. Marie Leary from the Federal Judicial Center ("FJC"). Dean Michael A. Fitts attended briefly to welcome the committee; Professor Stephen B. Burbank and Professor Tobias Barrington Wolff attended the first portion of the meeting to give a presentation. A number of students from the Law School attended portions of the meeting. Professor Catherine T. Struve, the Reporter, took the minutes.

Dean Fitts welcomed the Committee and noted that how pleased and honored the Law School was to have the Committee meet at the Law School. He observed that Penn Law School is very proud of its civil procedure faculty, including Professors Burbank and Wolff (who would be addressing the Committee). And he thanked the Committee members for their important work in improving the Rules. Judge Sutton thanked Dean Fitts for hosting the Committee's meeting. Judge Sutton noted that Judge Jordan is joining the Committee as a liaison member from the Bankruptcy Rules Committee in order to facilitate communications between the two Committees on matters that pertain to both the Appellate Rules and the Bankruptcy Rules. Judge Jordan served as an Assistant United States Attorney and then as a federal district judge in Miami, and in early 2012 he was confirmed to a seat on the U.S. Court of Appeals for the Eleventh Circuit. Judge Sutton also welcomed Judge Colloton, whose term as the Chair of the Appellate Rules Committee would commence on October 1, 2012.

Professor Coquillette brought greetings from Judge Mark R. Kravitz, the Chair of the Standing Committee. Professor Coquillette also reported that Judge Kravitz had just received a major honor: The Connecticut Bar Foundation has instituted a symposium in Judge Kravitz's name.

During the meeting, Judge Sutton thanked Mr. Rose, Mr. Robinson, and the AO staff for their preparations for and participation in the meeting. Judge Sutton also thanked Mr. Green for his excellent and important contributions during his service on the Committee. He congratulated Mr. Green on his retirement, and observed that Mr. Green was the longest-serving Clerk of the Sixth Circuit.

II. Presentations by Professor Burbank and Professor Wolff

The Reporter introduced Professors Burbank and Wolff. She noted how fortunate she is to serve on a faculty with colleagues who are stronger scholars of procedure than she is. Professor Burbank, she noted, is the nation's leading authority on the history of the Rules Enabling Act and has long been a close observer of the rulemaking process. The Reporter noted her personal debt of gratitude to Professor Burbank for his generous and thoughtful guidance during the twelve years that they had been colleagues. More recently, Penn was fortunate to induce Professor Wolff to join the faculty. Even before getting to know Professor Wolff, the Reporter recalled, she had already realized that he is the most creative, thoughtful, innovative scholar of her generation on topics such as such as the preclusive effect of judgments in class actions. At Judge Sutton's invitation, Professor Burbank had agreed to address the Committee on the topic of the rulemaking process, and Professor Wolff had agreed to comment on this presentation.

Professor Burbank observed that the Federal Rules of Civil Procedure are nearing their seventy-fifth anniversary, and thus he took as his topic "Rulemaking at 75" (with a focus on the Civil Rules). He noted that Professor Barrett is an expert on the topic of courts' inherent rulemaking power. Congress, he observed, has almost plenary power with respect to federal court procedure – limited only in those areas where true inherent court power operates. The U.S. Supreme Court has been very modest in its claims of inherent power that can trump a contrary directive from Congress.

Nonetheless, Congress has given the federal courts rulemaking power, both local and supervisory, since almost the beginning. In the eighteenth and nineteenth century, the Supreme Court refrained from exercising its supervisory rulemaking power for actions at law. By means of the 1872 Conformity Act, Congress effectively withdrew that power. Meanwhile, experience in states such as New York – which went from the relative simplicity of the Field Code to complexity of the Throop Code – and the concerns of lawyers with multistate practices contributed to a movement supporting adoption of a uniform system of federal procedure. The American Bar Association took up that idea and advocated in favor of it for two decades. The concept was opposed by Senator Thomas Walsh, but after Walsh's death the concept of uniform federal procedure came to fruition in the 1934 passage of the Rules Enabling Act.

When the first Advisory Committee began meeting in the 1930s, questions arose with respect to the scope and limits of the rulemaking power. The major question at the time concerned the

meaning of "general rules." Ultimately, the Advisory Committee almost backed into the idea that their task was to create trans-substantive rules.

As for the scope limitation set by the Enabling Act – that the Rules "shall neither abridge, enlarge, nor modify the substantive rights of any litigant" – the original Advisory Committee had no coherent and consistent understanding of that limitation. In a 1937 letter, William D. Mitchell (the Chair of the original Advisory Committee) stated that "the twilight zone around the dividing line between substance and procedure is a very broad one. If it were not for the fact that the court which makes these rules will decide whether they were within the authority, we would have very serious difficulties in dealing with this problem. The general policy I have acted on is that where a difficult question arose as to whether a matter was substance or procedure and I thought the proposed provision was a good one, I have voted to put it in, on the theory that if the Court adopted it, the Court would be likely to hold, if the question ever arises in litigation, that the matter is a procedural one." And Mitchell's prediction proved accurate; the Supreme Court has never invalidated a Civil Rule.

Sibbach v. Wilson & Co., 312 U.S. 1 (1941), cast the Enabling Act's scope limitation in terms of federalism concerns, but the notion that the Enabling Act's scope limitation arose from federalism concerns is a myth; the real motivation for that limit was a concern over separation of powers. *Hanna v. Plumer*, 380 U.S. 460 (1965), clarified that it makes a difference, for purposes of the *Erie* analysis, what *type* of federal law is operating, but *Hanna* did not improve the law respecting the nature of the Enabling Act's scope limitation. The concerns expressed by Justice Harlan in his separate opinion in *Hanna* have been vindicated; it seems almost impossible to invalidate a duly adopted Rule. Citing as examples *Semtek International, Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), and *Burlington Northern Railroad Co. v. Woods*, 480 U.S. 1 (1987), Professor Burbank stated that the Supreme Court's jurisprudence on the Enabling Act's scope limitation is incoherent.

During the early 1980s, Professor Burbank recalled, the Civil Rules Committee took a broad view of its powers, as evidenced by the 1983 amendments to Civil Rule 11. As a contrast, Professor Burbank cited the conference that the Civil Rules Committee convened in 2001 to discuss the topic of federal courts' power to enjoin overlapping class actions. Academics who participated in that conference expressed the view that the rulemakers would exceed their powers under the Enabling Act if they were to propose the adoption of a rule empowering federal courts to enjoin the certification of a state-court class action where certification of a substantially similar class had been denied in federal court; and the Committee decided not to proceed with such a proposal. Similar concerns about the scope of rulemaking authority led some to support the enactment by Congress of the Class Action Fairness Act.

Professor Burbank next highlighted the politics of rulemaking during different time periods. Initially, there was a long honeymoon (punctuated occasionally by dissents – by Justices Black and Douglas – from the Court's orders promulgating a proposed rule). In the 1980s, Representative Kastenmeier began engaging in oversight of issues relating to the Civil Rules – such as offers of judgment under Civil Rule 68. Congress itself has acknowledged the power of procedure; for

instance, in the Private Securities Litigation Reform Act it ratcheted up the pleading standard. As the power of procedure to affect the operation of the substantive law became more widely recognized, the topic attracted interest, and also interest groups. Meanwhile, during the 1980s the rulemaking process became more transparent. Chief Justice Burger oversaw the creation of a legislative affairs office within the AO.

The composition of the Advisory Committee changed over time. The original Advisory Committee was made up of lawyers and academics; it included no sitting judges. That changed during the 1970s, perhaps because people no longer perceived (as they formerly had) a unity of interests between the bench and bar. Calls arose for judicial management of litigation. Now, Professor Burbank observed, judges have come to dominate the rulemaking process. This raises the question, he suggested, how judges should function as part of a political process – for that, he stated, is what the rulemaking process is.

The rulemaking process has made progress with respect to the use of empirical data. Charles Clark and Edson Sunderland were legal realists who valued empirical research. One barrier to such research on matters touching the rulemaking process, Professor Burbank argued, has been the appeal of the image of trans-substantive rules. But when one compares the rulemakers' attitude toward empirical research in the 1980s and today, the change is admirable. Professor Burbank adduced, as an example of this shift, the Civil Rules Committee's decision not to incorporate into the recent Civil Rule 56 amendments the point-counterpoint mechanism that some districts mandate by local rule. But, Professor Burbank suggested, it would be even better if the AO would systematically collect, and make available to researchers outside the FJC, data concerning the litigation system.

Professor Wolff opened his remarks by noting that much of his scholarship focuses on the relationship between procedural rules and the underlying substantive law. He suggested that the rulemakers should take a modest view of the role that rules should play in relation to the substantive law. Judges and lawyers have become accustomed, Professor Wolff observed, to thinking about procedure trans-substantively. Similarly, he noted, in *Shady Grove Orthopedic Associates v. Allstate Insurance Co.*, 130 S. Ct. 1431 (2010), the plurality asserted that Civil Rule 23 is merely another joinder rule. That assertion, Professor Wolff suggested, avoids the tough question that would otherwise arise: If you acknowledge the transformative nature of Rule 23, how could Rule 23 be a valid exercise of rulemaking power? Professor Wolff posited that one can answer that question by viewing the permissibility of class certification as tied to, and dependent on, the policies that underlie the relevant substantive law. In this view, the rules provide courts with an *occasion* for asking difficult liability questions. But, he suggested, it is not for the rulemakers to decide how liability policy will respond to the Rules; that task lies with legislators or with common-law courts. The Court recognized this principle, Professor Wolff commented, in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011). In *Wal-Mart*, one of the Court's holdings was that the proposed employment discrimination class could not be certified under Civil Rule 23(b)(2) because that would conflict with certain requirements that the Court viewed as non-defeasible features of Title VII's statutory scheme.

Judge Sutton thanked Professor Burbank and Professor Wolff for their remarks. It is very helpful, he noted, for the Committee to obtain big-picture perspectives on the rulemaking process. He recalled that, in fall 2011, the Committee had heard from Professor Richard D. Freer on the issue of the frequency of rule amendments. (Later in the meeting, Judge Sutton noted that Professor Freer had recently drafted an article setting out his critiques of the rulemaking process.) Judge Sutton asked Professors Burbank and Wolff if they had advice to share with the Committee about the rulemaking process.

Professor Wolff noted that rule changes impose costs on the legal profession. Bold changes in the Rules, he suggested, should be undertaken only when supported by empirical data. Professor Burbank mentioned his 1993 article, "Ignorance and Procedural Law Reform: Time for a Moratorium," in which he criticized the 1993 amendments to Civil Rule 26 concerning initial disclosures. Professor Burbank agreed about the importance of empirical data. He also noted that trans-substantive procedure has costs. When rules are made with complex cases in mind, the rules become more elaborate and this raises the expense of litigation. As an example, Professor Burbank cited the point-counterpoint procedure for summary judgment, which, he observed, allows a litigant to impose huge costs on an opponent. Professor Wolff questioned whether the recent amendments to Civil Rule 56 were helpful to litigants in low-stakes cases. It is important, he suggested, to think about the broad array of litigants who may use the federal courts, and to ensure access to justice.

Professor Coquillette recalled that, in the 1990s, the Standing Committee considered the possibility of drafting a set of uniform Federal Rules of Attorney Conduct. In the end, the Standing Committee decided not to proceed with that project, which some regarded as being at or outside the limits of the rulemaking power. Senator Leahy, however, regarded the project as a good one and drafted a bill that would have empowered the rulemakers to undertake it. Professor Coquillette asked whether it is valuable when Congress looks to the Rules Committees for ideas on law reform. Professor Burbank responded that good law reform can require thinking beyond the boundaries of the Rules Enabling Act. (He pointed out that when sending forward the 1993 amendments to Civil Rule 4, the rulemakers included a special note flagging the question whether new Rule 4(k)(2) complied with the Rules Enabling Act's limits.) Professor Burbank suggested that multi-tiered lawmaking – in which the rulemakers provide input to Congress – can be useful.

Professor Wolff suggested that it can also be useful for the rulemakers to flag for the judicial branch issues that may arise from a change in the Rules. As an example, he cited the 1966 Committee Note to Civil Rule 23, which directed judges' attention to the connection between the procedures articulated in amended Rule 23 and the binding effect of a resulting judgment.

Mr. Rose stated that a classmate of his who is a district judge has commented on the difference between managerial judges who seek to avert trial through case management and summary judgment, and others who are more traditionalist about the idea that scheduling trials itself constitutes effective case management. He asked the presenters if they had suggestions for changing the way that the AO collects statistics. Professor Burbank noted that he had been involved in the ABA's project on the "vanishing trial" and, in connection with that, he wrote two articles about summary judgment. He found that the AO's data did not distinguish summary judgment motions

from other pretrial motions. The AO, Professor Burbank said, keeps statistics for the judiciary's purposes, and not for researchers' purposes. The Rules Committees have turned to the FJC for targeted research, but the FJC's resources are limited. He noted that he and Professor Judith Resnik participate in the activities of the American Bar Association's Standing Committee on Federal Judicial Improvements, and they have proposed a project on the collection of court data. Mr. Rose asked whether Professor Burbank has a view on the question of managerial judging. Professor Burbank responded that it is sad that people have come to regard trial as a failure. Modern procedure, he said, has made trial impossible, even for those who want it and deserve it. Summary judgments now account for from four to six times as many terminations as trials do. It would be better, he suggested, if federal judges spent more time in court trying cases and less time in their chambers managing cases.

Returning to the topic of the amendments to Civil Rule 56, an appellate judge recalled that the proposal to include a point-counterpoint mechanism in Rule 56 first arose because many federal districts have instituted such a mechanism in their local rules. Those districts felt that the mechanism worked very well. There was a concern that the rules for summary judgment procedure should be uniform nationwide. Opposition to the point-counterpoint proposal did come from judges in some districts who had employed the point-counterpoint mechanism and found that it did not work well. But there were also those who did not want a new mechanism imposed on their districts. So the failure of the point-counterpoint proposal was not solely due to conclusions drawn from empirical data. There were concerns about whether the proposal could ultimately receive approval. And there was a balancing of the value of uniformity against the value of local control. Professor Burbank responded that if the Committee had reached a contrary conclusion, that would have been surprising in light of the FJC study's findings concerning the length of time to motion disposition: When the point-counterpoint procedure was used, summary judgment motions took longer to decide. Also, the FJC study found a statistically significant difference in dismissal rates in employment discrimination cases: When the point-counterpoint mechanism was used, those cases were dismissed at a higher rate. The appellate judge participant responded that in evaluating the higher dismissal rate, one must consider why cases are being dismissed at a higher rate. The purpose of the point-counterpoint rule, he noted, is to clarify the issues.

Professor Wolff recalled that, at the 2010 Duke Civil Litigation Conference, he had argued during one of the sessions that *Twombly* and *Iqbal* confer a type of discretion on district judges – to employ their "judicial experience and common sense" – that the judges themselves should not wish to have. In a one-on-one conversation after that discussion, a judge had said to him that the *Twombly* / *Iqbal* pleading standard is a useful tool for disposing of *pro se* prisoner complaints. Professor Wolff suggested that good empirical data can help make visible to judges aspects of the practice in their own courthouses that the judges, acting in all good faith, may not otherwise perceive.

Judge Sutton asked Professors Burbank and Wolff for their views on whether it is better for procedural reforms to come about through judicial decisions or by means of a Rule amendment. Professor Burbank noted that the idea of "uniform rules" is appealing, but that a facially uniform rule can be interpreted differently in different places around the country. Many Rules, he observed,

confer discretion; such discretion-conferring Rules should not be viewed the same way as Rules that explicitly make policy choices. Professor Wolff suggested that so long as judges think carefully about the interplay between procedural rules and the substantive law, open-textured Rules can be a virtue. As an example, he cited litigation in which many "Doe" defendants are joined in a single copyright-infringement suit concerning file-sharing; in such suits, Civil Rules 20 and 26 give the district judge considerable discretion whether to allow early discovery prior to resolving the propriety of joinder.

Judge Sutton thanked Professors Burbank and Wolff for their presentations.

III. Approval of Minutes of April 2012 Meeting

During the meeting, a motion was made and seconded to approve the minutes of the Committee's April 2012 meeting. The motion passed by voice vote without dissent.

IV. Report on June 2012 Meeting of Standing Committee and Other Information Items

Judge Sutton described relevant aspects of the Standing Committee's June 2012 meeting. He noted that the Standing Committee gave final approval to proposed amendments to Appellate Rules 13, 14, 24, 28, and 28.1 and to Form 4, and that those amendments were recently approved by the Judicial Conference for submission to the Supreme Court. The Standing Committee approved for publication proposed amendments to Appellate Rule 6, concerning appeals in bankruptcy cases; so far, he reported, no comments had been submitted.

Judge Sutton noted that, after the Appellate Rules Committee's spring 2012 meeting, he had written to the Chief Judge of each circuit to thank them for their input on the question of amicus filings by Indian tribes and to let them know that the Committee plans to revisit the question in five years. At the Judicial Conference, Judge Sutton reported, he spoke with Chief Judge Kozinski, who stated that the Ninth Circuit will consider the possibility of adopting a local rule concerning such filings. He encouraged those present to suggest to the Chief Judge of their home circuit that the circuit consider adopting a local rule on that issue.

Judge Sutton noted that, at the Standing Committee's January 2012 meeting, Judge Kravitz had appointed Judge Gorsuch as the chair of a subcommittee to discuss terms, in the sets of national Rules, that may be affected by the shift from paper to electronic filing, storage, and transmission. Research performed for the subcommittee by Andrea Kuperman disclosed that the Rules currently use many different terms that could be affected by the shift to electronic filing. The subcommittee held discussions during spring 2012 and determined that, going forward, each Advisory Committee should attend carefully to the choice of words, in proposed Rule amendments, to denote the filing, storage, and transmission of documents.

V. Discussion Items

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

Judge Sutton invited Judge Dow to introduce this item, concerning sealing and redaction of appellate briefs. Judge Dow noted that the item arose from an observation by Paul Alan Levy of Public Citizen Litigation Group, who stated that redactions in appellate briefs make it difficult for a potential amicus to gain the information necessary for effective amicus participation. That observation led the Committee to a more general discussion of sealing on appeal.

The Committee's inquiries identified three primary approaches to sealing and redaction on appeal. The D.C. Circuit and Federal Circuit require the litigants to review the record and to try to determine jointly whether any sealed portions can be unsealed; the litigants are to present that agreement to the court below. Some other circuits apply a presumption that materials sealed below should remain sealed on appeal. By contrast, the Seventh Circuit applies a contrary presumption; after a brief grace period, any sealed portions of the record on appeal are unsealed unless a motion is made to maintain the seal or unless the parties ask the court to excise the materials in question from the record on appeal.

Judge Dow reported that he, Mr. Letter, and Mr. Green had spoken informally with people in selected Circuit Clerks' offices to gain a better understanding of local circuit practices. In Mr. Letter's absence, the Reporter summarized the results of his research; she reported that the officials with whom Mr. Letter had conferred did not identify any practical problems with their circuits' approaches to sealing. The clerks' responses did provide some reason to think, the Reporter suggested, that a shift to an approach like the Seventh Circuit's approach might raise concerns in some circuits about possible resource constraints and delays. Mr. Green noted that, in the Sixth Circuit, items in the record that were sealed below remain sealed on appeal. The Sixth Circuit's approach, he said, seems to work well; motions seeking either to seal or to unseal matters in the record are rare, and counsel tend to have no complaints.

Judge Dow explained that the premise underlying the Seventh Circuit's approach is that the judiciary's activities are open to the public. There is a concern that district courts may seal items in the record without adequate justification if both parties agree to sealing. Judge Dow noted that the Seventh Circuit's approach requires more work both from the district court and from the parties. On appeal in the Seventh Circuit, the following procedure applies: If the record on appeal includes sealed items and the sealing is not required by statute or rule, the Clerk's Office notifies the parties that after two weeks the sealed documents will be unsealed unless a party moves to maintain the documents under seal or unless a party asks the Court to return the sealed documents to the district court (on the ground that those documents were not germane to the lower court's decision). Participants in this process characterize it as a well-oiled machine.

In sum, Judge Dow concluded, each circuit that was canvassed seems happy with its own procedures for dealing with sealed appellate filings. To achieve nationwide adoption of an approach similar to the Seventh Circuit's might take a Supreme Court decision or legislation. Failing that, the best course may be to try to generate dialogue among the circuits concerning best practices. The CM/ECF system, Judge Dow noted, has the capacity to handle sealed filings.

An appellate judge agreed that it may be difficult to induce other circuits to change their approaches, and that this fact makes him somewhat skeptical about the prospects for a national rule on the subject. On the other hand, he suggested, the Seventh Circuit's approach makes sense. He agreed that it could be productive to circulate to each circuit information concerning the other circuits' practices.

An attorney member asked how sealed filings affect the resulting court opinions. The Reporter responded that her research had not focused on the treatment, in judicial opinions, of information from sealed filings. Participants in the discussion noted the importance of explaining the reasons for a judicial decision and also the possibility of asking the parties to address in letter briefs whether previously sealed information should be disclosed in the opinion. An appellate judge asked how sealed materials in criminal cases are handled on appeal in the Seventh Circuit. The Reporter mentioned that the Seventh Circuit's procedures take into account statutory sealing requirements; if materials are sealed pursuant to statute or rule, then the Seventh Circuit's presumption in favor of unsealing on appeal does not apply. Judge Dow reported that there sometimes are motions by third parties to unseal materials that the court has placed under seal; such motions might be made, for example, by a media entity. An appellate judge noted that judicial opinions might disclose some information from a sealed document; for example, an opinion addressing a sentencing issue might discuss information from a pre-sentence investigation report.

An appellate judge member suggested that, if each circuit is satisfied with its own approach, there is no need for rulemaking on this topic. Judge Dow, noting the earlier proposal to circulate information to each circuit's Chief Judge, asked what sort of information might be included. Judge Sutton responded that the letter could describe the genesis of this item and also describe the varied approaches that the circuits take to sealed materials. The Committee has found that information useful, he noted, so it could be helpful to share it with each circuit.

A member expressed support for the idea but asked whether it is likely that the circuits would give attention to this question. The Reporter observed that after the Committee had circulated to the Chief Judges of each circuit Ms. Leary's 2011 report on the taxation of appellate costs under Rule 39, at least one circuit had changed its practices concerning costs. A participant suggested that any letter on sealing practices should be sent to the Circuit Clerks as well as the Chief Judges. A member asked how frequently the Committee decides to send letters to the Chief Judges. The Reporter noted that in fall 2006 Judge Stewart, as the Chair of the Committee, had written to the Chief Judge of each circuit to urge the circuits to consider whether their local briefing requirements were truly necessary and to stress the need to make those requirements accessible to lawyers.

Professor Coquillette observed that it is important not to encourage the proliferation of local circuit rules. In some instances, though, committees have identified specific areas where local variation may be justified, and have merely circulated information about such local variations.

An appellate judge member asked whether the letter should take a policy position on which approach is best. Another participant asked whether such a letter might cause readers to wonder why the Committee is not moving forward with a rulemaking proposal. An appellate judge observed

that, even if a provision were to be adopted that imposed a nationally uniform presumption in favor of unsealing on appeal (i.e., an approach similar to the Seventh Circuit's), this would not ensure that the resulting *decisions* on motions to seal achieved uniform results. The Reporter observed that if the Committee were to decide to take a strong policy position, consultation with other interested Judicial Conference committees (such as the Judicial Conference Committee on Court Administration and Case Management ("CACM")) might be advisable. Mr. Rose said that advance coordination would not be necessary if the Committee's letter were informational.

An appellate judge member expressed support for the idea of a letter. Judge Sutton asked whether the Committee preferred that the letter take an agnostic position on the relative merits of the circuits' approaches. Professor Coquillette stated that it would be necessary to consult CACM before taking the step of endorsing the Seventh Circuit's approach. An appellate judge member suggested that the letter could usefully identify the concerns that arise from sealed and redacted appellate filings. A district judge member added that the letter could also note the Seventh Circuit's rationale for its approach.

A motion was made that the Committee not proceed with a proposed rule amendment on the subject of sealed or redacted appellate filings. The motion was seconded and passed by voice vote without dissent.

Judge Sutton undertook to write to the Chief Judge of each circuit to advise them of Mr. Levy's suggestion, the reasons for it, the Committee's findings concerning the circuits' approaches, and the rationale for the Seventh Circuit's approach. Copies of the letter would be sent to the Circuit Clerks. A motion was made to approve this approach. The motion was seconded and passed by voice vote without dissent.

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

Judge Sutton invited Judge Fay to present this item, which arises from a suggestion by Dr. Roger Roots that Appellate Rule 4(b) be amended to lengthen the deadline for a criminal defendant to take an appeal. Judge Fay reviewed the suggestion and observed that the Committee had discussed a similar proposal roughly a decade earlier. At that time, after a very broad discussion, the Committee had voted to remove the proposal from its agenda. More recently, the Committee at its Spring 2012 meeting discussed Dr. Roots' proposal. Much of the discussion focused on whether the current 14-day deadline poses a hardship for defendants. Participants in that discussion observed that it is typically easier for a criminal defendant to decide whether to appeal than it is for the government to decide whether to appeal. And there is ordinarily a time lapse between conviction and sentencing, so that (except as to sentencing issues) defendants tend to have more than 14 days within which to consider possible bases for appeal.

Judge Fay noted that the agenda materials for the current meeting included some figures concerning the rate at which federal criminal defendants appeal; he stated that he was surprised by the low proportion of such defendants who appeal. The agenda materials also indicated that the choice of deadlines for criminal defendants' appeals is not likely to have major implications for

speedy trial requirements. It appears, Judge Fay noted, that relatively few appeals are dismissed on untimeliness grounds. District courts are likely to grant extensions where warranted. After *Bowles v. Russell*, 551 U.S. 205 (2007), courts are unlikely to regard a criminal defendant's appeal deadline as jurisdictional. The DOJ has opposed altering criminal defendants' appeal time limit, and has pointed out that there are big differences between the government and criminal defendants in terms of the time needed to decide whether to appeal. In sum, Judge Fay suggested, the current Rule works well and there is no reason to change it.

The Reporter thanked Ms. Leary for her very helpful research on criminal defendants' appeals. Ms. Leary noted that she had done a preliminary search, looking only at criminal appeals terminated in the Third Circuit since January 1, 2011. Among those appeals, nine were dismissed because the pro se defendant failed to meet Appellate Rule 4(b)'s 14-day deadline. But, she noted, in all but one of those cases, the defendant's delay was lengthy and would have rendered the appeal untimely even if the relevant deadline had been 30 days rather than 14 days. A member asked whether Ms. Leary had looked at all relevant appeals in the Third Circuit during the stated time period; she responded that the search was comprehensive.

A district judge member observed that very few cases go to trial. There is typically a long delay between conviction and sentencing. And where a criminal defendant needs more time to file a notice of appeal, caselaw in the Seventh Circuit supports the view that the district court should grant an extension under Rule 4(b)(4). Mr. Byron reiterated the DOJ's view that no amendment is needed.

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

C. Item Nos. 08-AP-A, 11-AP-C, and 11-AP-D (possible changes in light of electronic filing and service)

Judge Sutton invited the Reporter to introduce these items, which concern the possibility of amending the Appellate Rules to account for the shift to electronic filing, service, and transmission. The Committee last discussed this set of issues at its fall 2011 meeting. At this point, the Advisory Committees may not be ready to take joint action to further adjust the Rules in light of electronic filing. Given that fact, the Committee may wish to consider whether it wishes to proceed with such updates to the Appellate Rules outside the context of a joint project. There have been some relevant developments since the fall 2011 meeting. In the interim, the Eleventh and Federal Circuits have instituted electronic filing. The Bankruptcy Rules Committee has published for comment proposed amendments to Part VIII of the Bankruptcy Rules, which deal with appellate practice and which reflect the early adoption, in bankruptcy practice, of electronic filing and service. There are a variety of adjustments that might eventually be made to the Appellate Rules in light of the shift to electronic filing; one of the questions before the Committee is how to time those adjustments. One approach would be to propose such revisions only when the Committee is proposing to amend a particular Rule for other reasons. But, the Reporter suggested, it makes sense for the Committee to

consider whether there are any such revisions that are worth proposing earlier than that, as stand-alone amendments.

Mr. Green reported that the Circuit Clerks do not see an urgent need for revisions to the Appellate Rules at this time. Admittedly, he noted, Rule 26(c)'s "three-day rule" is odd and anachronistic. It would be difficult to achieve nationally uniform procedures for the treatment of the record and appendix; practices currently vary widely among the circuits. Judge Sutton asked whether the "three-day rule" is causing problems. Mr. Green responded that he did not think it causes logistical problems; rather, it is an oddity and it is hard to explain why it exists.

Mr. Byron asked about the effects, if any, of the adoption of the next generation of software for the CM/ECF system. The Reporter noted that the new software is slated to be rolled out gradually over a period of years. Mr. Green stated that the next generation software will make refinements, rather than big changes, in the electronic filing system.

Judge Sutton suggested that it might make sense for the Advisory Committees to address jointly the question of whether to revise the Rules to account for changes related to electronic filing. By consensus, the Committee retained Items 08-AP-A, 11-AP-C, and 11-AP-D on its study agenda.

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

Judge Sutton invited the Reporter to introduce this item, which concerns the possibility of amending the Rules to address situations in which parties attempt to "manufacture" a final appealable judgment (so as to obtain review of a ruling on one claim in a suit (the "central claim")) by dismissing all other pending claims (the "peripheral claims"). The Reporter noted that the Civil / Appellate Subcommittee, chaired by Judge Colloton, had considered this item in depth but had not reached consensus on it.

The Reporter noted that there are a variety of ways in which one might try to secure review of the central claim. First, a straightforward way is to dismiss the peripheral claims with prejudice; there is consensus that such action produces a final, appealable judgment. Second, at the other end of the spectrum, if the peripheral claims are dismissed without prejudice, roughly half the circuits have made clear that this does not produce an appealable judgment; but there are some decisions in a few circuits taking a different view. The Ninth Circuit has a test that examines whether the would-be appellant tried to manipulate appellate jurisdiction. Third, when the dismissal of the peripheral claims was nominally without prejudice but those claims can no longer be asserted due to some practical impediment, there is a growing consensus that such a dismissal does create an appealable judgment. Fourth, in the Eighth and Ninth Circuits an appealable judgment results when the dismissal of the peripheral claims without prejudice completely removes a defendant from the suit. Fifth, the Second Circuit takes the view that an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice – i.e., commits not to re-assert the peripheral claims unless the appeal results in the reinstatement of the central claim. However, some four circuits disagree with this view. Most recently, in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011),

the Second Circuit applied the conditional-prejudice doctrine to permit an appeal, but refused to extend the doctrine to the attempted cross-appeal in the same case.

An attorney member noted that, two days earlier, the Supreme Court had granted certiorari in *Gabelli*.

Judge Colloton summarized the Civil Rules Committee's discussions of the topic of manufactured finality; some members of that Committee had reacted negatively to the idea of the conditional-prejudice doctrine. The Civil / Appellate Subcommittee considered the idea of proposing a rule that would eliminate avenues for manufacturing jurisdiction (such as dismissal without prejudice or with conditional prejudice), and alternatively considered the idea of not proposing a rule amendment. Ultimately, through lack of strong support for the first option, the Subcommittee defaulted to the second option. Some participants in the discussion were of the opinion that any problems that arise can be handled under Civil Rule 54(b).

A member asked whether the topic of appellate jurisdiction is appropriate for rulemaking. Judge Colloton responded that Congress has authorized rulemaking to define when a district-court ruling is final for purposes of appeal. An attorney member stated that this area of law meets his criterion for rulemaking action: It is an area in which litigants ought to be able to find a clear answer.

A participant asked for examples of scenarios that could not be adequately dealt with under Civil Rule 54(b). It was noted that the use of Civil Rule 54(b) is within the district court's discretion, and that Civil Rule 54(b) certification can apply only when there is a particular claim that is ripe for the certification. Judge Colloton noted that Professor Cooper had pointed out that Civil Rule 54(b) does not address instances where a ruling severely affects a claim but does not completely dispose of it – as when a court has excluded a party's most persuasive evidence in support of its claim, but has ruled admissible just enough evidence "to survive summary judgment and limp through trial."

It was suggested that it would be wise to await the Supreme Court's decision in *Gabelli*. By consensus, the Committee retained this item on its study agenda.

VI. Additional Old Business and New Business

A. Item No. 12-AP-B (Form 4's directive regarding institutional-account statements)

Judge Sutton invited the Reporter to introduce this item, which arises from a comment that the National Association of Criminal Defense Lawyers ("NACDL") submitted on the pending amendment to Form 4 (concerning applications to proceed *in forma pauperis* ("IFP")). The pending amendments – which are on track to take effect on December 1, 2013 if the Supreme Court approves

them and Congress takes no contrary action – make certain technical changes to the Form and revise the current Form's detailed questions about the applicant's payments for legal and other services.

The pending technical changes include a revision to the Form's directive that prisoners must attach an institutional account statement. The pending revision would limit that directive to prisoners "seeking to appeal a judgment in a civil action or proceeding." That revised language more closely tracks the language in 28 U.S.C. § 1915(a)(2) (a statutory provision added by the Prison Litigation Reform Act ("PLRA")). Commenting on this proposed change, NACDL suggested that this provision be further revised by adding the following parenthetical: "(not including a decision in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255)."

The Reporter stated that NACDL's legal analysis accords with the overall state of the law. All circuits have cases stating that the PLRA's IFP provisions do not apply to habeas petitions under Section 2254. A majority of circuits have cases stating the same view with respect to Section 2255 motions. However, the Reporter noted that courts might well apply the PLRA's IFP requirements if a prisoner (erroneously or not) styled a challenge to prison conditions as a habeas petition, or if a prisoner included a prison-conditions challenge in a habeas petition.

The Reporter suggested that, in evaluating NACDL's proposal, it may be useful to consider the effect of Form 4's wording on the risk of error by an IFP applicant. Form 4, as revised by the pending amendment, might risk inconveniencing some IFP applicants in habeas cases who erroneously think that they must include an institutional-account statement with their IFP application. This risk may be relatively widespread, but would likely pose no more than an inconvenience in any given case. If NACDL's proposed change is made, there would be a risk that some (relatively small) number of IFP applicants would erroneously believe they need not include an institutional-account statement. That risk would not likely be widespread, but it might have more significant implications for the appeal. Those implications would depend on how courts would treat the absence of an institutional-account statement when one is required. The caselaw gives reason to hope that such an error would not render the filing untimely, and that the appeal would be permitted to proceed so long as the applicant supplied the required statement promptly once alerted to the error. That would be the likely outcome, but there remains the possibility that a court might disagree.

An appellate judge member suggested that the worst-case scenario under the Form (as revised by the pending amendment) does not seem a matter for grave concern: The prison will simply supply an institutional-account statement unnecessarily. An attorney member asked what would happen if an inmate is moved from one institution to another – would he or she need to supply more than one institutional-account statement? Mr. Green stated that if a litigant omitted an institutional-account statement when one was required, his office would simply direct the litigant to remedy the omission. A district judge member reported that this requirement does not cause problems at the district court level; within his district, each prison has a designated person whose job it is to process the institutional-account statements.

Judge Colloton noted the broader issue of the role of rulemaking concerning forms; the Civil Rules Committee, he observed, is considering whether to cease promulgating forms. Professor Coquillette noted that the Advisory Committees vary in their approaches to forms.

An attorney member suggested that any change in response to NACDL's comment should be held for disposition along with other small changes that might be addressed once every five years or so. Judge Sutton agreed that it is worth thinking about the frequency of rule amendments. More generally, though, bundling amendments might not always work for all of the Advisory Committees. Mr. Byron recalled that in the late 1990s and early 2000s the Appellate Rules Committee did follow the practice of bundling rule amendments.

Concerning the present proposal about Form 4, Mr. Byron stated that the DOJ defers to the views of the judges and clerks. An appellate judge member suggested that it would make sense to wait and see how the pending amendments to Form 4 function in practice before considering further changes.

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

B. Item No. 12-AP-C (FRAP 28 – pinpoint citations)

Judge Sutton invited Judge Chagares to present this item, which arises from a suggestion submitted by the Council of Appellate Lawyers of the Appellate Judges Conference of the American Bar Association's Judicial Division (the "Council") as part of that group's comments on the pending amendments to Rules 28 and 28.1 (concerning the statement of the case). The Council proposes "amending Rule 28(e) to require a pinpoint citation to the appendix or record to support each statement of fact and procedural history anywhere in every brief," rather than "only in the statement of facts."

Judge Chagares noted that it is very frustrating to read briefs that lack citations to the record. The amendment proposed by the Council, he suggested, might raise awareness (among less experienced lawyers) about the requirement of citations to the record. However, an attorney member asked what the Council's proposed amendment would change. Another attorney member observed that Appellate Rule 28(a)(9)(A) already requires "citations to the authorities and parts of the record on which the appellant relies." Professor Coquillette argued that one should not propose a rule amendment for the purpose of educating lawyers. A member suggested that lawyers should not need further instruction concerning the requirement of citations to the record. Judge Jordan observed that the Bankruptcy Rules Committee has had a similar discussion about whether to amend the Rules in order to address lawyers' failure to comply with existing requirements; some rules, he noted, are disobeyed frequently. Good lawyers will comply with the rules and bad lawyers will not.

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

C. Item No. 12-AP-D (Civil Rule 62 and FRAP 8 – appeal bonds)

Judge Sutton invited Mr. Newsom to introduce this item, which arises from Mr. Newsom's suggestion that the Committee consider the topic of appeal bonds. Mr. Newsom explained that he finds the bonding process mystifying every time that it arises in a complex civil case. Though he does not advocate amending the Rules to educate lawyers about the bonding process, he suggested that amendments might usefully address gaps in the Rules' treatment of the topic. This topic centrally concerns Civil Rule 62, but most lawyers who deal with these issues are appellate lawyers.

Mr. Newsom pointed out that Civil Rule 62 currently addresses separately two time periods for which a bond will typically be needed: Civil Rule 62(b) addresses stays of a judgment pending disposition of a postjudgment motion, while Civil Rule 62(d) addresses stays of the judgment pending appeal. Issues that might be addressed by a Rule amendment include the timing, form, and amount of a bond. Current Rule 62 may produce something of a gap, because under Rule 62(d) the stay takes effect only when the court approves the bond, and the bond can be given "upon or after filing the notice of appeal." So technically the Rule 62(b) stay would have expired upon the disposition of the postjudgment motion, and the Rule 62(d) stay would not take effect until the appellant has filed the notice of appeal and the bond, and the court has approved the bond.

The question of procedure, Mr. Newsom suggested, is more interesting than the question of the amount of the bond. Questions include the following: (1) Should Civil Rule 62(b) be amended to *require* the issuance of a stay upon the posting of sufficient security? (2) Should the Rule be amended to reflect the reality that most complex cases involve both postjudgment motions and an appeal, and to treat those two periods under the same framework? (3) Should the Rule be amended to address the timing gap between disposition of the postjudgment motion and the approval of the supersedeas bond? In practice, Mr. Newsom said, lawyers take a "belt and suspenders" approach by obtaining – for purposes of the postjudgment motion period – a bond that will also meet the requirements for a supersedeas bond under Civil Rule 62(d); one pays a single annual premium and can get a refund for the unused period.

An attorney member observed that this topic seems to fall largely within the jurisdiction of the Civil Rules Committee. Judge Sutton asked for Judge Dow's views. Judge Dow responded that the appeal-bond requirement can be a big problem when things go wrong. He suggested that the Reporter discuss the matter with Professor Cooper.

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

D. Item No. 12-AP-E (FRAP 35 – length limits for petitions for rehearing en banc)

Judge Sutton invited Professor Katyal to introduce this item, which arises from Professor Katyal's observation that Appellate Rule 35(b)(2) sets a 15-page limit for rehearing petitions.

Professor Katyal observed that he has seen a lot of manipulation of length limits that are set in pages. People waste time altering fonts and line spacing. The 1998 amendments to the Appellate Rules set type-volume length limits for merits briefs, but limits denoted in pages remain in Rules

5, 21, 27, and 35. The time may have come to reconsider that choice. Technological developments have made it much easier to count words. The type-volume limit is harder to manipulate. On the other hand, the type-volume limit does entail an added item – a certificate of compliance. And some pro se litigants continue to file handwritten briefs. But on balance, Professor Katyal suggested, it would be worthwhile to denote length limits in a consistent fashion. An attorney member agreed with this view.

A district judge member pointed out that Rule 28(j) sets a 350-word limit for letters concerning supplemental authorities, and he expressed support for that approach. Mr. Byron noted that one might view the type-volume approach as the exception and the page-limit approach as the general rule. He asked whether the page limits create problems for judges and clerks. Mr. Green said that they do not. Professor Katyal observed that when one's opponent manipulates a page limit, it can be awkward to call the opponent on it. The district judge member observed that when length limits are set in pages, the resulting briefs can be harder to read.

The Reporter noted that the type-volume limits include a safe harbor denoted in pages, and she asked how those safe-harbor page limits compare to the type-volume limits. Mr. Byron responded that the safe-harbor page limits are significantly shorter than the type-volume limits. An attorney member observed that the Supreme Court switched from page limits to word limits in 2007. A participant asked how length limits are applied to pro se briefs. An appellate judge participant responded that the court would likely just deal with the pro se brief on its merits rather than worrying about its compliance with length limits.

An attorney member expressed support for pursuing this topic further. By consensus, the Committee retained this item on its study agenda.

E. Item No. 12-AP-F (FRAP 42 and class action appeals)

Judge Sutton invited the Reporter to introduce this item, which arises from a suggestion by Professors Brian T. Fitzpatrick, Brian Wolfman, and Alan B. Morrison that Appellate Rule 42 be amended to require approval from the court of appeals for any dismissal of an appeal from a judgment approving a class action settlement or fee award, and to bar such dismissals absent a certification that no person will give or receive anything of value in exchange for dismissing the appeal.

The Reporter observed that the backdrop for this proposal is the debate over the role of objectors in class actions. That debate played a part in the Civil Rules Committee's discussions, during the early 2000s, of the proposals that ultimately gave rise to the 2003 amendments to Civil Rule 23. The 2003 amendments, among other things, revised Rule 23(e) in order to intensify judicial scrutiny of proposed class settlements. In considering ways to better inform the district judge about the merits of such a proposed settlement, the Civil Rules Committee had discussed possible ways to facilitate a role for objectors in generating information about a proposed settlement. Participants discussed – but the Committee ultimately rejected – the possibility of amending Rule 23 to, for example, provide for discovery conducted by objectors, or provide ways to remunerate

objectors and their counsel. Participants noted that objectors may have varying motives and that it could be problematic to give all such objectors undue sway. Ultimately the Committee moved in a different direction; the 2003 amendments to Rule 23 use other means to try to improve the settlement approval process – such as providing the possibility of a second round of opting out.

The question, in dealing with objectors, has always been how best to promote useful objections while minimizing the problems caused by objectors (and their counsel) whose objections do not improve the result for the class and who are motivated by the prospect of personal gain. When determining how to treat the withdrawal of an objection, one might also seek to distinguish between objections with grounds that apply to the class as a whole and objections founded upon circumstances unique to the objector in question.

Civil Rule 23(e)(5) addresses the question of dropping an objection. It provides that "[a]ny class member may object" to a proposed class settlement, and that "the objection may be withdrawn only with the court's approval." To that extent, Civil Rule 23(e)'s treatment of objectors departs from the usual principle that the court will not force a litigant to keep litigating when the litigant no longer wishes to do so. (Of course, the requirement of court approval for class settlements is itself a departure from that principle.)

The proponents of the current proposal point out that Civil Rule 23(e)(5) will not prevent objectors from making objections in order to extract monetary compensation. Those objectors might simply wait until they have a pending appeal and then offer to drop the appeal if they are paid off at that point. Currently there is no provision in the Rules that explicitly addresses that possibility. Professor Cooper has pointed out that during the discussions that led to the 2003 amendments, there was a proposal to draft the provision in Civil Rule 23(e) broadly enough to encompass the withdrawal of objector appeals. That proposal did not make it into the 2003 amendments to Civil Rule 23. Some participants had questioned whether a district court would have authority to address the propriety of an objector's dismissal of a pending appeal.

Compared with current Civil Rule 23(e)(5), the proposed amendment to Appellate Rule 42 is broader in scope and more stringent in its criteria. Unlike Civil Rule 23(e)(5), the proposed amendment would encompass objections to fee awards. Civil Rule 23(h)(2) does contemplate objections to fee awards, but does not constrain the dropping of such objections in the way that the proposed Appellate Rule 42 amendment would. In addition, Civil Rule 23(e)(5) gives the district court discretion whether to approve the withdrawal of an objection, whereas the proposed amendment to Appellate Rule 42 would remove the court of appeals' discretion to approve the withdrawal of the appeal if there is a payment in exchange for that withdrawal.

The Reporter suggested that the proposal is an elegant one in the sense that its goal is to craft a Rule that would cause undesirable objectors to self-select out of the appellate process. If they anticipate that they can get no personal benefit from the appeal, then they will not appeal. But the Reporter noted a few questions about the proposal. One concerns the possibility that the Rule's existence might not deter all such objectors from appealing. If an objector did in fact take an appeal, and then receive something of value in exchange for dropping the appeal, the court would be in the

unusual position of forcing a now-unwilling appellant to maintain an appeal. There are not very many cases that interpret and apply Appellate Rule 42, but among those scattered cases are at least some that remark upon the awkwardness of denying an appellant permission to drop an appeal. Perhaps it would be less awkward in the case of a class action objector's appeal, to the extent that one could view the objector as having a duty to act in the interests of the class when objecting. One question is whether the proposal could be modified to provide the court of appeals with discretion whether to permit the dropping of an appeal – along the lines of the discretion that Civil Rule 23(e)(5) accords to the district court. The decision whether to permit the withdrawal of the appeal would fall to the court of appeals, unless that court decided to remand to the district court for a resolution of that question. Court of appeals judges may not be as well situated as the district court to assess the validity of the objector's reasons for seeking to withdraw the appeal.

Judge Sutton suggested that this proposal might best be considered within the larger context of the Civil Rules Committee's consideration of possible changes to Civil Rule 23. If so, perhaps it would be useful for a member of the Appellate Rules Committee to participate in the discussions of the relevant subcommittee of the Civil Rules Committee. Professor Coquillette agreed that it will be important to work closely with the Civil Rules Committee.

An attorney member stated that the current proposal concerning Appellate Rule 42 would go beyond the provisions of Civil Rule 23(e)(5). It is not intuitively obvious, this member suggested, that all payments to class action objectors are nefarious. District judges are in a better position than court of appeals judges to assess an objector's reasons for withdrawing an objection. If the Committee moves forward with a proposal on this topic, the proposal should assign the decision to the district court rather than the court of appeals.

An appellate judge member described her experience with parties' motions seeking permission to withdraw from an appeal. Resolving such motions, she reported, can be very time-intensive for the appellate court.

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

VII. Adjournment

The Committee adjourned at 3:45 p.m. on September 27, 2012.

Respectfully submitted,

Catherine T. Struve
Reporter

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 3-4, 2013
Cambridge, Massachusetts

Draft Minutes

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ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Cambridge, Massachusetts, on Thursday and Friday, January 3 and 4, 2013. The following members were present:

Judge Jeffrey S. Sutton, Chair
Dean C. Colson, Esq.
Roy T. Englert, Jr., Esq.
Gregory G. Garre, Esq.
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Larry D. Thompson, Esq.
Judge Richard C. Wesley
Judge Diane P. Wood

The Department of Justice was represented at various points at the meeting by Acting Assistant Attorney General Stuart F. Delery, Elizabeth J. Shapiro, Esq., and Allison Stanton, Esq.

Deputy Attorney General James M. Cole, Judge Neil M. Gorsuch, and Judge Jack Zouhary were unable to attend.

Also participating were former member Judge James A. Teilborg; Professor Geoffrey C. Hazard, Jr., consultant to the committee; and Peter G. McCabe, Administrative Office Assistant Director for Judges Programs. The committee's style consultant, Professor R. Joseph Kimble, participated by telephone.

On Thursday afternoon, January 3, Judge Sutton moderated a panel discussion on civil litigation reform initiatives with the following panelists: Judge John G. Koeltl, a member of the Advisory Committee on Civil Rules and Chair of its Duke Conference subcommittee; Rebecca Love Kourlis, Executive Director of the Institute for the Advancement of the American Legal System at the University of Denver and a former justice of the Colorado Supreme Court; Dr. Emery G. Lee, III, Senior Research Associate in the Research Division of the Federal Judicial Center; and Judge Barbara B. Crabb, U.S. District Court for the Western District of Wisconsin.

Providing support to the Standing Committee were:

Professor Daniel R. Coquillette	The Committee's Reporter
Jonathan C. Rose	The Committee's Secretary and Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Rules Officer
Julie Wilson	Rules Office Attorney
Andrea L. Kuperman (by telephone)	Chief Counsel to the Rules Committees
Joe Cecil	Research Division, Federal Judicial Center

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Steven M. Colloton, Chair
Professor Catherine T. Struve, Reporter (by telephone)
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 —
Chief Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Sutton opened the meeting by noting the extraordinary service to the rules committees by his predecessor Judge Mark Kravitz, which would be further commemorated at the committee's dinner in the evening. He praised Judge Kravitz's extraordinary ten years of service on both the Civil Rules Advisory Committee and the Standing Committee. Judge Kravitz served as chair of both committees.

Judge Sutton specifically called attention to the commendation of Judge Kravitz in Chief Justice Roberts's year-end report and asked that the following paragraph from that report be included in the minutes:

> On September 30, 2012, Mark R. Kravitz, United States District Judge for the District of Connecticut, passed away at the age of 62 from amyotrophic lateral sclerosis—Lou Gehrig's Disease. We in the Judiciary remember Mark not only as a superlative trial judge, but as an extraordinary teacher, scholar, husband, father, and friend. He possessed the temperament, insight, and wisdom that all judges aspire to bring to the bench. He tirelessly volunteered those same talents to the work of the Judicial Conference, as chair of the Committee on Rules of Practice and Procedure, which oversees the revision of all federal rules of judicial procedure. Mark battled a tragic illness with quiet courage and unrelenting good cheer, carrying a full caseload and continuing his committee work up until the final days of his life. We shall miss Mark, but his inspiring example remains with us as a model of patriotism and public service.

Chief Justice John G. Roberts, Jr., 2012 Year-End Report on the Federal Judiciary 11 (2012).

Judge Sutton reported that at its September 2012 meeting, the Judicial Conference approved without debate all fifteen proposed rules changes forwarded to it by the committee for transmittal to the Supreme Court. Assuming approval by the Court and no action by Congress to modify, defer, or delay the proposals, the amendments will become effective on December 1, 2013.

APPROVAL OF MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of its last meeting, held on June 11 and 12, 2012, in Washington, D.C.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professors Cooper and Marcus presented the report of the advisory committee, as set forth in Judge Campbell's memorandum of December 5, 2012 (Agenda Item 3). Judge Campbell presented several action items, including the recommendation to publish for comment amendments to Rules 37(e), 6(d), and 55(c). Judge Campbell also presented the advisory committee's recommendation to adopt without publication an amendment to Rule 77(c)(1).

Amendment for Final Approval

FED. R. CIV. P. 77(c)(1) – CROSS REFERENCE CORRECTION

The proposed amendment to Rule 77(c)(1) corrects a cross-reference to Rule 6(a) that should have been changed when Rule 6(a) was amended in 2009 as part of the Time Computation Project. Before those amendments, Rule 6(a)(4)(A) defined "legal holiday" to include 10 days set aside by statute, and Rule 77(c)(1) incorporated that definition by cross-reference.

As a result of the 2009 Time Computation amendment, the Rule's list of legal holidays remained unchanged, but became Rule 6(a)(6)(A). However, through inadvertence, the cross-reference in Rule 77(c) was not addressed at that time. The proposed amendment corrects the cross-reference.

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

Amendments for Publication

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

Judge Campbell first gave a short history behind the drafting of the proposed new Rule 37(e). He stated that the subject of the rule had been extensively considered at a mini-conference, as well as in numerous meetings of the advisory committee and conference calls of the advisory committee's discovery subcommittee. There was wide

agreement that the time had come for developing a rules-based approach to preservation and sanctions.

The Civil Rules Committee hosted a mini-conference in Dallas in September 2011. Participants in that mini-conference provided examples of extraordinary costs assumed by litigants, and those not yet involved in litigation, to preserve massive amounts of information, as a result of the present uncertain state of preservation obligations under federal law. In December 2011, a subcommittee of the House Judiciary Committee held a hearing on the costs of American discovery that focused largely on the costs of preservation for litigation.

The discovery subcommittee of the advisory committee had agreed for some time that some form of uniform federal rule regarding preservation obligations and sanctions should be established. The subcommittee initially considered three different approaches: (1) implementing a specific set of preservation obligations; (2) employing a more general statement of preservation obligations, using reasonableness and proportionality as the touchstones; and (3) addressing the issue through sanctions. The subcommittee rejected the first two approaches. The approach that would set out specific guidance was rejected because it would be difficult to set out specific guidelines that would apply in all civil cases, and changing technology might quickly render such a rule obsolete. The more general approach was rejected because it might be too general to provide real guidance. The subcommittee therefore opted for a third approach that focuses on possible remedies and sanctions for failure to preserve. This approach attempts to specify the circumstances in which remedial actions, including discovery sanctions, will be permitted in cases where evidence has been lost or destroyed. It should provide a measure of protection to those litigants who have acted reasonably in the circumstances.

After an extensive and wide ranging discussion of the proposed new Rule 37(e), the committee approved it for publication in August 2013, conditioned on the advisory committee reviewing at its Spring 2013 meeting the major points raised at this meeting. Judge Campbell agreed that the advisory committee would address concerns raised by Standing Committee members and make appropriate revisions in the draft rule and note for the committee's consideration at its June 2013 meeting.

During the course of the committee's discussion, the following concerns were expressed with respect to the current draft of proposed new Rule 37(e) and its note:

Displacement of Other Laws

One committee member expressed concern about the statement in the note that the amended rule "*displaces* any other law that would authorize imposing litigation sanctions in the absence of a finding of wilfulness or bad faith, including state law in diversity

cases." (emphasis added).

The member pointed out that use of the term "displace" could be read as a possible effort to preempt on a broad basis state or federal laws or regulations requiring the preservation of records in different contexts and for different purposes, such as tax, banking, professional, or antitrust regulation. Judge Campbell stated that there had been no such intent on the part of the advisory committee. The advisory committee had been focused on establishing a uniform federal standard solely for the preservation of records for litigation in federal court (including cases based on diversity jurisdiction). The advisory committee intended to preserve any separate state-law torts of spoliation.

Judge Campbell believed the draft committee note could be appropriately clarified to make clear that the proposed rule on preservation sanctions had no application beyond the trial of cases. A committee member noted that a statutory requirement of records preservation for non-trial purposes should not require a litigant to make greater preservation efforts for trial discovery purposes than would otherwise be required by the amended rule.

Use of the Term "Sanction"

Another participant noted that the word "sanction" has particularly adverse significance in most contexts when applied to the conduct of a lawyer. In some jurisdictions, this might require reporting an attorney to the board of bar overseers. Thus, in using the term "sanction," he urged that the advisory committee differentiate between its use when referring to the actions permitted under the rule in response to failures to preserve and its broader application to the general area of professional responsibility.

"Irreparable Deprivation"

Several committee members raised concerns about proposed language that would allow for sanctions if the failure to preserve "irreparably deprived a party of any meaningful opportunity to present a claim or defense." These members stated that this language could potentially eliminate most of the rule's intended protection for the innocent and routine disposition of records. Also, as a matter of style and precise expression, one committee member preferred substitution of the word "adequate"for the word "meaningful."

Acts of God

Another concern was whether the proposed draft of Rule 37(e) would permit the imposition of sanctions against an innocent litigant whose records were destroyed by an "act of God." The accidental destruction of records because of flooding during the recent

Hurricane Sandy was offered as a hypothetical example. Judge Campbell agreed that a literal reading of the current draft might lead to imposition of sanctions as the result of a blameless destruction of records resulting from such an event. Both he and Professor Cooper agreed that the question of who should bear the loss in an "act of God" circumstance was an important policy issue for the advisory committee to revisit at its spring meeting.

Preservation of Current Rule 37(e) Language

The Department of Justice and several committee members also recommended retention of the language of the current Rule 37(e), which protects the routine, good-faith operation of an electronic information system. Andrea Kuperman's research showed that the current rule is rarely invoked. But the Department of Justice argued that in its experience, the presence of the Rule 37(e) has served as a useful incentive for government departments to modernize their record-keeping practices.

Expanded Definition of "Substantial Prejudice"

The Department also urged that the term "substantial prejudice in the litigation"—a finding required under the draft proposal in order to impose sanctions for failure to preserve—be given further definition. It suggested that "substantial prejudice" should be assessed both in the context of reliable alternative sources of the missing evidence or information as well as in the context of the materiality of the missing evidence to the claims and defenses involved in the case. The Department and several committee members suggested that publication for public comment might be helpful to the committee in developing its final proposed rule.

By voice vote, the committee preliminarily approved for publication in August 2013 draft proposed Rule 37(e) on the condition that the advisory committee would review the foregoing comments and make appropriate revisions in the proposed draft rule and note for approval by the Standing Committee at its June 2013 meeting.

FED. R. CIV. P. 6(d) – CLARIFICATION OF "3 DAYS AFTER SERVICE"

Professor Cooper reviewed the advisory committee's proposed amendment to Rule 6(d), which provides an additional 3 days to act after certain methods of service. The purpose of the amendment is to foreclose the possibility that a party who must act within a specified time after making service could extend the time to act by choosing a method of service that provides the added time.

Before Rule 6(d) was amended in 2005, the rule provided an additional 3 days to

respond when service was made by various described means. Only the party being served, not the party making the service, had the option of claiming the extra 3 days. When Rule 6(d) was revised in 2005 for other purposes, it was restyled according to the conventions adopted for the Style Project, allowing 3 additional days when a party must act within a specified time "after service." This could be interpreted to cover rules allowing a party to act within a specified time after making (as opposed to receiving) service, which is not what the advisory committee intended. For example, a literal reading of present Rule 6(d) would allow a defendant to extend from 21 to 24 days the Rule 15(a)(1)(A) period to amend once as a matter of course by choosing to serve the answer by any of the means specified in Rule 6(d). Although it had not received reports of problems in practice, the advisory committee determined that this unintended effect should be eliminated by clarifying that the extra 3 days are available only to the party receiving, as opposed to making, service.

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

FED. R. CIV. P. 55(c) – APPLICATION TO "FINAL" DEFAULT JUDGMENT

Professor Cooper explained that the proposed amendment to Rule 55(c), the rule on setting aside a default or a default judgment, addresses a latent ambiguity in the interplay of Rule 55(c) with Rules 54(b) and 60(b) that arises when a default judgment does not dispose of all claims among all parties to an action. Rule 54(b) directs that the judgment is not final unless the court directs entry of final judgment. Rule 54(b) also directs that the judgment "may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." Rule 55(c) provides simply that the court "may set aside a default judgment under Rule 60(b)." Rule 60(b) in turn provides a list of reasons to "relieve a party . . . from a final judgment, order, or proceeding . . . ."

A close reading of the three rules together establishes that relief from a default judgment is limited by the demanding standards of Rule 60(b) only if the default judgment is made final under Rule 54(b) or when there is a final judgment adjudicating all claims among all parties.

Several cases, however, have struggled to reach the correct meaning of Rule 55(c), and at times a court may fail to recognize the meaning. The proposed amendment clarifies Rule 55(c) by adding the word "final" before "default judgment."

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

Information Items

Judge Campbell reported on several information items that did not require committee action at this time.

DUKE CONFERENCE SUBCOMMITTEE WORK

A subcommittee of the advisory committee formed after the advisory committee's May 2010 Conference on Civil Litigation held at Duke University School of Law ("Duke Conference subcommittee") is continuing to implement and oversee further work on ideas resulting from that conference. Judge Campbell and Judge Koeltl (the Chair of the Duke Conference subcommittee) presented to the committee a package of various potential rule amendments developed by the subcommittee that are aimed at reducing the costs and delays in civil litigation, increasing realistic access to the courts, and furthering the goals of Rule 1 "to secure the just, speedy, and inexpensive determination of every action and proceeding." This package of amendments has been developed though countless subcommittee conference calls, a mini-conference held in Dallas in October 2012, and discussions during advisory committee meetings. The discussions that have occurred will guide further development of the rules package, with a goal of recommending publication of this package for public comment at the committee's June 2013 meeting.

An important issue at the Duke Conference and in the work undertaken since by the Duke Conference subcommittee has been the principle that discovery should be conducted in reasonable proportion to the needs of the case. In an important fraction of the cases, discovery still seems to run out of control. Thus, the search for ways to embed the concept of proportionality successfully in the rules continues.

Current sketches of possible amendments to parts of Rule 26 exemplify this effort and include the following proposals:

Rule 26

* * * * *

(b) Discovery Scope and Limits.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense <u>and proportional to the needs of the case considering the amount in controversy, the importance of the issues at stake in the action, the parties'</u>

resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information [within this scope of discovery]{sought} need not be admissible in evidence to be discoverable. ~~— including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(C).~~ * * *

(2) *Limitations on Frequency and Extent.*

(A) *When Permitted.* By order, the court may alter the limits in these rules on the number of depositions, ~~and~~ interrogatories, requests [to produce][under Rule 34], and requests for admissions, or on the length of depositions under Rule 30. ~~By order or local rule, the court may also limit the number of requests under Rule 36.~~

(C) *When Required.* On motion or on its own, the court must limit the frequency or extent of discovery ~~otherwise allowed by these rules or by local rule~~ if it determines that: * * *

(iii) the ~~burden or expense of the~~ proposed discovery is outside the scope permitted by Rule 26(b)(1) ~~outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.~~

* * * * *

(c) Protective Orders

(1) *In General.* * * * The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: * * *

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery; * * *

The drafts are works in progress and will be revisited by the advisory committee at its spring meeting.

FED. R. CIV. P. 84 AND FORMS

Judge Campbell further reported that the subcommittee of the advisory committee formed to study Rule 84 and associated forms is inclined to recommend abrogating Rule 84. This inclination follows months of gathering information about the general use of the forms and whether they provide meaningful help to attorneys and pro se litigants. The advisory committee is evaluating the subcommittee's inclination and intends to make a recommendation to the committee concerning the future of Rule 84 at the June 2013 meeting. If Rule 84 is abrogated, forms will still remain available through other sources, including the Administrative Office. Although forms developed by the Administrative Office do not go through the full Enabling Act process, the subcommittee would likely recommend that the advisory committee plan to work with the Administrative Office in drafting and revising forms for use in civil actions.

The committee briefly discussed the feasibility of appointing a liaison member of the civil rules advisory committee to the Administrative Office forms committee. Several members of the committee praised the prior work of the Administrative Office forms committee, particularly its ready responsiveness to current judicial and litigant needs. Its flexibility and responsiveness to rapidly changing requirements were favorably compared to the more cumbersome process imposed by the Rules Enabling Act. Peter McCabe, who chairs the Administrative Office forms committee, expressed the willingness of that committee to respond to the needs of the civil rules advisory committee.

No significant concern was raised by the committee about the potential abrogation of Rule 84.

MOTIONS TO REMAND

Judge Campbell reported on a proposal from Jim Hood, Attorney General of Mississippi, to require automatic remand in cases in which a district court takes no action on a motion to remand within thirty days. Attorney General Hood also proposed that the removing party be required to pay expenses, including attorney fees, incurred as a result of removal when remand is ordered. While the advisory committee was sympathetic to the problems created by federal courts failing to act timely on removal motions, it did not believe the subject fell within the jurisdiction of the rules committees. Both subject matter jurisdiction and the shifting of costs from one party to another on removal and remand are governed by federal statutes enacted by Congress and not by rules promulgated under the Rules Enabling Act. Judge Sutton has conveyed the advisory committee's response to Attorney General Hood.

PANEL ON CIVIL LITIGATION REFORM PILOT PROJECTS

Four panelists covered the topics outlined below.

Selected Federal Court Reform Projects

Judge Koeltl outlined five litigation reform projects that the Duke Conference subcommittee is following. These include:

a. A set of mandatory initial discovery protocols for employment discrimination cases was developed as part of the work resulting from the Duke Conference. These protocols were developed by experienced employment litigation lawyers and have so far been adopted by the Districts of Connecticut and Oregon.

b. A set of proposals embodied in a pilot project in the Southern District of New York to simplify the management of complex cases.

c. A Southern District of New York project to manage section 1983 prisoner abuse cases with increased automatic discovery and less judicial involvement. The project's goal is to resolve these types of cases within 5.5 months using judges as sparingly as possible through the use of such devices as specific mandatory reciprocal discovery, mandatory settlement demands, and mediation.

d. A project in the Seventh Circuit inspired by Chief Judge James F. Holderman that seeks to expedite and limit electronic discovery. The project emphasizes concepts of proportionality and cooperation among attorneys. One specific innovation, Judge Koeltl noted, was the mandatory appointment of a discovery liaison by each litigant.

e. The expedited trial project being implemented in the Northern District of California. This project provides for shortened periods for discovery and depositions and severely limits the duration of a trial. The goal is for the trial to occur within six months after discovery limits have been agreed upon. Judge Koeltl acknowledged, however, that this entire procedure is an "opt in" one, and so far no litigant has "opted" to use it. As a result, the entire project is now under review to determine what changes will make it more appealing to litigants.

State Court Pilot Projects

Justice Kourlis presented a summary of information compiled by the Institute for the Advancement of the American Legal System on state court pilot projects. She said

these projects fell into three basic categories, all with the common purpose of increasing access to the courts for all types of litigants. The three basic categories were:

a. Different rules for different types of cases

One category of pilot projects attempts to resolve issues of costs and delay by establishing different sets of rules for different types of cases, such as for complex (e.g., business) cases and simple cases amenable to short, summary, and expedited ("SES") procedures. Complex case programs are currently underway in California and Ohio. In those projects, the emphasis appears to be on close judicial case management, frequent conferences, and cooperation by counsel. Substantial prior experience in complex business cases by participating judges appears to have contributed to the success of the projects.

SES programs for simple cases are currently underway in California, Nevada, New York, Oregon, and Texas. These programs emphasize streamlined discovery, strict adherence to tight trial deadlines, and, in at least one state, mandatory participation by litigants whose cases fall under a $100,000 damages limit.

b. Proportionality in Discovery

A number of states have launched projects to achieve this objective. These projects have involved local rule changes to expedite and limit the scope of discovery, more frequent and earlier conferences with judges, and more active judicial case management to achieve proportionate discovery and encourage attorney cooperation.

c. Active Judicial Case Management

This third category of state projects overlaps with the first two categories. Some examples of the techniques employed include: (i) the assignment of a case to a single judicial officer from start to finish; (ii) early and comprehensive pretrial conferences; and (iii) enhanced judicial involvement in pretrial discovery disputes before the filing of any written motions.

A "Rocket Docket" Court

Judge Crabb gave a succinct presentation on the benefits of her "rocket docket" court (the Western District of Wisconsin) and how such a court can effectively manage its docket. She explained that litigants value certainty and predictability, and that the best way to achieve these goals is to set a firm trial date. Given her court's current case volume, the goal is to complete a case within twelve to fifteen months after it is filed. Judge Crabb explained that this management style achieves transparency, simplicity, and

service to the public.

Once a case is filed in the Western District of Wisconsin, a magistrate judge promptly holds a comprehensive scheduling conference. At this conference, a case plan is developed and discovery dates are fixed. Although this court usually will not change pre-trial discovery deadlines, it will do so on application of both parties if the ultimate trial date is not jeopardized.

In Judge Crabb's district, the magistrate judges are always available for telephone conferences on motions or other pretrial disputes, but they do not seek to actively manage cases. The litigants know that they have a firm trial date and can be relied upon to seek judicial intervention whenever it is necessary. In Judge Crabb's view, this "rocket docket" approach permits both the rapid disposition of a high volume of cases and maintenance of high morale of the court staff.

Federal Judicial Center Statistical Observations on Discovery

Dr. Lee of the Federal Judicial Center then gave a short presentation on statistical observations about discovery. He noted that the Center's research shows that the cost of discovery is a problem only in a minority of cases. Indeed, various statistical analyses lead him to conclude that the problem cases are a small subset of the total number of cases filed and involve a rather small subset of difficult lawyers.

Dr. Lee cited a multi-variant analysis done in 2009 and 2010 for the Duke Conference. In that study, the Federal Judicial Center found that the costly discovery cases have several common factors:

1. High stakes for the litigants (either economic or non-economic);
2. Factual complexity;
3. Disputes over electronic discovery; and
4. Rulings on motions for summary judgment.

Other interesting statistical observations of the study included the fact that on average a 1% increase in the economic value of the case leads to a .25% increase in its total discovery cost. Other discovery surveys indicate that almost 75% of lawyers on average believe that discovery in their cases is proportionate and that the other side is sufficiently cooperative. Only in a small minority of the cases—approximately 6%—are lawyers convinced that discovery demands by the opposing side are highly unreasonable.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Colloton and Professor Struve presented the report of the advisory committee, as set forth in Judge Colloton's memorandum of December 5, 2012 (Agenda Item 6). There were no action items for the committee.

Information Items

SEALING AND REDACTION OF APPELLATE BRIEFS

Judge Colloton reported that the advisory committee had decided not to proceed with a proposal to implement a national uniform standard for sealing or redaction of appellate briefs. He explained that the circuits take varying approaches to sealing and redaction on appeal. During the advisory committee's discussions, several members had expressed support for the approach of the Seventh Circuit, where sealed items in the record on appeal are unsealed after a brief grace period unless a party seeks the excision of those items from the record or moves to seal them on appeal. This approach is based on the belief that judicial proceedings should be open and transparent. However, members also noted that each circuit currently seems satisfied with its own approach to sealed filings.

Given the division of opinion among the circuits, the advisory committee ultimately decided there was no compelling reason to propose a rule amendment on the topic of sealing on appeal. However, its members believed that each circuit might find it helpful to know how other circuits handle such questions; therefore, shortly after its meeting, Judge Sutton, in one of his last acts as the chair of the advisory committee, wrote to the chief judge and clerk of each circuit to summarize the concerns that have been raised about sealed filings, the various approaches to those filings in different circuits, and the rationale behind the approach of the Seventh Circuit.

MANUFACTURED FINALITY

The advisory committee also revisited the topic of "manufactured finality," which occurs when parties attempt to create an appealable final judgment by dismissing peripheral claims in order to secure appellate review of the central claim. A review of circuit practice found that virtually all circuits agree that an appealable final judgment is created when all peripheral claims are dismissed with prejudice. Many circuits also agree that an appealable final judgment is not created when a litigant dismisses peripheral claims without prejudice, although some circuits take a different view. But less uniformity exists for handling middle ground attempts to "manufacture" finality. For example, there is disagreement in the circuits as to whether an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice by

agreeing not to reassert the peripheral claims unless the appeal results in reinstatement of the central claim. A joint civil-appellate rules subcommittee was appointed to review whether "manufactured finality" might be addressed in the federal rules. On initial examination, members had divergent views.

Before last fall's advisory committee meeting, the Supreme Court accepted for review *SEC v. Gabelli*, 653 F.3d 49 (2nd Cir. 2011), *cert. granted*, 133 S.Ct. 97 (2012). The Second Circuit's jurisdiction in that case rested on "conditional finality." Since the Court might clarify this issue in that case, the advisory committee decided to await the Court's decision before deciding how to proceed.

LENGTH LIMITS FOR BRIEFS

The advisory committee is considering whether to overhaul the treatment of filing-length limits in the Appellate Rules. The 1998 amendments to the Appellate Rules set the length limits for merits briefs by means of a type-volume limitation, but Rules 5, 21, 27, 35, and 40 still set length limits in terms of pages for other types of appellate filings. Members have reported that the page limits invite manipulation of fonts and margins, and that such manipulation wastes time, disadvantages opponents, and makes filings harder to read. The advisory committee intends to consider whether the type-volume approach should be extended to these other types of appellate filings.

CLASS ACTION OBJECTORS

Finally, the advisory committee has received correspondence about so-called "professional" class action objectors who allegedly file specious objections to a settlement and then appeal the approval of the settlement with the goal of extracting a payment from class action attorneys in exchange for withdrawing their appeals. One proposed solution would amend Rule 42 to require court approval of voluntary dismissal motions by class action objectors, together with a certification by an objector that nothing of value had been received in exchange for withdrawing the appeal. Another proposed solution would require an appeal bond from class action objectors sufficient to cover the costs of delay caused by appeals from denials of non-meritorious objections. Judge Colloton suggested that collaboration with the Civil Rules Advisory Committee would likely be required to determine both the scope of and possible remedies for this problem.

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 of November 26, 2012 (Agenda Item 8). As the committee's fall meeting in Washington was canceled as a result of Hurricane Sandy,

there were no action items for the committee.

Information Items

Judge Raggi reported that on the agenda for the advisory committee's Fall 2012 meeting and now high on the agenda for its Spring 2013 meeting is a Department of Justice proposal to amend Rule 4 to permit effective service of summons on a foreign organization that has no agent or principal place of business within the United States. The Department argues that its proposed change is necessary in order to prevent evasion of service by organizations committing offenses within the United States.

Judge Raggi also reported on the status of the proposed amendments to Rule 12, the rule addressing pleadings and pretrial motions. The proposed amendments were published for public comment in August 2011. The amendments clarify which motions must be raised before trial and the consequences if the motions are not timely filed. Numerous comments were received, including detailed objections and suggestions from various bar organizations. The committee's reporters prepared an 80-page analysis of these comments. In its consideration of the comments, the Rule 12 subcommittee reaffirmed the need for the amendment, but concluded that the public comments warranted several changes in its proposal. With those changes, the subcommittee has recommended to the advisory committee that an amended proposal be approved and transmitted to the Standing Committee for its approval. The advisory committee's consideration of the Rule 12 subcommittee's report will take place at its Spring 2013 meeting. Judge Raggi expressed her appreciation for the extended attention already devoted by Judge Sutton to the committee's work on Rule 12.

REPORT OF THE ADVISORY COMMITTEE ON RULES OF EVIDENCE

Judge Fitzwater and Professor Capra delivered the report of the advisory committee, as set forth in Judge Fitzwater's memorandum of November 26, 2012 (Agenda Item 4). There were no action items for the committee.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Professor Capra reported on a symposium the advisory committee hosted in conjunction with its Fall 2012 meeting. The purpose of the symposium was to review the current use (or lack of use) of Rule 502 (on attorney-client privilege and work product and waiver of those protections) and to discuss ways in which the rule can be better known and understood so that it can fulfill its original purposes of clarifying and limiting

waiver of privilege and work product protection, thereby reducing delays and costs in litigation. Panelists included judges, lawyers, and academics with expertise and experience in the subject matter of the rule, some of whom are also veterans of the rulemaking process. The symposium proceedings and a model Rule 502(d) order will be published in the March 2013 issue of the *Fordham Law Review*.

The panel attributed much of the lack of use of Rule 502 as a device to aid in pre-production review to a simple lack of knowledge of the rule by practitioners and judges. Part of this absence of knowledge was attributed to the rule's location in the rules of evidence as opposed to the rules of civil procedure. Various suggestions on promotion of the rule's visibility, including a model Rule 502 order, education through Federal Judicial Center classes and a possible informational letter to chief district judges, are in the process of being implemented or developed.

PROPOSED AMENDMENTS TO FED. R. EVID. 801(d)(1) AND 803(6)-(8)

A published proposed amendment to Rule 801(d)(1), the hearsay exemption for certain prior consistent statements, provides that prior consistent statements are admissible under the hearsay exemption whenever they would otherwise be admissible to rehabilitate the witness's credibility. This proposal has been the subject of only one public comment so far. Proposed amendments to Rule 803(6)-(8)—the hearsay exemptions for business records, absence of business records, and public records—would clarify that the opponent has the burden of showing that the proffered record is untrustworthy. No comments have been received yet on this proposal.

SYMPOSIUM ON TECHNOLOGY AND THE FEDERAL RULES OF EVIDENCE

Judge Fitzwater reported that the advisory committee is planning to convene a symposium to highlight the intersection of the evidence rules and emerging technologies and to consider whether the evidence rules need to be amended in light of technological advances. The symposium will be held in conjunction with the advisory committee's Fall 2013 meeting at the University of Maine School of Law in Portland.

These presentations concluded the first day of the meeting of the Standing Committee.

FRIDAY, JANUARY 4, 2013

REPORT ON PACE OF RULEMAKING

Benjamin Robinson gave a brief presentation on the timing and pace of federal rulemaking over the past thirty years. Judge Sutton had requested the report, noting that at various times in the past both the Federal Judicial Center and the committee have tackled this subject. He specifically pointed to the Easterbrook-Baker "self-study" report by the Standing Committee, 169 F.R.D. 679 (1995), contained in the agenda book.

Mr. Robinson presented a series of charts that demonstrated that over the past thirty years there have been several peaks and valleys in the pace of federal rulemaking. The charts demonstrated that the peaks were caused by legislative activity and to a lesser extent by several rules restyling projects.

For example, bankruptcy legislation in the mid-1980s created the occasion in 1987 for 117 bankruptcy rule changes. Similarly, bankruptcy legislation created the occasion for 95 bankruptcy rule changes in 1991. Additional bankruptcy legislation in 2005 produced a total of 43 bankruptcy rules amendments in 2008. The civil and evidence rules restyling projects also have required a considerable number of rule changes.

Mr. Robinson's presentation initiated a broader discussion of the timing and pace of rulemaking by committee members.

Judge Sutton stated that he had placed this matter on the agenda in part to sensitize the Standing Committee to the work required by the Supreme Court on rule amendments.

At one point during the discussion, Judge Sutton advanced a theoretical proposal that perhaps rule changes could be made every two years instead of every year. For example, the civil and appellate rules committees could group their proposed changes in the even years, while the criminal, evidence, and bankruptcy rules committees could group their proposed changes in the odd years. Judge Sutton noted that such a scheme would have the advantage of predictability both for the Supreme Court and for the bar as to what types of rule changes could be expected in a particular year.

Judge Sutton asked for comments from several of those present, in particular, participants who have had extensive experience over the years in the rulemaking process. Several points emerged during the discussion. First, there is no question that the Supreme Court is very aware of the burden that the rulemaking process places upon it. Chief Justices Burger and Rehnquist were particularly conscious of it. Also, the current rules

calendar places a heavy burden on the Court in that the rule proposals arrive in the spring when the Court is busiest. However, no one argued that seeking a legislative change in the calendar made any sense. Instead, the idea was advanced that the Rules Committees could target the March meeting of the Judicial Conference for its major proposals, rather than the September meeting. This would mean that the rule changes could go to the Court at a more convenient time, such as late summer before its annual session begins on October 1. However, a correlative disadvantage would be the overall extension in the length of time required for a proposed amendment to the rules to be adopted.

Experienced observers pointed out that much of the timing of rulemaking is dictated by external factors such as legislation or decided cases. While the timing of such projects as the restyling of the evidence and civil rules might be discretionary, the need for new rules created by legislation or other external events often is not. All participants appeared to agree that keeping the Supreme Court involved in the rulemaking process is most important to its integrity and standing. Thus, all agreed at a minimum that greater sensitivity to the needs and desires of the Court as to the timing of proposed rules changes is highly advisable.

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff, Professor Gibson, and Professor McKenzie presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum of December 5, 2012 (Agenda Item 7). The report covered four major subjects: (1) revisions to the official forms for individual debtors; (2) a mini-conference on home mortgage forms and rules; (3) the development of a Chapter 13 form plan and related rule amendments; and (4) electronic signature issues.

DRAFTS OF REVISED OFFICIAL FORMS FOR INDIVIDUAL DEBTORS

Judge Wedoff first reported on the restyled Official Bankruptcy Forms for individual debtors. These forms are the initial product of the forms modernization project, a multi-year endeavor of the advisory committee, working in conjunction with the Federal Judicial Center and the Administrative Office. The dual goals of the forms modernization project are to improve the official bankruptcy forms and to improve the interface between the forms and available technology.

In August 2012, the first nine forms were published for public comment. To date, few comments have been received; however, the advisory committee expects to receive more comments before the February 15, 2013, deadline, and it will review those comments before seeking approval at the June meeting to publish the following eighteen remaining forms for individual debtor cases that have not yet been published:

Forms To Be Considered in June

- Official Form 101—Voluntary Petition for Individuals Filing for Bankruptcy
- Official Form 101AB—Your Statement About an Eviction Judgment Against You – Parts A and B
- Official Form 104—List in Individual Chapter 11 Cases of Creditors Who Have the 20 Largest Unsecured Claims Against You Who are not Insiders
- Official Form 106 – Summary—A Summary of Your Assets and Liabilities and Certain Statistical Information
- Official Form 106A—Schedule A: Property
- Official Form 106B—Schedule B: Creditors Who Hold Claims Secured by Property
- Official Form 106C—Schedule C: Creditors Who Have Unsecured Claims
- Official Form 106D—Schedule D: The Property You Claim as Exempt
- Official Form 106E—Schedule E: Executory Contracts and Unexpired Leases
- Official Form 106F—Schedule F: Your Codebtors
- Official Form 106 – Declaration—Declaration About an Individual Debtor's Schedules
- Official Form 107—Your Statement of Financial Affairs for Individuals Filing for Bankruptcy
- Official Form 112—Statement of Intention for Individuals Filing Under Chapter 7
- Official Form 119—Bankruptcy Petition Preparer's Notice, Declaration and Signature
- Official Form 121—Your Statement About Your Social Security Numbers
- Official Form 318—Discharge of Debtor in a Chapter 7 Case
- Official Form 423—Certification About a Financial Management Course
- Official Form 427—Cover Sheet for Reaffirmation Agreement

In anticipation of seeking publication in June, Judge Wedoff gave the committee an extensive preview of each of the above forms and took under advisement specific committee member comments on each of them with a plan to incorporate these comments in the preparation of the advisory committee's ultimate proposals.

MINI-CONFERENCE ON HOME MORTGAGE FORMS AND RULES

Judge Wedoff reported on a successful mini-conference held by the advisory committee on September 19, 2012, to explore the effectiveness of the new rules and forms concerning the impact of home mortgage rules and reporting requirements for chapter 13 cases, which went into effect on December 1, 2011. The mini-conference reflected a general acceptance of the disclosure requirements of the new rules, but pointed out various specific difficulties that will likely require some subsequent fine-tuning either

by the advisory committee or through case-law development.

CHAPTER 13 FORM PLAN AND RELATED RULE AMENDMENTS

Professor McKenzie reported on the advisory committee's development of a national form plan for chapter 13 cases. The working group presented a draft of the form plan for preliminary review at the advisory committee's Fall 2012 meeting. The group also proposed amendments to Bankruptcy Rules 3002, 3007, 3012, 3015, 4003, 5009, 7001, and 9009, specifically to require use of the national form plan and to establish the authority needed to implement some of the plan's provisions.

The advisory committee discussed the proposed form and rules amendments and accepted the working group's suggestion that the drafts be shared with a cross-section of interested parties to obtain their feedback on the proposals. Professor McKenzie reported that a mini-conference on the draft plan and proposed rule amendments was scheduled to take place in Chicago on January 18, 2013. The working group will make revisions based on the feedback received at the mini-conference and then present the model plan package to both the consumer issues and forms subcommittees for their consideration. The subcommittees will report their recommendations to the advisory committee at its Spring 2013 meeting. If a chapter 13 form plan and related rule amendments are approved at that meeting, the advisory committee will request that they be approved for publication in August 2013 at the June meeting of the Standing Committee.

CONSIDERATION OF ELECTRONIC SIGNATURE ISSUES

The last item of Judge Wedoff's report was an update on the advisory committee's consideration (at the request of the forms modernization project) of a rule establishing a uniform procedure for the treatment and preservation of electronic signatures. The advisory committee has requested Dr. Molly Johnson of the Federal Judicial Center to gather information on existing practices regarding the use of electronic signatures by nonregistered individuals and requirements for retention of documents with handwritten signatures. Her findings will be available by the end of this year and will be reported to the advisory committee at its Spring 2014 meeting.

NEXT MEETING

The Standing Committee will hold its next meeting in Washington, D.C., on June 3 and 4, 2013.

TAB 2

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TAB 2A

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 08-AP-L and 09-AP-C

In August 2012, proposed amendments to Appellate Rule 6 (concerning appeals in bankruptcy matters) were published for comment along with a proposed new version of Part VIII of the Bankruptcy Rules (concerning bankruptcy appellate practice). The proposed revision to Appellate Rule 6(b) updates some cross-references and removes an ambiguity that arose from the 1998 restyling of the Appellate Rules. Proposed new Appellate Rule 6(c) addresses permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2); it is designed to dovetail with proposed new Bankruptcy Rule 8006.

Though many comments were submitted on the proposed new Part VIII Rules, only one comment was submitted concerning the proposed amendment to Appellate Rule 6. (That comment is enclosed.) The Bankruptcy Rules Committee will be considering some changes to the Part VIII proposals in response to the public comments. Our agenda materials include the redlined draft of the Part VIII Rules, showing those possible changes, and a memo from Professor Gibson summarizing and responding to the public comments on the Part VIII Rules package.[1] It does not seem to me that any of the changes that may be made to the Part VIII Rules package would call for changes to the Appellate Rule 6 proposal.

Part I of this memo sets out the Appellate Rule 6 proposal as published. Part II describes the comment submitted on Appellate Rule 6 by Judge S. Martin Teel, Jr., a bankruptcy judge in the District of Columbia. Part III notes relevant post-publication changes that the Bankruptcy Rules Committee will be considering in the Part VIII Rules, and argues that none of these changes will require alterations in the Rule 6 proposal. Part IV suggests that the Committee approve the Rule 6 amendments as published and add Judge Teel's suggestions to the Committee's agenda as a new item. Part V highlights one issue (that arose in the context of discussions concerning the comments submitted on the proposed amendments to the Part VIII Rules) concerning Appellate Rule 28.1's treatment of length limits on cross-appeals; that issue has nothing to do with the Appellate Rule 6 proposal, but I mention it here to flag it for the Committee's possible future consideration.

[1] In the electronic version of these materials, Professor Gibson's memo and the Part VIII redline are included in Volume II.

I. Text of Rule and Committee Note as published

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b)~~. But there are 3 exceptions~~, but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~ 12(c), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel~~.~~";

and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for ~~r~~Rehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8022 is filed, the time to appeal for all parties runs from the entry of the order disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The ~~r~~Record on ~~a~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

- the redesignated record as provided above;
- the proceedings in the district court or bankruptcy appellate panel; and
- a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ Making the ~~r~~Record Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and ~~send~~ promptly make it available ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. ~~Unless directed to do so by a party or the circuit clerk~~ If the

clerk makes the record available in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk to assemble the record and ~~forward the record~~ make it available. When the record is made available in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ made available in place of the redesignated record~~, b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be ~~sent~~ made available.

(D) Filing the ~~r~~Record. ~~Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must file it and immediately notify all parties of the filing date~~ When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) as used in any applicable rule, "district court" or "district clerk" includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk; and

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(2) Additional Rules. In addition, the following rules apply:

(A) The Record on Appeal. Bankruptcy Rule 8009 governs the record on appeal.

(B) Making the Record Available. Bankruptcy Rule 8010 governs completing the record and making it available.

(C) Stays Pending Appeal. Bankruptcy Rule 8007 applies to stays pending appeal.

(D) Duties of the Circuit Clerk. When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(E) Filing a Representation Statement. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are

amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to "file" the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

II. Summary of public comment

12-AP-001: Judge S. Martin Teel, Jr. Judge Teel, a United States Bankruptcy Judge in the District of Columbia, suggests that Appellate Rule 6(b)(2)(B)(iii)'s list of the contents of the record on appeal be revised by deleting the Rule's current reference to "a certified copy of the docket entries prepared by the clerk under Rule 3(d)" and inserting "the docket entries maintained by the clerk of the district court or bankruptcy appellate panel." Judge Teel states that the reference to certification is unnecessary, that the lower-court clerk maintains rather than prepares the docket entries, and that the cross-reference to Appellate Rule 3(d) is superfluous. Turning to Appellate Rule 3(d) itself, Judge Teel also questions why the lower-court clerk should be required to transmit a copy of the docket entries to the court of appeals now that docket entries are available electronically.

III. Post-publication changes in the Part VIII Rules

At its upcoming spring meeting, the Bankruptcy Rules Committee will be considering some changes to the Part VIII Rules package as published. I do not think that any of those changes requires alteration of the Appellate Rule 6 proposal as published. In Part III.A, I discuss the changes that are directly relevant to the operation of Rule 6. Part III.B briefly lists other changes that do not seem to me to affect the operation of Rule 6.

A. Relevant changes to the Part VIII Rules package

Although the Bankruptcy Rules Committee will be considering a number of possible changes (to the Part VIII Rules package) that have some relevance to appeals to the courts of appeals, most of those changes are very straightforward; I list those changes in the table below.

There is one proposed change to Bankruptcy Rule 8007, as published, that may be of interest to the Appellate Rules Committee. Rule 8007 concerns stays pending appeal, and under proposed Appellate Rule 6(c)(2)(C), it will apply to direct appeals to the court of appeals under 28 U.S.C. § 158(d)(2). Rule 8007(a), like Appellate Rule 8(a)(1), requires that a litigant seeking a stay must ordinarily move first in the bankruptcy court. Rule 8007(a)(2) states that this "motion may be made either before or after the notice of appeal is filed." As Professor Gibson explains in her memo on the Part VIII proposals, there is no similar timing provision "in either current Bankruptcy Rule 8005 or in FRAP 8. Its purpose, insofar as the bankruptcy court is concerned, is to clarify that a bankruptcy court retains jurisdiction to rule on a motion for a stay pending appeal even after a notice of appeal has been filed. That rule is consistent with the case law."

As published, Rule 8007(b)(2) provided that "[a] motion for the relief specified in subdivision (a)(1)—or to vacate or modify a bankruptcy court's order granting such relief—may be made in the court where the appeal is pending or where it will be taken." A comment submitted on this proposal stated that "[a]lthough it is appropriate to allow a motion for stay or other relief to be made in the bankruptcy court before a notice of appeal is filed, as subdivision (a)(2) provides, a notice of appeal should be required before an appellate court can hear such a motion. That is how the appellate court obtains jurisdiction. The rule does not explain how the motion gets before the appellate court if no notice of appeal has been filed." Professor Gibson's memo states: "A search … turned up no authority concerning whether a notice of appeal must be filed before an appellate court may rule on a motion for a stay pending appeal. As published, subdivision (b)(1) suggested that the appellate court does have that authority. The Subcommittee recommends eliminating that suggestion."

The Subcommittee's recommended approach seems to me to be consistent with the statutory language governing direct appeals under 28 U.S.C. § 158(d)(2). Section 158(d)(2)(D) provides: "An appeal under this paragraph does not stay any proceeding of the bankruptcy court, the district court, or the bankruptcy appellate panel from which the

appeal is taken, unless the respective bankruptcy court, district court, or bankruptcy appellate panel, *or the court of appeals in which the appeal is pending*, issues a stay of such proceeding pending the appeal." 28 U.S.C. § 158(d)(2)(D) (emphasis added).

This proposed change thus seems to me unproblematic, as do the other changes noted in the table below:

Part VIII Rule:	Change contemplated in response to public comment:	My comments:
8006	In subdivision (b), add "under Rule 8002" after "effective date" on lines 13-14.	Rule 8006 addresses the certification of a direct appeal to the court of appeals. This proposed change to Rule 8006(b) is a clarifying change.
8006	In subdivision (f)(4), delete "not governed by Rule 9014 and are" in lines 71-72.	This subdivision concerns the procedure for seeking – from a bankruptcy court, district court, or BAP – a certification for direct review in a court of appeals under 28 U.S.C. § 158(d)(2). The noted language is being deleted as unnecessary. (Rule 9014 applies to contested matters "not otherwise governed by these rules.")
8006	At the end of subdivision (g), add "in accordance with F.R. App. P. 6(c)."	This is a clarifying cross-reference.
8006	Add "with the circuit clerk" after "timely filed" in the next-to-the-last line of the first paragraph of the Committee Note.	Clarifying change.
8007	Change the order in which the courts are listed in the title of subdivision (b).	No change in substance.
8007	In subdivision (b)(1), delete "or where it will be taken" in lines 21-22.	As noted in the discussion above this table, this change seems to accord with the statutory framework.
8007	In subdivision (e)(1), substitute "order the continuation of" for "continue."	Clarifying change removes ambiguous language that had been recommended by the style consultant.
8007	Add a discussion of subdivision (e) in the Committee Note.	Clarifying change.
8009	In subdivision (a)(2) and (3), add "with the bankruptcy clerk" after "may file" on lines 20-21 and 28.	Clarifying change.

Part VIII Rule:	Change contemplated in response to public comment:	My comments:
8009	Add "the docket entries maintained by the bankruptcy clerk" as the first item in (a)(4).	As Professor Gibson notes, the addition of this item to the listing of the components of the record on appeal from the bankruptcy court is a helpful addition. Please see Part III of this memo for further discussion of this proposed change.
8010	In subdivision (a)(1), change "the person or service that the bankruptcy court designates" to "the person or service selected in accordance with bankruptcy court procedures."	Concerns practice in the bankruptcy court.
8010	In subdivision (a)(2)(A), add "in accordance with Rule 8009(b)" on line 11 following "order for a transcript."	Makes clear the appropriate procedure in the bankruptcy court.

B. Other changes to the Part VIII Rules package

This table summarizes changes to the Part VIII Rules package that do not seem relevant to the operation of Appellate Rule 6.

Part VIII Rule:	Change contemplated in response to public comment:	My comments:
8002	In subdivision (c), delete "to a district court or BAP" after "bankruptcy court" on line 58.	Stylistic change.
8003	In subdivision (c), change references to "serving" and "service" to "transmitting" and "transmission," or vice versa. (Two alternative proposals for change.)	This provision concerns appeals as of right to the district court or BAP.
8003	In subdivision (d)(2), lines 61-62, "case and the title of the adversary proceeding, if any" is substituted for "court action."	This concerns details of the docketing of an appeal in the district court or BAP.
8004	In subdivision (c)(2), make the same change regarding the title under which an appeal is docketed that is proposed for Rule 8003(d)(2).	This concerns details of the docketing of an appeal in the district court or BAP.
8004	Delete the last sentence of subdivision (c)(3) on lines 45-46.	This Rule concerns appeals to a district court or BAP by permission; and the change brings the proposed Part VIII Rule into closer parallel with the FRAP.

Part VIII Rule:	Change contemplated in response to public comment:	My comments:
8004	Possibility, flagged by Bankruptcy Committee's Subcommittee, of "eliminate[ing] the requirement of a separate notice of appeal and requir[ing] a motion for leave to appeal to include information that would be in a notice of appeal." Offered for consideration as an alternative.	This Rule concerns appeals to a district court or BAP by permission. Moreover, this change would likely not be adopted in this cycle because it would likely require republication of Rule 8004.
8005	In subdivision (a), change "that conforms substantially to" to "using" in order to mandate the use of the Official Form that for appellants combines the Notice of Appeal and the Statement of Election. Make conforming changes to the Committee note.	This Rule concerns the procedure for an election to have an appeal heard by the district court instead of the BAP.
8005	Add "and notify the bankruptcy clerk of the transfer" at the end of subdivision (b). Make conforming changes to the Committee Note.	This Rule concerns the procedure for an election to have an appeal heard by the district court instead of the BAP.
8005	Add a sentence to the first paragraph of the Committee Note explaining that the rule only applies in districts in which appeals to a BAP are authorized.	This Rule concerns the procedure for an election to have an appeal heard by the district court instead of the BAP.
8012	At the end of the first paragraph of the Committee Note, add an explanation that the broad definition of "corporation" in § 101(9) of the Code applies to this rule.	Concerns corporate disclosure statement in connection with appeals to district court or BAP.
8013	Add "Unless the court orders otherwise," to the beginning of subdivision (a)(D)(ii) and (iii) on lines 33-36.	Concerns motion practice in the district court or BAP.
8013	In subdivision (d)(2)(B), change "reconsider" to "consider" on line 67.	Concerns motion practice in the lower courts.
8015	In subdivision (f), delete "or order in a particular case" following "local rule" in line 122, and make a conforming change to the Committee Note.	Concerns briefing practices in the district court or BAP.
8015	Add language to the penultimate paragraph of the Committee Note to clarify the distinction between Rule 8011(a)(3) and subdivision (f) of this rule.	Concerns briefing practices in the district court or BAP.

Part VIII Rule:	Change contemplated in response to public comment:	My comments:
8015	Revise the Committee Note's discussion of subdivision (a)(7) to clarify that using the type-volume limitations for brief lengths will permit briefs that exceed the number of pages specified in the rule.	Concerns briefing practices in the district court or BAP.
8016	Add subdivision (d)(2)(D) that parallels Rule 8015(a)(7)(B)(iii).	Concerns briefing on cross-appeals in the district court or BAP. See Part V below for discussion of parallel issue concerning the FRAP.
8016	Delete subdivision (f), and make a conforming change to the Committee Note.	Concerns briefing on cross-appeals in the district court or BAP.
8018	In subdivision (a)(4), change "the appeal may be dismissed" to "an appellee may move to dismiss the appeal or the appellate court, after notice, may dismiss the appeal on its own motion."	Concerns appeals to the district court or BAP.
8024	In subdivision (c), change references to "original documents" to "physical items," and make conforming changes to the Committee Note. (The term "physical items" would cover documents and any exhibits that are physically, rather than electronically, sent to the appellate court.)	Concerns duties of district clerk or BAP clerk upon disposition of appeal to district court or BAP.

IV. Recommendation concerning the current proposal

I recommend that the Committee approve the proposed amendments to Appellate Rule 6 as published, and that the Committee add Judge Teel's comments to the Committee's agenda as a new item.

Judge Teel's suggestion concerns an aspect of Appellate Rule 6(b)(2)(B)(iii) that is already present in the current version of the Rule. The Committee has not received any reports, to date, that this aspect of the Rule's current wording is causing problems in practice. (I take Judge Teel's objection to be more that the wording is conceptually inappropriate; his comment does not report any practical difficulties that his court has encountered under the present Rule.) Although Judge Teel identifies wording that may be worth consideration in the context of a larger project to review the Appellate Rules in light of the shift to electronic filing, it does not seem to me that his proposal is ripe for adoption as part of the current package of amendments to Rule 6.

Rule 6(b)(2)(B)(iii)'s statement that the record includes "a certified copy of the docket entries prepared by the clerk under under Rule 3(d)" roughly parallels Appellate Rule 10(a)(3), which states that the record includes "a certified copy of the docket entries prepared by the district clerk." And the reference to a "certified copy of the docket entries" also appears in Appellate Rule 6(b)(2)(C)(ii) and Appellate Rule 11(e)(1). Thus, if the Committee agrees with Judge Teel's suggestion that the "certified copy" language is unnecessary, it might make more sense to hold off on that change and to implement it in the context of a change to all of these Rules.

More broadly, Judge Teel's suggestion seems workable insofar as it would apply to courts where both the lower court and the court of appeals have entirely shifted to electronic transmission of the record. However, the Committee deliberately drafted the proposed amendments to Appellate Rule 6 on the assumption that although the record will increasingly be "made available" electronically it will still, in other instances, be "made available" in paper form instead. Given that fact, I would not suggest adopting Judge Teel's proposed language at this time.

It should be noted that the Bankruptcy Rules Committee adopted Judge Teel's formulation when it decided, in response to his suggestion, to add "the docket entries maintained by the bankruptcy clerk" to Rule 8009(a)(4)'s list of the required contents of the record on appeal from the bankruptcy court. I do not think that the difference in wording between this language in proposed Rule 8009(a)(4) and the language of Rule 6(b)(2)(B)(iii) ("a certified copy of the docket entries prepared by the clerk under Rule 3(d)") will cause problems; Professor Gibson shares my view on this. The docket entries to which Rule 8009(a)(4) refers are those that concern the proceedings in the bankruptcy court; the docket entries to which Rule 6(b)(2)(B)(iii) refers are those that concern the proceedings in the district court or bankruptcy appellate panel.

Judge Teel also notes that, with the advent of CM/ECF, there may no longer be a need to retain in Appellate Rule 3(d) the directive to the district clerk to send to the circuit clerk "a copy … of the docket entries – and any later docket entries." This may be true for cases in which the court of appeals is accessing the record electronically, at least as to the provision of the initial set of lower-court docket entries. However, one useful function of Rule 3(d)'s requirement that the district clerk send "any later docket entries" to the circuit clerk is that this helps to ensure that the court of appeals is made aware of lower-court docket activity that post-dates the filing of the notice of appeal. Unless we can be sure that the circuit clerk will be automatically notified by the electronic system about subsequent entries in the lower-court docket, this feature of current Rule 3(d) seems worthwhile.

In sum, Judge Teel's suggestions warrant further study, and I suggest that the Committee docket them as a separate agenda item that it can address in the context of the larger electronic-filing project.

V. Rule 28.1's length limits for briefing on cross-appeals

In drafting the proposed Part VIII Rules – which are modeled closely on the current Appellate Rules – Professor Gibson noticed that Appellate Rule 28.1's length limits for briefing in connection with cross-appeals differ in one respect from Appellate Rule 32(a)(7)'s length limits for briefing in connection with other appeals. Whereas Rule 32(a)(7)(B)(iii) specifies items that are excluded for purposes of calculating the type-volume limitation, Rule 28.1(e)(2) includes no such provision. The 2005 Committee Note to Rule 28.1(e) does not explain the omission. I am guessing that lawyers, in computing the type-volume limit for briefs in cross-appeals, may simply be assuming that it is permissible to exclude the items that Rule 32(a)(7)(B)(iii) lists as excludable. However, I wanted to mention this issue to the Committee in case members think that it would be worthwhile to consider amending Rule 28.1(e)(2) to incorporate language like that in Rule 32(a)(7)(B)(iii). This issue ties in with the larger question of length limits treated in Item No. 12-AP-E.

VI. Conclusion

I recommend that the Committee approve the proposed amendments to Appellate Rule 6 as published, and that it consider whether to add to its study agenda, as separate items, Judge Teel's suggestions (described in Part II of this memo) and the question concerning length limits on cross-appeals (described in Part V of this memo).

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TAB 2B

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COMMENTS OF BANKRUPTCY JUDGE S. MARTIN TEEL, JR.
RE PROPOSED FED. R. APP. P. 6(b)(2)(B)(iii)

I suggest that proposed Fed. R. App. P. 6(b)(2)(B)(iii) be changed to read:

> (iii) The record on appeal consists of:
> • the redesignated record as provided above;
> • the proceedings in the district court or bankruptcy appellate panel; and
> • ~~a certified copy of~~ the docket entries ~~prepared~~ maintained by the clerk ~~under Rule 3(d)~~ of the district court or bankruptcy appellate panel.

[Deletions noted by strike-throughs; addition noted by highlighting.]

The requirement of a **certified** copy of the docket entries is unnecessary: the district court clerk's (or BAP clerk's) transmission of a copy of the docket entries or the docket entries' availability on the district court's (or BAP's) electronic docket is in itself a certification that it is a copy of the docket entries.[1] The district court clerk (or BAP clerk) does not **prepare** the docket entries, and instead **maintains** the docket entries.

Rule 3(d), referred to in the current proposal, does not refer to **certifying** the copy of the docket entries or **preparing** the docket entries. Rule 3(d) provides in relevant part:

> (1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. **The clerk must promptly send a copy** of the notice of appeal and **of the docket entries—and any later docket entries—to the clerk of the court of appeals named in the notice.** The district clerk must note, on each

[1] I have made a similar recommendation that proposed Fed. R. Bankr. P. 8009(b)(4) be changed to add that the record on appeal includes "the docket entries maintained by the bankruptcy clerk."

copy, the date when the notice of appeal was filed.

[Emphasis added.] There is no reason to refer in 6(b)(2)(B)(iii) to Rule 3(d): upon complying with Rule 3(d), a copy of the docket entries will already be in the court of appeals. It suffices in Rule 6(b)(2)(B)(iii) to refer to the docket entries maintained by the clerk of the lower court.[2]

S. Martin Teel, Jr.
United States Bankruptcy Judge
for the District of Columbia
February 9, 2013

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[2] Indeed, the docket entries are available electronically via PACER, it is questionable why the lower court needs to transmit to the court of appeals a copy of the docket entries with the notice of appeal: they will be part of the record under Rule Rule 6(b)(2)(B)(iii), and there is no apparent reason why they will be needed beforehand. This sugests that eventually the Advisory Committee should propose that Rule 3(d)(1) be amended to provide:

> (1) The district clerk must serve notice of the filing of a notice of appeal by mailing a copy to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. When a defendant in a criminal case appeals, the clerk must also serve a copy of the notice of appeal on the defendant, either by personal service or by mail addressed to the defendant. The clerk must promptly send a copy of the notice of appeal ~~and of the docket entries—and any later docket entries—~~to the clerk of the court of appeals named in the notice. The district clerk must note, on each copy, the date when the notice of appeal was filed.

At the same time, there is another questionable part of Rule 3(d)(1): in this day of electronic filing it makes little sense to require the clerk to serve the notice of appeal instead of requiring that the appellant to file a certificate of service of the notice of appeal, but that is another issue.

TAB 2C

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Please note:

In the electronic version of these materials, Professor Gibson's March 20, 2013 memorandum and the redlined version of the proposed Part VIII Rules are located in Volume II.

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TAB 3A

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-H

This item arises from Judge Harris Hartz's suggestion that the Committee review a concern raised by the Tenth Circuit's opinion in *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007). The concern was that where Civil Rule 58(a) requires a judgment to be set out in a separate document and the district court fails to provide such a separate document, under Civil Rule 58(c)(2) the time for making postjudgment motions does not begin to run until 150 days after the entry of the judgment in the docket. In such instances, an appellant might make a very belated (but still technically timely) postjudgment motion that, under Appellate Rule 4(a)(4), suspends the effectiveness of any previously noticed appeal pending the disposition of the motion.

The Committee discussed this proposal at its spring and fall 2008 meetings. The Committee initially considered adopting a time limit within which tolling motions must be filed even when there has been no provision of a separate document. Ultimately, however – after consultation with the Chair and Reporter of the Civil Rules Committee – the Committee decided that the issue could be better addressed by encouraging district court compliance with the requirements of Civil Rule 58. Judge Hartz took steps to raise awareness of the issue among district clerks within the Tenth Circuit, and those efforts produced a perceptible improvement in compliance. At the fall 2008 meeting, the Committee voted to recommend to the Standing Committee that appropriate steps be taken to raise awareness of the problem, in coordination with the Civil Rules Committee and Bankruptcy Rules Committee. Judge Stewart, the Chair of the Committee, conveyed this recommendation to the Standing Committee at its January 2009 meeting.

Since then, this item has lain dormant. It thus seems that the time may have come to remove this item from the Committee's agenda. As background for the Committee's consideration of whether to do so, I enclose relevant memoranda and excerpts of the minutes of the meetings mentioned above.

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TAB 3B

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MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-H

Judge Harris Hartz has suggested that the Committee review the issues raised by the Tenth Circuit's opinion in *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007). The *Warren* opinion presents an intricate nest of doctrinal issues. Part I of this memo summarizes the case's facts and reasoning. Part II concludes that the *Warren* court's discussion of the separate document requirement should not raise any concern for the Committee. Part III argues that *Warren* erred in its discussion of the 2002 amendments' effect on the doctrine set by *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam), but that this error would not appear to warrant a rule amendment at this time.

I. *Warren*'s facts and holdings

Kirk Warren was injured in a car accident involving his brother's car.[1] Warren sued American Bankers in federal court in diversity, asserting rights under a "resident relative" provision in certain of his family members' insurance policies with American Bankers. The district court dismissed Warren's complaint based on the conclusion that under the applicable state law Warren's claim was not yet ripe.

The district court entered its order of dismissal on June 23, 2006, but did not set out the judgment in a separate document as required by Civil Rule 58(a). On Monday, July 24, 2006, Warren filed a notice of appeal. On July 28, he filed a "motion to reconsider" in the district court. American Bankers moved to strike the motion for lack of jurisdiction (due to the pending appeal). Warren "responded that the notice of appeal was simply a precautionary measure because the court had not entered a separate judgment."

By order filed September 19, 2006, the district court held that it lacked jurisdiction to consider the motion; it reasoned that the notice of appeal was effective despite the fact that the

[1] Unless otherwise noted, this memo takes the facts and procedural history of the case from *Warren*, 507 F.3d at 1241-42. Copies of the court of appeals and district court opinions in *Warren* are enclosed.

court had not entered the judgment of dismissal in a separate document:

> No separate entry was required in this case because there was no judgment adjudicating the merits of any of the plaintiff's claims in that this Court's order dismissed the entire civil action for lack of subject matter jurisdiction. Rule 4(a)(1) of the Federal Rules of Appellate Procedure expressly provides for the filing of a notice of appeal within 30 days after the judgment or order appealed from is entered. Judgment and order are stated in the disjunctive. This Court could not enter a judgment in a case in which it has no jurisdiction. Accordingly, the notice of appeal was timely filed and did deprive this Court of jurisdiction to consider the motion for reconsideration.

Warren v. American Bankers Ins. Co. of Florida, No. 04-cv-01876-RPM, 2006 WL 4968123, at *1 (D. Colo. June 23, 2006), *vacated and remanded*, 507 F.3d 1239 (10th Cir. 2007).

On October 19, 2006, Warren filed an amended notice of appeal that encompassed the denial of the motion to reconsider. On appeal, the Tenth Circuit held that the district court erred in failing to apply Rule 58(a)'s separate document requirement. 507 F.3d at 1243. It reasoned, however, that despite the failure to comply with the separate document requirement, there was jurisdiction over the appeal from the original judgment because 150 days had passed since the entry of the dismissal order. *Id.* at 1242 n.1. Next, it held that the "motion to reconsider" was in reality a timely Rule 59(e) motion to alter or amend the judgment. *Id.* at 1244. The court suggested that the July 24, 2006 notice of appeal had not yet become effective at the time that the Rule 59(e) motion was filed, and reasoned that in any event the timely Rule 59(e) motion "further suspended" the effectiveness of the previously-filed notice of appeal. *Id.* at 1244-45. Thus, the court of appeals concluded that the district court was wrong to conclude that it lacked jurisdiction to consider the Rule 59(e) motion. *Id.* at 1245. The court accordingly vacated and remanded for the district court to address the Rule 59(e) motion. *Id.*

II. Interpretation of Civil Rule 58's separate document requirement

Warren holds that there is no exception to Civil Rule 58(a)'s separate document requirement for dismissals based on a lack of subject matter jurisdiction. Part III.A. notes briefly that this holding seems clearly correct. *Warren* also states in dictum an "exception" to the separate document requirement where the order contains no analysis; Part III.B. concludes that this doctrine would not seem to merit any action by the Committee.

A. Dismissals for lack of subject matter jurisdiction

As the Tenth Circuit pointed out, Civil Rule 58(a) requires that "[e]very judgment and

amended judgment must be set out in a separate document."[2] Though Rule 58(a) lists five exceptions to that requirement, dismissals for lack of subject matter jurisdiction are not among them. The goals of clarity and certainty would be undermined if additional exceptions were read into Rule 58(a) based on the nature of the reasons for the dismissal. *Warren* seems clearly correct in holding that dismissals for lack of subject matter jurisdiction do not fall within an exception to Rule 58(a)'s separate document requirement.

B. Dismissal orders that lack any reasoning

The Tenth Circuit noted in passing a judge-made exception to Rule 58(a)'s separate document requirement where a final order "contain[s] neither a discussion of the court's reasoning nor any dispositive legal analysis." 507 F.3d at 1243 n.2. The court quoted pre-2002 caselaw stating that "orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis can act as final judgments if they are intended as the court's final directive and are properly entered on the docket." *Trotter v. Regents of University of New Mexico*, 219 F.3d 1179, 1183 (10th Cir. 2000) (quoting *Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992)). This view does not seem to offend the goals that the separate document requirement is designed to serve.

The separate document requirement was introduced into Civil Rule 58 by the 1963 amendments. The 1963 Committee Note explained that the requirement was intended to eliminate doubt as to when the periods for post-judgment motions and for appeals begin to run: "The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment." Over the next four decades, problems arose because courts sometimes failed to comply with the separate document requirement, thus failing to trigger the time limits for post-judgment motions and appeals. The 2002 amendments to Civil Rule 58 and Appellate Rule 4 addressed this problem. Those amendments specified when a separate document is necessary; they also set outer limits on post-judgment motions and appeal time limits by providing that if a separate document is required, then judgment is considered to be entered when the judgment is entered in the civil docket and "the earlier of these events occurs: (A) it is set out in a separate document; or (B) 150 days have run from the entry in the civil docket." Civil Rule 58(c)(2); see also Appellate Rule 4(a)(7)(A)(ii). The 2002 amendments did not, however, address the question of what constitutes a "separate document." The 2002 Committee Note to Rule 58 observes: "No attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document. It is easy to prepare a separate

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[2] For this purpose, a judgment dismissing a case for lack of subject matter jurisdiction is a judgment like any other. The district court erred in reasoning that it "could not enter a judgment in a case in which it has no jurisdiction." After all, courts always have jurisdiction to determine their jurisdiction. *See, e.g.*, Rosado v. Wyman, 397 U.S. 397, 403 n.3 (1970) (noting "the truism that a court always has jurisdiction to determine its own jurisdiction").

document that recites the terms of the judgment without offering additional explanation or citation of authority. Forms 31 and 32 provide examples."

This brief summary of the separate document requirement's history suggests no particular reason to think that the goals of the requirement would be thwarted by the Tenth Circuit's "judicial exception to Rule 58 ... for final orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis." *Warren*, 507 F.3d at 1243 n.2. Viewed from a different angle, it might be said that the "judicial exception" is not really an exception at all; rather it might be seen to proceed from the view that when the final order contains no reasoning or analysis the final order itself can *constitute* the separate document.

In any event, this aspect of the *Warren* opinion does not present an innovation; the line of cases noting this "exception" existed at the time of the 2002 amendments. Now, as then, this seems a matter that need not be further addressed in the Rules.

III. *Mallis* and the 2002 amendments

Recognizing that Warren had filed a notice of appeal, the *Warren* court dealt in a footnote with the question of whether that decision to file a notice of appeal waived the requirement of a separate document. The court's analysis is worth noting because it appears to misconstrue the effect of the 2002 amendments to Appellate Rule 4(a):

> For purposes of appellate jurisdiction, a party-at least prior to the 2002 amendments to Rule 58(b)-could waive Rule 58's separate judgment requirement: "[I]f the only obstacle to appellate review is the failure of the district court to set forth its judgment on a separate document, there would appear to be no point in obliging appellant to undergo the formality of obtaining a formal judgment." *Mallis*, 435 U.S. at 386, 98 S.Ct. 1117 (internal quotations omitted), *called into doubt by Outlaw v. Airtech Air Conditioning and Heating, Inc.*, 412 F.3d 156, 162-163 (D.C. Cir. 2005) (Roberts, J.). Under *Mallis*, we have appellate jurisdiction per 28 U.S.C. § 1291 to consider Plaintiff's appeal despite the district court's failure to enter a separate Rule 58 judgment following entry of its dismissal order. Moreover, even assuming the 2002 amendments to Rule 58(b) supercede *Mallis*, we have appellate jurisdiction in this case because 150 days have elapsed since the district court entered its dismissal order. *See* Fed. R.App. P. 4(a)(7)(A)(ii); *Outlaw*, 412 F.3d at 163.[3]

Appellate Rule 4(a)(7)(B) settles the question with which the *Warren* court was wrestling in this footnote. Rule 4(a)(7)(B) provides: "A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the

[3] *Warren*, 507 F.3d at 1242 n.1.

validity of an appeal from that judgment or order." The 2002 Committee Note explains:

> New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in *Mallis* and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

Although the *Warren* court appeared to think that the D.C. Circuit's decision in *Outlaw* called *Mallis* into doubt, that is not how I read *Outlaw*. (It would be surprising if then-Judge Roberts – the author of the *Outlaw* opinion and a member of the Appellate Rules Committee at the time the 2002 amendments were under discussion – were to think that the 2002 amendments overruled *Mallis*.) *Outlaw* does note that the 2002 amendments to Appellate Rule 4(a) changed prior law, but the prior law to which *Outlaw* refers is the pre-2002 rule that if a separate document was required and not provided then the appeal time did not begin to run. I have bolded the relevant language in the block quote below to highlight the *Outlaw* court's chain of reasoning:

> **Prior to December 1, 2002, that oversight would have saved Outlaw's appeal without the need to consider Appellate Rule 4(a)(2): her time to appeal runs from the entry of judgment, and thus would not even begin to run until the district court clerk entered the separate document required by Rule 58**.... Our dismissal of her appeal at most would only have temporarily postponed our ability to reach the merits, because on remand the district court would simply enter the separate document required by Rule 58, allowing Outlaw then to file a timely appeal. Indeed, because such paper shuffling serves "no practical purpose," *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 ... (1978), our cases have held that we could have taken jurisdiction directly and dispensed with the detour to the district court....
>
> **The rules were changed in 2002, however, precisely to address the problem that a failure to comply with the separate document rule meant that the time to appeal never expired because it never began to run.**

Outlaw, 412 F.3d at 162-63 (emphasis added) (citations omitted).

In sum, the *Warren* court erroneously states that the 2002 amendments might have overruled *Mallis*. The *Warren* court's neglect of Rule 4(a)(7)(B) also led it to an erroneous view of the timing of Warren's appeal. To determine the effect of the appeal, the court wished to identify the time at which the appeal became effective. It reasoned:

> First, Fed. R.App. P. 4(a)(1) generally provides that a notice of appeal must be filed with the district clerk within 30 days after entry of the judgment. Second, Fed. R.App. P. 4(a)(2) provides "[a] notice of appeal filed after the court announces a decision ... but before the entry of judgment ... is treated as filed on the date of and after the entry." *See FirsTier Mtg. Co. v. Investors Mtg. Ins. Co.*, 498 U.S. 269, 276 ... (1991). If, as here, the district court never enters a separate Rule 58 judgment, then judgment is deemed entered 150 days after entry of the court's final decision or order.

Warren, 507 F.3d at 1244. Based on this reasoning, the court concluded that "[p]laintiff's notice of appeal had no effect on the district court's jurisdiction to address his 'motion to reconsider' because the district court never entered a separate judgment and 150 days had not elapsed since entry of the court's dismissal order." *Id.* at 1245.

I would submit that this analysis errs. Under Rule 4(a)(7)(B), Warren's appeal was "valid[]" despite the court's failure to provide a separate document. However, the *Warren* court provided an additional, and sounder, rationale for its conclusion that the district court had jurisdiction to rule on the Rule 59(e) motion: It also reasoned that the filing of the timely Rule 59(e) motion suspended the previously-taken appeal, thus re-vesting the district court with jurisdiction to determine the motion.

The interesting question in this context is whether the Rule 59(e) motion was indeed timely. If Warren had never filed a notice of appeal, it would be indisputable that his July 28, 2006 motion was timely because the dismissal was never entered on a separate document and 150 days had not yet run from the entry of the dismissal order in the civil docket. *See* Civil Rule 58(c)(2). The question is whether, by filing the notice of appeal and thus waiving the separate document requirement, Warren should be viewed as having triggered a conclusion that his deadline for postjudgment motions ran from the June 23, 2006 dismissal. I think that such a conclusion would be flawed. The 2002 Committee Note to Rule 4 expressly rejects an analogous line of reasoning with respect to appeal deadlines:

> The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days ... from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In *Townsend v. Lucas*, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1)....
>
> The Committee agrees with the majority of courts that have rejected the

> *Townsend* approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of *Townsend*.

I thus believe that the *Warren* court was correct in viewing Warren's Rule 59(e) motion as timely, and also correct in concluding that this motion suspended the effectiveness of the prior notice of appeal and provided the district court with jurisdiction to rule on the motion.

* * *

In conclusion, the *Warren* court evidently overlooked Appellate Rule 4(a)(7)(B), and this error led to the flaws in reasoning identified in Part III of this memo. The present question is whether *Warren* justifies any action by the Committee. I would suggest that no such action is required at this time.

Encls.

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Minutes of Spring 2008 Meeting of
Advisory Committee on Appellate Rules
April 10 and 11, 2008
Monterey, California

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 10, 2008, at 8:30 a.m. at the Monterey Plaza Hotel in Monterey, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Paul D. Clement attended the meeting on April 10, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present on April 10 and represented the Solicitor General on April 11. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. Judge Stewart noted the Committee's appreciation that Solicitor General Clement was attending the meeting. The Reporter observed that congratulations are due to Judge Stewart for his recent receipt of the 2007 Celebrate Leadership Award from the Shreveport Times and the Alliance for Education; the award honors top community leaders. Mr. Levy reported that Justice Alito sent his greetings to the Committee.

II. Approval of Minutes of November 2007 Meeting

The minutes of the November 2007 meeting were approved, subject to some minor edits to the minutes' discussion of model local rules.

III. Report on January 2008 Meeting of Standing Committee

Judge Stewart reported that the Standing Committee, at its January 2008 meeting, approved for publication the proposed amendment to Rule 29 concerning amicus brief disclosures. Judge Stewart reminded the Committee that the proposed amendment to Rule 1(b)

[1] Dean McAllister attended the meeting on April 10 but was unable to be present on April 11.

Since that time, the Administrative Office made interim changes to the version of Form 4 that is posted on the AO's website, and Mr. Fulbruge updated his colleagues on the new privacy requirements. But those interim measures do not remove the need to amend the official version of Form 4 to conform to the privacy requirements. The Reporter therefore recommended that the Committee publish for comment a proposed amendment to Form 4 that will make the necessary changes. She also suggested that the Committee retain on its study agenda the question of additional possible changes to Form 4.

The proposed amendment would alter Questions 7 and 13 so that they will no longer request the names of minor dependents or the applicant's full home address and social security number. Question 7 in the interim version posted by the AO reads in part "Name [or, if a minor (i.e., underage), initials only]". That is the approach taken in the proposed amendment provided in the agenda materials. However, Professor Kimble suggests deleting "(i.e., underage)." The Reporter questioned whether such a change would be a style matter; if one believes that "underage" would be easier for i.f.p. applicants to understand than "minor," then one might view this question as one of substance. However, this question can be avoided if the Committee is willing to select a particular age, such as "under 21." Specifying an age would make the form much more user-friendly. There is some question as to what age one should specify. It is unclear what law should define minority for purposes of the privacy rules. The statute which the rules implement does not shed light on this question. It seems that in most states the age of majority is 18; but in a few states the relevant age is higher.

Mr. Fulbruge stated that it would be helpful for the Form to specify an age rather than referring to "minors." Mr. Letter inquired whether the Reporter had looked to federal law for a definition of the age of majority. For example, the Federal Juvenile Delinquency Act uses 18 as the age of majority. The Reporter stated that she had not surveyed the definitions under federal law; it is unclear what law should govern for the purposes of the privacy rules as they apply to Form 4. State law usually governs the question of parental support obligations.

A member suggested that the Form should read "Name [or, if under 18, initials only]." By consensus, the Committee decided to approve for publication the amendment shown in the agenda materials, subject to the change described in the preceding sentence.

VII. Additional Old Business and New Business

A. 07-AP-H (issues raised by *Warren v. American Bankers Insurance of Florida* (10th Cir. 2007))

Judge Stewart invited the Reporter to discuss the Tenth Circuit's recent decision in *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007).

Mr. Warren was injured in a car accident and sued American Bankers in federal court in diversity. On June 23, the district court dismissed the complaint but did not set out the judgment

in a separate document as required by Civil Rule 58(a). Warren filed a notice of appeal on Monday, July 24; then, on July 28, he filed a motion to reconsider in the district court. The defendant moved to strike the motion for lack of jurisdiction (due to the pending appeal). The district court held that no separate document was required with respect to the dismissal of the complaint, because that dismissal was for lack of subject matter jurisdiction; that the notice of appeal was effective to take the appeal, and that the notice deprived the district court of jurisdiction to consider the motion to reconsider. Warren then amended his notice of appeal to encompass the denial of the motion to reconsider.

On appeal, the Tenth Circuit held that the district court erred in failing to apply Rule 58(a)'s separate document requirement. It reasoned, however, that despite the failure to comply with the separate document requirement, there was jurisdiction over the appeal from the original judgment because 150 days had passed since the entry of the dismissal order. Next, it held that the "motion to reconsider" was in reality a timely Rule 59(e) motion to alter or amend the judgment. The court suggested that the July 24, 2006 notice of appeal had not yet become effective at the time that the Rule 59(e) motion was filed, and reasoned that in any event the timely Rule 59(e) motion "further suspended" the effectiveness of the previously-filed notice of appeal. Thus, the court of appeals concluded that the district court was wrong to conclude that it lacked jurisdiction to consider the Rule 59(e) motion. The court accordingly vacated and remanded for the district court to address the Rule 59(e) motion.

The Reporter suggested that the Tenth Circuit was clearly correct in rejecting the district court's view that the separate document requirement does not apply to dismissals for lack of subject matter jurisdiction. The Tenth Circuit also noted an "exception" to the separate document requirement where an order contains no analysis; the Reporter was not sure that such an exception comports with the separate document rules, but she noted that the Tenth Circuit caselaw on this predated 2002 and she observed that the rulemakers had not seen fit to address that issue in the 2002 amendments. The Tenth Circuit also suggested in *Warren* that the 2002 amendments superseded the teaching of *Bankers Trust Co. v. Mallis*, 435 U.S. 381 (1978) (per curiam), that a party could waive the separate document requirement. On this point, the Tenth Circuit erred. Rule 4(a)(7)(B) provides: "A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order." As the 2002 Committee Note to Rule 4 explains, the 2002 amendments were intended to codify *Mallis*'s holding. Under Rule 4(a)(7)(B), Warren's appeal was "valid[]" despite the court's failure to provide a separate document. However, the *Warren* court provided an additional, and sounder, rationale for its conclusion that the district court had jurisdiction to rule on the Rule 59(e) motion: It also reasoned that the filing of the timely Rule 59(e) motion suspended the previously-taken appeal, thus re-vesting the district court with jurisdiction to determine the motion.

The interesting question in this context is whether the Rule 59(e) motion was indeed timely. If Warren had never filed a notice of appeal, it would be indisputable that his July 28 motion was timely because the dismissal was never entered on a separate document and 150 days had not yet run from the entry of the dismissal order in the civil docket. The question is whether,

by filing the notice of appeal and thus waiving the separate document requirement, Warren should be viewed as having triggered a conclusion that his deadline for postjudgment motions ran from the June 23 dismissal. The Reporter suggested that such a conclusion would be flawed; the 2002 Committee Note to Rule 4 expressly rejects an analogous line of reasoning with respect to appeal deadlines.

Based on this discussion, Judge Hartz raised a concern that where a separate document is required and the district court fails to provide one, an appellant might make a very belated (but still technically timely) postjudgment motion that, under Rule 4(a)(4), suspends the effectiveness of the appeal pending the disposition of the motion. To address this problem, Judge Hartz proposed that the Committee consider adopting a time limit – perhaps 10 days after the filing of a notice of appeal, or perhaps some number greater than 10 days – within which tolling motions must be filed even when there has been no provision of a separate document. He explained that in the Tenth Circuit there are many violations of the separate document rule and there are also many pro se litigants. In many cases a district court dismisses a pro se complaint before the government defendant responds. In such instances, a violation of the separate document requirement may go unremarked and a late-filed motion by the pro se litigant may operate to suspend the effectiveness of the appeal – even at a very late stage in the appeal process.

An attorney member responded that in some instances the separate document provides information to the litigant that is relevant to the litigant's calculations – for example, the separate document might state whether a dismissal is with or without prejudice. Another attorney member asked whether the problem Judge Hartz identified could be addressed by encouraging better district court compliance with the requirements of Civil Rule 58. Judge Rosenthal suggested that violations of the separate document requirement are most likely to arise when a law clerk is just starting out and has not yet learned about the requirement.

Judge Hartz noted, however, that the 2002 amendments themselves arose in part from a recognition that noncompliance with the separate document requirement will occur. He stated that in many of the pro se cases in the Tenth Circuit in which the problem arises, it is unlikely that the government defendant will alert the court to the lack of the separate document.

An attorney member noted that the problem for litigants is what to do when judges fail to comply with the requirement; he suggested that 10 days is probably too short a deadline, and that 21 days might be better. Another attorney member suggested that 28 days might be better still; but she also noted that imposing such a cutoff could effectively limit the district court's ability to delay the due date for postjudgment motions (by delaying the provision of a separate document).

Judge Hartz suggested that it would be helpful for him to discuss these issues with the Tenth Circuit Clerk. The Reporter noted that it would also be advisable to consult the Civil Rules Committee. A judge member suggested that it would be useful for Mr. Fulbruge to survey the circuit clerks for their views. Mr. Fulbruge predicted that the survey will disclose variations in how the circuits handle these issues; he noted that the Fifth Circuit's staff attorney office does a lot of work on pro se appeals.

Judge Stewart stated that the issue raised by Judge Hartz warrants further study. Mr. Fulbruge will survey the circuit clerks. Also, the Committee should check with the FJC to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys. Judge Bye noted that the Eighth and Tenth Circuits would be meeting together in summer 2008, and he observed that it would be useful to raise the topic at that meeting. By consensus, the matter was retained on the study agenda.

B. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart invited the Reporter to discuss the questions raised by Judge Diane Wood concerning Rule 4(c)'s inmate-filing provision. Judge Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), and *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007).

As discussed in the agenda materials, questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. The origins of the current Rule can be traced to the Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988), in which the Court held that Houston filed his notice of appeal when he delivered the notice to the prison authorities for forwarding to the district clerk. After deciding *Houston*, the Supreme Court revised its Rule 29.2 to take a similar approach. In 1993, the Appellate Rules were amended to add Rule 4(c). In 1998, Rule 4(c) was amended to provide that if the institution has a system designed for legal mail, the inmate must use that system in order to get the benefit of Rule 4(c). In 2004, the Committee discussed a suggestion by Professor Philip Pucillo that the Rules be amended to clarify what happens when there is a dispute over timeliness and the inmate has not filed the affidavit mentioned in Rule 4(c)(1). The Committee decided to take no action on that suggestion. Shortly thereafter, a Tenth Circuit decision illustrated the problem identified by Professor Pucillo: in *United States v. Ceballos-Martinez*, 371 F.3d 713, 717 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

Turning to the questions raised by Judge Wood's suggestion, the Reporter observed that the rule could be read to require postage prepayment when the institution has no legal mail system; that was, indeed, the Seventh Circuit's view in *Craig*. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the

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MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-H

The Committee's spring 2008 discussion of *Warren v. American Bankers Insurance of Florida*, 507 F.3d 1239 (10th Cir. 2007), led the Committee to consider the concern that where Civil Rule 58 requires a separate document and the district court fails to provide one, an appellant might make a very belated (but still technically timely) postjudgment motion that, under Rule 4(a)(4), suspends the effectiveness of the appeal pending the disposition of the motion.

To address this problem, it was initially proposed that the Committee consider adopting a time limit within which tolling motions must be filed even when there has been no provision of a separate document. Judge Hartz noted that in the Tenth Circuit there are many violations of the separate document rule and there are also many pro se litigants. In many cases a district court dismisses a pro se complaint before the government defendant responds. In such instances, a violation of the separate document requirement may go unremarked and a late-filed motion by the pro se litigant may operate to suspend the effectiveness of the appeal – even at a very late stage in the appeal process. The question was raised, though, whether this concern could be addressed by encouraging better district court compliance with the requirements of Civil Rule 58. It was suggested that violations of the separate document requirement are most likely to arise when a law clerk is just starting out and has not yet learned about the requirement. After further discussion, Judge Hartz suggested that it would be helpful for him to discuss these issues with the Tenth Circuit Clerk. It was noted that it would also be advisable to consult the Civil Rules Committee. A member suggested that it would be useful for Fritz Fulbruge to survey the circuit clerks for their views. It was also suggested that we check with the Federal Judicial Center to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys.

This memo reports on the status of those inquiries. We now have information gained through Judge Hartz's inquiries within the Tenth Circuit; through discussions with the Chair and Reporter of the Civil Rules Committee; through Fritz Fulbruge's survey of his colleagues' views; and through Marie Leary's inquiries within the Federal Judicial Center.

I. Judge Hartz's inquiries within the Tenth Circuit

Judge Hartz raised the separate-document issue at the Tenth Circuit judges' meeting in May 2008. As a result of that discussion, the Tenth Circuit Clerk was authorized to raise the issue with the district courts within the circuit and to request better compliance with the separate document requirement. The resulting improvement in district-court compliance led Judge Hartz to thank the district judges at the Tenth Circuit's judicial conference in September 2008.

As the Tenth Circuit Clerk reports: "Judge Hartz raised the issue and the judges talked at length about the best way to address it--via a new rule or through the 'better compliance method' .... Ultimately, the judges asked me to go back to the district clerks and to encourage them ... to be more vigilant on this. I did, and various emails followed with district court personnel. In a couple instances I did short legal memoranda to advise them of the case law .... That was in May, and we have seen compliance rates jump. My personal position is that this isn't a law clerk issue. It[']s a clerk's office issue. The deputy clerk assigned to each judge should make this an automatic and ministerial task. My message to the clerks went at the issue in that fashion, as I think it is correct that law clerks aren't always going to catch this."

II. Discussions with the Civil Rules Committee

I described to Judge Kravitz and Professor Cooper the Appellate Rules Committee's discussions concerning the separate document requirement. I asked them for their thoughts on the rate of noncompliance with the separate document requirement. Professor Cooper notes that "the revisions of [Civil] Rule 58 responded to an endemic problem. Pat Schiltz ... read more than 500 cases addressing the 'time bomb' problem. And of course they were but the tip of the iceberg."

I also asked them for their impressions concerning how frequently such noncompliance is followed by both an appeal and then (later) a timely postjudgment motion that suspends the appeal's effectiveness. Professor Cooper noted that he has "no empirical or even anecdotal information bearing on" this question.

Judge Kravitz and Professor Cooper agree with the Appellate Rules Committee's intuition that if the Appellate Rules Committee were to decide to proceed with a project addressing these issues, close cooperation with the Civil Rules Committee would be necessary. As Professor Cooper notes, "[a]t a minimum, the Committee will have to consider whether any Appellate Rules revisions should be supported by parallel Civil Rules changes, or whether they have been contrived on a stand-alone basis that generates no collateral consequences."

III. Fritz Fulbruge's survey of the circuit clerks

We are indebted to Fritz Fulbruge for his efforts in surveying his colleagues among the circuit clerks. I asked Fritz to pose the following questions:

> ❶ How frequently do district courts fail to comply with the separate document requirement?
>
> ❷ When such failures occur, how frequently are those failures followed by both an appeal and then (later) a timely postjudgment motion that suspends the appeal's effectiveness?
>
> ❸ When the events described in the preceding sentence occur, how frequently does the tolling motion come so late that the appeal has already required a significant investment of effort by the court of appeals and the litigants (such that its suspension would cause significant inconvenience)?
>
> ❹ I also asked whether procedures are in place to ensure that the court of appeals is aware of the filing of a motion that, in these circumstances, has the effect of suspending the appeal's effectiveness.

To illustrate the questions, I suggested the following scenario: On June 1, the district court enters an order granting summary judgment dismissing the complaint in Smith v. Jones. Civil Rule 58(a) requires that the judgment be set forth on a separate document, but the district court does not comply with this requirement. Smith, one of the plaintiffs, files a notice of appeal on June 25, designating the order dismissing the complaint. The processing of Smith's appeal commences. On October 20, Brown, another plaintiff in Smith v. Jones, moves in the district court (under Civil Rule 59(e)) for reconsideration of the order dismissing the complaint. Under Civil Rule 58(c)(2), Brown's Civil Rule 59(e) motion is timely. Under Appellate Rule 4(a)(4)(A)(iv), Brown's motion counts as one that would suspend the running of the time to appeal the dismissal order (of course, as of October 20 that time has not yet begun to run, due to the lack of a separate document). And under Appellate Rule 4(a)(4)(B)(i), the effectiveness of Smith's notice of appeal is suspended by the filing in the district court of Brown's timely Civil Rule 59(e) motion – with the result that the proceedings on Smith's appeal must now be suspended until the district court disposes of Brown's motion.

With respect to question ❶, the Third Circuit Clerk reports frequent violations of the separate document requirement, but other clerks do not report significant problems:

- Third Circuit: "I find that district courts frequently violate the rule, although some are getting better since cm/ecf."
- Fourth Circuit: "Our district courts are pretty good about the separate document requirement. With regard to the Rule 59 motions, we receive notice from the

district court and do not proceed with an appeal pending resolution of the motion. We have occasional problems in this area, but not to the point of requiring a rule rev[i]sion."

- As to the Fifth Circuit, Fritz reports: "This is not a major problem for us. When we do our jurisdictional review we check to see if a needed separate document has been entered. If not, we 'tickle' it for a period of time and if no entry is made we contact the district court to have the judge prepare the necessary judgment. While it takes time in my office it ultimately gets the job done in almost all the cases."

- Sixth Circuit: "Our experience in the Sixth is very similar to that of the Fourth; there is an occasional problem, but it's by far the exception."

- Seventh Circuit (following the comments by the Sixth Circuit Clerk, above): "Ditto."

- The D.C. Circuit Clerk reports: "Our - only - district court is pretty good about complying with Rule 58."

As to question ❷ and the illustrative hypothetical, two circuit clerks responded that the hypothetical scenario seems rare:

- Third Circuit: "I see a lot of such cases [presumably, cases where the district court failed to comply with the separate document requirement] with timely reconsideration motions and timely notices of appeal, which are not a problem. I have to say that in general I see fewer post-judgment motions than I did years ago. I see some cases with notices of appeal beyond the 30 or 60 days. The situation described, an untimely reconsideration motion filed by a co-party long after the NOA is rare."

- D.C. Circuit: "I don't recall dealing with any instances similar to the example set out by Cathie."

Concerning question ❹, the Third Circuit Clerk reported as follows: "In theory, the district court is supposed to notify us of post-judgment filings, but they often fail to do so. The rule could provide that the party filing such a motion must notify the court of appeals and without such notification, the first appeal can proceed. The time for an NOA would be tolled for the party filing the reconsideration though." The Third Circuit Clerk observed that the proposed change in the deadline for postjudgment motions may exacerbate this problem: "It occurs to me that this may become more of a problem when the new counting rules go into effect. .... We may often see scenarios when the NOA is filed and then a week later a 59e motion is filed and we don't know about it."

Two of the circuit clerks also expressed dissatisfaction with the separate document requirement itself. The Third Circuit Clerk stated: "Let's just do away with the separate judgment rule. It creates more problems than it solves." She observed that the separate document requirement can elevate form over substance: "Often in pro se cases what I see is an opinion of varying length, but usually at least a few pages and then at the end the court says, accordingly, we enter the following order: sum. judgment is granted, the case is closed, any appeal is frivolous. If they just did a page break and repeated the caption all would be well." Fritz expresses agreement with this view: "[T]he pragmatic answer is to do away with the separate document requirement. I suppose you can argue the Fed. R. Civ. P. 58(a) requirement is analogous to the Fed R. App. P. 41 mandate requirement, so some may think it is advisable to keep the separate document notion in place. I think it confuses people more than it helps them."

IV. FJC training materials for new staff attorneys

We are indebted to Marie Leary for pursuing inquiries within the FJC. She reports: "The Federal Judicial Center does only very limited training for staff attorneys, and this issue (separate document requirement) is not covered in that training. I checked with Bruce Clarke (head of the Education Division), along with Brenda Baldwin-White (who is developing some new training for staff attorneys), and they both confirmed that there are no materials on the separate document requirement presented to staff attorneys at this time."

V. Conclusion

Reflecting on the Tenth Circuit's experience, Judge Hartz suggested last month that "trying to solve the problem [of belated tolling motions after violations of the separate-document requirement] by tweaking the rules is probably not a good use of our resources." But he noted that his view could change "if the problem is arising in other circuits or revives in the Tenth." So far, the information from the circuit clerks suggests that the problem appears to be relatively rare. The experience within the Tenth Circuit suggests that efforts to raise awareness of the issue within the district clerk's office may be a good avenue for addressing the problem (in those districts where the problem tends to arise).

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Minutes of Fall 2008 Meeting of
Advisory Committee on Appellate Rules
November 13 and 14, 2008
Charleston, SC

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 13, 2008, at 8:30 a.m. at the Charleston Place Hotel in Charleston, South Carolina. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Gregory G. Garre joined the meeting after lunch on November 13, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), attended the whole meeting. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Mr. Timothy Reagan from the FJC and Professor Richard Marcus joined the meeting on the morning of the 14th. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants.

II. Approval of Minutes of April 2008 Meeting

The minutes of the April 2008 meeting were approved.

III. Report on June 2008 Meeting of Standing Committee

Judge Stewart and the Reporter summarized the FRAP-related actions taken by the Standing Committee at its June 2008 meeting. The Standing Committee gave final approval to a

[1] Dean McAllister was present on November 13 but was unable to be present on November 14.

issue," suggesting a clear statement rule for determining when "a threshold limitation on a statute's scope shall count as jurisdictional").

The Committee resolved by consensus that the Reporter will ask the Reporters for the other Advisory Committees to raise the general issue with a view to obtaining the views of the Advisory Committees concerning the possibility of coordinating on this project. The Reporter will draft (for the Committee's review) possible language for a proposed statute that would identify which statutory deadlines are to be treated as jurisdictional and which are not. The Reporter's charge includes developing a list of existing statutory deadlines the status of which should be clarified by the proposed statute, and also developing proposed statutory language that would govern the treatment of deadlines set by statutes that are enacted in the future.

B. Item No. 07-AP-H (issues raised by *Warren v. American Bankers Insurance of Florida* (10th Cir. 2007))

Judge Stewart invited the Reporter to introduce the discussion of this item, which concerns the problems that could be caused by belated tolling motions in cases where the district court has failed to comply with Civil Rule 58's separate document requirement. The concern is as follows: suppose that a separate document is required but not provided; that an appeal is commenced; and that a party subsequently files a tolling motion which is timely (due to the lack of a separate document) and which suspends the effectiveness of the notice of appeal. The Committee's discussion of this problem at the Spring 2008 meeting resulted in several requests that members make additional inquiries. Judge Hartz undertook to discuss these issues with the Tenth Circuit Clerk. Fritz Fulbruge agreed to survey the circuit clerks for their views. Marie Leary was asked to check with the Federal Judicial Center to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys. And the Committee directed the Reporter to consult the Chair and Reporter of the Civil Rules Committee for their views.

The results of those inquiries are, overall, encouraging. Judge Hartz reported that he had raised the matter at a Tenth Circuit judges' meeting in May, and that the Tenth Circuit Clerk had subsequently contacted the district court clerks to encourage compliance with the separate document requirement. The outreach to the Tenth Circuit's district clerks produced a marked increase in compliance. Judge Hartz noted, however, that the problem of noncompliance may be more widespread than the Committee realizes, since the problem is a hidden one.

A district judge member reported that, after reading the agenda book materials, he made inquiries within his district. He learned that failure to comply with the separate document requirement is common, particularly in connection with the entry of summary judgment. The member suggested that the first step to take is to raise the matter with the district clerks' offices. Judge Rosenthal observed that compliance with the separate document requirement is not difficult. Mr. Letter noted the importance of the separate document requirement in making clear, to practitioners, the point at which the district judge considers the case to be at an end (and thus

ripe for appeal).

Judge Stewart suggested that compliance could be improved by raising awareness of the issue, for example, by placing an item on the agenda at meetings for district judges. A letter from the chief judge to the district judges in the district could highlight the issue. Judge Rosenthal noted that if the Committee believes such a reminder would be helpful, it could be useful for the Committee to make a recommendation along those lines. For example, the Committee might ask the Director of the AO to send out such a letter, with examples of documents that comply with the separate document provision. Mr. Rabiej noted that such a letter could be sent to both judges and district clerks. Mr. McCabe noted that there are a number of possible additional avenues for distributing the information, for example, through newsletters. Perhaps it might also be possible to insert a measure into the CM/ECF system that would prompt users to comply. A district judge member suggested that the Director's letter could be followed by another letter from a judge. Judge Rosenthal suggested that the letter could present the matter as a problem which is easy to solve.

Mr. Letter moved that the Committee recommend to the Standing Committee that appropriate steps be taken to raise awareness of the problem, in coordination with the Civil Rules Committee and Bankruptcy Rules Committee. The motion was seconded and was approved by voice vote without objection.

C. Item No. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning Judge Wood's proposal with respect to Rule 4(c)(1)'s inmate filing rule. At the Committee's Spring 2008 meeting, members raised a number of questions about institutional practices with respect to inmate legal mail – and, in particular, the extent to which indigent inmates have access to funds for postage for use on legal mail. Mr. Letter has made inquiries concerning the policy of the federal Bureau of Prisons. He reports that the issues raised by Judge Wood are not currently of concern to federal agencies or to the DOJ. The Bureau of Prisons has special procedures for legal mail; it provides indigent prisoners with a reasonable supply of postage for use on legal mail; and it requires the prisoners to affix the postage themselves. Thus, if Rule 4(c) were interpreted or amended to require prepayment of postage when an inmate uses an institution's legal mail system, that would not alter existing practice within the Bureau of Prisons. Mr. Letter has also put the Reporter in touch with an official who can provide information concerning the practice in immigration facilities; the Reporter will follow up with her directly.

The Reporter noted that researching the practices in state and local facilities is challenging because of the variety of policies and because many institutions' policies do not seem to be memorialized in readily accessible documents. Some institutions provide set, periodic sums to indigent prisoners; some institutions instead state that they will allow indigent

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COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
Meeting of January 12-13, 2009
San Antonio, Texas
Minutes

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ATTENDANCE

The mid-year meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held at St. Mary's Law School in San Antonio, Texas, on Monday and Tuesday, January 12 and 13, 2009. The following members were present:

Judge Lee H. Rosenthal, Chair
David J. Beck, Esquire
Douglas R. Cox, Esquire
Chief Justice Ronald N. George
Judge Harris L Hartz
Judge Marilyn L. Huff
John G. Kester, Esquire
William J. Maledon, Esquire
Judge Reena Raggi
Judge James A. Teilborg
Judge Diane P. Wood

because the matter will not be presented to the Judicial Conference until its September 2009 session. The advisory committee, he said, hoped to receive additional input from the Department at its April 2009 meeting.

BOWLES V. RUSSELL

Judge Stewart noted that a number of issues are unresolved regarding the impact of *Bowles v. Russell* on appeal deadlines set by statute versus those set by rules. The Supreme Court, he said, has had other pertinent cases on its docket since *Bowles*, but has not provided additional guidance. Accordingly, the advisory committee decided to explore – in coordination with the civil, criminal, and bankruptcy advisory committees – whether a statutory change, rather than a rules amendment, might be appropriate to resolve these issues.

Professor Struve explained that although *Bowles* holds that appeal deadlines set by statute are jurisdictional, the implications of the decision for other types of deadlines are unclear. A consensus has developed, she said, that purely non-statutory deadlines are not jurisdictional. But there are also "hybrid deadlines," such as those involving motions that toll the deadline for taking an appeal. A split in the case law already exists among the circuits on this matter, and there may even be instances in which one party in a case has a statutory deadline and the other does not.

Professor Struve reported that the advisory committee was considering developing a proposed statutory fix to rationalize the whole situation, and it had asked her to try drafting it. Obviously, she said, the advisory committee will consult with the other advisory committees and reporters, and it will appreciate any insights or guidance that members of the Standing Committee may have. She added that the Advisory Committee on Civil Rules had been particularly helpful in working with her on the matter.

COMPLIANCE WITH THE SEPARATE-DOCUMENT REQUIREMENT OF FED. R.CIV. P. 58

Judge Stewart reported that the advisory committee had voted to ask the Standing Committee to take appropriate steps to improve district-court awareness of, and compliance with, the separate-document requirement of FED. R. CIV. P. 58 (entering judgments), rather than to seek rules changes. In particular, jurisdictional problems arise between the district court and the court of appeals in cases where: (1) a separate judgment document is required but not provided by the court; (2) an appeal is filed; and (3) a party later files a tolling motion – which is timely because the court did not enter a separate judgment document – and the motion suspends the effect of the notice of appeal.

Judge Stewart emphasized that it is important for the bar to have the district courts comply with the rule. He reported that the advisory committee had asked the Federal Judicial Center to make informal inquiries regarding compliance. In addition, the advisory committee had asked its appellate clerk liaison, Charles Fulbruge, to canvass his clerk colleagues regarding the level of compliance that they have experienced in their respective circuits with the separate-document rule. Some clerks, he reported, had noted a fair degree of noncompliance, but others had not.

A member reported that a serious problem had existed in his circuit with district courts not entering separate documents, especially in prisoner cases. After judgment, prisoners who have already filed a notice of appeal file a document that can be construed as a Rule 59 motion for a new trial that tolls the deadline for filing a notice of appeal. The court of appeals then loses jurisdiction because a timely post-judgment motion has been filed in the district court, but the district court fails to act because it believes that the court of appeals has the case. He said that representatives of his circuit had spoken directly with the district court clerks in the circuit about the Rule 58 requirements, and compliance has now been much improved. He suggested that it would be productive for the rules committees also to work informally with the district courts on the matter. In addition, it would be advisable to place an automated prompt or other device in the CM/ECF electronic docket system to help ensure compliance with the separate-document requirement. Judge Rosenthal added that the committee should coordinate on the matter with the Committee on Court Administration and Case Management.

MANUFACTURED FINALITY

Judge Stewart reported that the advisory committee was collaborating with the other advisory committees on the issue of "manufactured finality" – a mechanism used in various circuits for parties to get a case to the court of appeals when a district court dismisses a plaintiff's most important claims but other claims survive. To obtain the necessary finality for an appeal, he said, the plaintiff may seek to dismiss the peripheral claims in order to let the case proceed to the court of appeals on the central claims.

Whether or not these tactics work to create an appealable final judgment generally depends on the conditions of the voluntary dismissal. The circuits are split on whether there is a final judgment when the plaintiff has reserved the right to resume and revive its dismissed peripheral claims if it wins its appeal on its central claims. A member added that her circuit does not allow dismissals without prejudice to create an appealable final judgment. The circuit will permit the appellant to wait until oral argument to stipulate to a dismissal with prejudice, but the appellant must do so by that time. Another member pointed out that manufactured finality may arise in several ways. In his circuit, some parties simply take no action after an interlocutory decision, and the district court ultimately dismisses the peripheral claims for failure to prosecute. A participant suggested that the case law on finality and the application of 28 U.S.C. § 1292(b) varies

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-N

This item arises from Peder Batalden's proposal that the Committee consider amending Appellate Rule 5 to permit litigants to submit an appendix of key record documents along with a petition for permission to appeal (or along with an answer to such a petition).

The Committee considered Mr. Batalden's suggestion during its spring 2009 meeting. Participants in that discussion noted that when the filings in the district court are in electronic form, personnel in the court of appeals can access them in the CM/ECF system. Admittedly, some pro se litigants will continue to make paper filings and, in some instances, sealed portions of the district court record may be transmitted to the court of appeals in paper rather than electronic form. But participants predicted that the courts of appeals' shift to the electronic filing system would largely alleviate the problem identified by Mr. Batalden.

The Committee retained this item on its study agenda but has taken no action on it. Now that all of the courts of appeals have completed the shift to electronic filing, it seems that the rationale for the proposed amendment is weaker than it was in 2009. It thus may be an appropriate time for the Committee to consider removing this item from its agenda. As context for that discussion, I enclose my prior memorandum on this item and the relevant portion of the minutes of the Committee's spring 2009 meeting.

Encl.

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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-N

Peder Batalden has submitted the following suggestion concerning appeals by permission: "Rule 5 contains no provision allowing the parties to submit an appendix of key documents from the record along with their petitions and answers. The Rule does require the petitioner to provide the court with the order under challenge, but it will often be helpful to the court to have ready access to important materials in the record (for example, in a class cert case, the evidentiary materials establishing numerosity, commonality, and so forth)."

As Mr. Batalden notes, Appellate Rule 5 provides the framework for assessing this issue.[1] Rule 5(b)(1) requires the petition for permission to appeal to include:

> (A) the facts necessary to understand the question presented;
> (B) the question itself;
> (C) the relief sought;
> (D) the reasons why the appeal should be allowed and is authorized by a statute or rule; and
> (E) an attached copy of:
>> (i) the order, decree, or judgment complained of and any related opinion or memorandum, and

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[1] A quick search of local circuit provisions did not disclose any provisions addressing whether a petition for permission to appeal can include an appendix.

A related question is whether the issue identified here might be addressed within the framework for forwarding the record for use in connection with a preliminary motion. Appellate Rule 11(g) provides that "[i]f, before the record is forwarded, a party makes any of the following motions in the court of appeals: • for dismissal; • for release; • for a stay pending appeal; • for additional security on the bond on appeal or on a supersedeas bond; or • for any other intermediate order-- the district clerk must send the court of appeals any parts of the record designated by any party." It seems doubtful that Rule 11(g) was meant to encompass practice with respect to petitions for permission to appeal. In any event, the question of forwarding the record seems likely to become less salient because the parts of the record that might be forwarded under Rule 11(g)'s approach will increasingly be available in electronic form through CM/ECF.

(ii) any order stating the district court's permission to appeal or finding that the necessary conditions are met.

Rule 5(c) limits the length of petitions and answers: "Except by the court's permission, a paper must not exceed 20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E)."[2] Though Rule 5(b)(1)'s list does not exclude the possibility of additional attachments, Rule 5(c)'s length limit could be read to count those additional attachments toward the presumptive page limit. Thus, a litigant could reasonably conclude that the safest course (if the litigant wishes to include an appendix of key documents other than those listed in Rule 5(b)(1)(E)) is to seek court permission to do so.[3]

Since 1998, Rule 5 has governed the procedure for permissive appeals generally, rather than being limited to permissive appeals under 28 U.S.C. § 1292(b). The advent of permissive appeals under Civil Rule 23(f) is particularly significant. As Mr. Batalden points out, the issues on a petition for permission to appeal from a class certification order under Civil Rule 23 may be very fact-bound, and it might thus be useful for the parties to have the option of including appendices that provide record support for their factual assertions. On the other hand, if parties were to include unduly large appendices, that might be perceived as burdensome.

The Committee may wish to consider whether it would be useful to seek the views of the appellate clerks on this matter. It would also be interesting to know whether the Federal Judicial Center's CAFA Project might shed light on these or related issues. If so, then the Committee might consider holding this suggestion on the agenda pending completion of the portion of the FJC's CAFA study that encompasses Rule 23(f) appeals.

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[2] This length limit was added in 2002. The 2002 Committee Note does not discuss the application of the limit to attachments other than those specified in Rule 5(b)(1)(E). A quick search of the Committee minutes in Westlaw's US-RULESCOMM database disclosed no mention of such attachments during the discussions of the proposals that led to the 2002 amendments.

[3] It is interesting to compare Rule 21's procedure for seeking extraordinary writs. When read alongside Rule 5(b)(1)(E), Rule 21(a)(2)(C) looks more open-ended; it provides: "The petition must include a copy of any order or opinion or parts of the record that may be essential to understand the matters set forth in the petition." The 30-page length limit in Rule 21(d) excludes, inter alia, "the accompanying documents required by Rule 21(a)(2)(C)." Thus, if a petitioner believes a particular portion of the record is key to an understanding of the petition, Rule 21 permits the petitioner to include that portion in the petition while excluding it for purposes of applying the length limit.

Minutes of Spring 2009 Meeting of
Advisory Committee on Appellate Rules
April 16 and 17, 2009
Kansas City, Missouri

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 2009, at 8:30 a.m. at the Hotel Phillips in Kansas City, Missouri. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. Mark I. Levy, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Harris L Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. He expressed regret that Maureen Mahoney, Judge Ellis, Judge Rosenthal and Professor Coquillette were unable to be present. Judge Stewart noted the Committee's great appreciation of Judge Rosenthal's work on all the Committee's matters including the package of proposed time-computation legislation that is currently before Congress.

II. Approval of Minutes of November 2008 Meeting

The minutes of the November 2008 meeting were approved subject to the correction of a typographical error on page 11.

III. Report on January 2009 meeting of Standing Committee

Judge Stewart and the Reporter highlighted relevant aspects of the Standing Committee's discussions at its January 2009 meeting. The proposed amendment to Appellate Rule 40(a)(1) had been approved by the Appellate Rules Committee at its fall 2008 meeting. Judge Stewart presented that proposed amendment to the Standing Committee for discussion rather than for action, in order to provide an opportunity for the new administration to consider the proposal before the presentation of the proposal for final approval by the Standing Committee. Judge Stewart also described to the Standing Committee the Appellate Rules Committee's ongoing work on other matters such as the question of manufactured finality.

Judge Stewart invited the Reporter to introduce this item, which concerns the framework for interlocutory tax appeals. At its fall 2008 meeting, the Committee discussed the fact that Appellate Rules 13 and 14 appear designed to deal only with appeals as of right from Tax Court decisions and not to deal with permissive appeals from Tax Court orders under 26 U.S.C. § 7482(a)(2). The Reporter stated that in the time since the Committee's discussion of this item last fall, she had obtained useful insights from Judge Mark Holmes of the United States Tax Court. Judge Holmes states that this seems like an omission in the Appellate Rules that it would be a good idea to fix, but he also states that the number of cases that would be affected is tiny.

Mr. Letter noted that though the number of affected cases may be small, some of them can present very important issues. Mr. Letter reported that he discussed the question with his colleagues who handle tax appeals, and that those discussions indicate that the problem is worth fixing.

A motion was made and seconded to consider a possible rules amendment to address interlocutory tax appeals. The motion passed by voice vote without opposition.

h. Item No. 06-08 (amicus briefs with respect to rehearing)

Judge Stewart invited the Reporter to summarize this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. The Committee had discussed this item at its three previous meetings (in fall 2007, spring 2008 and fall 2008). By consensus, the Committee removed this item from its study agenda.

i. Item No. 08-AP-I (discussion of the uses of postjudgment motions)

Judge Stewart invited the Reporter to summarize this item, which relates to a suggestion made by Professor Daniel Meltzer during the June 2008 Standing Committee meeting. Professor Meltzer noted his impression that some of those involved in trial-level practice had raised concern about superfluous post-trial motions, and he asked whether the Committees might wish to consider whether the Civil Rules are too permissive about when a postjudgment motion can be made. The Appellate Rules Committee's discussion of this question at the fall 2008 meeting revealed support for the view that postjudgment motions serve important functions, and did not reveal support for the view that a change is needed in order to rein in the use of such motions. At the Committee's request, the Reporter conveyed the substance of the discussion to Professor Cooper. By consensus, the Committee removed this item from its study agenda.

VII. Additional Old Business and New Business

a. Item No. 08-AP-N (appendix for petitions for permission to appeal)

Judge Stewart invited the Reporter to introduce this item, which was suggested to the Committee by Mr. Batalden. Mr. Batalden proposes that Rule 5 be amended to provide for the inclusion (in the appendix to a petition for permission to appeal) of key documents from the district court record. Rule 5(b)(1) requires the petition for permission to appeal to include, among other things, a copy of the challenged order or judgment and any related opinion, as well as any order stating the district court's permission to appeal or stating the district court's findings concerning any preconditions for appeal. Rule 5(c) sets a presumptive limit of 20 pages, excluding (among other things) the orders or judgments specified by Rule 5(b)(1). Rule 5 does not prevent the applicant from including additional record documents as attachments to the petition but such documents would appear to count toward the presumptive length limit.

The Reporter noted that Mr. Batalden pointed out that it may be particularly useful to include record documents with the petition in the context of petitions for permission to appeal under Civil Rule 23(f). The Reporter's memorandum in preparation for the meeting had asked whether the Federal Judicial Center's research on the Class Action Fairness Act (the "CAFA project") might shed light on these issues. In preparation for the meeting, Ms. Leary had consulted with her colleague Thomas Willging and based on that consultation she suggested that the Committee should not delay its consideration of this item for the purpose of seeking further data from the CAFA project. Ms. Leary explained that the focus of the CAFA project is to look at CAFA's effect on trial-level activity, and therefore the project was unlikely to provide a great deal of data that would directly pertain to practice on petitions for permission to appeal. She reported that the project still has about another year of work to go.

Mr. Fulbruge observed that the circuits take varying approaches to the questions raised by Mr. Batalden. Mr. Fulbruge suggested that it is hard to generalize about these approaches and that they are still developing in the light of the shift to electronic filing. An appellate judge stated that in the Sixth Circuit joint appendices are no longer generally used; rather, the matter proceeds on the basis of the original record as it is available through the CM / ECF system. Another appellate judge suggested that the shift to electronic filing may eventually render this item moot. Mr. Fulbruge agreed that the CM / ECF system generally provides the court of appeals with access to the electronic records filed in the district court. He mentioned, however, that sealed documents can be hard to obtain in electronic form. Mr. Fulbruge also mentioned that handwritten documents require different treatment; but he observed that the court can run paper documents through an optical character recognition ("OCR") system which can render many of them electronically searchable.

An appellate judge noted that though judges may be able to access documents electronically through CM / ECF, some judges may also prefer to have key documents appended to a paper copy of the petition; but he suggested that a wait-and-see approach may be appropriate with respect to this item. Another appellate judge noted that law clerks tend to be particularly comfortable using electronic copies of the record. This judge noted that another question is how to deal with instances when a particular judge wants a paper copy of the documents; in particular, there is the question of who prints the paper copy (the clerk's office or the judge's

chambers). Mr. Fulbruge noted that one way to resolve that question is for the clerk's office to send the documents electronically to print on a special printer in chambers. An appellate judge noted that prisoner and other pro se filings present distinct issues. He pointed out that death-penalty habeas cases involving state-court convictions will involve the filing of the paper state-court record. An attorney member asked how much expense the government incurs in printing paper copies of filings; Mr. Fulbruge responded that it can be costly.

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

b. Item No. 08-AP-O (clarify briefing deadlines in appeals with multiple parties)

Judge Stewart invited the Reporter to introduce this item, which arises from Mr. Batalden's question concerning the application of Rule 31's briefing deadlines in appeals in which multiple parties on a side serve and file separate briefs on different days. Rule 31(a) pegs the time for serving and filing the appellee's brief and the appellant's reply brief to the date of service of the previous brief. Rule 28.1 takes a similar approach to the timing of briefs in cases involving cross-appeals. The Committee Notes to Rule 28.1 and Rule 31 do not discuss the timing of briefs in an appeal in which there are multiple parties on a side. In two circuits, local provisions address Mr. Batalden's question. This timing question is not likely to trouble litigants in circuits where the briefing schedule is set by order, assuming that the scheduling order uses dates certain. In circuits where the briefing schedule is not set by order or where the scheduling order does not use dates certain, this timing question will still not arise if the multiple parties on a given side file a joint brief rather than separate briefs.

An attorney member expressed doubt that this question would pose a serious problem: If the attorney is unsure of the deadline, he or she can call the clerk's office to seek clarification. Another attorney agreed; he suggested that Mr. Batalden's question might be worth considering if the Committee decides to undertake a broader set of rules amendments in the future, but that the question is not worth addressing at this time. Another attorney member agreed. This member stated that he had never seen this problem arise in his practice in the courts of appeals; though he has seen a similar question arise in Supreme Court briefing, when the question arises one simply asks the Clerk for clarification.

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

c. Item No. 08-AP-P (FRAP 32 – line spacing of briefs)

Judge Stewart invited the Reporter to introduce this item, which concerns Mr. Batalden's suggestion that Rule 32 be amended to provide for 1.5-spaced briefs rather than double-spaced briefs. At Mr. Levy's suggestion, the Reporter had prepared two samples – one using 1.5

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-P

This item arises from Peder Batalden's proposal that the Committee consider amending Appellate Rule 32 to provide for 1.5-spaced briefs instead of double-spaced briefs.

The Committee discussed this proposal at its meetings in spring and fall 2009. The discussions encompassed not only Mr. Batalden's proposed switch to 1.5-spacing but also the possibility of permitting double-sided printing. Each of those possible changes garnered support among some of the participants in these discussions. However, other participants counseled caution, noting that there had been previous opposition to double-sided printing and that judges might have strong views on 1.5-spacing as well. Moreover, participants suggested that the shift to electronic filing could weaken the argument for amending the Rules to address double-sided printing: electronic filing might lead a circuit to require fewer or no hard copies, and would enable court personnel to print a double-sided copy when desired.

The Committee has not discussed this proposal since 2009. In the interim, the circuits have completed the shift to electronic filing. The Sixth Circuit is still the only circuit to dispense entirely with the filing of paper copies of electronically filed briefs.[1] The other circuits generally[2] require litigants to file from six to ten paper copies of electronically filed briefs,[3] except for the Seventh Circuit (which requires fifteen copies).[4]

[1] See Sixth Circuit Rule 31(a) ("When a party is required to file a brief electronically, the clerk will not accept a paper copy.").

[2] Some circuits make special provision for certain types of filers, such as appointed counsel.

[3] See D.C. Circuit Rule 31(b) ("original and 8 copies"); First Circuit Rule 31(b) (nine paper copies if the brief is filed electronically); Second Circuit Rule 31.1 (six paper copies); Third Circuit Local Appellate Rule 31.1(a) (ten paper copies); Fourth Circuit Rule 31(d)(1) (generally eight paper copies); Fifth Circuit Rule 31.1 (seven paper copies); Eighth Circuit Rule 28A(d) (ten copies); Ninth Circuit Rule 31-1 ("[A]n original and 7 copies of each brief shall be filed. Parties submitting a brief electronically shall defer submission of paper copies of the brief pending a directive from the Clerk to do so …."); Tenth Circuit Rule 31.5 (seven hard copies); Eleventh Circuit Rule 31-3 (generally, an original plus six copies); Federal Circuit Rule 31(b) (generally, twelve copies); Federal Circuit Administrative Order Regarding Electronic Case Filing, ECF-10(B) ("In addition to filing electronically, counsel shall submit to the court six paper copies of each formal principal brief, response or reply brief, supplemental brief, or amicus brief ….").

[4] See Seventh Circuit Rule 31(b).

A number of circuits provide that electronic service of a brief removes the need to serve a paper copy on the relevant party.[5]

A quick search disclosed few local circuit provisions specifically addressing either the line spacing of briefs[6] or the number of sides (one or two) on which the briefs should be printed. The D.C. Circuit Handbook specifies double-spacing and single-sided printing,[7] and an Eleventh Circuit rule specifies double-spacing.[8] The First and Fourth Circuits prefer double-sided printing for appendices,[9] but make no similar provision for briefs.

In sum, the passage of time does not seem to have produced any local rule developments that would strengthen the case for Mr. Batalden's proposal, or for the alternative proposal that the Rules be amended to permit double-sided printing. The time may have come for the Committee to consider removing this item from its agenda. As background for the Committee's consideration of this issue, I enclose the relevant prior memoranda[10] and excerpts of meeting minutes.

Encl.

[5] See, e.g., Fourth Circuit Rule 31(d)(2); Ninth Circuit Rule 25-5(f).
[6] There are some local circuit provisions that specify double-spacing for typewritten briefs, but that seems to me a different issue.
[7] See DC Circuit Handbook IX.A.6 ("Briefs must be double-spaced and printed on one side of the page only.").
[8] See Eleventh Circuit Rule 32-3 ("Only the cover page, the certificate of service, direct quotes, headings and footnotes may be single-spaced. All other typed matter must be double-spaced, including the Table of Contents and the Table of Citations.").
[9] See U.S. Court of Appeals for the First Circuit, Ten Pointers for an Appeal 8.A ("The pages of the appendix should be double-sided."); Fourth Circuit Rule 32(a) ("Double-sided copying of appendices is preferred in all cases."). Cf. Fourth Circuit Rule 25(a)(1)(C) (in agency review or enforcement matters, paper copies of the administrative record must be copied double-sided).
[10] My October 2009 memo enclosed excerpts from the Appellate Rules Committee's June 5, 1995 report, which contained comments on a prior proposal that contemplated double-sided printing. In the interests of brevity, I am omitting that enclosure here. Of course, I would be glad to share copies of those excerpts, and the report can also be accessed on the uscourts.gov website.

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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-P

Peder Batalden has submitted the following suggestion concerning the format of briefs:

> The double line-spacing requirement for briefs in Rule 32(a)(4), when combined with the font size requirement in Rule 32(a)(5), has increased the size of briefs dramatically. This is particularly true when practitioners use Century Schoolbook (following SCOTUS's lead) or other large fonts. Using a larger font improves readability, and is all to the good, but it can be hard to fit a single paragraph of reasonable length on a single page when using double line-spacing. Switching to 1.5 line spacing would improve matters dramatically without sacrificing readability. Briefs would shrink in length (and weight!). In my opinion, the double line-spacing requirement drives appellate lawyers nuts. (As a contrast, the California state appellate rules require 1.5 line-spacing, and state appellate briefs look much better.)

In this memo, I will not dwell at length on the possible benefits of implementing this proposal. Members of the Committee are familiar with the current style of briefs and can readily form an opinion on that point. Rather, this memo seeks to provide context for an assessment of the proposal. Two main points may be relevant. First, the 1998 amendments – which put in place the basic structure of the current framework – were the product of a long and arduous rulemaking process. Second, if Rule 32(a)(4) were amended to provide for 1.5-spaced rather than double-spaced text, this would have implications for page limits set elsewhere in the Rules.

The history of the 1998 amendments. Prior to 1998, Rule 32 had never been amended. The original Rule 32 had thus failed to keep pace with changes in the manner of producing briefs. Proposed amendments to Rule 32 were published for comment in 1992.[1] An amended version of the proposal was published for comment in 1993.[2] A third version of the proposal was published for comment in 1994.[3] When, in 1995, the Appellate Rules Committee submitted a

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[1] See 144 F.R.D. 447, 487 (1992).

[2] See 150 F.R.D. 323, 354 (1993).

[3] See 156 F.R.D. 339, 384 (1994).

further revised draft to the Standing Committee, the Standing Committee sent it back to the Appellate Rules Committee for further study.[4] Yet another draft was published for comment in 1996,[5] and after comment and some revision, this draft ultimately gained approval and took effect in 1998.

Page-limit implications of changing line-spacing. Changing Rule 32(a)(4)'s line-spacing provision to permit 1.5-spaced briefs would affect a number of page limits, as shown below. (Also, if Rule 32(a)(4) were amended to permit 1.5-spaced briefs, this would raise the question whether to amend Rule 27(d)(1)(D) to do the same for motions. Amending Rule 27(d)(1)(D) to permit 1.5-spaced text would affect the 20-page and 10-page limits in Rule 27(d)(2).)

- Changing Rule 32(a)(4) to permit 1.5-spaced text would affect the following page limits:
  - The 30-page and 15-page limits in Rule 32(a)(7).
  - The 30-page / 35-page / 30-page / 15-page limits in Rule 28.1(e)(1).
  - The 20-page limit in Rule 5(c) concerning petitions for permission to appeal (and responses thereto).
  - The 30-page limit in Rule 21(d) concerning extraordinary writ petitions (and responses thereto).
  - The 15-page limit in Rule 35(b)(2) concerning petitions for en banc hearing or rehearing.
  - The 15-page limit in Rule 40(b) concerning petitions for panel rehearing.

[4] See Standing Committee Report, September 1995, at 5-6.

[5] See 165 F.R.D. 117, 231 (1996).

Minutes of Spring 2009 Meeting of
Advisory Committee on Appellate Rules
April 16 and 17, 2009
Kansas City, Missouri

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 2009, at 8:30 a.m. at the Hotel Phillips in Kansas City, Missouri. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. Mark I. Levy, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Harris L Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. He expressed regret that Maureen Mahoney, Judge Ellis, Judge Rosenthal and Professor Coquillette were unable to be present. Judge Stewart noted the Committee's great appreciation of Judge Rosenthal's work on all the Committee's matters including the package of proposed time-computation legislation that is currently before Congress.

II. Approval of Minutes of November 2008 Meeting

The minutes of the November 2008 meeting were approved subject to the correction of a typographical error on page 11.

III. Report on January 2009 meeting of Standing Committee

Judge Stewart and the Reporter highlighted relevant aspects of the Standing Committee's discussions at its January 2009 meeting. The proposed amendment to Appellate Rule 40(a)(1) had been approved by the Appellate Rules Committee at its fall 2008 meeting. Judge Stewart presented that proposed amendment to the Standing Committee for discussion rather than for action, in order to provide an opportunity for the new administration to consider the proposal before the presentation of the proposal for final approval by the Standing Committee. Judge Stewart also described to the Standing Committee the Appellate Rules Committee's ongoing work on other matters such as the question of manufactured finality.

chambers). Mr. Fulbruge noted that one way to resolve that question is for the clerk's office to send the documents electronically to print on a special printer in chambers. An appellate judge noted that prisoner and other pro se filings present distinct issues. He pointed out that death-penalty habeas cases involving state-court convictions will involve the filing of the paper state-court record. An attorney member asked how much expense the government incurs in printing paper copies of filings; Mr. Fulbruge responded that it can be costly.

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

b. Item No. 08-AP-O (clarify briefing deadlines in appeals with multiple parties)

Judge Stewart invited the Reporter to introduce this item, which arises from Mr. Batalden's question concerning the application of Rule 31's briefing deadlines in appeals in which multiple parties on a side serve and file separate briefs on different days. Rule 31(a) pegs the time for serving and filing the appellee's brief and the appellant's reply brief to the date of service of the previous brief. Rule 28.1 takes a similar approach to the timing of briefs in cases involving cross-appeals. The Committee Notes to Rule 28.1 and Rule 31 do not discuss the timing of briefs in an appeal in which there are multiple parties on a side. In two circuits, local provisions address Mr. Batalden's question. This timing question is not likely to trouble litigants in circuits where the briefing schedule is set by order, assuming that the scheduling order uses dates certain. In circuits where the briefing schedule is not set by order or where the scheduling order does not use dates certain, this timing question will still not arise if the multiple parties on a given side file a joint brief rather than separate briefs.

An attorney member expressed doubt that this question would pose a serious problem: If the attorney is unsure of the deadline, he or she can call the clerk's office to seek clarification. Another attorney agreed; he suggested that Mr. Batalden's question might be worth considering if the Committee decides to undertake a broader set of rules amendments in the future, but that the question is not worth addressing at this time. Another attorney member agreed. This member stated that he had never seen this problem arise in his practice in the courts of appeals; though he has seen a similar question arise in Supreme Court briefing, when the question arises one simply asks the Clerk for clarification.

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

c. Item No. 08-AP-P (FRAP 32 – line spacing of briefs)

Judge Stewart invited the Reporter to introduce this item, which concerns Mr. Batalden's suggestion that Rule 32 be amended to provide for 1.5-spaced briefs rather than double-spaced briefs. At Mr. Levy's suggestion, the Reporter had prepared two samples – one using 1.5

spacing and the other using double spacing. Those samples were circulated among the Committee members during the meeting.

An appellate judge suggested that so long as the briefs are readable, 1.5 spacing could save costs. A member asked why the proposed change should specify 1.5 spacing rather than permitting single spacing. It was suggested, however, that single spacing might make a non-printed brief less readable. Members noted that the double-spacing requirement is a holdover from the time when non-printed briefs were typed as opposed to printed on a computer printer. Mr. Letter asked why the rules should not permit computer-printed briefs to be printed on both sides of the page. An attorney member agreed that double-sided printing should be permitted. An appellate judge member noted that when he prints briefs in his chambers he prints them double-sided. Judge Stewart noted that his law clerks print briefs double-sided. Judge Stewart stressed the importance of ensuring that judges find the briefs readable; if briefs could be presented in a format that is both readable and light-weight, that would be desirable. An appellate judge member observed that the questions of line spacing and single-sided versus double-sided printing have implications at the trial level too.

An appellate judge suggested that the Appellate Rules Committee is likely to be considering possible Rules amendments relating to electronic filings and that the line-spacing and single-sided versus double-sided printing questions might be considered as part of that larger set of possible amendments. This member wondered whether judges may already be able to print their copies of electronically-filed briefs with the exact line spacing and other format choices that they prefer. He also predicted that if the Committee proposes rules that change the current line-spacing or single-sided printing practices without permitting local variations, such proposals would elicit very strong reactions. Mr. Rabiej noted that the development of the current provisions concerning brief fonts proved very controversial. Mr. Letter suggested that the cost savings of 1.5 spacing and double-sided printing might be significant enough to justify proceeding with a proposal targeting these topics without awaiting a broader set of amendments concerning electronic filing. He pointed out that even with the advent of electronic filing, judges are likely to continue to require parties to submit hard copies.

Mr. Fulbruge observed that if the rules are changed to permit double-sided printing, this will require the Committee to re-consider the question of how the briefs should be bound. If the brief is double-sided, it becomes very important to ensure that the brief lies flat when it is open; he suggested that spiral binding is preferable for this purpose. Mr. Letter noted that if the rules are changed to permit double-sided printing, they should make that practice voluntary rather than mandatory, because older computer printers may not be capable of printing double-sided. An attorney member predicted that views on these questions will be divergent and perhaps irreconcilable; he asked whether this might be an area in which an appropriate interim step might be to permit local variation. Another member stated that raising these issues might produce a very constructive dialogue. Another attorney member emphasized that adopting these reforms would cut the bulk of the files in half. An appellate judge stated that the Eighth Circuit is heading in the direction of using double-sided, spiral-bound briefs; he suggested that this is the best approach and that the sooner it is adopted, the better. Judge Stewart observed that cost

containment is a priority, and that making briefs less costly to produce also increases the accessibility of the courts. An attorney member stated that he, personally, prefers reading briefs that are printed single-sided – for example, single-sided briefs are easier to read on airplanes. An appellate judge member predicted that eventually courts will cease to require paper copies, and he stressed that if the only people doing the printing are the judges, and if they can alter the format of electronic briefs to suit their tastes, there will be no need to change the rule.

By consensus, the Committee determined to retain this item on its study agenda.

d. Item No. 08-AP-Q (FRAP 10 – digital audiorecordings in lieu of transcripts)

Judge Stewart invited the Reporter to introduce this item, which concerns a suggestion by Judge Michael Baylson that the Appellate Rules Committee consider the possibility of allowing the use of digital audiorecordings in place of written transcripts for the purposes of the record on appeal. Judge Baylson has permitted the use of digital audiorecordings in lieu of written transcripts for the purpose of post-trial motions. Such a practice can save the parties the expense of obtaining a transcript. However, it is likely that a transcript will need to be prepared for purposes of the appeal. Even if a particular circuit were inclined to experiment with the use of audiorecordings in lieu of transcripts, the current Appellate Rules would not fit comfortably with such an experiment. Thus, the Reporter suggested, this topic merits monitoring by the Committee.

An appellate judge member asked whether it is possible to convert a written brief into an audio file. Mr. Fulbruge stated that there is software that can enable one to convert a written brief into spoken word, but that the software can be finicky. Mr. McCabe provided the Committee with background on the history of audiorecording in federal court proceedings. He observed that discussions concerning transcripts and audiorecordings have been going on for years and that the topic is a controversial one. There is little consensus; views are divergent and strongly held. Mr. Fulbruge noted that views on audiorecordings may evolve as the technology becomes easier to use.

Judge Hartz observed that, for the last 25 years, most appeals in the New Mexico Court of Appeals have been proceeding on the basis of audiorecordings. That court adopted the practice out of frustration with the delays that attended the preparation of transcripts. He noted that the court was very strict with attorneys if they did not accurately quote from the audiorecordings. In his experience, the judges did not have to listen to the audiorecordings very often. On the other hand, he noted, the New Mexico Court of Appeals has more central staff assistance than the federal courts of appeals generally do. It was suggested that the provision of an audiorecorded record can affect the standard of review; for example, when the question is whether a closing argument was inflammatory the answer might be unclear on the face of the transcript but the audiorecording might demonstrate that the argument was not, in fact, inflammatory. An appellate judge member noted that the Kentucky Supreme Court has used

MEMORANDUM

DATE: October 16, 2009

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-P

At the spring 2009 meeting, the Committee discussed Peder Batalden's suggestion that Rule 32 be amended to provide for 1.5-spaced briefs rather than double-spaced briefs. As the minutes reflect, participants expressed diverse views. In addition to discussing line spacing, some participants raised the possibility of permitting double-sided printing. In turn, it was noted that permitting double-sided printing would raise questions concerning how briefs should be bound. The question was raised whether the shift to electronic filing would, in time, decrease the importance of these issues – though one participant responded that judges are likely to continue to require hard copies for the foreseeable future. Participants noted that many judges and lawyers have strong views on these questions, and the issue of permitting local variation was raised. No firm conclusions were reached, and the Committee retained this item on the study agenda.

After the meeting, John Rabiej asked James Ishida to review the history of the proposed amendments to Rule 32.[1] John reports:

> I asked James to review our records and extract excerpts dealing with proposed amendments to Rule 32, which would have required double-sided printing of briefs. As noted by James, the amendment was rejected after public comment for three main reasons: (1) double-sided printing may leave the brief illegible, especially if passages are highlighted by law clerks in yellow; (2) judges and law clerks use the blank pages to annotate or write comments; and (3) any environmental savings would be offset by the need to use heavier stock paper to prevent "bleedthrough," which would make the briefs less legible.

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[1] As noted in my prior memo, prior to 1998, Rule 32 had never been amended. The original Rule 32 had thus failed to keep pace with changes in the manner of producing briefs. Proposed amendments to Rule 32 were published for comment in 1992. An amended version of the proposal was published for comment in 1993. A third version of the proposal was published for comment in 1994. When, in 1995, the Appellate Rules Committee submitted a further revised draft to the Standing Committee, the Standing Committee sent it back to the Appellate Rules Committee for further study. Yet another draft was published for comment in 1996, and after comment and some revision, this draft ultimately gained approval and took effect in 1998.

Thirty-one commentators objected to the double-sided printing. The majority were judges, including: Judges Aldisert, Baldock, Birch, Bowman, Browning, Canby, Edmondson, Farris, Feinberg, Gibson, Luttig, Mahoney, Mayer, David Nelson, Dorothy Nelson, Thomas Nelson, Noonan, Reinhardt, Stapleton, and Suhrheinlich. All the public comments can be found in the June 5, 1995, Appellate Rules Committee report to the Standing Committee.

I enclose James' very helpful memo of May 20, 2009, detailing the history of the consideration of the double-sided printing issue. I also enclose relevant excerpts from the Appellate Rules Committee's June 5, 1995 report.

Encls.

Proposed Rules Amendments re Double-Sided Printing

Appellate Rules

December 1992 - Appellate Rules Committee recommended publishing for public comment numerous changes to Appellate Rule 32. The changes — which included limitations on the number of characters per inch, method for binding briefs, printing of briefs and appendices — did not include double-siding printing.

December 1992 - Standing Committee approved the proposed amendment for publication.

December 1992 - Proposed amendment published for public comment.

April 1993 - In light of the public comments, the Advisory Committee made substantial changes to the proposed amendment and recommended republishing it. Again, no changes were proposed re double-sided printing.

June 1993 - Standing Committee approved the revised amendment and request to republish.

October 1993 - Revised amendment published for public comment.

April 1994 - Witnesses from the publishing and computer industries testified at the advisory committee meeting.

May 1994 - Advisory Committee made additional changes to the published rule amendment, including, for the first time, a provision allowing double-sided printing in briefs so long as the brief is clear and legible. The new revision is in response to several comments received during the second public comment period. Several committee members noted, however, that their circuits had local rules specifically prohibiting double-sided briefs. A motion was made to remove the double-sided language, leaving the rule silent on the issue of single or double-sided printing. The motion was defeated by a vote of 3-5, leaving the double-sided provision in the draft rule amendment.

The Advisory Committee also recommended that the proposed rule amendment be republished.

June 1994 - Standing Committee approved republication.

April 1995 - Advisory Committee reviewed comments on the proposed amendment and made further revisions, including the elimination of double-sided printing. The Advisory Committee noted 31 commentators opposed double-siding printing because: (1) double-sided printing may leave the brief illegible, (2) many judges and law clerks use the blank page to annotate or write notes, and (3) any environmental savings by using double-sided printing will be offset by the need to use heavier weighted paper in order to meet the legibility requirement in the proposed amendment.

The Advisory Committee not only removed language permitting double-sided printing, but it also added language to the rule and committee note that specifically stated only one side of the paper may be used for the brief. The single-page requirement is still in the current rule.

Civil Rules

November 1995 - Civil Rules Committee placed on its study calendar a proposal requiring that all papers filed in the district court be on recycled paper and printed double-sided.

Criminal Rules

April 1992 - Criminal Rules Committee considered a request from the Environmental Defense Fund to amend various rules of practice and procedure "to require that only double-sided, unbleached paper, be used for all court documents." The Advisory Committee unanimously agreed to communicate to the EDF that its proposal was being considered by other Judicial Conference committees.

In 2000, the Court Administration and Case Management Committee eventually took up a proposal that would require the use of recycled paper for all court filings. The proposal was based on the fact that both the executive and legislative branches have enacted laws and policies to encourage the use of recycled paper, as well as the fact that some federal and state courts have established rules requiring the use of recycled paper. CACM ultimately decided not to pursue the proposal on jurisdictional grounds. ("The Committee was of the opinion that while paper recycling was a laudatory goal, a rule or policy requiring filings to be submitted on recycled paper was beyond the scope of the Committee's jurisdiction.")

May 20, 2009

Minutes of Fall 2009 Meeting of
Advisory Committee on Appellate Rules
November 5 and 6, 2009
Seattle, Washington

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 5, 2009, at 8:30 a.m. at the Fairmont Olympic Hotel in Seattle, Washington. The following Advisory Committee members were present: Judge Kermit E. Bye, Justice Randy J. Holland, Ms. Maureen E. Mahoney, Dean Stephen R. McAllister, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Lee H. Rosenthal, the Chair of the Standing Committee; Judge Carl E. Stewart, the past Chair of the Appellate Rules Committee; Judge T.S. Ellis III, a past member of the Appellate Rules Committee; Judge Harris L Hartz, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Sutton welcomed the meeting participants and introduced Mr. Green. Judge Sutton noted that Mr. Fulbruge's contributions as clerk liaison to the Committee were irreplaceable but that the Committee is very fortunate to have, as Mr. Fulbruge's successor, someone as experienced as Mr. Green. Judge Sutton noted that the Committee will particularly benefit from Mr. Green's experience with the Sixth Circuit's transition to electronic filing.

Judge Sutton pointed out to the Committee the tribute to Mark I. Levy that was displayed in the meeting room. Judge Sutton recalled that at the first Appellate Rules Committee meeting he attended (in San Francisco in April 2006), Mr. Levy took the time to have lunch with him and other new participants and to make them feel welcome. He was a great friend and colleague and he made tremendous contributions to the work of the Committee. At Judge Sutton's suggestion, the Committee observed a moment of silence in memory of Mr. Levy.

During the meeting, Judge Sutton and Committee members presented tokens of appreciation to Judge Stewart for his service on the Committee from 2002 onward and for his leadership of the Committee from 2006 to 2009, and to Judge Ellis for his service as a member of the Committee from 2003 to 2009. Judge Sutton thanked Judge Stewart for his wise guidance of the Committee's deliberations, and noted that Judge Stewart had provided a model for him to follow as the incoming Chair of the Committee. Judge Stewart said that he had greatly enjoyed serving as a member of the Committee and, later, as its Chair. He observed that he valued the Committee members' commitment and collegiality. He expressed appreciation to the Chief Justice for appointing him to serve and to Judge Rosenthal for her leadership of the parent Committee. He thanked the Reporter for her work, and he thanked Mr. McCabe, Mr. Rabiej, Mr.

H. Item No. 08-AP-P (FRAP 32 – line spacing of briefs)

Judge Sutton invited the Reporter to introduce this item, which arose from Mr. Batalden's suggestion that Rule 32 should be amended to provide for 1.5-spaced instead of double-spaced briefs. At the spring 2009 meeting, members also discussed the possibility of permitting briefs to be printed double-sided. Members expressed diverse views; much discussion centered on the potential significance of the ongoing shift to electronic filing. After the spring 2009 meeting, Mr. Rabiej had asked Mr. Ishida to review the history of prior proposals to amend Rule 32 to provide for double-sided briefs. The agenda materials include Mr. Ishida's very helpful memo detailing that history, as well as excerpts from a 1995 Appellate Rules Committee report that summarized the comments submitted on the double-sided printing proposal.

An attorney member stated that she would like to hear from the judge members of the Committee what they thought about the proposal. Justice Holland noted that the Delaware Supreme Court permits double-sided (but double-spaced) printing for printed briefs, and that two-sided printing has not been a problem; he also noted that the lawyers are required to provide hard copies for all the justices and their clerks. A district judge asked whether the shift to electronic filing would moot the question. Mr. Green noted that even with the shift to e-filing, all circuits other than the Sixth Circuit still require the submission of hard copies of briefs. An appellate judge noted that once a brief is electronically filed, each judge can have it printed precisely the way he or she prefers. Another appellate judge noted that the problem of eye strain is likely to prevent judges from simply reading briefs on-screen without printing them. He stated that judges on the Fifth Circuit generally want to receive hard copies of the briefs. Another appellate judge agreed that many judges are likely to continue to want hard copies, though their law clerks may read the briefs on the screen; he noted that the need to print out electronically filed briefs has created a great deal of work for the judicial assistants. Another appellate judge noted that the Eighth Circuit was an early adopter of electronic filing. He stated that his assistant prints out copies of the electronically filed briefs for him; he prefers single-sided printing, though his clerks do not.

An appellate judge suggested that as time progresses, this item might usefully be addressed as part of the set of issues that relate to electronic filing. An attorney member questioned whether line-spacing really will become moot with the shift to electronic filing; she noted that if a judge chooses to have electronic double-spaced briefs printed out with 1.5 or single line spacing, the brief's internal page references will no longer make sense. But it was noted that the question of line-spacing does relate to the question of double-sided printing, and the latter question does appear to be shifting in valence with the adoption of electronic filing.

By consensus, the Committee resolved to keep this item on its study agenda.

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

Judge Sutton invited the Reporter to introduce this item, which concerns Daniel Rey-Bear's suggestion that the term "state" be defined, for purposes of the Appellate Rules, to

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-Q

This item arises from Judge Baylson's proposal that the Committee consider amending the Appellate Rules to permit the use of audiorecordings in lieu of a transcript for purposes of the record on appeal.

The Committee discussed this proposal at its spring 2009 and fall 2010 meetings. Although some participants expressed interest in the possible uses of digital recordings in lieu of transcripts, other participants expressed skepticism about the feasibility of such a change in federal appellate practice. The Committee did not take any action on the proposal.

At the time that Judge Baylson suggested this topic to the Committee, selected federal trial courts were engaged in a pilot project involving the use of audiorecordings. In 2010, the Judicial Conference approved a proposal to provide PACER access to selected audiorecordings of trial court proceedings.[1] A listing on the PACER website indicates that at least two federal district courts and 23 bankruptcy courts have provided such audiorecordings via PACER.[2] In 2011, the Judicial Conference Committee on Court Administration and Case Management (CACM), joined by the Federal Judicial Center, commenced a pilot project in fourteen federal districts to study the use of digital videorecordings of trial court proceedings.[3]

However, these pilot projects have not focused on the possible use of such electronic recordings as part of the record on appeal.[4] A quick search of local circuit rules discloses only two circuits that have local provisions addressing the inclusion in the record on appeal of recordings made below. The Third Circuit presumptively requires a

[1] *See* PACER, Digital Audio Recording Project, available at http://www.pacer.gov/announcements/general/audio_pilot.html (accessed March 6, 2013).
[2] *See id.*
[3] *See* United States Courts, Cameras in Courts, available at http://www.uscourts.gov/Multimedia/Cameras/OverviewofPilot.aspx (accessed March 6, 2013).
[4] The Indiana state courts embarked on such a pilot project last year. *See* Order Establishing the Indiana Court Reporting Pilot Project for Exploring the Use of an Audio/Visual Record on Appeal (Ind. Sup. Ct. Sept. 18, 2012), available at http://www.in.gov/judiciary/files/order-other-2012-94S00-1209-MS-522a.pdf (accessed March 6, 2013).

written transcript and requires court permission if a party wishes to include a link to an electronic recording.[5] The Federal Circuit has a local rule permitting the inclusion of electronic recordings in the record on appeal.[6]

It seems unlikely that all of the courts of appeals would be receptive, in the near future, to the substitution of electronic recordings for written transcripts of the proceedings below (for purposes of the record on appeal). Of the two circuits that have addressed the topic in local rules, one – the Third Circuit – appears presumptively to prohibit such substitution. Meanwhile, the federal trial courts appear to be in the early stages of moving to make electronic audio and video recordings publicly available – a process that is taking place under the supervision of CACM. For the present, there is reason to think that an amendment to the Appellate Rules on this topic would be premature. It may be worthwhile for the Committee to consider removing this item from its agenda. As context for the Committee's consideration of this possibility, I enclose the relevant prior memos[7] and an excerpt of the minutes of the Committee's April 2009 meeting.

Encl.

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[5] Third Circuit Local Appellate Rule 28.3(c) provides:

> 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.

See also Third Circuit Local Appellate Rule 30.1(c) ("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."); Third Circuit Local Appellate Rule 113.13(a)(2) ("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.").

[6] *See* Federal Circuit Rule 30(j) ("When the record on appeal or review has been perpetuated in whole or in part on video recording media in accordance with the rules of the court or agency, those video recording media portions of the record that would properly be included in the appendix if they were in documentary form may be included in a supplementary video recording media appendix. Four copies must be filed.").

[7] To conserve space, I am omitting the enclosure to my September 2010 memorandum. Of course, I will be glad to provide a copy if desired; the enclosure can also be accessed among the Committee's fall 2010 agenda materials on the uscourts.gov website.

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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-Q

Digital audio recording has been an approved method of making the record of district court proceedings for a decade.[1] Judge Michael Baylson, a member of the Civil Rules Committee, 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. Copies of Judge Baylson's November 2008 letter and its attachment are enclosed.

Part I of this memo describes the use of digital audio recordings in a recent case in front of Judge Baylson. Part II notes the traditional importance of the transcript as a part of the record on appeal. Part III assesses whether the Appellate Rules would permit the adoption of a local circuit rule authorizing the use of audio files in lieu of a transcript. Part IV considers the desirability of such a practice.

I. The use of digital audio recordings in lieu of a transcript in *K.R. v. School District of Philadelphia*, 2:06-cv-2388

K.R. v. School District, a case litigated before Judge Baylson this fall and winter, provides an example of the possible uses of audio files in lieu of transcripts. The plaintiffs brought various federal claims against the school district and other defendants, challenging the defendants' response to their requests concerning the education of their daughter, who has Asperger Syndrome. After the court granted partial summary judgment to the defendants, the case went to trial on the plaintiffs' claims under the Americans with Disabilities Act and the Rehabilitation Act. The jury found for the defendants, and the plaintiffs moved for a new trial.

At the plaintiffs' request, Judge Baylson permitted the new trial motion to be supported by references to the digital audio files of the trial proceedings rather than by references to a printed transcript. Judge Baylson's order permitting the use of the digital audio recordings is

[1] 28 U.S.C. § 753(b) provides that district court proceedings "shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge." The Judicial Conference approved the use of digital audio recording in 1999.

included as an attachment to this memo. Judge Baylson's order notes that the Eastern District of Pennsylvania is participating in a pilot program whereby the audio recordings of trial proceedings are made available on PACER. Judge Baylson states that avoiding the need for a transcript will reduce the cost of litigation. He observes: "Although judges are used to relying on written transcripts of trials and testimony, a judge (and the law clerk who often makes the most detailed review of court proceedings relevant to post-trial motions) can secure sufficient knowledge of the trial record from a digital audio recording, just as from a written transcript." The order directed the parties to cite the audio recordings by minute and second, so as to pinpoint the portion of the record to which the party wished to direct the court's attention.

Judge Baylson subsequently denied the plaintiffs' motion for a new trial. See K.R. v. School District, Memorandum re: Motion for a New Trial, No. 2:06-cv-2388, Dec. 26, 2008. From the fact that Judge Baylson's order denying the new trial cites at seven points to portions of the audio recordings, it can be seen that the parties did indeed proceed on the basis of the audio recordings without a written transcript. But the plaintiffs have appealed the judgment, which means that they may ultimately have to order at least part of the trial transcript after all. That general issue, which is governed by Appellate Rule 10, is the one that leads Judge Baylson to bring the question of audiorecordings to the attention of the Appellate Rules Committee.

II. The traditional importance of the transcript as part of the record on appeal

Under Appellate 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 10 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."[2] 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 exclude anything from the transmitted record that might be useful. For every appeal where the

[2] Assuming the pending time-computation amendments take effect, as of December 1, 2009 Rule 10(b)(1)'s 10-day deadline will become a 14-day deadline.

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."[3] 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;[4] 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).[5]

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

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[3] Knibb, Fed. Ct. App. Manual § 28:1 (5th ed.).

[4] This would arise if the proceedings had for some reason not been recorded or if the recording were lost.

[5] See, e.g., Richardson v. Henry, 902 F.2d 414, 416 (5th Cir. 1990) ("[I]nability to bear the financial burden of providing a transcript does not make the transcript unavailable within the meaning of Rule 10(c)."). However, a litigant who cannot afford the cost of the appeal can seek in forma pauperis status and request that the government pay for the transcript. See 28 U.S.C. §§ 753 & 1915.

digital audio files instead.

III. Do the Appellate Rules preclude the use of audio files in lieu of the transcript?

There do not yet appear to exist any local circuit rules that address the use of audio files in lieu of transcripts. Some circuits have provisions concerning the provision of electronic versions of the record,[6] but those provisions appear to contemplate that the electronic files in question will be electronic copies of *paper documents* rather than electronic audio files. It nonetheless makes sense to consider whether local rules permitting the use of audio files in lieu of transcripts would be permissible under the existing framework. 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. As noted above, Rule 10(a) defines the record on appeal as "(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." 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." However, for purposes of discussion, this memo will assume that a court of appeals 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." The certificate must be filed within 10 days (or, if the time-computation amendments take effect, 14 days) after the later of the filing of the notice of appeal or the entry of the order disposing of the last tolling motion. 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

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[6] See, e.g., 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 appeals must be consecutively numbered and paginated."); Sixth Circuit Rule 10(a)(1) ("When the record is complete as described in FRAP 11(b)(2), the clerk will compile an electronic record on appeal (ROA) from the district court's electronic record. The ROA will be an electronic file in PDF format or, where the size of the record requires, multiple files."); Sixth Circuit Rule 28(a)(2) ("For cases where there is an electronic record on appeal, in addition to the reference required by 6 Cir. R. 28(a)(1), a brief must refer to the page of the electronic record on appeal for items that appear in that record."); see also the Sixth Circuit Guide to Electronic Filing.

transcript.[7] 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." Another difficulty is that 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."

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,[8] and it seems likely that the permissible variations could include the use of audio files as part of the original record.

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[7] Rule 10(b)(1)(A), concerning the process for ordering the transcript, explicitly states that its provisions are "subject to a local rule of the court of appeals." That deference to local rulemaking stemmed from a recognition of variation in local practices. The Committee Note to the 1979 amendments to Rule 10 states in part: "Rule 10(b) is made subject to local rules of the courts of appeals in recognition of the practice in some circuits in some classes of cases, e.g., appeals by indigents in criminal cases after a short trial, of ordering immediate preparation of a complete transcript, thus making compliance with the rule unnecessary."

[8] Rule 30(f) provides: "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."

IV. Is the use of audio files in lieu of a transcript desirable for purposes of the record on appeal?

The use of audio files in place of a transcript would have significant advantages, but on the other hand a number of judges and lawyers are likely to prefer using transcripts. 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.

Judge Baylson summarizes well the advantages of using audio files. Using audio recordings rather than a transcript could help to contain the costs of the appeal by avoiding the need to order a transcript. Especially when the trial itself was short, the audio file can be manageable to use. As Judge Baylson points out, citations to the audio file can pinpoint the relevant parts of the file by stating the hour and minute; the reader can then jump directly to that spot in the recording. In addition to keeping costs down, use of audio files can expedite appeals because the audio recording is available immediately, whereas the transcript can take a long time to prepare.

The main advantage of using a transcript instead of an audio file is that a transcript can be visually skimmed. For litigants in some cases, the cost of ordering the transcript might be somewhat balanced by a cost savings in attorney time because a printed transcript can be reviewed more quickly, and annotated more efficiently, than an audio file. And for similar reasons, substituting the audio file for a transcript might make the task of reviewing the record more cumbersome for appellate judges. Appellate judges – unlike the district judge – lack familiarity with the events below and thus might wish to read parts of the transcript surrounding the portions cited by the parties.

It also seems likely that judges' preferences will vary. Some judges may like using audio files, but it is probable that others will not. 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.

V. Conclusion

Judge Baylson's suggestion that courts consider permitting the use of audio files instead of transcripts is well worth consideration. Such a practice holds the promise of significant savings in cost and time in appropriate cases. Due to the likelihood that some judges are likely to prefer transcripts to audio files, it seems probable that most early experimentation with the practice will occur at the district court level rather than in the courts of appeals. Moreover, in the courts of appeals it seems possible that relevant factors will vary from circuit to circuit. Should a court of appeals wish to adopt a local rule permitting the use of audio files in lieu of a transcript, such a local rule would rest in some tension with some aspects of the Appellate Rules.

It therefore seems useful for the Committee to monitor developments in this area, in order to ensure that the Appellate Rules do not impede useful innovations by the courts of appeals.

Encl.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA
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Sixth and Market Streets
Philadelphia, Pennsylvania 19106-1741
E-mail: Chambers_of_Judge__Michael_Baylson@paed.uscourts.gov

Chambers of
Michael M. Baylson
United States District Judge

Telephone (267) 299-7520
Fax (267) 299-5078

November 5, 2008

Catherine Struve, Professor of Law
University of Pennsylvania Law School
3400 Chestnut Street
Philadelphia, PA 19104

Re: Rules of Appellate Procedure

Dear Cathie:

I am enclosing a short Memorandum and Order that I filed in a case to allow a plaintiff to proceed on post-trial motions with a digital audio recording, without a written transcript. I respectfully suggest that you consider the availability of this program on a future agenda of the Appellate Rules Advisory Committee.

Best regards.

Sincerely yours,

Michael M. Baylson

MMB:lm
enclosure

O:\Letters - personal\Struve, Catherine, U. of Pa Law School ltr II.wpd

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

K.R., a minor, by her Parents	:	CIVIL ACTION
v.	:	
SCHOOL DISTRICT OF PHILADELPHIA, et al.	:	NO. 06-2388

MEMORANDUM AND ORDER
RE: USE OF DIGITAL AUDIO RECORDING IN LIEU OF TRANSCRIPT

Baylson, J. **November 5, 2008**

From smoke signals to e-mail (with telegraph, telephone, and texting along the way), humans have changed their habits to accommodate advances in technology. Digital audio recording of court proceedings is one of many advances in technology, designed to increase public access and decrease the cost of litigation.[1] Digital audio is another step up these stairs.

Plaintiff has filed a Motion to Excuse the Filing of Transcript Excerpts (Doc. No. 127). Plaintiff intends to rely on the audio record of a jury trial which resulted in a defense verdict. This Motion, and also the post-trial motions themselves, make clear that the primary focus of the asserted legal errors is the Court's instructions to the jury. This was not a lengthy case. Not

[1] Legal scholars have also recognized the wide array of recent technological advances in public access to court proceedings and the variety of benefits arising from those advances. See generally Peter W. Martin, Online Access to Court Records - From Documents to Data, Particulars to Patterns (Cornell Law Sch. Legal Studies Res. Paper Series, Paper No. 08-003, Mar. 14, 2008), available at http://ssrn.com/abstract=1107412. As that author highlights, the Supreme Court has frequently listed many of the benefits that follow from the public availability of court proceedings. Id. at 3; Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982) (upholding public access to criminal trials to allow citizens to oversee and "check the judicial process"); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 508-09 (1984) (open courts facilitate a "community therapeutic value" for cases of public concern). In its role of giving final approval to changes in federal rules before submission to Congress, the Supreme Court has regularly approved rule changes recommended to take advantage of technology.

including jury selection, the trial took less than two days for the presentation of evidence. The jury instructions were prepared in writing, and a copy was provided to the jury. Plaintiff will probably cite and rely on certain portions of the trial testimony to give context to the allegedly erroneous jury instructions.

Defendants have filed a response in opposition to Plaintiff's Motion. Acknowledging that digital audio recording has been authorized as a means of making an official record of court proceedings since 1999, when it was approved by the Judicial Conference of the United States, Defendants mistakenly assume that Plaintiff's attorneys want to prepare a written transcript of the digital audio file themselves to support the post-trial motions. Plaintiff's reply makes clear that they have no intention of preparing such a transcript, but merely wish to refer to excerpts of the audio record in their post-trial briefs.

The consequences of relying on the audio, rather than the written, record are not profound. Although judges are used to relying on written transcripts of trials and testimony, a judge (and the law clerk who often makes the most detailed review of court proceedings relevant to post-trial motions) can secure sufficient knowledge of the trial record from a digital audio recording, just as from a written transcript.

The following steps are easily taken:

1. The audio proceeding is "uploaded" from the courtroom recording to the case file and is docketed.

2. The judge (and/or law clerk) locates the proceeding on the case's docket through the Case Management/Electronic Case Filing System ("CM/ECF"), available on the personal computer used by many judges and virtually all law clerks, (in this case, Docket Nos. 110-116).

3. The user then "clicks" on the appropriate docket number, and the computer screen displays a description of the recording.

4. Another "click" will start the recording, which can be heard through speakers or earphones.

5. The computer screen displays the minutes and seconds elapsing as they are played. Counsel should provide the precise minute(s) and second(s) at which the relevant portion of the testimony occurred, and the judge/law clerk can then go directly to that portion. For example, if a relevant portion of the transcript is found at 3 minutes and 10 seconds after the hearing began, counsel should state that in their post-trial briefs.

6. An on-screen cursor, controlled by the mouse, allows the user to advance the recording to the specific minute and second specified by counsel.

7. By referencing the specific minute and second, the Court can easily locate specific testimony on the computer and play that portion through a speaker or headphones – just as counsel usually designate a particular part of a written transcript (by page and line) and the Court goes directly to that page and line in the written transcript. Thus, the judge need only listen to whatever portions of the proceeding the parties have cited in their briefs.

The use of an audio file is more opportune than onerous. Human habits change. The Judicial Conference of the United States has authorized all federal district courts to rely on digital audio recording as a substitute for court reporters. This District Court for the Eastern District of Pennsylvania is currently one of a few select federal district courts chosen to participate in a pilot program that allows an audio recording to be "uploaded" onto the court's computerized docket and therefore to be accessible to the bar and public by means of the Internet, through the PACER[2] system. Remote PACER users can now listen to court proceedings, which improves the transparency of, and access to, federal court proceedings. The cost to a PACER user is minimal. Judicial Conference policy establishes a charge of eight cents (8¢) for uploading a particular hearing, 99% cheaper than the $26 that Judicial Conference rules require the court to charge for audio access to court proceedings through the purchase of a CD.

The digital audio program, as it develops technologically and becomes accepted by

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[2]PACER stands for "Public Access to Court Electronic Records."

members of the judiciary, counsel, litigants, and the public, will most likely hasten the substitution of an audio record for the current reliance on written transcripts as the official court record in most cases.

Written transcripts will still be ordered – but they are expensive and substantially add to the costs of litigation. Digital audio is minimal in cost, and its use will save great amounts of paper by allowing the court record to be reviewed in audio form rather than through a written transcript.

There are also many advantages in the prompt transparency of court proceedings. Written transcripts take time to prepare, unless someone orders daily copy, which is very expensive. With digital audio recording, the record of a court hearing or trial will be uploaded shortly after the proceedings are completed, usually within one hour. A public with quick and cheap availability to court proceedings through digital audio is a public which can better understand what happens in court.

This is an appropriate case in which to proceed without written transcripts. My experience in using the digital audio record in this case will enhance the pilot program in which our District participates and allow other judges and court administrators to determine its strengths and weaknesses, needs for improvement, and in general, evaluate the efficacy of using digital audio to decide motions and reach verdicts in non-jury cases.

Federal court rules have long embraced advances in technology. Very recently, the Rules of Civil Procedure were amended by adding detailed procedures to deal with electronic discovery. Almost forty years ago, in 1970, Rule 30(b)(4) was adopted to allow for taking depositions by tape recorder in lieu of stenographic transcription. This was a dangerous concept

to many. Our late esteemed colleague Judge Clifford Scott Green approved this procedure for a plaintiff who was a prisoner in a state institution, represented by student counsel, and wisely noted:

> The manifest purpose of the Rule is to facilitate the effective participation of the economically disadvantaged in the federal courts, through the lowering of costs as a result of the use of modern technology. This purpose has special meaning in the case of suits by prisoners based on violations of their constitutional rights. The federal courts have attempted to overcome the substantial practical impediments to the bringing of such suits. Nevertheless, such impediments remain and Rule 30(b)(4) should be read in an attempt to render the ability to bring a suit in federal courts meaningful. The countervailing policy relevant to the interpretation and application of Rule 30(b)(4) is the necessity for the trustworthiness and reliability of depositions. We believe that a proper balancing of these considerations requires approval of the plaintiff's proposal.

Lucas v. Curran, 62 F.R.D. 336, 338 (E.D. Pa. 1974).

Defendants point out that if an appeal is taken, Federal Rule of Appellate Procedure 10(b)(1)(A) requires the appellant to "order from the reporter a transcript." My Order only concerns the proceedings on post-trial motions in this Court. Whether appellate courts will allow digital audio recordings to be used in place of written transcripts remains to be seen.

Although the use of digital audio proceedings on a wide basis in civil cases appears to be positive in all respects, there are additional considerations in some criminal cases. If a defendant or witness has cooperated with the authorities, or the record would reveal the names or other identifiers of informants, cooperating witnesses, victims, or others who may be vulnerable to wrongdoing, then caution is required. As part of our pilot program, the judge can simply decline the uploading of a hearing in a criminal case that contains such information. In the future, just as

Rule 52, F. R. Civ. P., and Rule 49.1, F. R. Crim. P., now provide for redaction of facts protected by privacy laws or policies, the uploading of a digital audio recording can be accompanied by redaction of personal and sensitive information.[3] Judges are very concerned over the accessibility to such information by people with evil intentions, as most visibly seen by the notorious website "whosarat.com."

For the foregoing reasons, Plaintiff's Motion is GRANTED. Attached is a description of the Digital Audio File Electronic Access Pilot Program now in operation in this Court.

BY THE COURT:

Michael M. Baylson, U.S.D.J.

O:\CIVIL\06-2388 K.R v. School Dist Phila\K.R. v. Phila. School Dist - Memo Order transcripts.wpd

Fax
cc: Herring (mail)
Shore
Goode

[3]In this Court, we have adopted a procedure requiring that documents which pertain to guilty pleas or sentencings be referred to on the docket merely as "plea document" or "sentencing document" so that an internet user will not know, from the docket itself, in a particular criminal case, whether the defendant has cooperated with authorities. Further enhancements to provide security for valuable law enforcement information is constantly under consideration.

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

Digital Audio File Electronic Access Pilot Program

NOTICE

The pilot program has been authorized by the Judicial Conference of the United States and will provide digital audio files of court proceedings through the Public Access to Court Electronic Records (PACER) system. The Judicial Conference of the United States Committee on Court Administration and Case Management has selected five pilot courts. The Eastern District of Pennsylvania and the District of Nebraska are the district courts selected to participate in the project. The Eastern District of North Carolina, the Northern District of Alabama and the District of Maine are the bankruptcy courts selected to participate in this project. During the pilot project digital audio recordings of courtroom proceedings will be publicly available on Pacer upon the approval of the presiding judge. More than 840,000 subscribers already use PACER to access docket and case information from federal appellate, district and bankruptcy courts.

Digital audio recording has been an authorized method of making an official record of court proceedings since 1999, when it was approved by the Judicial Conference of the United States. Digital audio recording is used in district and bankruptcy courts in the federal court system. A majority of Eastern District of Pennsylvania district court judges and all magistrate judges use digital audio recordings of court proceedings.

Should you have any questions concerning the notice, please contact Eastern District of Pennsylvania Systems Manager, Susan Matlack at 267-299-7051.

MICHAEL E. KUNZ
Clerk of Court

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Minutes of Spring 2009 Meeting of
Advisory Committee on Appellate Rules
April 16 and 17, 2009
Kansas City, Missouri

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 2009, at 8:30 a.m. at the Hotel Phillips in Kansas City, Missouri. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. Mark I. Levy, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Harris L Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. He expressed regret that Maureen Mahoney, Judge Ellis, Judge Rosenthal and Professor Coquillette were unable to be present. Judge Stewart noted the Committee's great appreciation of Judge Rosenthal's work on all the Committee's matters including the package of proposed time-computation legislation that is currently before Congress.

II. Approval of Minutes of November 2008 Meeting

The minutes of the November 2008 meeting were approved subject to the correction of a typographical error on page 11.

III. Report on January 2009 meeting of Standing Committee

Judge Stewart and the Reporter highlighted relevant aspects of the Standing Committee's discussions at its January 2009 meeting. The proposed amendment to Appellate Rule 40(a)(1) had been approved by the Appellate Rules Committee at its fall 2008 meeting. Judge Stewart presented that proposed amendment to the Standing Committee for discussion rather than for action, in order to provide an opportunity for the new administration to consider the proposal before the presentation of the proposal for final approval by the Standing Committee. Judge Stewart also described to the Standing Committee the Appellate Rules Committee's ongoing work on other matters such as the question of manufactured finality.

containment is a priority, and that making briefs less costly to produce also increases the accessibility of the courts. An attorney member stated that he, personally, prefers reading briefs that are printed single-sided – for example, single-sided briefs are easier to read on airplanes. An appellate judge member predicted that eventually courts will cease to require paper copies, and he stressed that if the only people doing the printing are the judges, and if they can alter the format of electronic briefs to suit their tastes, there will be no need to change the rule.

By consensus, the Committee determined to retain this item on its study agenda.

d. Item No. 08-AP-Q (FRAP 10 – digital audiorecordings in lieu of transcripts)

Judge Stewart invited the Reporter to introduce this item, which concerns a suggestion by Judge Michael Baylson that the Appellate Rules Committee consider the possibility of allowing the use of digital audiorecordings in place of written transcripts for the purposes of the record on appeal. Judge Baylson has permitted the use of digital audiorecordings in lieu of written transcripts for the purpose of post-trial motions. Such a practice can save the parties the expense of obtaining a transcript. However, it is likely that a transcript will need to be prepared for purposes of the appeal. Even if a particular circuit were inclined to experiment with the use of audiorecordings in lieu of transcripts, the current Appellate Rules would not fit comfortably with such an experiment. Thus, the Reporter suggested, this topic merits monitoring by the Committee.

An appellate judge member asked whether it is possible to convert a written brief into an audio file. Mr. Fulbruge stated that there is software that can enable one to convert a written brief into spoken word, but that the software can be finicky. Mr. McCabe provided the Committee with background on the history of audiorecording in federal court proceedings. He observed that discussions concerning transcripts and audiorecordings have been going on for years and that the topic is a controversial one. There is little consensus; views are divergent and strongly held. Mr. Fulbruge noted that views on audiorecordings may evolve as the technology becomes easier to use.

Judge Hartz observed that, for the last 25 years, most appeals in the New Mexico Court of Appeals have been proceeding on the basis of audiorecordings. That court adopted the practice out of frustration with the delays that attended the preparation of transcripts. He noted that the court was very strict with attorneys if they did not accurately quote from the audiorecordings. In his experience, the judges did not have to listen to the audiorecordings very often. On the other hand, he noted, the New Mexico Court of Appeals has more central staff assistance than the federal courts of appeals generally do. It was suggested that the provision of an audiorecorded record can affect the standard of review; for example, when the question is whether a closing argument was inflammatory the answer might be unclear on the face of the transcript but the audiorecording might demonstrate that the argument was not, in fact, inflammatory. An appellate judge member noted that the Kentucky Supreme Court has used

audiorecordings in place of transcripts for years, but that court nonetheless states that it employs a deferential standard when reviewing credibility assessments.

Judge Stewart noted that the relevant technology is changing rapidly. He noted that the recent Supreme Court decision in *Scott v. Harris*, 550 U.S. 372 (2007), referred to the videotape evidence that had been entered into the record below. An attorney member supported studying Judge Baylson's suggestion; he noted that obtaining a transcript poses a significant expense (for example, obtaining the transcript for a small four-day trial recently cost $1,200.00).

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

e. Item Nos. 08-AP-R & 09-AP-A (FRAP 26.1 & FRAP 29(c) – corporate disclosure requirement)

Judge Stewart invited the Reporter to introduce this item, which concerns suggestions made by Chief Judge Frank H. Easterbrook and the ABA's Council of Appellate Lawyers as part of their respective comments on the pending proposal to amend Rule 29(c) (discussed earlier in these minutes). These commenters suggest that the Committee should rethink the scope of Appellate Rule 26.1's disclosure requirement. They also suggest that the Committee revise the part of Rule 29(c) that requires amicus briefs filed by a corporation to include "a disclosure statement like that required of parties by Rule 26.1."

The ABA's Council of Appellate Lawyers suggests amending Rule 26.1 to cover amicus briefs and amending Rule 29(c) to require provision of the "same disclosure statement" required by Rule 26.1. This suggestion appears to arise from a view that Rule 29(c)'s current language – "a disclosure statement like that required of parties by Rule 26.1" – is unclear in some way and that the current language could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But that concern is somewhat puzzling, because it is difficult to imagine (and the Council does not specify) what sort of difference would arise.

An attorney member asked whether a filing by an amicus could cause a recusal. The Reporter observed that a related issue surfaced in the discussions concerning amicus filings in connection with rehearing en banc; in that context, at least one circuit prohibits such filings if they would cause the recusal of a judge. An appellate judge suggested that some recusal issues are to some extent discretionary and perhaps the standard is slightly less stringent with respect to amicus briefs. Another appellate judge noted that though it may be unusual for an amicus filing to trigger a recusal, it is possible – for example, if a judge's relative authors the amicus brief.

Chief Judge Easterbrook argues that the term "corporation" (in Rules 26.1 and 29(c)) is both over- and under-inclusive. On the first point, Chief Judge Easterbrook asserts that some corporations – such as municipal corporations, Harvard University or the Catholic Bishop of Chicago – have no stock and no parent corporations and ought not to be required to make

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MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-Q

At its April 2009 meeting, the Committee discussed Judge Michael Baylson's suggestion 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. By consensus, the Committee retained this suggestion on its study agenda.

This summer, Judge Baylson forwarded to us an opinion that he filed following a nine-day bench trial in a complex case concerning allegations of racial bias in school redistricting; post-trial briefing proceeded entirely on the basis of digital recordings, without any written transcript. *See* Memorandum on Conclusions of Law, Doe v. Lower Merion School Dist., Civil Action No. 09-2095, at 2 n.2 (June 24, 2010). The opinion is enclosed.

Encl.

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-D

This item relates to the proposed "Fair Payment of Court Fees Act of 2010," which would have amended Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The bill – introduced by Representative Henry C. "Hank" Johnson, Jr. – would have added a new subdivision (f) to Rule 39; that provision would require the court to order a waiver of appellate costs if the court determined that the interest of justice so required, and would define the "interest of justice" to include the establishment of constitutional or other precedent.

The Committee noted, at its fall 2010 meeting, that Appellate Rule 39 already provides the courts of appeals with discretion to deny costs in a case such as *Snyder*. The Committee asked Marie Leary and the Federal Judicial Center to study circuit practices concerning appellate costs. As detailed in her informative report,[1] Ms. Leary found that the circuit practices vary due to differences with respect to factors such as the ceilings on the reimbursable cost per page of copying and the number of copies. In *Snyder*, the great bulk of the $16,510 cost award was due to the cost of copying the briefs and extensive appendices.

At the Committee's request, Judge Sutton sent Ms. Leary's report to the Chief Judges of each circuit. Subsequently, the Fourth Circuit amended its local rules to lower the ceiling on reimbursable costs from $ 4.00 per page to 15 cents per page.[2] In July 2011, the Rules Committees submitted a memo to argue that the proposed bill to amend Civil Rule 68 and Appellate Rule 39 would be unnecessary in light of, inter alia, the circuits' responses to the FJC study and the growing prevalence of electronic filing (which will decrease copying costs). The bill has not been reintroduced in the 112th or 113th Congresses.

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[1] *See* Marie Leary, Comparative Study of the Taxation of Costs in the Circuit Courts of Appeals Under Rule 39 of the Federal Rules of Appellate Procedure (FJC April 2011), available at http://www.fjc.gov/library/fjc_catalog.nsf.

[2] *See* Fourth Circuit Rule 39(a) ("The cost of producing and binding necessary copies of briefs and appendices … shall be taxable as costs at a rate equal to actual cost, but not higher than15 cents per page for each copy required for filing and service by [local rule or court order].").

I therefore suggest that the Committee consider removing this item from its agenda. As background, I enclose a July 7, 2011 memorandum on this topic.

Encl.

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

MEMORANDUM

DATE: July 6, 2011

TO: Jocelyn Griffin

FROM: Lee H. Rosenthal
Jeffrey S. Sutton
Catherine T. Struve

RE: Fair Payment of Court Fees Act of 2011

This memo addresses the proposed "Fair Payment of Court Fees Act of 2011," which would amend Civil Rule 68 and Appellate Rule 39 in response to concerns raised about the taxation of costs in the case of *Snyder v. Phelps*, 580 F.3d 206 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011). The Judicial Conference's Committee on Rules of Practice and Procedure (the "Standing Rules Committee") and the Appellate Rules Advisory Committee (the "Advisory Committee") understand and share concerns raised about the taxation of costs in *Snyder*, and are already working on measures to address them. That work is well advanced. The issue in *Snyder*, which rarely arises, is being effectively addressed without the need for legislation, and the proposed legislation could cause unintended adverse consequences.

The Advisory Committee took very seriously the concerns raised by the $16,510.80 cost award in the *Snyder* case. The work began by thorough research into the legal standards that currently apply to cost awards in the courts of appeals. In resolving the request for appellate costs that followed its decision in *Snyder*, the Fourth Circuit applied Appellate Rule 39(a)(3)'s default rule that "if a judgment is reversed, costs are taxed against the appellee." Rule 39 sets default rules for the allocation of appeal costs, but those default rules are displaced if "the law provides or the court

orders otherwise." FED. R. APP. P. 39(a). Because Rule 39(a) explicitly states that the court may "order[] otherwise," and does not specify on what basis such an order might issue, the rule confers discretion on the court of appeals to depart from the default rules in appropriate circumstances. The research into Rule 39 and the cases applying it make it clear that the court of appeals had the discretion to deny costs in *Snyder v. Phelps*.

The Appellate Rules Advisory Committee discussed *Snyder* and Rule 39 at its Fall 2010 meeting. The Committee decided that it was important to understand the actual practices in each court of appeals under Rule 39. The Committee asked the Federal Judicial Center to research the typical amount of appellate costs awarded under the Rule. The FJC study — authored by Marie Leary and titled *Comparative Study of the Taxation of Costs in the Circuit Courts of Appeals Under Rule 39 of the Federal Rules of Appellate Procedure* — was completed this spring and is available at http://www.fjc.gov/library/fjc_catalog.nsf.

The FJC study found that the circuits vary in how they implement Appellate Rule 39's directives on costs. In particular, the variations stem from differences among the circuits over factors such as the ceilings (for purposes of reimbursement) on the cost per page of copying and on the number of copies. (In *Snyder*, by far the bulk of the cost award — $ 16,060.80 — resulted from the costs of copying the briefs and voluminous appendices.) The study provides comparative data on cost awards across the circuits, both according to the size of average cost awards and according to what the study characterizes as "outlier" awards. The cost award in *Snyder* was such an outlier award.

After discussing the FJC study at its Spring 2011 meeting, the Advisory Committee sent the study to the chief judge of each circuit, to enable each circuit to review its cost-award practices. The circuits' reaction to the study has been swift and positive. For example, at the time of the cost award in *Snyder,* the Fourth Circuit's local practices set a maximum rate of $4.00 per page (for purposes of determining what can be reimbursed in cost awards for the cost of copying briefs and appendices). That maximum rate stood in stark contrast to the practice in most circuits, which set maximum rates of $0.10 per page to $0.15 per page. After reviewing the FJC study's comparative data, the judges of the Fourth Circuit have voted to amend that court's rules to lower the maximum reimbursable copying cost to $0.15 a page. The change is now out for public comment, and it appears likely to take effect by September 1, 2011. If that change had been in effect at the time of the *Snyder* litigation, the amount of copying costs that could have been awarded in that case would have been capped at a much lower number. If *Snyder* had been decided in the other courts of appeals with lower copying cost caps, the costs would have similarly been capped at a much lower number.

The FJC study also highlights the fact that the growing use of electronic filing will further decrease the size of cost awards. In the Sixth Circuit, attorneys are generally expected to file and serve appellate briefs electronically without providing any paper copies. As the FJC study's comparative data demonstrate, this innovation has significantly lowered the average appellate cost awards in the Sixth Circuit relative to other circuits. As other circuits in the future complete the

transition to electronic service and filing, we can expect the same downward shift in their average appellate cost awards.

In sum, the Appellate Rules Advisory Committee — aided by the FJC's comprehensive study — has carefully considered the unusual problem that surfaced in *Snyder*. Under existing Appellate Rule 39, the court of appeals would have had discretion to deny costs in *Snyder*. And in any circuit other than the Fourth, even if the court had awarded costs, the size of the award would have been much less dramatic due to caps on the amount of copying costs that can be recovered under local rules. The pending change to the Fourth Circuit's local rules would bring the Fourth Circuit into line with other circuits in this regard. Finally, the current shift toward electronic service and filing will eliminate the reimbursement of copying costs as an element under Rule 39. There is no need for legislation to address or prevent what occurred in *Snyder*.

In addition, the proposed legislation could lead to unanticipated results. Under current Rule 39, the courts of appeals possess discretion to deny costs to the prevailing party. The bill's requirement that the court consider whether the appeal established an important precedent would add a specific ingredient to the court of appeals' equitable analysis. Under existing case law, that ingredient is one that courts already have discretion to take into account under Rule 39(a). Requiring consideration of this factor may suggest that it is to be given greater weight or significance than others, which could lead to unclear or unfair results in cases that involve important private interests but not an issue important to the public. And in cases that do involve a public interest, the legislative directive could lead to unintended results. For example, under the bill, if the plaintiff, rather than the defendants, had prevailed on appeal in *Snyder v. Phelps*, the defendants would likely oppose an award of costs to the prevailing appellee on the ground that the decision set an important precedent. That could lead the judge to believe she had no discretion to require those protesting the funeral to pay fees to the grieving father.

In addition, the bill proposes amending Civil Rule 68. This is a relatively complicated rule and its operation was not at issue in the *Snyder* case. Amending it is not only unnecessary, it is likely to create a number of unintended results and problems.

The Rules Committees examine whether to amend rules under the procedure that Congress set out in the Rules Enabling Act, 28 U.S.C. §§ 2071–2077. The proposed legislation would circumvent the procedure that Congress set out in the Act. The procedure in the Rules Enabling Act has worked well for over 75 years to allow the careful review of possible problems in the justice system that can be remedied through procedural rules. It involves careful study and analysis by the judges, lawyers, and academic members of the committees who are immersed in the issues. The committees undertake review of relevant case law, conduct public hearings to obtain the views of the bench and the bar on proposed amendments, and when appropriate, obtain empirical data. Once the advisory committee has considered public comments, relevant case law, and empirical data, proposed amendments are presented to the Standing Rules Committee, the Judicial Conference, the Supreme Court, and then to Congress. This multi-layer review process ensures that rule changes are needed to respond to actual problems in the practice and protects against unintended adverse

consequences. The Rules Committees would oppose this bill on the additional ground that it would amend the Appellate and Civil Rules outside the Rules Enabling Act process.

In sum, we believe that the proposed legislation to amend the Appellate Rules and the Civil Rules is unnecessary to address the concerns at issue and could lead to unintended adverse consequences. We appreciate the opportunity to express our concerns and look forward to continuing to work together to improve the administration of justice in our federal courts.

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-H

This item relates to an inquiry the Committee received in 2010 from Karen Kremer, an attorney at the Administrative Office who works with the Judicial Conference's Committee on Federal-State Jurisdiction. Ms. Kremer asked whether the Appellate Rules Committee was considering questions relating to appellate review of remand orders.

The Committee discussed this inquiry at its fall 2010 meeting. It was noted that this topic falls within the primary jurisdiction of the Federal-State Jurisdiction Committee, and that a comprehensive overhaul of the treatment of appeals from remand orders would presumably entail legislative action. Committee members expressed willingness to assist with a project in this area if the Federal-State Jurisdiction Committee decided to undertake one.

The Committee has not heard any further news from the Federal-State Jurisdiction Committee on this matter. It therefore seems like an appropriate time for the Committee to consider removing this item from its agenda. (A new agenda item could, of course, be opened if the Federal-State Jurisdiction Committee were to raise this issue with the Committee in the future.) I enclose the prior memo and an excerpt from the fall 2010 meeting minutes concerning this topic.

Encl.

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MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 10-AP-H

This summer we received an inquiry forwarded to us by John Rabiej from Karen Kremer at the AO, asking whether any of the Rules Advisory Committees are looking at the issue of the appealability of remand orders. Ms. Kremer mentioned that this is an issue that the Committee on Federal / State Jurisdiction has discussed in the past and she expressed interest in knowing if the rules committees are also looking at this issue.

The question of appellate review of remand orders is one to which Professor James Pfander (the Reporter for the Federal / State Jurisdiction Committee) has given thoughtful attention.[1] My understanding is that this question falls within the primary jurisdiction of the Federal / State Jurisdiction Committee. Should the Appellate Rules Committee be interested in considering this topic further, it would undoubtedly be helpful to work closely with the Federal / State Jurisdiction Committee and (in addition) to obtain the benefit of the materials on this topic that have previously been considered by that Committee.[2]

Even before obtaining the benefits of the Federal / State Committee's views on this topic, it can readily be seen why the area's intricacies have prompted calls for reform.[3] If one were re-

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[1] Professor Pfander's article on this topic will soon be published in the Penn Law Review. *See* James E. Pfander, *Collateral Review of Remand Orders: Reasserting the Supervisory Role of the Supreme Court*, 159 U. Pa. L. Rev. __ (forthcoming 2010).

[2] Additional sources of information would include the deliberations and proposals of the ALI's Federal Judicial Code Revision Project.

[3] For example, in *Carlsbad Technology, Inc. v. HIF Bio, Inc.*, 129 S. Ct. 1862 (2009), the Court held that 28 U.S.C. § 1447(d) does not bar appellate review of remand orders when the remand is occasioned by the district court's decision under 28 U.S.C. § 1367(c) not to exercise supplemental jurisdiction over the remanded claims. *See id.* at 1867. Justice Breyer, joined by Justice Souter, concurred but wrote separately to note the odd landscape of appellate review of remand orders. In particular, Justice Breyer noted that the Court had held that Section 1447(d) bars appellate review of a district court order remanding claims that had been removed under the Foreign Sovereign Immunities Act, and he contrasted that holding with *Carlsbad*'s holding: "[W]e have held that § 1447 permits review of a district court decision in an instance where that

thinking the area from scratch, one might wish to consider certain basic, over-arching questions, such as:

- In what sorts of circumstances should federal appellate review of orders remanding a case to state court be available? The values that may be served by barring such review include showing respect for state courts, avoiding interference with the progress of the remanded case in state court, and relieving the federal appellate courts of the responsibility for reviewing routine rulings on subject-matter jurisdiction or removal procedure. Are those values equally salient in all the situations[4] currently covered by 28 U.S.C. § 1447(d)'s general bar on appellate review of remand orders?[5]

- If the reviewability of a remand order should continue to depend on the reasons for the remand, should appellate courts be able to question the district court's stated reasons for

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decision is unlikely to be wrong and where a wrong decision is unlikely to work serious harm. And we have held that § 1447 forbids review of a district court decision in an instance where that decision may well be wrong and where a wrong decision could work considerable harm." *Id.* at 1869 (Breyer, J., joined by Souter, J., concurring). Justice Breyer concluded by "suggest[ing] that experts in this area of the law reexamine the matter with an eye toward determining whether statutory revision is appropriate." *Id.* at 1869-70.

[4] *See, e.g.*, *Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 237 (2007) ("A foreign sovereign defendant whose case is wrongly remanded is denied not only the federal forum to which it is entitled ... , but also certain procedural rights that the FSIA specifically provides foreign sovereigns only in federal court.").

[5] Cases applying Section 1447(d)'s appeal bar include *Things Remembered, Inc. v. Petrarca*, 516 U.S. 124, 129 (1995) ("If an order remands a bankruptcy case to state court because of a timely raised defect in removal procedure or lack of subject-matter jurisdiction, then a court of appeals lacks jurisdiction to review that order under § 1447(d), regardless of whether the case was removed under § 1441(a) or § 1452(a)."); *Kircher v. Putnam Funds Trust*, 547 U.S. 633, 648 (2006) (holding that the Securities Litigation Uniform Standards Act of 1998 "does not exempt remand orders from 28 U.S.C. § 1447(d) and its general rule of nonappealability"); *Powerex*, 551 U.S. at 239 (holding "that § 1447(d) bars appellate consideration of petitioner's claim that it is a foreign state for purposes of the [Foreign Sovereign Immunities Act]").

Cases *not* applying Section 1447(d)'s appeal bar include *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 340-41, 352 (1976) (holding that Section 1447(d) did not bar appellate review of district court order remanding diversity suit due to docket pressures); *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (holding that Section 1447(d) did not bar appellate review of an "abstention-based remand order"); and *Carlsbad*, 129 S. Ct. at 1867 ("When a district court remands claims to a state court after declining to exercise supplemental jurisdiction, the remand order is not based on a lack of subject-matter jurisdiction for purposes of §§ 1447(c) and (d).").

the remand?[6]

- If Congress were to lift or narrow its ban on appellate review of remand orders, what mode of appellate review would be most appropriate for them – appeal as of right, or by permission? And if by permission, should the gatekeeper be the district court, the court of appeals, or both?

- What should be the availability and scope of federal appellate review when a federal district court renders a ruling on one or more claims in a lawsuit and then remands the remaining claims to state court?[7]

- In what circumstances should immediate appellate review of orders denying remand be available? When immediate appellate review is not sought (or permission to take such an appeal is denied), what remedy should be afforded if – on appeal from a final judgment – the court of appeals determines that the case should have been remanded? How should the answer to the latter question be affected by the basis for the determination that the district court erred in refusing to remand?

- How should any re-shaping of appellate jurisdiction over remand orders treat specialized areas of law for which Congress has provided separately?[8]

It should be noted that re-thinking all of the above questions from scratch would seem to venture beyond the rulemaking authority conferred by 28 U.S.C. §§ 2072(c) and 1292(e). Those statutes would authorize rulemaking on some aspects of the topics noted above, but not all of

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[6] *See, e.g.*, *Powerex*, 551 U.S. at 233 (assuming for argument's sake "that § 1447(d) permits appellate courts to look behind the district court's characterization").

[7] *See, e.g.*, *City of Waco, Tex. v. U.S. Fidelity & Guaranty Co.*, 293 U.S. 140, 142-44 (1934) (district court had dismissed cross-complaint and remanded case because (with cross-complaint dismissed) there was no diversity; Supreme Court held that the dismissal of the cross-complaint was reviewable).

[8] *See, e.g.*, 28 U.S.C. § 1452 (bankruptcy removal); *id.* § 1443 (civil rights removal); *id.* § 1447(d) (exempting cases removed under Section 1443 from remand appeal bar); 12 U.S.C. § 1819(b)(2)(B) (authorizing removal by FDIC); *id.* § 1819(b)(2)(C) (authorizing FDIC to "appeal any order of remand entered by any United States district court"); 28 U.S.C. § 2679(d)(2) (Westfall Act certification "shall conclusively establish scope of office or employment for purposes of removal"); *Osborn v. Haley*, 549 U.S. 225, 231-32 (2007) (holding "that § 1447(d)'s bar on appellate review of remand orders does not displace § 2679(d)(2), which shields from remand an action removed pursuant to the Attorney General's certification"); 28 U.S.C. § 1453(c)(1) (exempting CAFA removals from Section 1447(d)'s remand appeal bar); *id.* § 1441(e)(3) (special provision for appeal of liability determinations prior to remand under Multiparty, Multiforum Trial Jurisdiction Act).

them. Activity by the rules committees in this area would entail cooperation with the Federal / State Jurisdiction Committee, with a view to proposing possible statutory changes. The project would present a host of challenging questions, but rationalizing this area of law would provide a service to practitioners and courts.

Minutes of Fall 2010 Meeting of
Advisory Committee on Appellate Rules
October 7 and 8, 2010
Boston, Massachusetts

I. Introductions

Judge Jeffrey S. Sutton called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, October 7, 2010, at 8:30 a.m. at the Langham Hotel in Boston, Massachusetts. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Robert Michael Dow, Jr., Justice Allison Eid, Judge Peter T. Fay, Mr. James F. Bennett, Ms. Maureen E. Mahoney, and Mr. Richard G. Taranto. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Former Committee members Justice Randy J. Holland[1] and Dean Stephen R. McAllister were present. Also present were Judge Lee H. Rosenthal, Chair of the Standing Committee; Professor Daniel R. Coquillette, Reporter for the Standing Committee;[2] Mr. Dean C. Colson, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Leonard Green, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); Ms. Holly Sellers, a Supreme Court Fellow assigned to the AO; and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Sutton welcomed the meeting participants. He introduced two of the Committee's three new members, Justice Eid and Judge Dow. Judge Dow, of the United States District Court for the Northern District of Illinois, replaces Judge T.S. Ellis III as the district judge representative on the Committee. Judge Dow was educated at Yale, Oxford and Harvard and clerked for Judge Flaum on the Seventh Circuit. Judge Sutton noted that Judge Dow's experience with appellate work, prior to his appointment to the bench, would be an asset to the Committee. Justice Eid, a Justice on the Colorado Supreme Court, succeeds Justice Holland as the state high court representative on the Committee. Justice Eid attended Stanford and the University of Chicago and clerked for Judge Jerry Smith on the Fifth Circuit and then for Justice Thomas. She brings to the Committee not only her perspective as a member of Colorado's highest court but also her experience as an appellate practitioner, a law professor and Colorado's Solicitor General. Judge Sutton noted that the Committee's third new member, Professor Amy Coney Barrett, replaces Dean McAllister. Professor Barrett was unable to be present in view of an impending due date and Judge Sutton stated that he looked forward to introducing her to the Committee at the spring 2011 meeting. Judge Sutton introduced Mr. Colson, who succeeds Judge Hartz as the liaison from the Standing Committee. Judge Sutton observed that Mr. Colson, whose law firm is located in Miami, graduated from Princeton and the University of

[1] Justice Holland joined the meeting after lunch on the 7th.

[2] Professor Coquillette was unable to attend the second day of the meeting.

a more recent case, the United States moved to intervene both in the district court and in the court of appeals.

An attorney member noted that a key question is where the would-be intervenor should seek permission to intervene – in the district court or the court of appeals? This member suggested that it might not make sense to have dual tracks for seeking intervention in both the district and appellate court. But she also stated that unless there are substantive variations among the circuits concerning the treatment of requests to intervene on appeal, the matter does not seem to require rulemaking.

A participant suggested that the United States is in a different position, with respect to intervention, than non-governmental parties are. Mr. Letter acknowledged this but also noted that private parties might not know about a case that is important to them until it reaches the appeal stage. An appellate judge member stated that if the Appellate Rules were amended to address intervention on appeal, the new rule should discourage belated intervention; he suggested that otherwise, judges might be concerned that the new rule would unduly increase the practice. Another appellate judge member suggested that the matter does not call for rulemaking. A third appellate judge member agreed that there is no need for rulemaking; he suggested that if a rule were to be adopted, he would favor one that directs the would-be intervenor to seek leave from the district court rather than the court of appeals. A district judge member observed that such a rule would capitalize on the district judge's knowledge of the case and the parties; but he also noted that when faced with similar sorts of requests concerning procedure for purposes of appeal, he always wonders what disposition the court of appeals would prefer.

The Committee's discussion did not produce any suggestions for moving forward with a rulemaking proposal on this item; on the other hand, the discussion did not explicitly result in the formal removal of the item from the Committee's agenda.

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

Judge Sutton invited the Reporter to summarize this item, which arises from an inquiry by Karen Kremer of the AO on behalf of the Committee on Federal / State Jurisdiction. That Committee is interested to know whether any of the Rules Advisory Committees are looking at the issue of appealability of remand orders. The question of appellate review of remand orders falls within the primary jurisdiction of the Federal / State Jurisdiction Committee and is a matter concerning which Professor James Pfander (the Reporter for that Committee) is an expert. The question presents a number of doctrinal intricacies and could benefit from rationalization. Existing grants of rulemaking authority would provide authorization for addressing some, but not all, aspects of the problem. A comprehensive revision of this area of doctrine would entail legislation.

Participants expressed interest in reviewing any proposal that the Committee on Federal / State Jurisdiction generates on this topic and expressed willingness to help with such a project if the Federal / State Jurisdiction Committee would be interested in such assistance.

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 05-01

This item concerns the possibility of amending the Appellate Rules to account for the mandamus procedures set by the Crime Victims' Rights Act ("CVRA"), which was part of the Justice for All Act of 2004. I enclose relevant memoranda and excerpts of Committee minutes from the Committee's discussions, which took place in 2005 and 2006. The Department of Justice undertook to monitor practice under the CVRA and to keep the Committee updated.

One of the three problems identified by then-Professor Schiltz in the enclosed memoranda no longer exists: As amended in 2009, Appellate Rule 26(a) explains how to compute a time period stated in hours. *See* Appellate Rule 26(a)(2).

During the Time-Computation Project (which produced the 2009 time-computation amendments), the Appellate Rules Committee and other Advisory Committees compiled lists of short statutory deadlines that Congress should revise in the light of the shift in time-computation method. The rulemakers ultimately decided to ask Congress to adjust the CVRA's 10-day deadline for victims' mandamus petitions to 14 days (to account for the new days-are-days time-computation method), *see* 18 U.S.C. § 3771(d)(5), but not to ask Congress to change the CVRA's 72-hour and five-day deadlines, *see id*. § 3771(d)(3).

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MEMORANDUM

DATE: March 22, 2005

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 05-01

The "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. A copy of § 102 of the Act is attached.

Section 102 creates a new § 3771 in Title 18. New § 3771(a) establishes a list of rights for victims of crime, new § 3771(b) directs courts to ensure that victims are afforded the rights established in § 3771(a), and new § 3771(c) directs federal prosecutors to do likewise. It is new § 3771(d) — which establishes enforcement mechanisms — that is of particular concern to this Advisory Committee.

New § 3771(d)(3) directs that "[t]he rights described in subsection (a) shall be asserted in the district court" and "[t]he district court shall take up and decide any motion asserting a victim's right forthwith." If the district court denies the relief sought, § 3771(d)(3) provides that "the movant may petition the court of appeals for a writ of mandamus." Section 3771(d)(3) goes on to provide:

> The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

At least three things about this are troubling:

First, § 3771(d)(3) provides that a single judge may issue the writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure." But Rule 27(c) prohibits a single judge from issuing a writ of mandamus, and Rule 47(a) bars local rules that are inconsistent with the Appellate Rules. So it is impossible for a single judge to issue the writ "pursuant to circuit rule or the [Appellate Rules]."

Second, it would be extremely difficult for a court of appeals to meet the deadline for acting on a petition, at least under the current rules. Rule 21(b)(1) now permits the court to *deny* a mandamus petition without awaiting an answer, but forbids the court to *grant* such a petition until it first orders the respondent to file an answer. Thus, a court is, within 72 hours, supposed to (1) docket a mandamus petition; (2) distribute the petition to a panel of judges; (3) give the panel time to read the petition; (4) order the respondent to file an answer; (5) serve that order on the respondent; (6) give the respondent time to draft and file an answer; (7) docket that answer; (8) distribute that answer to the panel; (9) give the panel time to read the answer, deliberate, and make a decision; and (if the decision is to deny relief) (10) draft "a written opinion." The 72-hour deadline is virtually impossible to meet under the current rules.

Finally, the fact that the deadline is stated in hours rather than days raises interesting time-computation issues. For example, if the victim files a petition at 2:00 p.m. Thursday afternoon, by when must the court "take up and decide such application"? It is not clear how the time-computation rules of Rule 26(a) will apply.

All of these problems were brought to the attention of Congressional staff by the Administrative Office, but to no avail. The question now is whether any of these problems should be addressed by amending the Appellate Rules.

One option for the Advisory Committee is to propose "systematic" changes to the Appellate Rules. For example, the Committee could propose that Rule 27(c) be amended to permit a single judge to issue a writ of mandamus, or that Rule 21(b)(1) be amended to authorize courts to issue a writ of mandamus without awaiting a response, or that Rule 26(a) be amended to specify how a deadline stated in hours should be calculated.

A second option for the Advisory Committee is to add a new subdivision (e) to Rule 21 -- a subdivision that would specifically address mandamus petitions filed under § 3771(d)(3). That subsection would supersede the other rules and set up a "fast-track" system that would apply just to § 3771(d)(3) petitions.

A third option for the Advisory Committee is to do nothing for the time being. This would give the Committee an opportunity to see how many § 3771(d)(3) petitions are in fact filed (it might be only a handful every year) and to get a better understanding of the problems the courts of appeals encounter in handling those petitions. In the meantime, the courts of appeals have authority under Rule 2 to "suspend any provision of [the Appellate Rules] in a particular case" when necessary "to expedite its decision or for other good cause." In two or three years, the Committee could revisit this issue and decide whether amendments to the Appellate Rules are necessary.

Westlaw.

UNITED STATES PUBLIC LAWS
108th Congress - Second Session
Convening January 7, 2004

Additions and Deletions are not identified in this database.
Vetoed provisions within tabular material are not displayed

PL 108-405 (HR 5107)
October 30, 2004
JUSTICE FOR ALL ACT OF 2004

An Act To protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

<< 42 USCA § 13701 NOTE >>

(a) SHORT TITLE.--This Act may be cited as the "Justice for All Act of 2004".

(b) TABLE OF CONTENTS.--The table of contents for this Act is as follows:

involving the crime or of any release or escape of the accused.

"(3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.

"(4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.

"(5) The reasonable right to confer with the attorney for the Government in the case.

"(6) The right to full and timely restitution as provided in law.

"(7) The right to proceedings free from unreasonable delay.

"(8) The right to be treated with fairness and with respect for the victim's dignity and privacy.

***2262** "(b) RIGHTS AFFORDED.--In any court proceeding involving an offense against a crime victim, the court shall ensure that the crime victim is afforded the rights described in subsection (a). Before making a determination described in subsection (a)(3), the court shall make every effort to permit the fullest attendance possible by the victim and shall consider reasonable alternatives to the exclusion of the victim from the criminal proceeding. The reasons for any decision denying relief under this chapter shall be clearly stated on the record.

"(c) BEST EFFORTS TO ACCORD RIGHTS.--

"(1) GOVERNMENT.--Officers and employees of the Department of Justice and other departments and agencies of the United States engaged in the detection, investigation, or prosecution of crime shall make their best efforts to see that crime victims are notified of, and accorded, the rights described in subsection (a).

"(2) ADVICE OF ATTORNEY.--The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).

"(3) NOTICE.--Notice of release otherwise required pursuant to this chapter shall not be given if such notice may endanger the safety of any person.

"(d) ENFORCEMENT AND LIMITATIONS.--

"(1) RIGHTS.--The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a). A person accused of the crime may not obtain any form of relief under this chapter.

"(2) MULTIPLE CRIME VICTIMS.--In a case where the court finds that the number of crime victims makes it impracticable to accord all of the crime victims the rights described in subsection (a), the court shall fashion a reasonable procedure to give effect to this chapter that does not unduly complicate or prolong the proceedings.

"(3) MOTION FOR RELIEF AND WRIT OF MANDAMUS.--The rights described in subsection (a) shall be asserted in the district court in which a defendant is being prosecuted for the crime or, if no prosecution is underway, in the district court in the district in which the crime occurred. The district court shall take up and decide any motion asserting a victim's right forthwith. If the district court denies the relief sought, the movant may petition the court of appeals for a writ of mandamus. The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take

up and decide such application forthwith within 72 hours after the petition has been filed. In no event shall proceedings be stayed or subject to a continuance of more than five days for purposes of enforcing this chapter. If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

"(4) ERROR.--In any appeal in a criminal case, the Government may assert as error the district court's denial of any crime victim's right in the proceeding to which the appeal relates.

"(5) LIMITATION ON RELIEF.--In no case shall a failure to afford a right under this chapter provide grounds for a ***2263** new trial. A victim may make a motion to re-open a plea or sentence only if--

"(A) the victim has asserted the right to be heard before or during the proceeding at issue and such right was denied;

"(B) the victim petitions the court of appeals for a writ of mandamus within 10 days; and

"(C) in the case of a plea, the accused has not pled to the highest offense charged.

This paragraph does not affect the victim's right to restitution as provided in title 18, United States Code.".

"(6) NO CAUSE OF ACTION.--Nothing in this chapter shall be construed to authorize a cause of action for damages or to create, to enlarge, or to imply any duty or obligation to any victim or other person for the breach of which the United States or any of its officers or employees could be held liable in damages. Nothing in this chapter shall be construed to impair the prosecutorial discretion of the Attorney General or any officer under his direction.

"(e) DEFINITIONS.--For the purposes of this chapter, the term 'crime victim' means a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia. In the case of a crime victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardians of the crime victim or the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights under this chapter, but in no event shall the defendant be named as such guardian or representative.

"(f) PROCEDURES TO PROMOTE COMPLIANCE.--

"(1) REGULATIONS.--Not later than 1 year after the date of enactment of this chapter, the Attorney General of the United States shall promulgate regulations to enforce the rights of crime victims and to ensure compliance by responsible officials with the obligations described in law respecting crime victims.

"(2) CONTENTS.--The regulations promulgated under paragraph (1) shall--

"(A) designate an administrative authority within the Department of Justice to receive and investigate complaints relating to the provision or violation of the rights of a crime victim;

"(B) require a course of training for employees and offices of the Department of Justice that fail to comply with provisions of Federal law pertaining to the treatment of crime victims, and otherwise assist such employees and offices in responding more effectively to the needs of crime victims;

"(C) contain disciplinary sanctions, including suspension or termination from employment, for employees of the Department of Justice who willfully or wantonly fail to comply with provisions of Federal law pertaining to the treatment of crime victims; and

"(D) provide that the Attorney General, or the designee of the Attorney General, shall be the final arbiter of the complaint, and that there shall be no judicial review of the final decision of the Attorney General by a complainant.".

***2264**
(b) TABLE OF CHAPTERS.--The table of chapters for part II of title 18, United States Code, is amended by inserting at the end the following:

<< 18 USCA prec. § 3001 >>

"237. Crime victims' rights.....3771".

<< 42 USCA § 10606 >>

(c) REPEAL.--Section 502 of the Victims' Rights and Restitution Act of 1990 (42 U.S.C. 10606) is repealed.

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Minutes of Spring 2005 Meeting of
Advisory Committee on Appellate Rules
April 18, 2005
Washington, D.C.

I. Introductions

Judge Samuel A. Alito, Jr., called the meeting of the Advisory Committee on Appellate Rules to order on Monday, April 18, 2005, at 9:15 a.m. at the Thurgood Marshall Federal Judiciary Building in Washington, D.C. The following Advisory Committee members were present: Judge Carl E. Stewart, Judge John G. Roberts, Jr., Judge T.S. Ellis III, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. W. Thomas McGough, Jr., Mr. Sanford Svetcov, and Mr. Mark I. Levy. Mr. Robert D. McCallum, Jr., Associate Attorney General, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, were present representing the Solicitor General. Also present were Judge David F. Levi, Chair of the Standing Committee, and his law clerk, Ms. Brook Coleman; Judge J. Garvan Murtha, liaison from the Standing Committee; Ms. Marcia M. Waldron, liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, and Mr. James N. Ishida from the Administrative Office ("AO"); and Dr. Timothy Reagan and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Prof. Patrick J. Schiltz served as Reporter.

Judge Alito welcomed Justice Holland and Dean McAllister to the Committee. Judge Alito also said that the Committee was pleased to have Associate Attorney General McCallum representing the Solicitor General at this meeting.

II. Approval of Minutes of November 2004 Meeting

The minutes of the November 2004 meeting were approved.

III. Report on January 2005 Meeting of Standing Committee

The Reporter said that this Advisory Committee had not requested action on any items at the Standing Committee's January 2005 meeting.

The Reporter said that Judge Alito had described the intention of the Advisory Committee to take a "dynamic-conformity" approach to protecting the privacy of court filings, permitting the Bankruptcy, Civil, and Criminal Rules Committees to make the policy choices,

rules imposed requirements that are not imposed by the Appellate Rules. Judge Levi and the Reporter said that the two major Local Rules Projects conducted by the Standing Committee had defined "conflict" very narrowly, being careful not to characterize a local rule as "conflicting" with a national rule unless the conflict was direct. Members agreed that this Committee should follow the lead of the Local Rules Projects and that the letter should be revised so that it does not imply that any local rules on briefing are in conflict with or inconsistent with any of the Appellate Rules.

Finally, members discussed whether the letter should be stronger. For example, should the letter not only ask the chief judges to review the problematic local rules, but, if they choose to retain those rules, to justify that decision? Or should the letter ask the chief judges to let the Committee know whether the circuit decides to repeal any of the problematic local rules?

Some members expressed the fear that being too aggressive might create resentment, which, in turn, might make progress less likely. Members said that, if the letter did nothing more than cause circuits to clearly identify all local variations in one place on their websites, that would be a major accomplishment. It is hard to imagine that the circuits will object to the request that all local variations be clearly identified, unless the letter goes too far and creates a backlash. Other members agreed, but said that they believe that most chief judges will appreciate having these local rules called to their attention and appreciate the fact that the Committee is trying to use collaboration rather than coercion to address the problem.

By consensus, the Committee agreed that the letter was fine as drafted, except that it should be revised so that it does not imply that any local rules are in conflict with the Appellate Rules, and it should include a circuit-specific "executive summary" when it is mailed. Judge Alito said that, as previously agreed, he or his successor will mail the letter after the controversy over Rule 32.1 subsides.

B. Items Awaiting Initial Discussion

1. Item No. 05-01 (FRAP 21 & 27(c) — conform to Justice for All Act)

Judge Alito invited the Reporter to introduce this item.

The Reporter said that the "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. Section 102 of the Act creates a new § 3771 in Title 18. New § 3771(a) establishes a list of rights for victims of crime, new § 3771(b) directs courts to ensure that victims are afforded the rights established in § 3771(a), and new § 3771(c) directs federal prosecutors to do likewise. It is new § 3771(d) — which establishes enforcement mechanisms — that is of particular concern to this Committee.

New § 3771(d)(3) directs that "[t]he rights described in subsection (a) shall be asserted in the district court" and "[t]he district court shall take up and decide any motion asserting a

victim's right forthwith." If the district court denies the relief sought, § 3771(d)(3) provides that "the movant may petition the court of appeals for a writ of mandamus." Section 3771(d)(3) goes on to provide:

> The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

At least three things about this are troubling:

First, § 3771(d)(3) provides that a single judge may issue a writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure." But Rule 27(c) prohibits a single judge from issuing a writ of mandamus, and Rule 47(a) bars local rules that are inconsistent with the Appellate Rules. So it is impossible for a single judge to issue a writ "pursuant to circuit rule or the [Appellate Rules]."

Second, it would be extremely difficult for a court of appeals to meet the deadline for acting on a petition, at least under the current rules. Rule 21(b)(1) now permits the court to *deny* a mandamus petition without awaiting an answer, but forbids the court to *grant* such a petition until it first orders the respondent to file an answer. It is difficult to imagine that a court can review a petition, order the respondent to file an answer, await the answer, read the answer, make a decision, and draft a written opinion -- all within 72 hours.

Finally, the fact that the deadline is stated in hours rather than days raises interesting time-computation issues. For example, if the victim files a petition at 2:00 p.m. Thursday afternoon, by when must the court "take up and decide such application"? It is not clear how the time-computation rules of Rule 26(a) will apply.

The Reporter said that, at this point, the Committee has at least three options for addressing the problems created by the Act:

One option for the Committee is to propose systematic changes to the Appellate Rules. For example, the Committee could propose that Rule 27(c) be amended to permit a single judge to issue a writ of mandamus, or that Rule 21(b)(1) be amended to authorize courts to issue a writ of mandamus without awaiting an answer, or that Rule 26(a) be amended to specify how a deadline stated in hours should be calculated.

A second option for the Committee is to add a new subdivision (e) to Rule 21 -- a subdivision that would specifically address mandamus petitions filed under § 3771(d)(3). That subdivision would supersede the other rules and set up a "fast-track" system that would apply just to § 3771(d)(3) petitions.

A third option for the Committee is to do nothing for the time being. That would give the Committee an opportunity to see how many § 3771(d)(3) petitions are in fact filed (it might be only a handful every year) and to get a better understanding of the problems that the courts of appeals will encounter in handling those petitions. In the meantime, the courts of appeals have authority under Rule 2 to "suspend any provision of [the Appellate Rules] in a particular case" when necessary "to expedite its decision or for other good cause." In two or three years, the Committee could revisit this issue and decide whether amendments to the Appellate Rules are necessary.

Mr. Letter said that the Department of Justice believes that the Appellate Rules should not be amended at this time. He said that the Department hopes there will be very few proceedings under the Act and that the Department believes that the Committee should wait to see whether and what problems actually develop before amending the rules.

Mr. Rabiej said that the Criminal Rules Committee has decided to take a wait-and-see approach, for the reasons given by Mr. Letter and the Reporter.

A member said that he, too, favors doing nothing for the time being. He predicted, though, that victims will seek relief from the appellate courts in two situations. First, victims will assert the right to be protected from defendants, and victims will be unhappy with the level of protection that can practically be afforded. Second, victims will assert the right to full and timely restitution, but soon will grow frustrated at the inability to collect restitution from largely judgment-proof defendants.

A member said that he was not convinced that the Committee should do nothing. What would be the harm in amending the Appellate Rules to authorize a single judge to issue a writ of mandamus? Or to create a fast-track procedure for § 3771(d)(3) petitions?

Members responded that, while there would likely be no harm in the first amendment, there could be harm in the second. Members said that putting a fast-track procedure in the Appellate Rules would encourage Congress to add additional types of cases to the fast track. Before long, the courts of appeals will have an array of cases that require fast-track consideration. One member said that fast-track provisions raise substantial separation-of-powers concerns when they do not give federal judges adequate time to exercise "judicial Power" under Article III.

The member responded that, while he understood those concerns, he thought the Committee could move forward on a more modest set of amendments, such as amendments to permit a single judge to issue a writ of mandamus, to specify how deadlines stated in hours should be calculated, and perhaps to authorize the courts of appeals to use their local rules to establish a fast-track procedure for § 3771(d)(3) petitions.

After further discussion, the Committee agreed to ask the Department of Justice to study this matter further and present a recommendation to the Committee at a future meeting.

MEMORANDUM

DATE: March 24, 2006

TO: Advisory Committee on Appellate Rules

FROM: Patrick J. Schiltz, Reporter

RE: Item No. 05-01

The "Justice for All Act of 2004" (Pub. L. No. 108-405) was signed into law by President Bush on October 30, 2004. A copy of § 102 of the Act is attached.

Section 102 creates a new § 3771 in Title 18. New § 3771(a) establishes a list of rights for victims of crime, new § 3771(b) directs courts to ensure that victims are afforded the rights established in § 3771(a), and new § 3771(c) directs federal prosecutors to do likewise. It is new § 3771(d) — which establishes enforcement mechanisms — that has concerned this Advisory Committee.

New § 3771(d)(3) directs that "[t]he rights described in subsection (a) shall be asserted in the district court" and "[t]he district court shall take up and decide any motion asserting a victim's right forthwith." If the district court denies the relief sought, § 3771(d)(3) provides that "the movant may petition the court of appeals for a writ of mandamus." Section 3771(d)(3) goes on to provide:

> The court of appeals may issue the writ on the order of a single judge pursuant to circuit rule or the Federal Rules of Appellate Procedure. The court of appeals shall take up and decide such application forthwith within 72 hours after the petition has been filed. . . . If the court of appeals denies the relief sought, the reasons for the denial shall be clearly stated on the record in a written opinion.

At least two things about this are troubling:[1]

First, § 3771(d)(3) provides that a single judge may issue the writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure." But Rule 27(c) prohibits a single judge from issuing a writ of mandamus, and Rule 47(a)(1) bars local rules that are inconsistent with the Appellate Rules. So it is impossible for a single judge to issue the writ "pursuant to circuit rule or the Federal Rules of Appellate Procedure."

Second, it would be extremely difficult for a court of appeals to meet the deadline for acting on a petition, at least under the current rules. Rule 21(b)(1) now permits the court to *deny* a mandamus petition without awaiting an answer, but forbids the court to *grant* such a petition until it first orders the respondent to file an answer. Thus, under the Act, a court has 72 hours to (1) docket the mandamus petition; (2) distribute the petition to a panel of judges; (3) read the petition; (4) order the respondent to file an answer; (5) serve that order on the respondent; (6) give the respondent time to draft and file an answer; (7) docket that answer; (8) distribute that answer to the panel; (9) read the answer; (10) deliberate and make a decision; and (if the decision is to deny relief) (11) draft, circulate, file, and serve "a written opinion." Obviously, the 72-hour deadline is very difficult to meet under the current rules.

At its April 2005 meeting, this Committee discussed whether any of these problems should be addressed by amending the Appellate Rules. I presented three options:

---

[1]A third problem is the fact that the deadline is stated in hours. If a victim files a petition at 2:00 p.m. Thursday afternoon, by when must the court "take up and decide such application"? The answer is not clear under the Appellate Rules, as Rule 26(a) does not address deadlines that are stated in hours. However, the Time-Computation Subcommittee is working on this issue, and the template that the Subcommittee has proposed would provide specific instructions for computing deadlines that are stated in hours.

First, the Committee could propose systematic changes to the Appellate Rules. For example, the Committee could propose that Rule 27(c) be amended to permit a single judge to issue a writ of mandamus or that Rule 21(b)(1) be amended to authorize courts to issue a writ of mandamus without awaiting a response. These changes would not be confined to mandamus petitions filed under the Justice for All Act; they would apply to all mandamus petitions.

Second, the Advisory Committee could add a new subdivision (e) to Rule 21 — a subdivision that would apply only to mandamus petitions filed under the Justice for All Act. That subsection would supersede the other rules and set up a "fast-track" system for such petitions. (Of course, once such a fast-track system was in place, Congress might very well add additional types of cases to the fast track.)

Finally, the Advisory Committee could do nothing for the time being. This would give the Committee an opportunity to see how many § 3771(d)(3) petitions are in fact filed (it might be fewer than a handful every year) and to discover what problems the courts of appeals actually encounter in handling those petitions. In the meantime, the courts of appeals have authority under Rule 2 to "suspend any provision of [the Appellate Rules] in a particular case" when necessary "to expedite its decision or for other good cause." In two or three years, the Committee could revisit this issue and decide whether amendments to the Appellate Rules are necessary.

After discussing these options, the Committee postponed a decision and asked the Department of Justice to make a recommendation. That recommendation is attached.

U.S. Department of Justice
Civil Division, Appellate Staff
950 Pennsylvania Ave., N.W., Rm: 7513
Washington, D.C. 20530

DNL

Douglas N. Letter
Appellate Litigation Counsel

Tel: (202) 514-3602
Fax: (202) 514-8151

March 23, 2006

Professor Patrick J. Schiltz
University of St. Thomas School of Law
1000 La Salle Avenue, MSL 400
Minneapolis, MN 55403-2015

Re: Possible FRAP Amendments in Light of the Justice for All Act of 2004

Dear Patrick:

At our prior Committee meeting in April 2005, I was asked to give you a report on the question of whether or not we should propose FRAP amendments in light of the relevant portions of the Justice for All Act of 2004 – known as the Crime Victims' Rights Act. You had made a presentation to the Committee at the 2005 meeting, pointing out that there are new requirements in that statute concerning appellate review of district court actions involving rights for victims of crime, and that some of those statutory requirements might raise problems with certain current FRAP provisions.

I have polled the relevant parts of the Department of Justice in Washington, D.C. (among others, the Criminal Division and the Solicitor General's Office), as well as United States Attorneys' Offices. To date, it appears that there is only one appellate case we know of addressing the possibly problematic new appellate provisions in 18 U.S.C. § 3771(d).

In Kenna v. U.S. District Court, 435 F.3d 1011 (9th Cir. 2006), the Ninth Circuit considered a mandamus petition after a district court had denied fraud victims the opportunity to speak at a sentencing hearing. The Ninth Circuit granted the petition and remanded the matter. In doing so, the court noted its "regrettable failure to consider the petition within the time limits of the statute, and apologize[d] to the petitioner for this inexcusable delay." Id. at 1018. The Ninth Circuit explained that it was in the process of promulgating procedures for expeditious handling of such petitions in the future. Ibid.

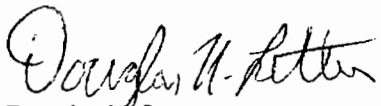
I spoke to Cathy Catterson, the Clerk of the Ninth Circuit, about this issue, and she informed

me that the Ninth Circuit indeed now has a new Rule 21-5. But Ms. Catterson explained that this rule merely requires notice to the court when a petition under the provisions of the Crime Victims' Rights Act is to be filed, so that appropriate arrangements can be made for expeditious filing and service. She indicated that a panel of the court would then issue necessary orders at that time in order to provide timely consideration of the particular petition. Thus, the new Ninth Circuit rule does not itself set any procedures for timely handling.

I am not aware of any other Circuits that have adopted new rules to implement this statute. The Criminal Rules Committee has proposed amendments to the FRCrP for this purpose. I looked at them and, not surprisingly, they do not appear to address appellate matters in any way.

Given the lack of appellate experience at this point, the Department of Justice continues to believe that the Committee should not propose any new FRAP provisions at this time. There is currently no serious problem in the Circuits, and we are concerned that we might propose FRAP changes only to learn that the problems that actually do arise require somewhat different solutions. Thus, we recommend that the Committee continue to monitor this matter, and make any appropriate proposals based on what happens in actual practice. (Ms. Catterson authorized me to say that she agrees with this assessment.) I am happy to report on this subject again at the next Committee meeting after our April 2006 session, if the Committee wishes.

Sincerely,



Douglas N. Letter
Appellate Litigation Counsel

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Minutes of Spring 2006 Meeting of
Advisory Committee on Appellate Rules
April 28, 2006
San Francisco, CA

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Friday, April 28, 2006, at 8:30 a.m. at the Park Hyatt San Francisco. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister, Mr. Sanford Svetcov, Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Neil M. Gorsuch, Principal Deputy Associate Attorney General, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice, were present representing the Solicitor General. Also present were Judge J. Garvan Murtha, liaison from the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. Peter G. McCabe, Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie C. Leary from the Federal Judicial Center ("FJC"). Judge Patrick J. Schiltz, the outgoing Reporter, participated in presenting the agenda items, and Prof. Catherine T. Struve, the incoming Reporter, took the minutes.

During the course of the meeting, Judge Stewart noted three departures from the Committee: Mr. W. Thomas McGough, Jr., Mr. Svetcov, and Judge Schiltz. Judge Stewart expressed the Committee's great appreciation for their service, and presented commendations to Mr. Svetcov and Judge Schiltz (Mr. McGough was unable to be present).

II. Approval of Minutes of April 2005 Meeting

The minutes of the April 2005 meeting were approved.

III. Report on June 2005 and January 2006 Meetings of Standing Committee

At the June 2005 meeting, the Standing Committee approved Rule 32.1 (concerning the citation of unpublished opinions). Judge Schiltz observed that the Standing Committee greatly shortened the Committee Note. Judge Schiltz reported that the Judicial Conference approved Rule 32.1 but rendered it prospective only (i.e., the Rule as approved by the Judicial Conference applies only to decisions issued on or after January 1, 2007); he noted that some Circuits may choose to apply the new Rule's approach retroactively as well. Also at the June 2005 meeting, the Standing Committee approved an amendment to Rule 25(a)(2) (authorizing the adoption of

Third, Judge Schiltz summarized the views of the National Association of Criminal Defense Lawyers ("NACDL"), which asserts that Rule 25(a)(5) requires clarification with respect to habeas and § 2255 proceedings. Judge Schiltz argued that, to the contrary, Rule 25(a)(5) is clear: Under Rule 25(a)(5), appeals in habeas and § 2255 proceedings are governed by Civil Rule 5.2; and Civil Rule 5.2(b)(6) excludes habeas and § 2255 proceedings from the redaction requirements in Civil Rule 5.2(a).

Judge Schiltz then turned to the changes suggested by the Style Subcommittee. Those changes would use language referring to "a case whose privacy protection was governed by" the relevant trial-level privacy rule, rather than language referring to "a case that was governed by" the relevant trial-level privacy rule, thus:

> **Privacy Protection.** An appeal in a case whose privacy protection ~~that~~ 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 a~~A~~ll other proceedings, privacy protection is ~~are~~ 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 Style Subcommittee's concern was that readers might not otherwise know that the cited trial-level rules deal with privacy protections; one member expressed agreement with this concern. Judge Schiltz argued that the Style Committee's proposed language would be redundant and ambiguous; on the other hand, he noted that the proposed changes are stylistic and that this Committee ordinarily defers to the Style Subcommittee on matters of style. Judge Murtha stated that he would place Judge Schiltz's comments before the Style Subcommittee. Mr. Rabiej noted that under the relevant protocol, the Advisory Committees are to defer to the Style Subcommittee on matters of style, but can also send an alternative style suggestion to the Standing Committee for consideration. Judge Stewart proposed that the Advisory Committee approve Rule 25(a)(5) as restyled by the Style Subcommittee, but that the Advisory Committee ask the Style Subcommittee to reconsider its view. This proposal was moved and seconded, and the motion carried (over three dissents).

V. Discussion Items

A. Item No. 05-01 (FRAP 21 & 27(c) – conform to Justice for All Act)

Mr. Letter described the provisions in the Justice for All Act of 2004 which concern appellate review of district court determinations regarding rights for victims of crime. The Committee had asked Mr. Letter to report on whether the timing constraints imposed by those provisions necessitate changes in the Appellate Rules. Mr. Letter reported that after polling relevant parts of the Department of Justice and United States Attorneys' Offices, he was aware of only one appellate case addressing such timing issues. In *Kenna v. U.S. District Court*, 435

F.3d 1011 (9th Cir. 2006), when the Ninth Circuit Court of Appeals granted a mandamus petition under the Act, it noted and apologized for its failure to comply with the Act's time limits, and stated that it was adopting procedures for handling such petitions in the future. From the Clerk of the Ninth Circuit Mr. Letter learned that the Circuit has adopted a new rule – Rule 21-5 – concerning petitions under the Act. Rule 21-5, however, simply requires notice to the court when a petition will be filed under the Act, so that a panel may then issue orders to promote speedy handling; Rule 21-5 does not itself set such procedures. To Mr. Letter's knowledge, no other Circuits have adopted rules implementing the Act's appellate review provisions. Though the Criminal Rules Committee has proposed rules amendments relating to the Act, Mr. Letter reported that those amendments do not concern appellate review.

Mr. Letter stated the Department of Justice's belief that no new Appellate Rules provisions are warranted at this time; he recommended that the Committee monitor developments under the Act. Mr. Fulbruge reported that the appellate clerks with whom he has discussed this question tell him that timing questions under the Act have not been a big issue. Mr. McCabe noted that the AO is aware of only four instances nationwide in which a district court denied a right asserted by a victim under the Act. A member noted that it is unclear whether the Appellate Rules are truly in tension with the Act, since the Act's provisions may be read in different ways. A member predicted that appellate-review issues under the Act will be very rare, since district judges will be careful not to impinge on victims' rights under the Act, and U.S. attorneys (and probation officers) will be careful to point such issues out to district judges. Mr. McCabe noted that the AO is setting up a computer system to notify crime victims of all relevant court proceedings. Mr. Letter promised that the Department of Justice would continue to monitor practice under the Act, and that he would keep the Reporter updated. Judge Stewart requested that if new issues arise under the Act, Mr. Letter should notify the Committee without waiting until the next meeting.

B. Items Awaiting Initial Discussion

1. Item No. 05-04 (FRAP 41 – *Bell v. Thompson*)

Judge Schiltz outlined the litigation in *Bell v. Thompson*, 125 S. Ct. 2825 (2005), and explained how that case highlighted ambiguities in Rule 41, which governs issuance of the mandate. In *Bell*, Thompson (a capital habeas petitioner) appealed from a district court judgment dismissing his petition. The Sixth Circuit Court of Appeals affirmed, but stayed the issuance of its mandate pending the disposition of Thompson's petition for certiorari. After certiorari was denied, Thompson obtained an order from the Court of Appeals staying issuance of the mandate until the Supreme Court resolved Thompson's petition for rehearing. After the Supreme Court denied rehearing, the Court of Appeals' mandate still failed to issue – but the parties (not noticing this omission) proceeded to litigate other matters (focusing on whether Thompson was competent to be executed). Meanwhile, without notice to the parties, the Court of Appeals reexamined the merits of Thompson's habeas petition, and five months after the Supreme Court denied rehearing the Court of Appeals issued an amended opinion vacating and

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E

As the Committee is aware, during the past decade the Supreme Court has issued a number of decisions that address whether particular litigation-related deadlines are jurisdictional.[1] One case in that line of decisions – *Bowles v. Russell*, 551 U.S. 205 (2007) – held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional, and barred the application of the "unique circumstances" doctrine to excuse violations of jurisdictional deadlines.[2]

In 2007, Mark Levy – a member of the Committee – suggested that the Committee consider the possibility of amending the Appellate Rules to address issues raised by *Bowles*. At the Committee's fall 2007 meeting, Committee members discussed this proposal, including the possibility of altering the law to specify which appeal deadlines are jurisdictional and/or to reinstate the unique circumstances doctrine. Participants in that meeting discussed questions of the scope of rulemakers' power to implement such changes; noted that similar questions could arise with respect to deadlines reflected in the other sets of national Rules; and determined that it was important to watch for further caselaw developments, both in the Supreme Court and in the lower federal courts.

During the next four years, the Committee periodically returned to these questions but did not develop any proposals to address them. In fall 2008, the Committee discussed the possibility of developing a legislative proposal that would list existing statutory appeal deadlines, establish a method for determining whether those deadlines are jurisdictional, and provide a method for determining the treatment of statutory deadlines that are enacted in the future. Accordingly, the agenda materials for the Committee's spring 2009 meeting included a memo that listed appeal-related deadlines that might come within the ambit of such a proposal. At the spring 2009 meeting, confronted with the potential scope of this project, Committee members expressed interest in determining how big a problem the ruling in *Bowles* actually poses in practice.

[1] Portions of this memo are drawn from my prior memos to the Committee, and/or from 16A Federal Practice & Procedure §§ 3950.1 and 3950.4 (for which I serve as a coauthor).
[2] *See Bowles*, 551 U.S. at 213-14.

I therefore prepared a memo for the Committee's fall 2009 meeting that attempted to address that question. The memo reported on the results of a study of a limited sample of post-*Bowles* decisions. From that sample, it was possible to see that some litigants were losing the opportunity for appellate review because an appeal deadline was deemed jurisdictional under *Bowles*; but it was not possible to determine the frequency with which such results occurred. The memo also noted that *Becker v. Montgomery*, 532 U.S. 757 (2001), and related cases might sometimes mitigate the effects of jurisdictional deadlines in instances where a document filed within the appeal time was found substantially equivalent to a notice of appeal.

Since that time, the Committee's agenda materials have periodically included *Bowles*-related updates, but the Committee has not held any substantive discussions of possible rulemaking actions on this topic. Therefore, it seems that the time may have come for the Committee to consider removing this item from its agenda.[3] I also note below two circuit splits that have arisen concerning the treatment of tolling motions under Appellate Rule 4(a)(4).

In *Bowles*, the deadline in question was set both by Appellate Rule 4(a)(6) and by 28 U.S.C. § 2107, and the Court relied upon the statutory nature of the deadline in determining that it was jurisdictional.[4] Post-*Bowles* decisions continue to confirm that statutory appeal deadlines are jurisdictional.[5] Rule 4(a)(1)(A)'s 30-day time limit, Rule 4(a)(1)(B)'s 60-day time limit, Rule 4(a)(5)(A)'s 30-day limit, and Rule 4(a)(6)'s 14-day, 21-day and 180-day limits are reflected in 28 U.S.C. § 2107, and thus it seems likely that under *Bowles*' reasoning these limits are to be regarded as jurisdictional.[6] Rule 4(b)(1)(B)'s 30-day time limit for government appeals roughly mirrors a statutory limit (applicable to certain appeals by the government in criminal cases) that is now codified at 18 U.S.C. § 3731, and thus the same 'jurisdictional' label may in some instances apply to that limit as well.

Post-*Bowles* decisions have taken the view that entirely nonstatutory appeal deadlines are claim-processing rules rather than jurisdictional deadlines. The most prominent example of such a deadline is Rule 4(b)(1)(A)'s deadline for appeals by criminal defendants.[7] Another example of a non-statutory appeal deadline is Civil Rule 23(f)'s 14-day deadline for seeking permission to appeal a class certification ruling.[8]

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[3] Because the prior memoranda and excerpts from relevant Committee minutes are lengthy, I have not included them as enclosures to this memo; please let me know if you would like to receive a set of them.

[4] *See Bowles*, 551 U.S. at 213.

[5] *See, e.g., Contino v. United States*, 535 F.3d 124, 126 (2d Cir. 2008) (Rule 4(a)(1)(B)'s 60-day period is jurisdictional).

[6] *See, e.g., Baker v. United States*, 670 F.3d 448, 456 (3d Cir. 2012) (Inmate plaintiff did not receive notice of the order dismissing his FTCA suit until more than 180 days after its entry because the court sent the order to a correctional institution where he was no longer housed; the court of appeals held that the 180-day time limit set by 28 U.S.C. § 2107(c) and Appellate Rule 4(a)(6)(B) for motions to reopen was jurisdictional and thus non-extendable.).

[7] *See United States v. Garduno*, 506 F.3d 1287, 1290-91 (10th Cir. 2007); *United States v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007); *United States v. Frias*, 521 F.3d 229, 233 (2d Cir. 2008) ("The time to appeal a criminal judgment ... is set forth only in a court-prescribed rule of appellate procedure. Rule 4(b), unlike Rule 4(a), is not grounded in any federal statute. ... It therefore does not withdraw federal

The statutory / nonstatutory distinction has proven more difficult to apply, however, in instances where a basic appeal deadline is set by statute but the Rules fill in statutory gaps or otherwise elaborate on the statutory framework. Appellate Rule 4(a)(4)'s treatment of tolling motions presents the most prominent example.[9] Rule 4(a)(4) provides that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." The statutory provision setting the deadlines for civil appeals – 28 U.S.C. § 2107 – contains no mention of such tolling motions, but the tolling effect of certain postjudgment motions was recognized by caselaw well before the adoption of Section 2107.

A number of circuits have concluded that the Civil Rules' deadlines for post-judgment motions are claim-processing rules rather than jurisdictional requirements.[10]

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jurisdiction over criminal appeals."); *United States v. Byfield*, 522 F.3d 400, 403 n.2 (D.C. Cir. 2008) ("In light of *Bowles*, we now hold that Rule 4(b) is not jurisdictional because it was judicially created and has no statutory analogue."); *Virgin Islands v. Martinez*, 620 F.3d 321, 328 (3d Cir. 2010).

[8] In *Gutierrez v. Johnson & Johnson*, 523 F.3d 187 (3d Cir. 2008), the Third Circuit concluded that Rule 23(f)'s deadline is a nonjurisdictional claim-processing rule. *See id*. at 198. But in *Gutierrez*, that conclusion did not help the would-be appellants because the court applied the 10-day deadline strictly. A reconsideration motion filed more than 10 days after the class certification ruling did not toll Rule 23(f)'s 10-day deadline, even though the extension of time to file the reconsideration motion had been agreed to by the parties and approved by the court. *See id.* at 194, 198-99.

[9] Similar issues could arise, for example, with respect to Appellate Rule 4(a)(4)(B)(ii)'s requirement of a new or amended notice of appeal, and with respect to Appellate Rule 4(a)(7)(A)'s definition of the entry of judgment. As to the second of these two examples, Section 2107 does not define the entry of judgment; Civil Rule 58 and Appellate Rule 4(a)(7)(A) fill that gap by, among other things, setting a 150-day cap for instances when a separate document is required but never provided. Addressing the 180-day time limit produced by adding the 30-day appeal time limit to the 150-day cap set by the Rules, the Ninth Circuit held the 180-day limit jurisdictional: "§ 2107(a) and [Rule] 4(a)(1) require that a notice of appeal be filed in a civil case 'within 30 days after the judgment or order appealed from is entered.' …. Because the district court did not enter judgment on the order to compel arbitration, CCI had 180 days to appeal the order. … CCI filed its first notice of appeal of the district court's order compelling arbitration on May 16, 2005, 287 days after the order was entered on August 2, 2004. This is well beyond the 180 days allowed by Federal Rule of Appellate Procedure 4(a)(7)(A)(ii). CCI's appeal of the district court's order compelling arbitration is untimely, and we lack jurisdiction to hear the appeal of that issue." *Comedy Club, Inc. v. Improv West Assocs.*, 514 F.3d 833, 841–42 (9th Cir. 2007), *judgment vacated on other grounds*, 555 U.S. 801 (2008).

[10] *See, e.g.*, *Lizardo v. United States*, 619 F.3d 273, 276 (3d Cir. 2010) ("[Civil] Rule 59(e) is a claim-processing rule, not a jurisdictional rule, so objections based on the timeliness requirement of that rule may be forfeited."); *National Ecological Found. v. Alexander*, 496 F.3d 466, 475 (6th Cir. 2007) (concluding that Civil Rules "6(b) and 59(e) …. are claim-processing rules that provide[] … a forfeitable affirmative defense"); *Blue v. International Bhd. of Elec. Workers Local Union 159*, 676 F.3d 579, 584 (7th Cir. 2012) ("[T]he 28-day limit[s] on filing motions under Rules 50 and 59 are non-jurisdictional procedural rules designed to aid in the orderly transaction of judicial business."); *Dill v. General Am. Life Ins. Co.*, 525 F.3d 612, 618-19 (8th Cir. 2008) (deciding "that Federal Rules of Civil Procedure 6(b)(2) and 50(b) are nonjurisdictional claim-processing rules," but holding that the nonmoving party timely raised an objection to the motion's untimeliness by objecting before the district court decided the motion on the merits); *Art Attacks Ink, LLC v. MGA Entm't Inc.*, 581 F.3d 1138, 1143 (9th Cir. 2009) ("Because Rule 50(b)'s ten-day filing deadline is a non-jurisdictional claim-processing rule, it can be waived or forfeited."); *Advanced Bodycare Solutions, LLC v. Thione Int'l, Inc.*, 615 F.3d 1352, 1360 n.15 (11th Cir. 2010) ("[S]ince [Civil] Rule 6(b) is a claims-processing rule, Thione, in failing to object to the district court's violation of the rule (by extending the time for filing post-trial motions) forfeited its objection to the time extension.").

Under this view, where a district court purports to extend the time for making such a motion, and no party objects to that extension, the district court has authority to decide the motion on its merits. But in such an instance, does the motion count as a "timely" one that, under Appellate Rule 4(a)(4), tolls the time to appeal? The Third,[11] Seventh,[12] Ninth,[13] and Eleventh[14] Circuits have indicated that such a motion does not toll the appeal time; but the Sixth Circuit has held to the contrary,[15] and a decision from the Eighth Circuit also suggests that such a motion would have a tolling effect.[16] Even if such a motion does not count as a "timely" one within the meaning of Appellate Rule 4(a)(4), is Appellate Rule 4(a)(4)'s timeliness requirement itself merely a claim-processing rule or is it a jurisdictional requirement? The Seventh, Ninth, and Eleventh Circuits have issued decisions indicating that Rule 4(a)(4)'s provisions set jurisdictional requirements;[17] but the D.C. Circuit has held, on the contrary, that Rule 4(a)(4)'s timeliness requirement is a nonjurisdictional claim-processing rule.[18]

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[11] *See Lizardo*, 619 F.3d at 280 ("[A]n untimely Rule 59(e) motion, even one that was not objected to in the district court, does not toll the time to file a notice of appeal under Rule 4(a)(4)(A).").

[12] *See Blue*, 676 F.3d at 582-84; *Justice v. Town of Cicero*, 682 F.3d 662, 665 (7th Cir. 2012) ("The motion did not extend the time for appeal … , because Fed. R. App. P. 4(a)(4) comes into play only when a Rule 59 motion is timely.").

[13] *See United States v. Comprehensive Drug Testing, Inc.*, 513 F.3d 1085, 1098 (9th Cir. 2008) (holding that motion filed outside 10-day time limit did not toll time to appeal). The court of appeals reheard this case en banc, but adhered to the panel's ruling concerning this timeliness issue. *See United States v. Comprehensive Drug Testing, Inc*., 621 F.3d 1162, 1167 (9th Cir. 2010) (en banc, per curiam opinion) ("The three-judge panel unanimously held that the government's appeal … was untimely…. We agree with the panel and adopt its analysis of the issue….").

[14] *See Advanced Bodycare*, 615 F.3d at 1359 n.15; Green v. DEA, 606 F.3d 1296, 1300, 1302 (11th Cir. 2010).

[15] *See National Ecological Found.*, 496 F.3d at 476 ("[W]here a party forfeits an objection to the untimeliness of a Rule 59(e) motion, that forfeiture makes the motion 'timely' for the purpose of Rule 4(a)(4)(A)(iv)."). Judge Sutton concurred in the judgment in *National Ecological Foundation*. He would have construed the untimely Civil Rule 59(e) motion as a Rule 60(b) motion filed more than 10 days after entry of judgment. Thus construed, the motion would not have had a tolling effect under Appellate Rule 4(a)(4)(A). *See id.* at 481-82 (Sutton, J., concurring in the judgment).

[16] *See Dill*, 525 F.3d at 619 ("Because the district court had not ruled [on the Rule 50(b) motion], we hold that Dill properly and timely raised the untimeliness defense …. As a result, General American's late-filed Rule 50(b) motion did not toll its time for filing its notice of appeal.").

[17] *See Blue*, 676 F.3d at 582 (characterizing the question – whether an untimely motion has tolling effect under Rule 4(a)(4) – as "a matter of jurisdictional importance"); *Justice*, 682 F.3d at 663 (stating that the notice of appeal "is timely if [appellant] filed a timely Rule 59 motion, see Fed. R.App. P. 4(a)(4), but otherwise is untimely … and jurisdictionally so"); *Comprehensive Drug Testing*, 513 F.3d at 1101 ("If [Rule] 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule…. If [Rule] 4(a)(4) is *non* jurisdictional, satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional 60-day rule of [Rule] 4(a)(1)."); *Advanced Bodycare*, 615 F.3d at 1359-60 n.15 ("[The] Rule 50(b) and Rule 59 motions were untimely and did not toll the time period for appealing …. As Federal Rule of Appellate Procedure 4(a) is a jurisdictional rule, Advanced's appeal … was untimely, and we lack jurisdiction to hear it."); *Green*, 606 F.3d at 1301.

[18] *See Obaydullah v. Obama*, 688 F.3d 784, 788-91 (D.C. Cir. 2012) (per curiam) (adopting parties' view "that FRAP 4(a)(4)(A)'s timeliness requirement is a 'claim-processing rule' subject to waiver"). For a case that reached a similar conclusion shortly prior to the Court's decision in *Bowles*, see *Wilburn v. Robinson*, 480 F.3d 1140, 1147 (D.C. Cir. 2007) ("Because Robinson failed to timely assert the timeliness defense afforded by Rule 4(a)(4)(A)(vi), we deem Wilburn's Rule 60(b) motion to have tolled the period to appeal the summary judgment order.").

In sum, the Committee's discussions of *Bowles*' implications for appellate practice have not, to this point, resulted in a proposal for rulemaking action. Unless the circuit splits concerning the treatment of Rule 4(a)(4)'s requirements merit rulemaking activity, this item may be ripe for removal from the Committee's agenda.

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

This item arises from Judge Diane Wood's suggestion that the Committee consider clarifying whether Rule 4(c)(1)'s inmate-filing rule[1] requires prepayment of postage. Appellate Rule 4(c)(1) provides:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

The Committee considered the question raised by Judge Wood, and related issues, over the course of three meetings from spring 2008 through spring 2009.[2] At that point, the Committee decided to retain the item on its study agenda while monitoring further developments in the caselaw. This memo provides an updated overview of relevant caselaw,[3] outlines questions that might be addressed by amendments to Rule 4(c), and (for discussion purposes) sketches a few possible alternatives for such amendments.

I. Does Rule 4(c)(1) require prepayment of postage as a condition of timeliness?

The Seventh Circuit has held that when the institution has no legal mail system, the third sentence of Rule 4(c)(1) requires that postage be prepaid.[4] By contrast, the Seventh and Tenth Circuits have indicated that, if the institution has a legal mail system

[1] The caselaw often refers to this as the "prison mailbox rule." That term, however, seems misleadingly narrow, given that Rule 4(c)(1) applies to any "inmate confined in an institution."
[2] I enclose relevant prior memoranda and excerpts of relevant meeting minutes.
[3] The memo draws upon, and updates, both the discussions in my prior memoranda and the discussion of the same topics in 16A Federal Practice & Procedure § 3950.12 (for which I serve as a coauthor).
[4] *See* United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004).

and the inmate uses that system, prepayment of postage is not required for timeliness.[5] (This raises the additional question of what constitutes a "system designed for legal mail" within the meaning of Rule 4(c)(1);[6] I return to that topic in Part III of this memo.) To the extent that a postage-prepayment requirement exists, it is currently unclear whether such a requirement is jurisdictional.[7]

The Committee has also considered whether there are constitutional limits on the government's ability to require prepayment of postage for filings by an indigent litigant. As noted in the enclosed memoranda, "prisoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). *See also* Lewis v. Casey, 518 U.S. 343, 349 (1996) (requiring "that an inmate alleging a violation of *Bounds* must show actual injury"). "The tools [*Bounds*] requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement." *Lewis*, 518 U.S. at 355. My October 2008 memo observed that while a number of courts have recognized (or presupposed) a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount can be relatively small. One could argue that *Bounds* requires the application of a prison mailbox rule in at least some instances. In a 2010 decision, the Sixth Circuit found a *Bounds* violation where a defendant's attempt to file a direct appeal of his state-court judgment of conviction was thwarted by prison officials' delay in mailing his appeal papers and by the absence of a prison-mailbox rule under state law.[8]

An amendment to Rule 4(c)(1) could address these questions in a variety of ways. For example, the amendment shown in I.A below would explicitly extend the postage-prepayment requirement to all inmate filings. Extending the requirement could expedite the processing of inmate litigation: Failure to prepay postage adds to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the litigant's appeal will be time-barred unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause.

On the other hand, the inmate's situation is distinguishable from that of the nonincarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand. And, as noted above, foreclosing the use of the inmate-filing rule by indigent inmates could raise constitutional concerns. For these reasons, the amendment sketched in I.A may be undesirable standing alone. It could,

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[5] *See* Ingram v. Jones, 507 F.3d 640, 644 (7th Cir. 2007), and United States v. Ceballos-Martinez, 387 F.3d 1140, 1144 (10th Cir. 2004).

[6] The 1998 Committee Note to Rule 4(c) explains merely: "Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision."

[7] This question is discussed in the enclosed March 13, 2008 memorandum at 13-19.

[8] *See* Dorn v. Lafler, 601 F.3d 439, 444 (6th Cir. 2010).

however, be combined with other changes that would mitigate the harsh effects of such a change – for example, a provision authorizing the court to excuse compliance with the postage-prepayment requirement (shown in I.B) and/or a provision requiring the court to excuse such compliance if the inmate is indigent (shown in I.C).

Another possible amendment, shown in I.D, would cabin the postage-prepayment requirement by stating explicitly that the requirement does not apply when the inmate uses an institution's legal mail system. One might wonder whether such a change is optimal. Is there something special about a legal mail system that removes the need for prepayment of postage? Also, even if there is a reason for distinguishing inmate mailings deposited in legal mail systems from other inmate mailings, it might be undesirable to tie the postage-prepayment requirement to that distinction because (as noted in Part III below) an inmate might in some instances be unsure whether a particular mailing system qualifies as a legal mail system under the Rule. For these reasons, some might argue that it makes more sense to extend the postage-prepayment requirement across the board while adding one or more safety valves (such as a good-cause exemption and/or an indigence exemption).

Here are sketches illustrating the options noted above:

A. Extend the requirement of prepayment of postage

This sketch shows an amendment that would make clear that the postage-prepayment requirement extends to all cases under the inmate-filing rule:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. ~~If an institution has a system designed for legal mail, the inmate must use that system to~~ To receive the benefit of this rule, first-class postage must be prepaid,[9] and if the institution has a system designed for legal mail, the inmate must use that system. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

B. Make clear that the court can excuse failure to prepay postage

This sketch adds a sentence to Rule 4(c)(1) to make clear that failure to prepay postage is excusable for good cause:

[9] I assume that there would be a stylistic objection to the use of the passive voice. However, in this context, the passive voice seems appropriate, given the likelihood that in many instances the postage would be affixed by the institution on the inmate's behalf. For a brief survey of some institutions' policies concerning postage, see the enclosed October 20, 2008 memorandum at 2-5.

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. For good cause, the court may excuse a failure to prepay postage.

Such an addition would empower a court to excuse such a failure, and would remove any contention that the failure was a jurisdictional defect. On the other hand, adding this sentence, without making any other changes in the Rule, could give rise to the inference that prepayment of postage is a general requirement under Rule 4(c)(1), except when excused by the court for good cause. As noted above, in at least some circuits, prepayment of postage is not required when the inmate uses the institution's legal mail system.

C. Exemption for indigent inmates

The amendment shown in this sketch would require the court to excuse the failure to prepay postage if the inmate is indigent:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid or that the inmate lacked the funds to prepay the postage. The court must excuse a failure to prepay postage if the inmate lacked the necessary funds.

D. Cabin the requirement of prepayment of postage

The amendment shown in this sketch would narrow the Rule's reference to the prepayment of postage, adopting an approach similar to that taken by the Seventh and Tenth Circuits:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. If the institution does not have such a system, first-class postage must be prepaid. Timely filing may be

shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and (if required) state that first-class postage has been prepaid.

II. Is the declaration (or statement) discussed in the third sentence of Rule 4(c)(1) required in all instances, and if so, must it be included with the notice of appeal or can the appellant provide it later?

My prior memos noted that caselaw in the Seventh and Tenth Circuits suggested that the statement or declaration need not be provided if the prison has a legal mail system and the prisoner uses that system.[10] Another Tenth Circuit decision questioned that view, and also noted that an inmate might err by thinking the institution's mail system qualified as a legal mail system when it in fact did not.[11] But most recently, the Tenth Circuit held that an appellant who uses the legal mail system need not provide the statement or declaration.[12] The Eighth Circuit has taken differing positions on whether the declaration must be included with the notice of appeal.[13] The Tenth Circuit has stated

[10] In *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007), Ingram "admittedly failed to affix first-class postage" when he deposited his notice of appeal in the prison's legal mail system. *Id.* at 642. But the court held his appeal timely, reasoning that "he satisfies the second sentence of Rule 4(c)(1) and [thus] receives the benefit of the Rule, without our consideration of the third sentence." *Id.* at 644. In *United States v. Ceballos-Martinez*, the court likewise described the Rule's requirements in a way that indicated that the second and third sentences were alternatives: "If a prison lacks a legal mail system, a prisoner *must* submit a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attest that first-class postage was pre-paid." United States v. Ceballos-Martinez, 371 F.3d 713, 717 (10th Cir. 2004).

[11] [A]lthough an inmate seeking to take advantage of the mailbox rule must use the prison's legal mail tracking system where one is in place, it would be unwise to rely solely on such a system. If an inmate relying on a prison legal mail system later learns that the prison's tracking system is inadequate to satisfy the mailbox rule, it would be best if an alternative notarized statement or perjury declaration establishing timely filing were already in place." Price v. Philpot, 420 F.3d 1158, 1166 (10th Cir. 2005). *See also id.* at 1166 n.7 ("Although dicta in *Ceballos-Martinez* suggests that in this Circuit a notarized statement or perjury declaration is required only in the case of an inmate who does not have access to a legal mail system …, a future case may hold otherwise.").

[12] *See* Montez v. Hickenlooper, 640 F.3d 1126, 1133 (10th Cir. 2011).

[13] In a case where the clerk received the notice of appeal after time for filing had run out, the Eighth Circuit held that prisoner's failure to provide proof of timely delivery when he first appealed prevented application of the prison mailbox rule.

> We perceive no good reason to allow an appellant to establish timely filing on remand (the second bite at the apple) when nothing hinders the appellant from proving timely filing when he first appeals. To permit remand for limited fact-finding by a district court when the appellant does not, in the first instance, demonstrate timely filing encourages delay and wasteful use of scarce judicial resources. We acknowledge that remand may be appropriate in the rare case in which the prisoner and the warden present conflicting proof of timeliness, or when other complicated circumstances exist.

Porchia v. Norris, 251 F.3d 1196, 1199 (8th Cir. 2001). But less than half a year later the Eighth Circuit held that the statement need not always be filed at the same time as the notice of appeal. *See* Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001) (applying a prior version of Rule 4(c) in determining the timeliness of a Section 2255 petition). *See also* Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir.

that Rule 4(c) does not require the declaration to be included with the notice of appeal, but that doing so is the better practice.[14]

Although the provision of the declaration or statement described in the third sentence of Rule 4(c)(1) is a useful means for establishing the timeliness of an inmate filing, there will be times when such a declaration or statement is not needed. Most obviously, if the clerk's office receives the filing before the due date, there is no further need to demonstrate timeliness. In addition, if the inmate uses an institution's legal mail system, that system should itself provide a means for determining the date on which the inmate placed the document in the legal mail system. Rule 4(c)(1) could be revised to make clear that the declaration or statement is required only if the filing's timeliness is in question and cannot be established by these other means. In addition, the Rule could be revised to make clear that in cases where the declaration or statement is needed, it must be provided upon the court's request but need not be filed along with the notice of appeal itself:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. If the court so directs, the inmate must demonstrate t~~T~~imely filing ~~may be shown~~ by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage ~~has been~~ was prepaid.

III. Could one clarify the Rule's reference to "a system designed for legal mail"?

One might argue that the Rule's reference to a "system designed for legal mail" is somewhat indeterminate.[15] If the only function of the Rule's reference to such a system is to require inmates to use legal mail systems where such systems are in place, then "system designed for legal mail" does not seem like a problematic term: An inmate should readily be able to find out from the institution whether it has a special system for legal mail. But if the use of the institution's legal mail system also triggers special rules – such as an exemption from prepaying postage or an exemption from providing a statement or declaration concerning timeliness – then questions might arise as to whether a particular institution's legal mail system qualifies for the application of those special rules. The Tenth Circuit, for example, has suggested that some systems might not

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2003) (following *Grady* when applying current Rule 4(c)(1) to the filing of a notice of appeal); United States v. Murphy, 578 F.3d 719, 720 (8th Cir. 2009) (following *Sulik*).

[14] "While we note that the text of the rule does not require the prisoner to file this attestation at any particular time, at the very least, the prisoner must file it before we resolve his case. If the prisoner fails to do so, we lack jurisdiction to consider his appeal. Thus, to avoid dismissal of their appeals, *we strongly encourage* all prisoners to include with their notices of appeal a declaration or notarized statement in compliance with Rule 4(c)(1)." United States v. Ceballos-Martinez, 387 F.3d 1140, 1144 n.4 (10th Cir. 2004),

[15] *See supra* note 6 and accompanying text; note 11 and accompanying text.

provide the necessary tracking information that justifies dispensing with the requirement of a statement or declaration concerning timeliness.[16]

No one would wish an inmate's reasonable mistake as to whether an institution's system qualified as a "system designed for legal mail" to result in the loss of appeal rights. However, it is not readily apparent how to redraft the Rule to clarify the meaning of "system designed for legal mail." Clearer language would likely be more cumbersome.

It may be preferable to address concerns about the possible vagueness of this term by including other measures that mitigate the effects of an inmate's reasonable mistake in categorizing a particular mail system. Such mitigating measures could include the "good cause" provision discussed in Part I.B and the amendment to Rule 4(c)(1)'s third sentence discussed in Part II.

IV. Is the term "inmate" too narrow to indicate the intended scope of Rule 4(c)(1)?

During the Committee's November 2008 meeting, a participant asked whether the Rule's use of the term "inmate confined in an institution" is too narrow. The concern was that the use of the word "inmate" might suggest that the Rule is directed only at those incarcerated in correctional institutions. However, I have not found any cases that have confined Rule 4(c)(1) to the correctional context. To the contrary, the Ninth Circuit has applied Rule 4(c)(1) to a filing by person who was civilly detained under California's Sexually Violent Predators Act.[17] Thus, I do not think that it is necessary to change this aspect of Rule 4(c)(1).

V. Does Rule 4(c)(1) extend to filings by an inmate who has a lawyer?

A 2009 student note purported to identify a circuit split on this question.[18] I am not convinced that the caselaw has actually developed a split concerning the interpretation of Rule 4(c)(1) itself, but it would not surprise me if such a split were to develop in the future. The Seventh Circuit has held that the Rule extends to filings by inmates who are represented.[19] A 1996 decision by the Eighth Circuit – concerning a filing made after the effective date of the amendment adopting Rule 4(c) – held that the

[16] *See supra* note 11 (quoting Price v. Philpot, 420 F.3d 1158, 1166 (10th Cir. 2005)).
[17] "[T]he rule … by its terms – and in spite of its popular nickname – applies broadly to any 'inmate confined in an institution.' There is no express limitation of the rule's application to prisoners, or to penal institutions, and neither the rule itself nor defendants suggest any reason to infer such a limitation. Jones is undisputably an inmate confined in an institution, specifically the Atascadero State Hospital." Jones v. Blanas, 393 F.3d 918, 926 (9th Cir. 2004).
[18] *See* Courtenay Canedy, Comment, *The Prison Mailbox Rule and Passively Represented Prisoners*, 16 Geo. Mason L. Rev. 773, 779-80 (2009).
[19] "Rule 4(c) applies to 'an inmate confined in an institution' …. A court ought not pencil 'unrepresented' or any extra word into the text of Rule 4(c), which as written is neither incoherent nor absurd." United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004).

judicially-recognized prison mailbox rule was limited to pro se prisoners;[20] but the decision failed to cite Rule 4(c), and thus the decision's implications for the interpretation of that Rule seem unclear. The Fifth, Eighth, and Ninth Circuits have held, with respect to the timeliness of habeas petitions, that the judicially-developed prison mailbox rule does not extend to filings by represented petitioners; but none of those decisions resulted in a holding concerning the application of Rule 4(c) (which by its terms concerns only the filing of the notice of appeal).[21] I have not found a decision that actually *held* that Rule 4(c)(1) is inapplicable to represented inmates.[22] The Tenth Circuit has noted the question without deciding it.[23]

Even if there is not yet a circuit split concerning Rule 4(c)(1) specifically, it seems quite possible that, in future, another circuit could disagree with the Seventh Circuit's conclusion and could hold Rule 4(c)(1) inapplicable to represented inmates. Such a development could prove to be a trap for unwary inmates who, in the meantime, might rely on the text of the current Rule.

Rule 4(c)(1) could be amended to provide a clear answer to this question. Should such an amendment restrict the Rule to unrepresented litigants? The arguments for restricting the Rule in that way might start from the premise that the *Houston* Court itself was focused on the difficulties facing *pro se* inmates. If a lawyer has represented the inmate in the proceeding below, that lawyer has an obligation to timely file a notice of appeal if the inmate so desires. The lawyer's failure to do so, the argument would run,

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[20] "Burgs is not entitled to the benefit of *Houston* because he was represented by counsel and thus in the same position as other litigants who rely on their attorneys to file a timely notice of appeal." Burgs v. Johnson County, 79 F.3d 701, 702 (8th Cir. 1996).

[21] *See* Nichols v. Bowersox, 172 F.3d 1068, 1074 (8th Cir. 1999) (en banc) ("The prison mailbox rule traditionally and appropriately applies only to *pro se* inmates who may have no means to file legal documents except through the prison mail system."), *overruled on other grounds by* Riddle v. Kemna, 523 F.3d 850, 856 (8th Cir. 2008) (en banc) ("This court therefore abrogates the part of *Nichols* that includes the 90-day time period for filing for certiorari in all tolling calculations under the 28 U.S.C. § 2244(d)(1)(A)."), *overruled by* Gonzalez v. Thaler, 132 S. Ct. 641, 656 (2012) ("[W]ith respect to a state prisoner who does not seek review in a State's highest court, the judgment becomes 'final' under § 2244(d)(1)(A) when the time for seeking such review expires…."); *Nichols*, 172 F.3d at 1077 n.5 ("For the sake of consistency, we adopt the same requirements for this type of filing by a *pro se* inmate as applies to notices of appeal pursuant to [Appellate] Rule 4(c)(1)…."); Cousin v. Lensing, 310 F.3d 843, 847 (5th Cir. 2002) ("[T]he justifications for leniency with respect to *pro se* prisoner litigants do not support extension of the 'mailbox rule' to prisoners represented by counsel."); Stillman v. LaMarque, 319 F.3d 1199, 1202 (9th Cir. 2003) ("Because Stillman was assisted by a lawyer and because he did not deliver his habeas petition to prison officials for forwarding to the court, he cannot take advantage of the mailbox rule.").

[22] A number of decisions refer to Rule 4(c) in terms indicating the assumption that the provision is limited to *pro se* inmates. *See, e.g.*, Allen v. Culliver, 471 F.3d 1196, 1198 (11th Cir. 2006) ("Allen claimed he was entitled to benefit from the 'prison mailbox rule,' articulated in *Houston v. Lack* … , and codified as Federal Rule of Appellate Procedure 4(c), under which a *pro se* prisoner's NOA is deemed filed in federal court on the date it is delivered to prison authorities for mailing.").

[23] *See* United States v. Ceballos-Martinez, 387 F.3d 1140, 1143 n.3 (10th Cir. 2004) (declining to decide "whether a represented prisoner may take advantage of Rule 4(c)(1).")

should not excuse an untimely appeal by an inmate any more than it would excuse any other litigant's appeal.[24]

There are, however, counter-arguments. Just as incarceration limits the inmate's ability to walk to the courthouse and file the notice of appeal in person (or to log on to the computer and file it electronically), incarceration also may limit the inmate's ability to monitor the litigation and to communicate quickly with his or her lawyer. A provision extending the inmate-filing rule to notices of appeal filed by the inmate would provide a safety valve for cases in which a communication breakdown prevented the inmate from inducing his or her lawyer to timely file the notice of appeal. Although the inmate-filing rule does add some delay to litigation – by extending the span of time during which an appeal may turn out to have been filed – one might wonder how many cases would actually be affected by the application of Rule 4(c)(1) to represented inmates. In most cases where an inmate is represented by counsel, counsel will file the notice of appeal as a matter of course. It is hard to see why an inmate's lawyer would instead rely upon the inmate to file the notice of appeal. Accordingly, the application of Rule 4(c)(1) will likely be limited to the – presumably small – universe of cases in which an inmate is represented by counsel but the only notice of appeal on the inmate's behalf is filed by the inmate himself or herself.

Here is a sketch of an amendment that would limit the inmate-filing rule to unrepresented litigants. As this sketch illustrates, such an amendment would require the Committee to define what constitutes representation:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. <u>This rule does not apply to an inmate who is represented by counsel – in the action in which the appeal is taken – on the day [of entry of the judgment or order to be appealed from] [when the notice of appeal is due].</u>

Here is a sketch that would instead make clear that the inmate-filing rule applies to represented litigants so long as the filing itself is made by the inmate:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a

[24] In cases where the Sixth Amendment right to counsel applies, redress could be sought by means of an ineffective-assistance claim.

declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid. This rule applies to an inmate represented by counsel if the inmate, not counsel, files the notice of appeal.

VI. A consolidated sketch of possible amendments

The precise configuration of amendments to Rule 4(c)(1) would depend, of course, on the Committee's choices concerning each of the questions discussed above. Purely for the sake of illustration – to show how a number of the possible changes might fit together – here is a sketch that consolidates several possible changes:

> If an inmate confined in an institution – whether or not represented by counsel – files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. To receive the benefit of this rule, the inmate also must submit contemporaneously with the notice either ~~Timely filing may be shown by~~ a declaration in compliance with 28 U.S.C. § 1746 or ~~by~~ a notarized statement~~, either of which must~~ that sets forth the date of deposit and states that first-class postage has been prepaid, unless the court excuses a failure to prepay postage for good cause.

VII. Connections with other sets of Rules

In considering changes to Rule 4(c)(1)'s inmate-filing provision, the Committee may wish to keep in mind the connections between that provision and related rules and doctrines. Appellate Rule 25(a)(2)(C) extends the inmate-filing concept to filings in the courts of appeals.[25] The Rules that govern habeas and Section 2255 proceedings now include provisions – added in 2004 – that mirror the Appellate Rules' inmate-filing provisions.[26] Supreme Court Rule 29.2 includes an inmate-filing provision that is similar but not identical to the relevant Appellate Rules.[27] As to filings not directly governed by

[25] Rule 25(a)(2)(C) states: "A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid."

[26] Rule 3(d) in the Rules Governing Section 2254 cases provides: "A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." The same provision appears as Rule 3(d) in the Rules Governing Section 2255 Cases.

[27] Supreme Court Rule 29.2 provides in part: "If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day

a particular inmate-filing rule, some courts have taken the view that the requirements of Rule 4(c)(1) should be followed for the sake of uniformity.[28]

If the Committee moves forward with proposed amendments to Appellate Rule 4(c)(1), it should consider whether to make conforming amendments to Appellate Rule 25(a)(2)(C). It is not clear that the case for making such amendments to Rule 25(a)(2)(C) would be as strong as the case for amending Rule 4(c)(1). Because Rule 4(c)(1) concerns the means for compliance with what (in civil cases) is a jurisdictional requirement, it is particularly important that Rule 4(c)(1) be clear; and one might also argue that it is particularly important that the Rule make clear a court's authority (where appropriate) to excuse certain types of noncompliance, such as failure to prepay postage. These concerns would be less salient when an inmate is attempting to file a brief in the court of appeals rather than attempting to file a notice of appeal in the district court.[29] On the other hand, introducing differences between the Appellate Rules' two inmate-filing provisions could lead to confusion – which is particularly undesirable in rules designed for use by pro se litigants. It would also be desirable to preserve similarity in approach among the other sets of inmate-filing rules. Thus, consultation with the Criminal Rules Committee and other rulemaking bodies would be an important step in connection with any changes in the Appellate Rules' inmate-filing provisions. It would also be important to gather the views of district and circuit clerks.

VIII. Developments concerning electronic filing

During the Committee's prior discussions of the inmate-filing rule, some participants suggested that, eventually, electronic filing would become available to inmates, rendering moot some of the problems that the current Rule is designed to address. In three federal districts – the Central and Southern Districts of Illinois and the District of Kansas – some or all state correctional facilities are now participating in electronic-filing programs for inmates.[30] But at present, most prison inmates lack access to electronic-filing facilities,[31] and it is clear that measures to provide such access must also balance security and other institutional concerns. For the moment, it would seem

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for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid."

[28] *See, e.g.*, Grady v. United States, 269 F.3d 913, 916 (8th Cir. 2001) ("Under our jurisprudence … a prisoner seeking to benefit from the prison mailbox rule must satisfy the requirements of Rule 4(c) whether he files a notice of appeal, a habeas petition, or a § 2255 motion.").

[29] However, it should be noted that Rule 25(a)(2)(C)'s inmate-filing rule also applies to filings that could involve jurisdictional deadlines, such as an inmate's petition under 28 U.S.C. § 1292(b) for permission to take an interlocutory appeal.

[30] I enclose relevant orders concerning these programs.

[31] *See* Donna Stienstra et al., Assistance to Pro Se Litigants in U.S. District Courts: A Report on Surveys of Clerks of Court and Chief Judges (FJC 2011). This study, reporting on the results of a survey of district clerks' offices, stated that – of 29 clerks' offices that identified specific challenges in handling pro se litigation -- "[s]eventeen … respondents stated that the policies and practices of the Bureau of Prisons, state departments of corrections, or the Department of Justice (DOJ) constrain their handling of pro so litigation. Included in this category are prisons' lack of cooperation in providing materials electronically, prisoners' lack of access to computers and electronic forms, the practice of frequently moving prisoners, and an unwillingness to participate in mediation (the one mention of DOJ)." *Id.* at 19.

that the inmate-filing Rules should be assessed based on the assumption that most inmates will continue to use paper filings.

IX. Conclusion

Provisions that affect compliance with jurisdictional deadlines – such as the deadline for taking a civil appeal – should be clear. That is particularly true of provisions designed for use by pro se litigants. A number of aspects of Rule 4(c)(1)'s inmate-filing provision might usefully be clarified. However, amending Rule 4(c)(1) would require a number of choices concerning the appropriate scope and operation of that Rule, and would raise questions about whether to make conforming amendments to Rule 25(a)(2)(C). In addition, choices made with respect to these Appellate Rules could affect the operation of other Rules that contain inmate-filing provisions.

Encls.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL AND SOUTHERN DISTRICTS OF ILLINOIS

IN RE: PROCEDURAL RULES FOR ELECTRONIC FILING PROGRAM	)	**GENERAL ORDER: No. 2012-1**

This General Order modifies and supersedes General Order No. 2010-1, which was entered on October 15, 2010.

The United States District Courts for the Central and Southern Districts of Illinois and the Illinois Department of Corrections have agreed to participate in an electronic filing program at certain correctional facilities in the State of Illinois. The electronic filing program is designed to reduce the cost of processing court filings made by prisoners in civil rights and habeas corpus cases brought under 42 U.S.C. §1983, 28 U.S.C. §§ 2241, 2254, or 2255, and any other type of case filed in these federal courts. This program will significantly reduce the expenditures for paper, envelopes, copier supplies, and postage for the correctional facilities and the prisoners. Furthermore, it will substantially reduce the amount of staff time spent processing prisoner filings for both the correctional facilities and the district courts.

The details of this program are as follows:

1. Library staff at the participating correctional facilities will scan prisoner filings into a pre-programmed digital sender which converts the filing to .pdf format and e-mails the document directly to the appropriate court. Each divisional office in the Central District of Illinois and the Southern District of Illinois will have a dedicated e-mail address for such filings.

2. Once the document has been scanned and sent to the Court, library staff will make a free copy of the document for the prisoner, and the original will be mailed, via the United States Postal Service, to the appropriate court with the "SCANNED" stamp affixed on the document. Library staff will collect the original pleadings throughout the business day and send all pleadings to the appropriate court at the end of each day.

3. After receiving the prisoner's document via e-mail from the correctional facility, the document will be filed by court staff into the Case Management Electronic Case Filing (CM/ECF). For any document filed by court staff on behalf of the prisoner (other than a complaint, which requires service of process), the Notice of Electronic Filing (NEF) generated by the CM/ECF system will constitute official service upon and notice to the other parties in the case, if counsel for the other parties are registered for electronic case filing. If a party to the case is not registered, the Clerk of Court will mail a copy of the prisoner's electronically filed document to each non-registered party on behalf of the prisoner, via the United States Postal Service.

4. Each participating correctional facility will establish an e-mail address by which library staff will receive the Notice of Electronic Filing (NEF) which issues when a document has been filed electronically. An NEF contains a hyperlink for a free download of the e-filed document. Library staff will print *every* NEF and provide a copy to the prisoner via the institutional mail. In addition, library staff will print the *entire* document when an NEF is

received for any document filed by the Court (orders, notices, minutes, etc.) and the *first page* of any document filed on behalf of the prisoner (which will show the Court's official file stamp and demonstrate that the document has been electronically filed). These materials will also be provided to prisoner via the institutional mail.

5. Defendants and any other non-prisoner party shall mail to the prisoner, via the United States Postal Service, a copy of any document filed on their behalf. Although library staff will print the NEF for documents filed by Defendants and any other non-prisoner party as set forth above, it is not the responsibility of library staff to print a document filed electronically by another party to the case. Any such document will be received by the prisoner via the United States Postal Service.

6. When the Court receives the prisoner's original (paper) document from the correctional facility via the United States Postal Service, court staff will verify that the electronic version of the document, which was received via e-mail from the correctional facility and electronically filed into CM/ECF, matches the original document. Once it has been determined that the electronic version of the document is in proper form, the original (paper) document will be destroyed.

7. After a merit review hearing or preliminary review of the case has been conducted by the Court, the Clerk of Court will produce the necessary copies of the complaint to accomplish service of process upon the

defendants as directed by the Court.

8. Library staff shall verify that any document printed for the prisoner is legible and immediately notify the appropriate court of any printing issues or other technical difficulties.

9. One of the district courts will provide and deliver a digital sender to each correctional facility participating in the Electronic Filing Program. The equipment will at all times remain property of the United States District Court which supplied the digital sender (and bear a property tag reflecting the ownership), and the Department of Corrections will execute an appropriate property receipt provided by the district court. The Department of Corrections will provide a printer and paper necessary to fulfill the requirements of this General Order at each participating correctional facility.

The effective date of this General Order is November 27, 2012.

ENTERED this 27th day of November, 2012.

JAMES E. SHADID
Chief Judge, United States District Court
Central District of Illinois

DAVID R. HERNDON
Chief Judge, United States District Court
Southern District of Illinois

STANDING ORDER NO. 12-1

The United States District Court for the District of Kansas (the Court) and the Kansas Department of Corrections have agreed to participate in a person electronic filing (e-filing) pilot project at the Lansing Correctional Facility (LCF) for a period of one year. The pilot project is expected to reduce the costs of court filings by prisoners in civil cases by reducing associated expenses for paper, envelopes, copying, and postage for prison litigants and time for both LCF staff and court staff in processing these pleadings. This Standing Order will set forth the rules for managing such pleadings during the pilot project.

In consideration of the foregoing,

IT IS HEREBY ORDERED:

1. Participation in the e-filing pilot project is limited to prisoners incarcerated at the LCF who are filing in the U.S. District Court for the District of Kansas. A prisoner who is transferred to any other facility will resume the submission of pleadings by mail.
2. Participation in the pilot project is mandatory for all prisoner litigants at the LCF, and all correspondence and court filings in civil cases in the District of kansas must be electronically transmitted.
3. The management of pleadings in the pilot project will proceed as follows:
   a. Prisoner litigants at the LCF will scan pleadings in civil actions on a digital sender. One digital sender will be provided by the Court for use at the LCF.

   b. Once the document has been scanned, the prisoner will e-mail the pleading to the Court at ksd_clerks_topeka@ksd.uscourts.gov.

   c. The Court will e-file these pleadings upon receipt by e-mail.

   d. Upon filing, the Court will create a Notice of Electronic Filing (NEF), which will confirm the date the pleading was e-filed by the court and contain an electronic link to the document.

   e. A party may not electronically serve a complaint, but instead must effect service according to Federal Rule of Civil Procedure 4. Once defendants or respondent have accepted such service, however, the NEF for a subsequent prisoner pleading shall constitute service of the document by first class mail, postage prepaid.

   f. The NEF will be transmitted to court_filing@lcf.doc.ks.gov and will be distributed through institutional channels to the inmate.

   g. Documents filed by defendants or respondents will continue to be mailed by those parties, and orders entered by the court will be transmitted by mail.

   h. The electronic transmission of correspondence and court filings is free to prisoners, however, statutory filing fees apply to these actions and are not affected by e-filing.

   i. Prisoner participants in the e-filing pilot project remain subject to the provisions of D. Kan. Rule 9.1. Initial court filings, such as petitions and complaints, submitted by these participants must be transmitted on official forms, and all court filings must contain the prisoners conviction name and KDOC identification number, the name of the opposing party, the case number, if one has been assigned, and signature. The failure to provide this information may result in delay in processing of the incomplete submission. Complete copies of the rules of the Court are available for review in the law library.

   j. Questions regarding filing by prisoners who are in segregated housing should be directed to the faciliy librarian.

4. The Clerk of the Court is authorized to develop, implement, publish, and modify as necessary additional administrative procedures to manage the e-filing pilot project.

IT IS FURTHER ORDERED that this Standing Order shall become effective January 1, 2012, and shall remain in effect for one year, subject to extension upon the agreement of the parties.

IT IS SO ORDERED

Dated this 15th day of December, 2011.

STANDING ORDER NO. 12-2

The United States District Court for the District of Kansas (the Court) and the Kansas Department of Corrections commenced a prison electronic filing (e-filing) pilot project in February 2012 at the Lansing Correctional Facility (LCF) for a period of one year. The pilot project is expected to reduce the costs of court filings by prisoners in civil cases by reducing associated expenses for paper, envelopes, copying, and postage for prison litigants and time for both corrections staff and court staff in processing these pleadings. This Standing Order expands the pilot project to all facilities maintained by the Kansas Department of Corrections (the Department), as designated by the Department, effective June 1, 2012, and sets forth the rules for managing such pleadings during the pilot project.

In consideration of the foregoing, IT IS HEREBY ORDERED:

1. Participation in the e-filing pilot project is extended to prisoners incarcerated at all facilities designated by the Department and filing in the U.S. District Court for the District of Kansas. A prisoner who is transferred to any facility not designated for inclusion by the Department will resume the submission of pleadings by mail.

2. Participation in the pilot project is mandatory for all prisoner litigants assigned to designated facilities, and all correspondence and court filings in civil cases in the District of Kansas must be electronically transmitted.

3. The management of pleadings in this pilot project will proceed as follows:

a. Prisoner litigants at designated facilities will scan pleadings in civil actions on a digital sender or similar equipment.

b. Once the document has been scanned, the prisoner will e-mail the pleading to the Court at: ksd_clerks_topeka@ksd.uscourts.gov.

c. The Court will e-file these pleadings upon receipt by e-mail.

d. Upon filing, the Court will create a Notice of Electronic Filing (NEF), which will confirm the date the pleading was e-filed by the court and contain an electronic link to the document.

e. A party may not electronically serve a complaint, but instead must effect service according to Federal Rule of Civil Procedure.

4. Once defendants or respondents have accepted such service, however, the NEF for a subsequent prisoner pleading shall constitute service of the document by first class mail, postage prepaid.

f. The NEF will be transmitted to an e-mail address established by the court upon the designation of the facility and will be distributed through institutional channels to the inmate.

g. Documents filed by defendants or respondents will continue to be mailed by those parties, and orders entered by the Court will be transmitted by mail.

h. The electronic transmission of correspondence and court filings is free to prisoners; however, statutory filing fees apply to these actions and are not affected by e-filing.

i. Prisoner participants in the e-filing pilot project remain subject to the provisions of D. Kan. Rule 9.1. Initial court filings, such as petitions and complaints, submitted by these participants must be transmitted on official forms, and all court filings must contain the prisoner's conviction name and KDOC identification number, the name of the opposing party, the case number, if one has been assigned, and signature. The failure to provide this information may result in delay in processing of the incomplete submission. Complete copies of the rules of the Court are available for review in the law library.

j. Questions regarding filing by prisoners who are in segregated housing should be directed to the facility librarian.

4. The Clerk of the Court is authorized to develop, implement, publish, and modify as necessary additional administrative procedures to manage the e-filing pilot project.

IT IS FURTHER ORDERED that this Standing Order shall become effective June 1, 2012, and shall remain in effect through February 2013, subject to extension upon the agreement of the parties.

IT IS SO ORDERED.

Dated this 17th day of May, 2012.

BY THE COURT:

KATHRYN H. VRATIL

Chief U.S. District Judge

TAB 11B

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MEMORANDUM

DATE: March 13, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

Judge Diane Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), discussed in Part II.A of this memo, and *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007), discussed in Part II.B. Copies of both those decisions are enclosed.

Rule 4(c)(1) provides:

> If an inmate confined in an institution files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

Several issues arise with respect to the prepayment of postage. First, does the rule require prepayment of postage when the institution has no legal mail system? Second, does the rule require prepayment of postage when the institution has a legal mail system and the inmate uses that system? And third, when the rule requires prepayment of postage, is that requirement jurisdictional?

Part I of this memo provides background on Rule 4(c). Part II discusses the issues noted above. Part III concludes.

I. Background and nature of the "prison mailbox rule"

This section reviews the history and development of the "prison mailbox rule."[1] Rule 4(c) – complemented by Rule 3(d)(2),[2] and paralleled by Rule 25(a)(2)(C)[3] – provides the current incarnation of that rule as it applies to notices of appeal. But before the Rules took special account of prisoner filings, two Supreme Court cases dealt with the challenges that arise when inmates in institutions file appeals or other documents. Part I.A. discusses those two key Supreme Court decisions – *Fallen v. United States*[4] and *Houston v. Lack*[5] – and then analyzes the Rules that currently govern inmate filings. Part I.B. reviews the Committee's discussions in 2004 concerning a proposal to amend the Rule.

A. Prior caselaw and the current rules

The Court's 1964 decision in *Fallen* is noteworthy because the concurring opinion prefigures the reasoning of *Houston*. In *Fallen*, the district judge assured the defendant at the time of sentencing on January 15th that he had a right to an appeal. On January 29th -- after the time for appeal had expired -- the clerk of the court received letters from the defendant seeking both a new trial and an appeal. The prisoner had dated the letters January 23 and had mailed them in a single envelope that was not postmarked but showed a government frank. The court of appeals held that both the new trial motion and the notice of appeal were untimely. The Supreme Court reversed. It found "no reason … to doubt that petitioner's date at the top of the

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[1] Part I.A. of this memo is adapted from § 3950.12 of the forthcoming new edition of Federal Practice and Procedure, Vol. 16A.

[2] Rule 3(d)(2) provides: "If an inmate confined in an institution files a notice of appeal in the manner provided by Rule 4(c), the district clerk must also note the date when the clerk docketed the notice."

[3] Rule 25(a)(2)(C) provides:

> **Inmate filing**. A paper filed by an inmate confined in an institution is timely if deposited in the institution's internal mailing system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

[4] 378 U.S. 139 (1964).

[5] 487 U.S. 266 (1988).

letter was an accurate one and that subsequent delays were not chargeable to him."[6] Reasoning that the "petitioner did all he could under the circumstances," the Court "decline[d] to read the Rules so rigidly as to bar a determination of his appeal on the merits."[7] The four concurring Justices would have reached the same result on a different line of reasoning: "[A] defendant incarcerated in a federal prison and acting without the aid of counsel files his notice of appeal in time, if, within the 10-day period provided by the Rule, he delivers such notice to the prison authorities for forwarding to the clerk of the District Court. In other words, in such a case the jailer is in effect the clerk of the District Court within the meaning of [Criminal] Rule 37."[8]

The Supreme Court revisited the question of inmate filings almost a quarter of a century later, in *Houston v. Lack*. Twenty-seven days after entry of the judgment dismissing his pro se habeas petition, Houston deposited a notice of appeal with the prison authorities for mailing to the court. The record did not reveal when the authorities actually mailed the letter, but the prison's mail log could support an inference that Houston gave the wrong P.O. box number for the federal district court. The district clerk stamped the notice "filed" 31 days after entry of judgment – i.e., one day late. Ultimately, the court of appeals dismissed the appeal as untimely.[9]

The Supreme Court reversed. It adopted the reasoning of the concurring opinion in *Fallen* and held that Houston had filed his notice within the 30-day period when, three days before the deadline, he delivered the notice to the prison authorities for forwarding to the district clerk.[10] The Court emphasized the unique difficulties faced by prisoners litigating pro se: They have no choice but to file by mail; they have to trust that the prison authorities will process the mail without delay; they have no ready way to check that the filing timely arrived in the clerk's office; and they lack the option other litigants have of (as a last resort) making a filing in person if the mailed filing does not timely arrive.[11] The dissenters in the *Houston* case agreed that "the Court's rule makes a good deal of sense" and dissented "only because it is not the rule that we have promulgated through congressionally prescribed procedures."[12]

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[6] 378 U.S. at 143-44.

[7] Id. at 144.

[8] Id. (Stewart, J., joined by Clark, Harlan & Brennan, JJ., concurring). The case was decided under what was then Criminal Rule 37(a).

[9] 487 U.S. at 268-69.

[10] Id. at 270.

[11] Id. at 270-72.

[12] Id. at 277 (Scalia, J., joined by Rehnquist, C.J., and O'Connor & Kennedy, JJ., dissenting).

Soon after the *Houston* decision the Supreme Court amended its own rules to incorporate the result it had reached in that case. In the 1990 revision of the Supreme Court Rules, Rule 29.2 was amended to provide that a document filed in the Supreme Court "by an inmate confined in an institution" is timely if "deposited in the institution's internal mail system on or before the last day for filing and … accompanied by a notarized statement or declaration in compliance with 28 U.S.C. §1746" stating the date of deposit and that first-class postage was prepaid.[13]

The *Houston* decision and the revised Supreme Court Rule were in turn the basis for a new Appellate Rule 4(c), added by the 1993 amendments.[14] This subdivision provides that a notice of appeal by an inmate confined in an institution is timely if deposited in the institution's internal mail system, within the prescribed appeal time, for mailing to the court. The 1993 version of Rule 4(c) left undefined the term "internal mail system"; the rulemakers in 1998 amended Rule 4(c) to provide that if the institution has a system designed for legal mail, the inmate must use it in order to have the benefit of Rule 4(c). Adjustments also were made, both in 1993 and 1998, to the time allowed for appeals by other parties, based on the recognition that several days may elapse between deposit in the institution's mail system and actual delivery to

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[13] Supreme Court Rule 29.2 currently provides:

> A document is timely filed if it is received by the Clerk within the time specified for filing; or if it is sent to the Clerk through the United States Postal Service by first-class mail (including express or priority mail), postage prepaid, and bears a postmark, other than a commercial postage meter label, showing that the document was mailed on or before the last day for filing; or if it is delivered on or before the last day for filing to a third-party commercial carrier for delivery to the Clerk within 3 calendar days. If submitted by an inmate confined in an institution, a document is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing and is accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the date of deposit and stating that first-class postage has been prepaid. If the postmark is missing or not legible, or if the third-party commercial carrier does not provide the date the document was received by the carrier, the Clerk will require the person who sent the document to submit a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting out the details of the filing and stating that the filing took place on a particular date within the permitted time.

[14] The version of Rule 4(c) adopted in 1993 read in relevant part: "If an inmate confined in an institution files a notice of appeal in either a civil case or a criminal case, the notice of appeal is timely filed if it is deposited in the institution's internal mail system on or before the last day for filing. Timely filing may be shown by a notarized statement or by a declaration (in compliance with 28 U.S.C. § 1746) setting forth the date of deposit and stating that first-class postage has been prepaid."

the clerk of the district court.[15]

The amended rule is not limited to prisoners; it applies to any "inmate confined in an institution." It applies in both civil and criminal actions. Some courts have held that it is not limited to persons appearing pro se, so long as it is the prisoner, not a lawyer, who is filing the notice of appeal. Although the rule in terms applies only to notices of appeal, some courts have extended the *Houston* decision and, later, Rule 4(c), to some other district-court filings as well. Rule 25(a)(2)(C) extends the prison mailbox rule to filings in the court of appeals.

The general rule is that an appellant bears the burden of showing that the appeal is timely, and courts have applied this principle to inmates.[16] Timely filing may be shown by a notarized statement or declaration stating the date of deposit and stating that first-class postage has been prepaid. Courts have disagreed on whether the inmate must file this statement or

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[15] Rule 4(c)(2) now provides: "If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice." And Rule 4(c)(3) provides: "When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later."

[16] *See* Grady v. United States, 269 F.3d 913, 916–17 (8th Cir. 2001) (applying Rule 4(c)'s prison mailbox rule to the filing of Section 2255 motions and stating that the movant "bears the ultimate burden of proving his entitlement to benefit from the rule"); Porchia v. Norris, 251 F.3d 1196, 1198 (8th Cir. 2001) ("[A]n appellant must prove that necessary preconditions to the exercise of appellate jurisdiction-including the timely filing of a notice of appeal-have been fulfilled.").

But see Garvey v. Vaughn, 993 F.2d 776, 781 (11th Cir. 1993) ("*Houston* places the burden of proof for the pro se prisoner's date of delivering his document to be filed in court on the prison authorities, who have the ability to establish the correct date through their logs."); Faile v. Upjohn Co., 988 F.2d 985, 989 (9th Cir. 1993) ("When a pro se prisoner alleges that he timely complied with a procedural deadline by submitting a document to prison authorities, the district court must either accept that allegation as correct or make a factual finding to the contrary upon a sufficient evidentiary showing by the opposing party."). In *United States v. Grana*, the court extended *Houston* to delay by prison officials in delivering notice of entry in criminal case to prisoner, and held that government had burden to establish date of delivery. "The prison will be the party with best and perhaps only access to the evidence needed to resolve such questions…. We therefore interpret *Houston* as placing the burden on the prison of establishing the relevant dates. This allocation of the burden of proof provides the proper motivation for prison authorities to keep clear and accurate mail logs, which are so essential to preserving appellate rights." United States v. Grana, 864 F.2d 312, 316-17 (3d Cir. 1989).

declaration with the notice of appeal,[17] or whether it can instead be filed later.[18] Rule 4(c) does not explicitly address the question of timing, stating merely that "[t]imely filing may be shown" by means of the declaration or statement. The 1993 Committee Note ignores this timing question, but the minutes of the spring 1991 Advisory Committee meeting show that the Advisory Committee intended not to require the filing of the statement with the notice.[19] The

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[17] In a case where the clerk received the notice of appeal after the time for filing had run out, the Eighth Circuit held that the prisoner's failure to provide proof of timely delivery when he first appealed prevented application of the prison mailbox rule:

> We perceive no good reason to allow an appellant to establish timely filing on remand (the second bite at the apple) when nothing hinders the appellant from proving timely filing when he first appeals. To permit remand for limited fact-finding by a district court when the appellant does not, in the first instance, demonstrate timely filing encourages delay and wasteful use of scarce judicial resources. We acknowledge that remand may be appropriate in the rare case in which the prisoner and the warden present conflicting proof of timeliness, or when other complicated circumstances exist.

Porchia v. Norris, 251 F.3d 1196, 1199 (8th Cir. 2001). But in a thoughtful opinion less than half a year later on behalf of a panel including two of the same judges, Judge Bye held that the statement need not always be filed at the same time as the notice of appeal. *See* Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001), discussed in the following footnote. A later Eighth Circuit decision applied *Grady*. *See* Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir. 2003).

[18] Grady v. United States, 269 F.3d 913, 917 (8th Cir. 2001) ("The literal terms of the Rule do not require a prisoner to accompany his motion with proof of timely filing and proper postage. The Rule mandates only that a prisoner submit such proof. While it might be sensible to require prisoners to file their affidavits at the same time they file their motions or notices of appeal, it would be imprudent for a court to graft this new requirement onto Rule 4(c) …."); Sulik v. Taney County, Mo., 316 F.3d 813, 814 (8th Cir. 2003) ("The prisoner is not required to attach his affidavit or statement to his notice of appeal." But if the prisoner unduly delays filing the statement, the court can give it less weight or even refuse to consider it.); United States v. Ceballos-Martinez, 371 F.3d 713, 716 n.4 (10th Cir. 2004) ("While we note that the text of the rule does not require the prisoner to file this attestation at any particular time, at the very least, the prisoner must file it before we resolve his case. If the prisoner fails to do so, we lack jurisdiction to consider his appeal. Thus, to avoid dismissal of their appeals, *we strongly encourage* all prisoners to include with their notices of appeal a declaration or notarized statement in compliance with Rule 4(c)(1).") (emphasis in original).

[19] The minutes of that meeting explain: "Judge Logan suggested omitting the requirement that a notice of appeal be accompanied by a statement concerning the date of deposit of the notice in the institutional mailing system. He noted that if the notice is not received by the

Committee's decision makes sense, since the declaration or statement would be unnecessary in cases where the clerk's office notes that it has received the notice within the time for filing. Where the notice has not been timely received by the clerk's office, it seems likely that courts will require the statement or declaration described by Rule 4(c)(1), though two circuits have indicated that the statement or declaration need not be provided if the prison has a legal mailing system and the prisoner uses that system.[20]

B. 2004 Advisory Committee discussion concerning Rule 4(c)

Part II of this memo discusses the issues raised by Judge Wood. A different, though related, aspect of practice under the prison mailbox rule was brought to the Committee's attention a few years ago. The following excerpt from the minutes of the Committee's spring 2004 meeting provides a summary:

> Prof. Philip A. Pucillo, Assistant Professor of Law at Ave Maria School of Law, has directed the Committee's attention to inconsistencies in the way that the "prison mailbox rule" of Rule 4(c)(1) is applied by the circuits....
>
> The circuits disagree about what should happen when a dispute arises over whether a paper was timely filed and the inmate has not filed the affidavit described in the rule. Some circuits dismiss such cases outright, holding that the appellate court lacks jurisdiction in the absence of evidence of timely filing. Other circuits remand to the district court and order the district court to take evidence on the issue of whether the filing was timely. And still other circuits essentially do their own factfinding - holding, for example, that a postmark on an envelope received by a clerk's office is sufficient evidence of timely filing. Prof. Pucillo has proposed that Rule 4(c)(1) be amended to clarify this issue.
>
> The Committee briefly discussed this suggestion at its November 2003 meeting. The Committee tabled further discussion to give Mr. Letter an opportunity to ask the U.S. Attorneys about their experience with this issue and

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court within the time for filing, the court may require the appellant to supply such a statement. Judge Logan moved that at page two of the memorandum line 18 be amended by placing a period after 'filing', by striking the words 'and it is accompanied', and by adding in the same place 'Timely filing may be shown', and by adding at the end of the line, 'by a'. Judge Boggs seconded the motion and it carried five to two."

[20] United States v. Ceballos-Martinez, 371 F.3d 713, 717 (10th Cir. 2004) ("If a prison lacks a legal mail system, a prisoner *must* submit a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attest that first-class postage was pre-paid.") (emphasis in original); Ingram v. Jones, 507 F.3d 640, 644 (7th Cir. 2007).

> get some sense of whether and how federal prosecutors believe that Rule 4(c)(1) should be amended.
>
> Mr. Letter reported that the U.S. Attorneys have not found that this issue is a problem. In general, when a question arises about the timeliness of a filing by a prisoner, U.S. Attorneys find it easier to respond to the prisoner's filing on the merits than to engage in litigation over timeliness. The Department does not believe that Rule 4(c)(1) needs to be amended.
>
> A member said that he did not think that the problem identified by Prof. Pucillo was serious enough to warrant amending Rule 4(c)(1). Other members agreed.

Minutes of Spring 2004 Meeting of Advisory Committee on Appellate Rules, at 33.

The question of whether the absence of the declaration or statement described in Rule 4(c)(1)'s third sentence dooms an appeal was starkly presented in a case decided just months after the Committee's spring 2004 meeting. As described by Judge Hartz in his dissent from the denial of rehearing en banc:

> The issue addressed in the panel opinion is whether Defendant satisfied the prison mailbox rule by depositing his notice of appeal with the prison mail system by September 25, 2002. It is uncontested that he did; the government does not dispute that the notice of appeal was mailed by the prison in an envelope postmarked September 24, 2002. Nevertheless ... the panel reads "may" in Federal Rule of Appellate Procedure 4(c)(1) to say "must," and dismisses Defendant's appeal because the rule required him to establish compliance with the prison mailbox rule by means of either a declaration in compliance with 28 U.S.C. § 1746 or a notarized statement.

United States v. Ceballos-Martinez, 387 F.3d 1140, 1141 (10th Cir. 2004) (Hartz, J., joined by Briscoe & Lucero, JJ., dissenting from denial of rehearing en banc).[21]

II. Issues relating to prepayment of postage

[21] *See also* United States v. Smith, 182 F.3d 733, 734 n.1 (10th Cir. 1999) ("Although Smith is a pro se inmate purporting to have filed his notice of appeal within the prison's internal mail system on April 20, 1998, we do not apply the *Houston v. Lack* ... pro se prisoner mailbox rule because Smith's declaration of a timely filing did not, as required, 'state that first-class postage has been prepaid.' Fed. R.App. P. 4(c)(1)."). (The Smith court, however, held Smith's appeal timely based on another rationale.)

Unlike the Supreme Court rule which it resembles, Rule 4(c) has always treated the payment of postage in a different sentence than the one that states under what conditions an inmate's "notice is timely." This raises the question whether prepayment of postage is a condition of timeliness; Part II.A. considers this question.

Since the 1998 amendments, Rule 4(c)(1) has included three sentences: the first stating when an inmate's notice is timely; the second requiring use of a prison's legal mail system if one exists; and the third (which mentions prepayment of postage) stating a way in which "[t]imely filing may be shown." If an inmate falls within and complies with the second sentence, does the third sentence's reference to postage prepayment apply? Part II.B. notes that two circuits (including the Seventh) have answered this question in the negative.

Assuming that Rule 4(c) requires prepayment of postage in at least some circumstances, what are the consequences of failure to comply with that requirement? Is the failure a jurisdictional defect, and thus not subject to waiver? Or is it a violation of an inflexible claim-processing rule, which can be waived by the other party's failure to timely object? Part II.C discusses these possibilities.

A. Does the rule require prepayment of postage when the institution has no legal mail system?

As discussed in Part II.B. below, some courts have held Rule 4(c)(1)'s third sentence inapplicable to filings by inmates in institutions with legal mail systems. But when the institution has no legal mail system, the third sentence is clearly apposite, and the question is whether that sentence imposes a requirement that the inmate prepay the postage at the time he or she deposits the notice in the prison mail system.[22]

The Seventh Circuit has held that it does impose such a requirement. In *United States v. Craig*, the court dismissed an inmate's notice of appeal as untimely because

> [h]is affidavit states that he deposited the notice in the prison mail system on March 20, 2003, but not that he prepaid first-class postage. Rule 4(c)(1) requires the declaration to state only two things; 50% is not enough. The postage requirement is important: mail bearing a stamp gets going, but an unstamped

[22] Part II.A. does not discuss the related but distinct question posed in the *Ceballos-Martinez* case, where the postmark showed the notice actually was mailed by the prison prior to the appeal deadline and the question was whether the inmate's *failure to submit the statement or declaration* described in the third sentence of Rule 4(c)(1) rendered the appeal untimely. Judge Hartz's critique of the outcome in *Ceballos-Martinez* is persuasive, but that issue is not the focus of Judge Wood's current suggestion to the Committee and, thus, is not treated in detail in this memo.

> document may linger. Perhaps that is exactly what happened: Craig may have dropped an unstamped notice of appeal into the prison mail system, and it took a while to get him to add an envelope and stamp (or to debit his prison trust account for one). The mailbox rule countenances *some* delay, but not the additional delay that is inevitable if prisoners try to save 37¢ plus the cost of an envelope.

United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (emphasis in original).[23]

Assuming that Rule 4(c)(1) does require prepayment of postage, the requirement should not be that *the inmate himself or herself* has prepaid the postage, but only that (to quote the Rule) the postage "has been prepaid." In particular, if the prison has a legal obligation to pay the postage for inmates' legal mail,[24] then the Rule should not be read to require prepayment *by the inmate* (as opposed to by the prison).[25]

There will, however, be times when an inmate has no funds and can assert no legal right to have the prison pay the postage.[26] If the lack of postage prevents the notice from timely proceeding through the mail,[27] then the current Rule can be read to provide that the inmate's

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[23] *Cf.* Hodges v. Frasier, No. 97-50917, 1999 WL 155667, at *1 (5th Cir. Mar. 10, 1999) (unpublished opinion) ("Hodges failed to file timely objections to the magistrate judge's report and recommendation. The objections were timely mailed but were returned because of insufficient postage.... [T]he 'mailbox rule' does not relieve a prisoner from doing all that he can reasonably do to ensure that the clerk of court receives documents in a timely manner.... Failure to place proper postage on outgoing prison mail does not constitute compliance with this standard.").

[24] *Cf. Ingram*, 507 F.3d at 644 n.7 ("Pursuant to a 1981 consent decree, Stateville is obligated to provide appropriate envelopes and pay for postage for all legal mail of the inmates.").

[25] *See Ingram*, 507 F.3d at 645 ("The statement in Rule 4(c)(1) that 'first-class postage has been prepaid' encompasses the notion that the postage has actually been prepaid, either by the prisoner or by the institution.").

[26] Rush, one of the petitioners in *Ingram*, lacked funds to pay for postage and had not yet secured a loan from the prison at the time he deposited his notice of appeal in the prison mail system. The court, reasoning that "[a]lthough prisoners have right of access to courts, they do not have right to unlimited free postage," held that "[p]ostage was not prepaid at the time of deposit because Rush did not secure his right to an exemption for a loan from the warden." 507 F.3d at 645.

[27] If a postmark dated on or before the deadline for taking an appeal shows that the notice timely proceeded through the mail, then the postmark itself ought to demonstrate that the inmate qualifies for the prison mailbox rule. See Part I.B. above, discussing Judge Hartz's

failure to prepay the postage precludes the inmate from showing timely filing.

One might argue that this result is correct. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the litigant's appeal will be time-barred[28] unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause.[29]

On the other hand, the inmate's situation is distinguishable from that of the non-incarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand. *Cf. Houston*, 487 U.S. at 271 ("Other litigants may choose to entrust their appeals to the vagaries of the mail ... but only the pro se prisoner is forced to do so by his situation.").

B. Does the rule require prepayment of postage when the institution has a legal

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argument to that effect in his dissent from the denial of rehearing en banc in *Ceballos-Martinez*.

[28] *See, e.g.*, 16A Federal Practice & Procedure § 3949.1 ("Deposit of the notice of appeal in the mail ordinarily is not enough if the notice is not actually received in the clerk's office within the designated time.").

[29] *Ramseur v. Beyer*, though it did not involve a failure to prepay postage, provides a possible analogy:

> Ramseur's notice of appeal was mailed on April 10th, a full six days before the 30-day time period expired. Yet it was not "filed" until April 23rd, thirteen days later. Ramseur asserts that this delay was inexplicable and thus qualifies as excusable neglect. We agree. Because his notice of appeal was filed only seven days late, granting Ramseur an extension does not raise overall fairness concerns. More importantly, the delay was not attributable to counsel's bad faith. Rather, Ramseur's notice of appeal was untimely despite counsel's diligent efforts at compliance. By mailing the notice of appeal on April 10th, Ramseur's counsel reasonably believed that it would be filed within the 30-day time period. Further, counsel, upon learning of the delay, acted expeditiously to cure it, by promptly moving for an extension under Rule 4(a)(5).

Ramseur v. Beyer, 921 F.2d 504, 506 (3d Cir. 1990). Similarly, one can imagine a situation involving the failure to prepay postage that might involve excusable neglect. For example, the litigant might affix what he or she believes to be the correct amount of first-class postage but the actual first-class rate is a few pennies higher, leading the post office to reject the mailing.

mail system and the inmate uses that system?

Rule 4(c)(1) mentions prepayment of first-class postage in its third sentence: "Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid." The placement of the reference to postage prepayment in the third sentence – and not elsewhere – in Rule 4(c)(1) raises the question of whether postage prepayment is required when an inmate comes within Rule 4(c)(1)'s *second* sentence by using the prison's legal mail system.

The Seventh Circuit has held that Rule 4(c)(1) does not require postage prepayment when a prisoner uses the prison's legal mail system. In such an instance, the inmate comes within Rule 4(c)(1)'s second sentence, which provides that "[i]f an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule." In *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007), Ingram "admittedly failed to affix first-class postage" when he deposited his notice of appeal in the prison's legal mail system. *Id.* at 642. But the court held his appeal timely, reasoning that "he satisfies the second sentence of Rule 4(c)(1) and [thus] receives the benefit of the Rule, without our consideration of the third sentence." *Id.* at 644.

The Tenth Circuit has expressed a similar reading of Rule 4(c)(1):

> The Rule has the following structure. The first sentence establishes the mailbox rule itself (i.e., a notice of appeal is timely filed if given to prison officials prior to the filing deadline). The second sentence is written as a conditional statement, stating that if the prison has a legal mail system, then the prisoner must use it as the means of proving compliance with the mailbox rule. The third sentence applies to those instances where the antecedent of the second sentence is not satisfied (i.e., where there is not a legal mail system).

United States v. Ceballos-Martinez, 387 F.3d 1140, 1144 (10th Cir. 2004).

One might quibble with the *Ceballos-Martinez* court's reasoning, because the court relies in large part on its view of the "structure" of Rule 4(c)(1). A possible problem with relying on the provision's structure is that the third sentence (concerning the declaration or statement) dates from the 1993 amendments, but the second sentence (concerning the legal mail system) was added by the 1998 amendments. Thus, at least as to the period of time between the effective dates of the 1993 and 1998 amendments, the *Ceballos-Martinez* court's "structural" rationale would have been unavailable. A better explanation might be that when an inmate uses an institution's legal mail system, the system will be designed to provide proof of the date of deposit, and thus Rule 4(c)(1)'s third sentence – which concerns how "[t]imely filing may be shown" – need not come into play since the legal mail log itself will show whether the filing was

timely.[30]

The *Ingram* court's approach thus seems reasonable; but it is not inevitable that all circuits will adopt this approach. Some circuits may in the future hold that even when the inmate uses the prison's legal mail system, the inmate must submit the declaration or statement showing that postage was prepaid. And even within a circuit that takes *Ingram*'s approach, an inmate might rely on that approach to his or her detriment, if the inmate is mistaken in his or her belief that the relevant prison's system qualifies as a "legal mail" system under Rule 4(c)(1). For these reasons, the Tenth Circuit provided "[a] word of caution" in a decision that post-dates *Ceballos-Martinez*:

> [A]lthough an inmate seeking to take advantage of the mailbox rule must use the prison's legal mail tracking system where one is in place, it would be unwise to rely solely on such a system. If an inmate relying on a prison legal mail system later learns that the prison's tracking system is inadequate to satisfy the mailbox rule, it would be best if an alternative notarized statement or perjury declaration establishing timely filing were already in place. Therefore, although inmates with an available legal mail system should assert in their filings that they did use that legal system, they would be wise, at least for the sake of thoroughness, to also include a notarized statement or perjury declaration attesting to the date of transmission and stating that postage has been prepaid.

Price v. Philpot, 420 F.3d 1158, 1166 (10th Cir. 2005). The *Price* court suggested that the *Ceballos-Martinez* court's view might not persist: "Although dicta in *Ceballos-Martinez* suggests that in this Circuit a notarized statement or perjury declaration is required only in the case of an inmate who does not have access to a legal mail system ... , a future case may hold otherwise." *Price*, 420 F.3d at 1166 n.7.

C. When the rule requires prepayment of postage, is that requirement jurisdictional?

If a court considers postage-prepayment a requisite to timeliness under Rule 4(c)(1), that court might conclude that prepayment of postage under the current Rule 4(c)(1) is a

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[30] *Cf.* United States v. Craig, 368 F.3d 738, 740 (7th Cir. 2004) (noting that use of a prison's legal mail system "provides verification of the date on which the notice was dispatched"); 1998 Committee Note to Appellate Rule 4(c) ("Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc.").

jurisdictional requirement rather than a non-jurisdictional claim-processing rule.[31] The rulemakers, however, could alter such a result.

Prior to the Supreme Court's decisions in *Kontrick v. Ryan*, 540 U.S. 443 (2004), and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam), it could have made sense to treat a postage-prepayment requirement set by Rule 4(c)(1)[32] as a jurisdictional prerequisite.[33] After all, if one views the prepayment of postage as critical to the application of the prison mailbox rule, then one views postage prepayment as critical to timely filing of the notice of appeal. And timely filing of the notice was widely considered, prior to *Kontrick* and *Eberhart*, as a jurisdictional requirement. *See, e.g.*, *United States v. Robinson*, 361 U.S. 220, 229 (1960) ("[Criminal] Rule 45(b) says in plain words that '* * * the court may not enlarge * * * the period for taking an appeal.' The courts have uniformly held that the taking of an appeal within the prescribed time is mandatory and jurisdictional.").

As the Committee is aware, *Kontrick* criticized the *Robinson* Court's use of the phrase

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[31] A different possibility is that a court might apply Rule 3(a)(2)'s directive 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." I do not discuss this possibility in the text, because I assume that if a court reads Rule 4(c)(1) to require prepayment of postage as a prerequisite to timely filing under the prison mailbox rule, then such a court would be likely to view prepayment of postage as part of the "timely filing of a notice" rather than as an "other" step that can be excused under Rule 3(a)(2).

[32] This discussion assumes, for purposes of argument, that Rule 4(c)(1) does require prepayment of postage.

[33] For example, the Eighth Circuit's discussion in *Porchia v. Norris* suggests such a view:

> The requirements of Rule 4 are mandatory and jurisdictional, and thus we may not lightly overlook a potential timing defect.... In the ordinary case, a party desiring to proceed in federal court bears the burden of establishing the court's jurisdiction....
>
> Porchia has failed to carry his burden in this instance. Porchia has not explained whether his corrections facility has a separate legal mailing system. He has not indicated whether he used such a mailing system, if indeed the prison operates one. He did not attach an affidavit or a notarized statement setting forth the date of deposit into the prison mail system, and attesting that first-class postage has been prepaid.

Porchia v. Norris, 251 F.3d 1196, 1198 (8th Cir. 2001).

"mandatory and jurisdictional." "Clarity would be facilitated," the *Kontrick* Court explained, "if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Kontrick*, 540 U.S. at 454-55. Then, in *Eberhart*, a unanimous Court reinterpreted *Robinson*:

> *Robinson* is correct not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked…. *Robinson* has created some confusion because of its observation that "courts have uniformly held that the taking of an appeal within the prescribed time is *mandatory and jurisdictional*."….
>
> As we recognized in *Kontrick*, courts "have more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court." …. The resulting imprecision has obscured the central point of the *Robinson* case-that when the Government objected to a filing untimely under Rule 37, the court's duty to dismiss the appeal was mandatory. The net effect of *Robinson*, viewed through the clarifying lens of *Kontrick*, is to admonish the Government that failure to object to untimely submissions entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often.[34]

More recently still, the Court in *Bowles v. Russell*, 127 S. Ct. 2360 (2007), held that Rule 4(a)(6)'s 14-day time limit on reopening the time to take a civil appeal is mandatory and jurisdictional. The *Bowles* Court focused on the fact that the 14-day time limit is set not only in Rule 4(a)(6) but also in 28 U.S.C.§ 2107(c). The Court cited a string of cases stating that appeal time limits are "mandatory and jurisdictional,"[35] as well as a couple of 19th-century cases viewing statutory appeal time limits as jurisdictional.[36] The majority acknowledged that a number of the cases that characterized appeal time limits as "mandatory and jurisdictional" had relied on *United States v. Robinson*, and that it had in recent decisions "questioned *Robinson*'s use of the term 'jurisdictional'"; but the majority maintained that even those recent cases "noted the jurisdictional significance of the fact that a time limit is set forth in a statute," and it stated that "[r]egardless of this Court's past careless use of terminology, it is indisputable that time

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[34] *Eberhart*, 546 U.S. at 17-18.

[35] *Bowles*, 127 S. Ct. at 2363-64 (citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (per curiam); *Hohn v. United States*, 524 U.S. 236, 247 (1998); *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314-315 (1988); and *Browder v. Director, Dep't of Corrs.*, 434 U.S. 257, 264 (1978)).

[36] *Bowles*, 127 S. Ct. at 2364 (citing *Scarborough v. Pargoud*, 108 U.S. 567, 568 (1883), and *United States v. Curry*, 6 How. 106, 113 (1848)).

limits for filing a notice of appeal have been treated as jurisdictional in American law for well over a century."[37] The majority thus concluded that "[j]urisdictional treatment of statutory time limits makes good sense…. Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them."[38]

It makes sense for the Committee to consider *Bowles*'s implications for the prison mailbox rule. An initial question might be whether the rulemakers have authority to adopt a rule like Rule 4(c)(1) if – as *Bowles* holds – statutory appeal time limits are jurisdictional. Fortunately, that question has already been answered by the Court's reasoning in *Houston*. Although *Houston* was decided well prior to the *Bowles* decision, the *Houston* Court addressed and rejected the argument that the statutory nature of the Section 2107 civil appeal deadline deprived the Court of authority to adopt a "prison mailbox" rule:

> Respondent stresses that a petition for habeas corpus is a civil action ... and that the timing of the appeal here is thus ... subject to the statutory deadline set out in 28 U.S.C. § 2107. But, as relevant here, § 2107 merely provides:
>
> "[N]o appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree."
>
> The statute thus does not define when a notice of appeal has been "filed" or designate the person with whom it must be filed, and nothing in the statute suggests that, in the unique circumstances of a *pro se* prisoner, it would be inappropriate to conclude that a notice of appeal is "filed" within the meaning of § 2107 at the moment it is delivered to prison officials for forwarding to the clerk of the district court.

Houston, 487 U.S. at 272.

Houston of course concerned the adoption of a judicially-crafted prison mailbox rule, but its reasoning also supports the conclusion that the rulemakers possess authority to adopt such a rule: Section 2107 sets a time limit for filing, but does not define when filing occurs or with whom the notice of appeal must be filed. Thus, the longstanding view that the rulemakers lack authority to alter the courts' subject matter jurisdiction (absent a specific statutory delegation of authority for that purpose) poses no obstacle to the adoption of a prison mailbox rule such as

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[37] *See Bowles*, 127 S. Ct. at 2364 & n.2 (discussing *United States v. Robinson*, 361 U.S. 220, 229 (1960); *Kontrick v. Ryan*, 540 U.S. 443 (2004); and *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam)).

[38] *Bowles*, 127 S. Ct. at 2365.

Rule 4(c)(1).

Having concluded that Rule 4(c)(1) is valid, it remains for us to ask whether that Rule's requirements are jurisdictional. A number of courts have held, post-*Bowles*, that appeal-time requirements set only by Rule and not by statute are not jurisdictional.[39] A Rule 4(c)(1) postage-prepayment requirement could thus be regarded as a claim-processing rule rather than a jurisdictional requirement. But it is not clear that courts will uniformly adopt the view that all non-statutory, rule-based requirements are for that reason non-jurisdictional.

Some courts have reasoned that when Rule 4 fills in details concerning the nature of the appeal-time deadline in Section 2107, those gap-filling provisions in Rule 4 themselves take on jurisdictional status. Thus, although Rule 4(a)(4)'s tolling provisions are absent from Section 2107, the Ninth Circuit has held that the time limits incorporated by Rule 4(a)(4)(A)'s reference to "timely" tolling motions must be jurisdictional (if Rule 4(a)(4)(A) is actually to be effective in tolling Section 2107's jurisdictional appeal time limits):

> *Bowles* does not specifically discuss Fed. R.App. P. 4(a)(4), the tolling provision relevant here. The government argues that "Rule 4(a) does not incorporate a statutory time limit in its provision of tolling for Rule 59(e) or Rule 60 motions" and therefore that any failure to comply with the rule should be immunized against belated attack. However, although Fed. R.App. P. 4(a)(4) does not contain language from 28 U.S.C. § 2107, which lacks a tolling provision, the Supreme Court's decision in *Bowles* suggests that the same characterization applies: "Today we make clear that the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." *Id.*
>
> And even if *Bowles* did not settle the matter with respect to Fed. R.App. P. 4(a)(4), we could not consider the underlying order granting the Rule 41(g) motion. In order to accept the government's argument, we would have to grant the jurisdictional benefit of tolling while denying the tolling rule's jurisdictional significance. We cannot defeat logic or text in this manner. If Fed. R.App. P. 4(a)(4) is jurisdictional, the government's motion does not qualify for tolling because it was filed outside the time frame specified in that rule. *See* Fed. R.App. P. 4(a)(4)(iv), (vi) (permitting tolling for such motions only if they are filed within 10 days of entry of judgment). If Fed. R.App. P. 4(a)(4) is *non* jurisdictional, satisfaction of that provision (or forfeiture of a claim that the government failed to satisfy it) would not enable us to ignore the jurisdictional

[39] Examples are the defendant's deadline for taking a criminal appeal under Rule 4(b)(1)(A), *see United States v. Martinez*, 496 F.3d 387, 388 (5th Cir. 2007); *United States v. Garduno*, 506 F.3d 1287, 1290-91 (10th Cir. 2007), and Rule 4(b)(4)'s authorization of extensions of criminal appeal time for excusable neglect of good cause, *see Garduno*, 506 F.3d at 1290-91.

> 60-day rule of Fed. R.App. P. 4(a)(1). *See Bowles*, 127 S.Ct. at ----, Slip Op. at 8. Under either interpretation of Fed. R.App. P. 4(a)(4), the government's notice of appeal was untimely as to Judge Cooper's underlying order granting the Rule 41(g) motion and must be dismissed for lack of jurisdiction.

United States v. Comprehensive Drug Testing, Inc., 513 F.3d 1085, 1100-01 (9th Cir. 2008) (emphasis in original) (footnotes omitted).[40]

Likewise, though the 150-day cap set by Civil Rule 58 and Appellate Rule 4(a)(7)(A)(ii) – for instances when a separate document is required but never provided – does not appear in Section 2107,[41] the Ninth Circuit has reasoned that the cap is jurisdictional:

> 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1) require that a notice of appeal be filed in a civil case "within 30 days after the judgment or order appealed from is entered." Fed. R.App. P. 4(a)(1)(A). Because the district court did not enter judgment on the order to compel arbitration, CCI had 180 days to appeal the order. *See* Fed. R.App. P. 4(a)(7)(A)(ii); *see also Bowles v. Russell*, --- U.S. ----, 127 S.Ct. 2360, 2363, 168 L.Ed.2d 96 (2007) (stating that "the taking of an appeal within the prescribed time is mandatory and jurisdictional" (internal quotation marks omitted)).
>
> CCI filed its first notice of appeal of the district court's order compelling arbitration on May 16, 2005, 287 days after the order was entered on August 2, 2004. This is well beyond the 180 days allowed by Federal Rule of Appellate Procedure 4(a)(7)(A)(ii). CCI's appeal of the district court's order compelling arbitration is untimely, and we lack jurisdiction to hear the appeal of that issue.

Comedy Club, Inc. v. Improv West Associates, 514 F.3d 833, 841-42 (9th Cir. 2007) (as amended Jan. 23, 2008).

It is thus possible that a court which reads Rule 4(c)(1) to set prepayment of postage as a prerequisite to a timely appeal could conclude, post-*Bowles*, that the postage-prepayment requirement is jurisdictional (at least with respect to civil appeals). That conclusion is not inevitable, however; some courts might instead reason that a requirement set only in Rule 4(c) and not in any statute is not, under *Bowles*, jurisdictional. In any event, because Rule 4(c)

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[40] By contrast, the Sixth Circuit panel majority in *National Ecological Foundation v. Alexander*, 496 F.3d 466, 476 (6th Cir. 2007), held that "where a party forfeits an objection to the untimeliness of a Rule 59(e) motion, that forfeiture makes the motion 'timely' for the purpose of Rule 4(a)(4)(A)(iv)."

[41] Section 2107 simply sets an appeal deadline of "thirty days after the entry of" the relevant judgment, order or decree; it does not define "entry."

constitutes permissible gap-filling by the rulemakers, the rulemakers have authority to alter Rule 4(c)'s requirements. Thus, it would be possible to amend Rule 4(c) to provide that failure to prepay postage is not always fatal to timeliness. For example, the rule might be amended to excuse failure to prepay postage if the inmate has no money with which to pay the postage and no right to require the prison to pay it.

III. Conclusion

Published opinions intepreting Rule 4(c)(1) are relatively rare; most decisions applying the prison mailbox rule are unpublished and nonprecedential. But the caselaw discussed in this memo suggests that courts may disagree about whether Rule 4(c)(1) always requires prepayment of postage as a condition of timely filing under the prison mailbox rule, and, if so, whether that requirement is jurisdictional. A lack of clarity on such matters is undesirable, since failure to comply with a jurisdictional requirement is fatal to an appeal, and even a non-jurisdictional requirement can doom an appeal when an objection is properly raised. If the Committee feels that an amendment to Rule 4(c)(1) is desirable, *Bowles* would appear to pose no barrier to further rulemaking concerning the contours of the prison mailbox rule.

Encls.

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Minutes of Spring 2008 Meeting of
Advisory Committee on Appellate Rules
April 10 and 11, 2008
Monterey, California

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 10, 2008, at 8:30 a.m. at the Monterey Plaza Hotel in Monterey, California. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Paul D. Clement attended the meeting on April 10, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present on April 10 and represented the Solicitor General on April 11. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. Judge Stewart noted the Committee's appreciation that Solicitor General Clement was attending the meeting. The Reporter observed that congratulations are due to Judge Stewart for his recent receipt of the 2007 Celebrate Leadership Award from the Shreveport Times and the Alliance for Education; the award honors top community leaders. Mr. Levy reported that Justice Alito sent his greetings to the Committee.

II. Approval of Minutes of November 2007 Meeting

The minutes of the November 2007 meeting were approved, subject to some minor edits to the minutes' discussion of model local rules.

III. Report on January 2008 Meeting of Standing Committee

Judge Stewart reported that the Standing Committee, at its January 2008 meeting, approved for publication the proposed amendment to Rule 29 concerning amicus brief disclosures. Judge Stewart reminded the Committee that the proposed amendment to Rule 1(b)

[1] Dean McAllister attended the meeting on April 10 but was unable to be present on April 11.

Judge Stewart stated that the issue raised by Judge Hartz warrants further study. Mr. Fulbruge will survey the circuit clerks. Also, the Committee should check with the FJC to see what information on the separate document requirement the FJC includes in its training materials for new staff attorneys. Judge Bye noted that the Eighth and Tenth Circuits would be meeting together in summer 2008, and he observed that it would be useful to raise the topic at that meeting. By consensus, the matter was retained on the study agenda.

B. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart invited the Reporter to discuss the questions raised by Judge Diane Wood concerning Rule 4(c)'s inmate-filing provision. Judge Wood has asked the Committee to consider whether Appellate Rule 4(c)(1)'s "prison mailbox rule" should be clarified. In particular, Judge Wood suggests that the Committee consider clarifying the Rule's position concerning the prepayment of first-class postage. Questions concerning postage have arisen in two recent Seventh Circuit cases – *United States v. Craig*, 368 F.3d 738 (7th Cir. 2004), and *Ingram v. Jones*, 507 F.3d 640 (7th Cir. 2007).

As discussed in the agenda materials, questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. The origins of the current Rule can be traced to the Court's decision in *Houston v. Lack*, 487 U.S. 266 (1988), in which the Court held that Houston filed his notice of appeal when he delivered the notice to the prison authorities for forwarding to the district clerk. After deciding *Houston*, the Supreme Court revised its Rule 29.2 to take a similar approach. In 1993, the Appellate Rules were amended to add Rule 4(c). In 1998, Rule 4(c) was amended to provide that if the institution has a system designed for legal mail, the inmate must use that system in order to get the benefit of Rule 4(c). In 2004, the Committee discussed a suggestion by Professor Philip Pucillo that the Rules be amended to clarify what happens when there is a dispute over timeliness and the inmate has not filed the affidavit mentioned in Rule 4(c)(1). The Committee decided to take no action on that suggestion. Shortly thereafter, a Tenth Circuit decision illustrated the problem identified by Professor Pucillo: in *United States v. Ceballos-Martinez*, 371 F.3d 713, 717 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

Turning to the questions raised by Judge Wood's suggestion, the Reporter observed that the rule could be read to require postage prepayment when the institution has no legal mail system; that was, indeed, the Seventh Circuit's view in *Craig*. As the *Craig* court noted, failure to prepay the postage will add to the delay created by the prison mailbox rule. And as a point of comparison, if a non-incarcerated litigant who chooses to file a notice of appeal by mail fails to prepay the requisite postage, and the notice of appeal arrives after the appeal deadline, the

litigant's appeal will be time-barred unless the litigant qualifies for, and convinces the district court to provide, an extension of time on the basis of excusable neglect or good cause. On the other hand, the inmate's situation is distinguishable from that of the non-incarcerated litigant in two ways: The inmate may lack ways to make money to pay for the postage, and the inmate cannot use the alternative of walking to the courthouse and filing the notice of appeal by hand.

When the institution has a legal mail system and the inmate uses that system, it may be the case that prepayment of postage is not required. This was the view adopted by the Seventh Circuit in *Ingram*, and the Tenth Circuit's *Ceballos-Martinez* opinion accords with such a view. But a later Tenth Circuit case has questioned this aspect of the *Ceballos-Martinez* court's reasoning. And it could be risky for an inmate to rely on such a view, even in the Seventh Circuit: what if the inmate's assumption that his or her institution's system qualifies as a legal mail system turns out to be incorrect?

As indicated by the Committee's earlier discussion of *Bowles v. Russell*, it is unclear whether courts will consider any postage-prepayment requirements in Rule 4(c)(1) to be jurisdictional. Rule 4(c)(1) itself is not mirrored in any statute. On the other hand, that provision fills a gap in the statutory scheme for civil appeals, by defining timely filing for purposes of 28 U.S.C. § 2107. As noted previously, some Ninth Circuit decisions have viewed similar gap-filling provisions in Rule 4 to be jurisdictional. Thus, it is possible – though certainly not inevitable – that a court might consider Rule 4(c)(1)'s requirements to be jurisdictional, at least in civil appeals. But the rulemakers have authority to alter those requirements through a rule amendment; as the *Houston* court explained, Section 2107 does not define the filing of a notice of appeal or say with whom it must be filed – and thus the rulemakers' authority to adjust the details of Rule 4(c)(1)'s requirements continues to be clear even after *Bowles*.

An attorney member stated that Judge Wood has identified an ambiguity in the Rule, and that provisions concerning the timeliness of an appeal should not be ambiguous – especially not when the provisions in question deal with appeals by inmates. A judge member agreed that this issue warrants study by the Committee. An attorney member wondered whether prison regulations require the inmate to affix postage to outgoing legal mail. Another attorney member observed that policies vary by institution. Judge Rosenthal observed that the Committee should include in its consideration any rules that may apply to incarcerated aliens. Judge Stewart reported that at the March 2008 Judicial Conference meeting, he attended a session dealing with issues relating to pro se prisoners. He noted that there are a great many pro se prisoner appeals, and that the Committee should also consider immigration appeals. By consensus, the matter was retained on the Committee's study agenda.

C. 08-AP-B (FRAP 28.1 – word limits in connection with cross-appeals)

Judge Stewart invited the Reporter to discuss Judge Alan Lourie's proposal concerning word limits on cross-appeals. Judge Lourie has expressed concern that litigants are abusing the

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MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-I

At the Committee's April 2008 meeting, members discussed Judge Diane Wood's suggestion that the Committee act to clarify ambiguities in Rule 4(c)'s inmate mailbox rule concerning the prepayment of postage. Relevant questions include whether Rule 4(c)(1) requires prepayment of postage when the institution in question has no legal mail system; whether the answer changes when the institution has a legal mail system and the inmate uses it; and whether, when the Rule requires prepayment of postage, that requirement is jurisdictional. The current rule could be read to require postage prepayment when the institution has no legal mail system. On the other hand, it may be the case that when the institution has a legal mail system and the inmate uses that system, prepayment of postage is not required. Under *Bowles v. Russell*, 127 S. Ct. 2360 (2007), it is possible – though certainly not inevitable – that a court might consider Rule 4(c)(1)'s requirements to be jurisdictional, at least in civil appeals. But 28 U.S.C. § 2107 does not define the filing of a notice of appeal or say with whom it must be filed – and thus the rulemakers' authority to adjust the details of Rule 4(c)(1)'s requirements continues to be clear even after *Bowles*.

During the April 2008 discussion of these questions, it was noted that provisions concerning the timeliness of an appeal should not be ambiguous – especially not when the provisions in question deal with appeals by inmates. Participants in the discussions raised a number of factual questions about institutions' policies concerning legal mail; Part I of this memo sketches answers to some of those questions. Part II briefly considers the extent to which indigent inmates may have a constitutional right to some amount of free postage for legal mail.

I. Institutional policy concerning legal mail

Litigants who might be affected by Rule 4(c)'s inmate-filing provision include inmates in federal and state prisons, pretrial detainees, incarcerated aliens, and inmates in mental

institutions. So far, I have obtained information concerning federal prison policy[1] and the policies that apply in some state and local facilities.

A. Federal prison policy

Federal Bureau of Prisons regulations provide:

> (a) Except as provided in paragraphs (d), (e), (f), and (i) of this section, postage charges are the responsibility of the inmate. The Warden shall ensure that the inmate commissary has postage stamps available for purchase by inmates.
>
> . . . .
>
> (c) Inmate organizations will purchase their own postage.
>
> (d) An inmate who has neither funds nor sufficient postage and who wishes to mail legal mail (includes courts and attorneys) or Administrative Remedy forms will be provided the postage stamps for such mailing. To prevent abuses of this provision, the Warden may impose restrictions on the free legal and administrative remedy mailings.
>
> . . . .
>
> (i) Holdovers and pre-trial commitments will be provided a reasonable number of stamps for the mailing of letters at government expense.

28 C.F.R. § 540.21.

From the definitional provisions in this Chapter of the C.F.R., it appears that Section 540.21 applies to all federal penal or correctional institutions[2] and that it governs correspondence by convicted prisoners and detainees of various kinds.[3]

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[1] By the time of the November meeting, I also expect to have information concerning federal policy with respect to alien detainees.

[2] Section 500.1(a) defines the Warden to include, inter alios, "the chief executive officer of a U.S. Penitentiary, Federal Correctional Institution, Medical Center for Federal Prisoners, Federal Prison Camp, Federal Detention Center, Metropolitan Correctional Center, or any federal penal or correctional institution or facility." 28 C.F.R. § 500.1.

[3] Section 500.1(c) provides: "Inmate means all persons in the custody of the Federal Bureau of Prisons or Bureau contract facilities, including persons charged with or convicted of offenses against the United States; D.C. Code felony offenders; and persons held as witnesses,

B. State and local facilities

It was not practicable for me to locate and analyze all the legal provisions governing prisoner mail in state and local facilities throughout the U.S. However, the following are some examples of state and local policies.

Some entities' regulations appear to require that postage be affixed to outgoing mail.[4] Some facilities will periodically provide a set amount of free postage.[5] Other facilities are directed to supply a "reasonable" amount of free postage for legal mail;[6] sometimes such "reasonable" amounts are subject to upper limits.[7] Florida provides free postage to indigent

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detainees, or otherwise." 28 C.F.R. § 500.1(c).

[4] See, e.g., Oregon Admin. R. 291-131-0020(2) ("Outgoing mail, except business mail to department officials in Central Administration sent through the intra-departmental mail system, shall be enclosed in an approved DOC envelope with U.S. postage.").

[5] See, e.g., Wash. Admin. Code 137-48-060(3) ("Indigent inmates shall be authorized to receive postage up to the equivalent to the mailing cost of ten standard first class letters per week. This indigent postage provision shall cover both legal and/or regular letters."); Policies of Lawrence County Jail, South Dakota, available at http://www.lawrence.sd.us/Sheriff/so_corrections.htm (last visited Sept. 14, 2008) ("The jail will provide 1 stamp a day for any out going mail."); Policies of Stearns County Jail, Minnesota, available at http://www.co.stearns.mn.us/3782.htm#mail (last visited Sept. 14, 2008) ("Upon request, indigent inmates may receive three prepaid postcards per week.).

[6] See, e.g., La. Admin Code. tit. 22, pt. I, § 765(E)(5)(b) ("Indigent youth shall have access to the postage necessary to send out approved legal mail on a reasonable basis and the basic supplies necessary to prepare legal documents."); 20 Ill. Admin. Code 525.130(a) ("Offenders with insufficient money in their trust fund accounts to purchase postage shall be permitted to send reasonable amounts of legal mail and mail to clerks of any court or the Illinois Court of Claims, to certified court reporters, to the Administrative Review Board, and to the Prisoner Review Board at State expense if they attach signed money vouchers authorizing deductions of future funds to cover the cost of the postage. The offender's trust fund account shall be restricted for the cost of such postage until paid or the offender is released or discharged, whichever is soonest."); Michigan Admin. Code R. 791.6603(2) ("A prisoner determined to be indigent by department policy shall be loaned a reasonable amount of postage each month, not to exceed the equivalent of 10 first-class mail stamps for letters within the United States of 1 ounce or less. Additional postage shall be loaned to prisoners as necessary to post mail to courts, attorneys, and parties to a lawsuit that is required for pending litigation.").

[7] The Kansas provision, for example, provides:

inmates for legal mail.[8] Some states recoup the cost of free postage from the inmate when funds are available in the inmate's prison account.[9] Wisconsin provides inmates with a revolving $200

> (2) Indigent inmates, as defined by the internal management policies and procedures of the department of corrections, shall receive reasonable amounts of free writing paper, envelopes, and postage for first-class domestic mail weighing one ounce or less, not to exceed four letters per month.
>
> (3) All postage for legal and official mail shall be paid by the inmate, unless the inmate is indigent, as defined by the internal management policies and procedures of the department of corrections. The cost of postage for legal or official mail paid by the facility on behalf of an indigent inmate shall be deducted from the inmate's funds, if available. Credit for postage for legal and official mail shall be extended to indigent inmates under the terms and conditions of the internal management policies and procedures of the department of corrections....

Kansas Admin. Regs. 44-12-601(f).

[8] The Florida provision states:

> The institution shall furnish postage for mail to courts and attorneys and for pleadings to be served upon each of the parties to a lawsuit for those inmates who have insufficient funds to cover the cost of mailing the documents at the time the mail is submitted to the mailroom, but not to exceed payment for the original and two copies except when additional copies are legally required. The inmate shall be responsible for proving that copies in addition to the routine maximum are legally necessary. Submission of unstamped legal mail to the mailroom or mail collection representative by an inmate without sufficient funds shall be deemed to constitute the inmate's request for the institution to provide postage and place a lien on the inmate's account to recover the postage costs when the inmate receives funds.

33 Fla. Admin. Code. Ann. R. 33-210.102(10)(a).

[9] See, e.g., Wash. Admin. Code 137-48-060(4) ("The department shall recoup any expenditures made by the institution for postage due on incoming mail and/or indigent postage for letters, (as identified in subsection (3) of this section) may be recouped by the institution whenever such indigent inmate has ten dollars or more of disposable income in his/her trust fund account."); 33 Fla. Admin. Code. Ann. R. 33-210.102(10)(b) ("At the time that postage is provided to an inmate for this purpose, the Bureau of Finance and Accounting, Inmate Trust Fund Section, shall place a hold on the inmate's account for the cost of the postage. The cost of providing the postage shall be collected from any existing balance in the inmate's trust fund account. If the account balance is insufficient to cover the cost, the account shall be reduced to zero. If costs remain unpaid, a hold will be placed on the inmate's account, subject to priorities of

loan to defray the cost of paper, copies and postage for legal mail; the superintendent can raise the $200 limit in cases of "extraordinary need."[10] There are some indications in the caselaw that some institutions, at some points in time, have had policies that did not provide free postage for indigent inmates.[11]

II. Constitutional requirements concerning access to courts

Though the overview in Part I is not complete, the data suggest that it may be a common practice to provide indigent inmates with some amount of free postage for legal mail, but also that such free postage is often subject to quite strict limits. Both of these observations seem consistent with my quick survey of relevant federal constitutional doctrine. As discussed below, there is support in the caselaw for the proposition that the Constitution requires the government to provide indigent inmates with some amount of free postage for legal mail – but the caselaw also indicates that the constitutionally required amount of free postage may not be very much.

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other liens, and all subsequent deposits to the account will be applied against the unpaid costs until the debt has been paid."); 20 Ill. Admin. Code 525.130(a); Kansas Admin. Regs. 44-12-601(f)(3).

[10] Wisconsin Administrative Code § DOC 309.51(1) provides in part:

> Correspondence to courts, attorneys, parties in litigation, the inmate complaint review system under ch. DOC 310 or the parole board may not be denied due to lack of funds, except as limited in this subsection. Inmates without sufficient funds in their general account to pay for paper, photocopy work, or postage may receive a loan from the institution where they reside. No inmate may receive more than $200 annually under this subsection, except that any amount of the debt the inmate repays during the year may be advanced to the inmate again without counting against the $200 loan limit. The $200 loan limit may be exceeded with the superintendent's approval if the inmate demonstrates an extraordinary need, such as a court order requiring submission of specified documents. The institution shall charge any amount advanced under this subsection to the inmate's general account for future repayment....

The Seventh Circuit has held that a Wisconsin inmate who had used up his $200 loan balance and who had sought but not yet received permission to borrow more than the $200 limit did not meet what the court viewed as Rule 4(c)(1)'s requirement that postage be prepaid at the time the notice of appeal is deposited in the prison mail system. Ingram v. Jones, 507 F.3d 640, 645 (7th Cir. 2007).

[11] See, e.g., Smith v. Erickson, 884 F.2d 1108, 1111 (8th Cir. 1989) (reversing dismissal of challenge to Minnesota state prison policy based on conclusion that "the district court erred in dismissing Smith's claim that the no-postage policy was facially unconstitutional").

"[P]risoners have a constitutional right of access to the courts." *Bounds v. Smith*, 430 U.S. 817, 821 (1977). The *Bounds* Court stated: "It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents[,] with notarial services to authenticate them, and with stamps to mail them." *Bounds*, 430 U.S. at 824-25.[12] The Court continued: "This is not to say that economic factors may not be considered, for example, in choosing the methods used to provide meaningful access. But the cost of protecting a constitutional right cannot justify its total denial." *Id*. at 825.

More recently, the Court has defined its ruling in *Bounds* narrowly by requiring "that an inmate alleging a violation of *Bounds* must show actual injury." *Lewis v. Casey*, 518 U.S. 343, 349 (1996). As the *Lewis* Court explained: "Because *Bounds* did not create an abstract, freestanding right to a law library or legal assistance, an inmate cannot establish relevant actual injury simply by establishing that his prison's law library or legal assistance program is subpar in some theoretical sense." Instead, the inmate must show how the defect in the prison's program impeded the inmate's access to the courts: "He might show, for example, that a complaint he prepared was dismissed for failure to satisfy some technical requirement which, because of deficiencies in the prison's legal assistance facilities, he could not have known. Or that he had suffered arguably actionable harm that he wished to bring before the courts, but was so stymied by inadequacies of the law library that he was unable even to file a complaint." *Lewis*, 518 U.S. at 351. Moreover, the *Lewis* Court stated that not all types of inmate claims trigger rights of access under *Bounds*: "*Bounds* does not guarantee inmates the wherewithal to transform themselves into litigating engines capable of filing everything from shareholder derivative actions to slip-and-fall claims. The tools it requires to be provided are those that the inmates need in order to attack their sentences, directly or collaterally, and in order to challenge the conditions of their confinement. Impairment of any *other* litigating capacity is simply one of the incidental (and perfectly constitutional) consequences of conviction and incarceration." *Lewis*, 518 U.S. at 355.

Citing *Lewis v. Casey*, courts have upheld limitations on indigent inmates' ability to proceed in forma pauperis. *See, e.g., Lewis v. Sullivan*, 279 F.3d 526 (7th Cir. 2002) (upholding the three-strikes provision in the Prison Litigation Reform Act).[13] Litigation over i.f.p. status

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[12] This memo focuses principally on institutional policies concerning the provision of postage to an inmate who has been determined to be indigent. It should be noted that an additional issue concerns the institution's policies for determining who counts as indigent. For example, in his dissent from the affirmance of the dismissal of a complaint raising an access-to-court claim, Judge Murnaghan questioned the reasonableness of a policy that determined inmates' indigency at monthly intervals based on the funds in the inmate's account on the 15th of each month. See White v. White, 886 F.2d 721, 728 (4th Cir. 1989) (Murnaghan, J., dissenting).

[13] The PLRA's three-strikes provision is contained in 28 U.S.C. § 1915(g), which states: "In no event shall a prisoner bring a civil action or appeal a judgment in a civil action or proceeding under this section if the prisoner has, on 3 or more prior occasions, while

often concerns such questions as whether the litigant will be permitted to proceed without prepaying (or giving security for) fees or costs. One might argue that an inmate's need for assistance in paying postage is qualitatively different from an inmate's need for assistance in paying a filing fee, because the inmate's incarceration *requires* the inmate to file by mail rather than in person (assuming that the option of electronic filing is not available) – and thus the need for postage might be seen to stem from the fact of incarceration. *Cf. Lewis v. Sullivan*, 279 F.3d at 530 ("Prisons curtail rights of self-help (and for that matter means of earning income) and have on that account some affirmative duties of protection. ... This is why the right of access to the courts entails some opportunity to do legal research in a prison library (or something equally good); the prison won't let its charges out to use other libraries, so it must make substitute provision, though not necessarily to the prisoner's liking.").

The caselaw varies by circuit and generalizations are tricky because the discussions can be fact-specific. However, it seems fair to say that while a number of courts have recognized (or presupposed) a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount can be relatively small. Cases applying right-of-access principles to prison postage policies include the following (sorted by circuit):

- *Gittens v. Sullivan*, 848 F.2d 389, 390 (2d Cir. 1988) (New York state prison system) (holding that pro se prisoner "was not denied meaningful access to the courts" where the prison "not only provided Gittens with $1.10 per week for stamps, but also provided him with an additional advance of at least $36 for postage for legal mail").

    - Compare *Chandler v. Coughlin*, 763 F.2d 110, 115 (2d Cir. 1985): Court of appeals reversed dismissal of complaint challenging New York state regulation providing that "an inmate may send five one-ounce letters per week at state expense but may not accumulate credit for unused postage or send one five-ounce document in a week in which he mails nothing else" and barring the provision of free postage for any legal brief.

    - Apparently, the relevant regulation was revised in response to *Chandler*. The application of the revised version was upheld in *Gittens*, and was then upheld on remand in *Chandler*. *See Chandler v. Coughlin*, 733 F.Supp. 641, 647 (S.D.N.Y. 1990).

- *Bell-Bey v. Williams*, 87 F.3d 832, 839 (6th Cir. 1996) (Michigan state prison system) ("MDOC has fulfilled its affirmative duty to provide indigent prisoners access to the courts. By allotting ten stamps per month, a prisoner may send ten sealed letters without

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incarcerated or detained in any facility, brought an action or appeal in a court of the United States that was dismissed on the grounds that it is frivolous, malicious, or fails to state a claim upon which relief may be granted, unless the prisoner is under imminent danger of serious physical injury."

being subject to inspection. If a postage loan is needed for a current suit, a prisoner may either submit proof that the mail pertains to pending litigation, or he may wait until the next month's allotment of postage.").

- *Gaines v. Lane*, 790 F.2d 1299, 1308 (7th Cir. 1986) (assessing prior version of relevant provision concerning Illinois state prison): "The regulations set forth a minimum number of privileged or non-privileged letters which may be sent at state expense. This provision is supplemented by a 'safety valve' provision which permits the additional expenditure of state funds for legal mail when such an expenditure is reasonable. We cannot say that, on its face, this regulation amounts to an unconstitutional impediment on an inmate's access to courts.... Should prison officials abuse these regulations by interpreting them in such a way as to block a prisoner's legitimate access to the courts, the prisoner is not without remedy."

- *Smith v. Erickson*, 884 F.2d 1108, 1111 (8th Cir. 1989) (reversing dismissal of challenge to Minnesota state prison policy based on conclusion that "the district court erred in dismissing Smith's claim that the no-postage policy was facially unconstitutional").

    - *See also Hershberger v. Scaletta*, 33 F.3d 955, 956 (8th Cir. 1994) (Iowa Men's Reformatory): The court of appeals affirmed a judgment which "enjoined the practice of imposing a 50 cent per month service charge on negative balances resulting from purchases of legal postage; enjoined the practice, as currently implemented, of requiring inmates with negative balances over $7.50 to show 'exceptional need;' and ordered the reformatory to provide indigent inmates with at least one free stamp and envelope per week for purposes of legal mail."

    - *Compare Blaise v. Fenn*, 48 F.3d 337, 338 (8th Cir. 1995) (Iowa State Penitentiary): Court of appeals affirmed the dismissal of a claim challenging Iowa state policy of providing "a monthly allowance of $7.70 to all inmates regardless of their disciplinary status. Inmates may use this income in any way they wish, including to pay postage for legal mail. Under ISP regulations, if an inmate has no funds, he may charge up to $3.50 in legal expenses to his account as an 'advance' on the next month's pay or allowance.... If an inmate needs further funds for legal expenses, he can obtain approval for debt over $3.50 from the deputy warden with a showing of 'exceptional need.'"

- *King v. Atiyeh*, 814 F.2d 565, 568 (9th Cir. 1987): Court of appeals reversed the dismissal of a claim challenging "the policy of the Oregon State Hospital limiting indigent patients to three stamps per week." Liberally construed, plaintiffs' allegation that they "have often found it necessary to communicate with the courts more than three (3) times per week and often the pleadings need more than twenty (20) cents postage" sufficed to state a claim.

- *Twyman v. Crisp*, 584 F.2d 352, 358 (10th Cir. 1978) (Oklahoma state prison): Court of

appeals affirmed dismissal of complaint challenging prison's policy that "an inmate must have less than $5.00 in his inmate account to qualify for free postage. He then receives postage for a maximum of two letters per week (eight per month), legal or otherwise. Only if a prisoner has zero in his trust fund will stamps for legal mail (no other type) be provided in excess of the eight."

- *Hoppins v. Wallace*, 751 F.2d 1161, 1162 (11th Cir. 1985) (Alabama state prison system) ("[T]he furnishing of two free stamps a week to indigent prisoners is (1) adequate to allow exercise of the right to access to the courts, and (2) adequate to allow a reasonable inmate to conduct reasonable litigation in any court.").

III. Conclusion

The research summarized above provides the basis for two preliminary observations. First, a number of institutions provide a limited amount of postage assistance to indigent inmates who wish to send legal mail. Second, there is some support in the caselaw for the proposition that the Constitution requires some minimal level of assistance for inmates who cannot afford to pay the postage for their legal mail.

However, these observations are necessarily tentative and incomplete. To understand the likely effect of various possible approaches to the inmate-filing provisions in Rule 4(c), it may be useful to engage in further research, for example by contacting organizations which may be able to shed light on the practices of a broader range of state and local prisons and mental institutions around the country.

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Minutes of Fall 2008 Meeting of
Advisory Committee on Appellate Rules
November 13 and 14, 2008
Charleston, SC

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, November 13, 2008, at 8:30 a.m. at the Charleston Place Hotel in Charleston, South Carolina. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Judge T.S. Ellis III, Dean Stephen R. McAllister,[1] Mr. Mark I. Levy, Ms. Maureen E. Mahoney, and Mr. James F. Bennett. Solicitor General Gregory G. Garre joined the meeting after lunch on November 13, and Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), attended the whole meeting. Also present were Judge Lee S. Rosenthal, Chair of the Standing Committee; Judge Harris L. Hartz, liaison from the Standing Committee; Professor Daniel R. Coquillette, Reporter to the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Mr. Timothy Reagan from the FJC and Professor Richard Marcus joined the meeting on the morning of the 14th. Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants.

II. Approval of Minutes of April 2008 Meeting

The minutes of the April 2008 meeting were approved.

III. Report on June 2008 Meeting of Standing Committee

Judge Stewart and the Reporter summarized the FRAP-related actions taken by the Standing Committee at its June 2008 meeting. The Standing Committee gave final approval to a

[1] Dean McAllister was present on November 13 but was unable to be present on November 14.

ripe for appeal).

Judge Stewart suggested that compliance could be improved by raising awareness of the issue, for example, by placing an item on the agenda at meetings for district judges. A letter from the chief judge to the district judges in the district could highlight the issue. Judge Rosenthal noted that if the Committee believes such a reminder would be helpful, it could be useful for the Committee to make a recommendation along those lines. For example, the Committee might ask the Director of the AO to send out such a letter, with examples of documents that comply with the separate document provision. Mr. Rabiej noted that such a letter could be sent to both judges and district clerks. Mr. McCabe noted that there are a number of possible additional avenues for distributing the information, for example, through newsletters. Perhaps it might also be possible to insert a measure into the CM/ECF system that would prompt users to comply. A district judge member suggested that the Director's letter could be followed by another letter from a judge. Judge Rosenthal suggested that the letter could present the matter as a problem which is easy to solve.

Mr. Letter moved that the Committee recommend to the Standing Committee that appropriate steps be taken to raise awareness of the problem, in coordination with the Civil Rules Committee and Bankruptcy Rules Committee. The motion was seconded and was approved by voice vote without objection.

C. Item No. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning Judge Wood's proposal with respect to Rule 4(c)(1)'s inmate filing rule. At the Committee's Spring 2008 meeting, members raised a number of questions about institutional practices with respect to inmate legal mail – and, in particular, the extent to which indigent inmates have access to funds for postage for use on legal mail. Mr. Letter has made inquiries concerning the policy of the federal Bureau of Prisons. He reports that the issues raised by Judge Wood are not currently of concern to federal agencies or to the DOJ. The Bureau of Prisons has special procedures for legal mail; it provides indigent prisoners with a reasonable supply of postage for use on legal mail; and it requires the prisoners to affix the postage themselves. Thus, if Rule 4(c) were interpreted or amended to require prepayment of postage when an inmate uses an institution's legal mail system, that would not alter existing practice within the Bureau of Prisons. Mr. Letter has also put the Reporter in touch with an official who can provide information concerning the practice in immigration facilities; the Reporter will follow up with her directly.

The Reporter noted that researching the practices in state and local facilities is challenging because of the variety of policies and because many institutions' policies do not seem to be memorialized in readily accessible documents. Some institutions provide set, periodic sums to indigent prisoners; some institutions instead state that they will allow indigent

inmates a reasonable amount of free postage; some institutions advance money for postage to such inmates and then seek to recoup the money once there is a balance in the inmate's account.

The caselaw appears to recognize that indigent prisoners have a federal constitutional right to some amount of free postage in order to implement the inmate's right of access to the courts. The Supreme Court's 1977 decision in *Bounds v. Smith*, 430 U.S. 817 (1977), provides authority for this view. However, *Bounds* has been narrowed in some respects by *Lewis v. Casey*, 518 U.S. 343 (1996). The caselaw from the different circuits varies, and the decisions are very fact-specific; however, common themes appear to be that indigent inmates do have a right to some free postage for legal mail – but also that the constitutionally required amount may not be very large.

Mr. Fulbruge noted that roughly 40 percent of the Fifth Circuit's docket consists of cases involving prisoner litigants. A district judge member asked whether the high percentages of inmate filings in the Fifth and Ninth Circuits are atypical. Mr. Fulbruge responded that, nationwide, the percentage of appellants in the courts of appeals who are pro se is roughly 40 per cent, and that most of those pro se litigants are inmates. The Ninth, Fifth and Fourth Circuits have the greatest proportion of inmate litigation, and the Eleventh Circuit has a large share of inmate litigation as well.

Mr. Letter noted that he sympathizes with Judge Wood's original inquiry: the Rule could definitely be written more clearly. A member noted that the Rule's use of the word "inmate" might be misleading, to the extent that the Rule is intended to cover other institutionalized persons such as people in mental institutions; he suggested that a broader term would be "person" rather than "inmate." A judge member agreed that the Rule should be clarified. An attorney member wondered whether it might be useful to take a more global look at the inmate-filing rule, as opposed to treating only the question of postage. Judge Hartz noted that a related but distinct issue is raised by cases such as *United States v. Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004), in which the court of appeals dismissed a prisoner's appeal – even though it was undisputed (and shown by the postmark) that he had deposited his notice of appeal with the prison mail system within the time for filing the appeal – merely because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid.

Judge Sutton, Dean McAllister, and Mr. Letter agreed to work with the Reporter to formulate some possible options for the Committee's consideration at the next meeting.

D. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. At the

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Minutes of Spring 2009 Meeting of
Advisory Committee on Appellate Rules
April 16 and 17, 2009
Kansas City, Missouri

I. Introductions

Judge Carl E. Stewart called the meeting of the Advisory Committee on Appellate Rules to order on Thursday, April 16, 2009, at 8:30 a.m. at the Hotel Phillips in Kansas City, Missouri. The following Advisory Committee members were present: Judge Kermit E. Bye, Judge Jeffrey S. Sutton, Justice Randy J. Holland, Dean Stephen R. McAllister, Mr. Mark I. Levy, and Mr. James F. Bennett. Mr. Douglas Letter, Appellate Litigation Counsel, Civil Division, U.S. Department of Justice ("DOJ"), was present representing the Solicitor General. Also present were Judge Harris L Hartz, liaison from the Standing Committee; Mr. Peter G. McCabe, Secretary to the Standing Committee; Mr. Charles R. Fulbruge III, liaison from the appellate clerks; Mr. John K. Rabiej, Mr. James N. Ishida and Mr. Jeffrey N. Barr from the Administrative Office ("AO"); and Ms. Marie Leary from the Federal Judicial Center ("FJC"). Prof. Catherine T. Struve, the Reporter, took the minutes.

Judge Stewart welcomed the meeting participants. He expressed regret that Maureen Mahoney, Judge Ellis, Judge Rosenthal and Professor Coquillette were unable to be present. Judge Stewart noted the Committee's great appreciation of Judge Rosenthal's work on all the Committee's matters including the package of proposed time-computation legislation that is currently before Congress.

II. Approval of Minutes of November 2008 Meeting

The minutes of the November 2008 meeting were approved subject to the correction of a typographical error on page 11.

III. Report on January 2009 meeting of Standing Committee

Judge Stewart and the Reporter highlighted relevant aspects of the Standing Committee's discussions at its January 2009 meeting. The proposed amendment to Appellate Rule 40(a)(1) had been approved by the Appellate Rules Committee at its fall 2008 meeting. Judge Stewart presented that proposed amendment to the Standing Committee for discussion rather than for action, in order to provide an opportunity for the new administration to consider the proposal before the presentation of the proposal for final approval by the Standing Committee. Judge Stewart also described to the Standing Committee the Appellate Rules Committee's ongoing work on other matters such as the question of manufactured finality.

sometimes be raised by the court on its own motion; the Tenth Circuit has provided a thoughtful discussion of this question in *United States v. Mitchell*, 518 F.3d 740 (10th Cir. 2008).

By consensus, the Committee retained this item on its study agenda. Judge Stewart promised that the Reporter would keep the Committee updated on her research concerning *Bowles*-related issues and would also update the Committee on relevant discussions by the joint Civil / Appellate Subcommittee.

c. Item No. 07-AP-I (FRAP 4(c)(1) and effect of failure to prepay first-class postage)

Judge Stewart summarized the Committee's fall 2008 discussion concerning this item, which relates to Rule 4(c)(1)'s provision for notices of appeal filed by inmates confined in institutions. Judge Diane Wood has suggested to the Committee that Rule 4(c)(1) is not as clear as it might be concerning the prepayment of postage. At the fall 2008 meeting, Judge Sutton, Dean McAllister and Mr. Letter had agreed to work with the Reporter to analyze these questions; in preparation for the spring 2009 meeting, they had listed relevant issues for the Committee's consideration.

The Reporter sketched a number of the issues. One question is whether Rule 4(c)(1) requires prepayment of postage as a condition of timeliness; this question is sometimes treated differently depending on whether the institution does or does not have a legal mail system. It is unclear under current caselaw whether the prepayment requirement (to the extent that it exists) is jurisdictional. But even if such a requirement is jurisdictional it could be changed via rulemaking. Another question is whether Rule 4(c)(1) *should* condition timeliness on the prepayment of postage. Admittedly, a first-class stamp costs little, but on the other hand an inmate may lack any funds to buy the stamp. And an inmate, unlike a free person, lacks the option of filing the notice of appeal in person. Another question is whether it makes sense for prepayment of postage to be treated differently for an institution with a legal mail system than for an institution without one. A further question is whether Rule 4(c)(1) might be amended to specify circumstances under which the failure to prepay postage might be forgiven. Yet another question is whether the Rule might be amended to respond to *United States v. Ceballos-Martinez*, 387 F.3d 1140 (10th Cir. 2004), in which the court of appeals dismissed a prisoner's appeal because the prisoner had not included a declaration or notarized statement setting forth the date of deposit and stating that first-class postage had been prepaid (even though the postmark demonstrated that the notice of appeal was deposited in the prison mail system within the time for filing the notice). Still another question is whether Rule 4(c)(1)'s use of the term "inmate" appropriately denotes the range of persons who are confined in institutions and who may invoke the rule.

The Reporter observed that Rule 4(c)(1)'s inmate-filing provision relates to other provisions: Appellate Rule 25(a)(2)(C), Supreme Court Rule 29.2, and Rule 3(d) of the rules governing habeas and Section 2255 proceedings. To the extent that the Appellate Rules

Committee is inclined to proceed with proposals on this topic, consultation with other Advisory Committees seems desirable. The Committee may also wish to consider the question of the project's scope. Should the project encompass other appellate timeliness issues such as delays in an institution's transmittal to an inmate of notice of the entry of a judgment or order? On this point, the Reporter noted that the Rules already address the possibility that a party may fail to learn of the entry of judgment in time to take an appeal, but the existing provisions do not focus on the circumstances of inmates in particular. Another question is whether the project should encompass the timeliness of trial court filings such as tolling motions or complaints.

Mr. Fulbruge described the policy of the Texas Department of Criminal Justice ("TDCJ"). Under that policy, if an inmate is on the "indigent list," the inmate is provided five legal letters per month. If the inmate does not put a stamp on a legal letter, the prison checks to see whether the inmate is on the indigent list and if he is, the prison puts a stamp on the letter, up to the five-letter limit per month (unless there are extraordinary circumstances that justify lifting this limit). Mr. Fulbruge expressed uncertainty as to whether this policy is applied in a uniform fashion by all units within the TDCJ. Mr. Fulbruge noted that if the timeliness of a filing is in question, the Fifth Circuit clerk's office will sometimes request clarification on that point from the district court or the institution.

An appellate judge asked whether the concern that an inmate may lack funds to pay for postage is already addressed by the caselaw indicating that inmates have a constitutional right to some amount of free postage for court filings. Another appellate judge suggested that it might be worth considering a provision that would permit an inmate who lacked the funds for postage to attest that he or she had a constitutional right to have the postage paid by the government. An attorney member suggested that the best course might be to retain the item on the Committee's study agenda so that the issues can percolate further in the courts. Mr. McCabe predicted that in five to ten years most prisons will provide a system that enables inmates to make electronic filings. By consensus, the Committee retained this item on its study agenda and directed the Reporter to monitor relevant developments in the caselaw and in practices relating to electronic filing.

d. Item Nos. 08-AP-D, 08-AP-E, & 08-AP-F (possible changes to FRAP 4(a)(4))

Judge Stewart invited the Reporter to introduce these items, which concern Rule 4(a)(4)'s treatment of timing with respect to tolling motions. These issues form one of the topics that will be considered by the joint Civil / Appellate Subcommittee. One of the items was raised by Peder Batalden, who points out that there can sometimes be a time gap between the entry of an order resolving a tolling motion and the entry of an amended judgment pursuant to that order. The other item responds to suggestions by Public Citizen Litigation Group and the Seventh Circuit Bar Association Rules and Practice Committee, who suggest amending Rule 4(a) so that an initial notice of appeal encompasses appeals from any subsequent order disposing of postjudgment motions.

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, and 11-AP-D

As the Committee discussed at the September 2012 meeting, it seems likely that eventually the Committee will wish to amend some of the Appellate Rules in the light of the shift to electronic filing; a main question concerns the timing of such proposals. Item No. 11-AP-D covers this broad, overarching topic. I enclose my fall 2011 and fall 2012 memos concerning this item.

Item No. 08-AP-C concerns a proposal to abolish Rule 26(c)'s "three-day rule." Like the Civil Rules Committee, the Appellate Rules Committee has periodically discussed criticisms of the "three-day rule." Thus far, the Appellate Rules Committee has been taking a wait-and-see approach. I enclose my fall 2008 memo concerning this issue.[1]

Item Nos. 08-AP-A and 11-AP-C arise from the observation that if a district permits the filing of a notice of appeal by CM/ECF and if all parties in the case are on CM/ECF, then Appellate Rule 3(d)'s requirement that the district clerk mail notice of the filing of the notice of appeal seems obsolete. The Committee held its only formal discussion of this item in November 2008. However, the topic is periodically discussed in connection with the broader question of whether the time has come to update the Appellate Rules in the light of the shift to electronic filing and service.

The question before the Committee at this point is whether it wishes to proceed with amendments on some or all of these topics on its own, or whether it prefers to await a joint project with the other Advisory Committees.

Encls.

[1] To conserve space, I have omitted some of the enclosures to that memo. Please let me know if you would like copies of those enclosures; they are also available on www.uscourts.gov.

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.

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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MEMORANDUM

DATE: October 20, 2008

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 08-AP-C

Appellate Rule 26(c) is the target of ongoing criticism. An amendment which is currently on track to take effect December 1, 2009[1] will remove undesirable ambiguity from the rule but will not eliminate calls for the rule's abolition.

Such calls have recurred periodically, and surfaced most recently in the public comments on the time-computation project. Those comments included the suggestion that Appellate Rule 26(c)'s "three-day rule" be abolished. This memo summarizes the issue and suggests that the Committee coordinate its consideration of this issue with the Bankruptcy, Civil and Criminal Rules Committees.

I. The comments

Four comments on the time-computation project are relevant to the three-day rule. Those four comments are enclosed. The central comment, with respect to Appellate Rule 26(c), is

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[1] The proposed amendment to Rule 26(c) was approved by the Judicial Conference in September 2008. If the Supreme Court also approves the amendment and Congress takes no contrary action during the statutorily-mandated waiting period, the amendment will take effect December 1, 2009. The proposed time-computation amendments, which also are currently on track to take effect December 1, 2009, would delete the word "calendar" from Rule 26(c) to reflect the fact that Rule 26(c)'s three-day period will be counted using the new days-are-days approach. Accordingly, as of December 1, 2009, if the amendments take effect Rule 26(c) will read:

> **(c) Additional Time After Service.** When a party ~~is required or permitted to act within a prescribed period after a paper is served on that party~~ may or must act within a specified time after service, 3 ~~calendar~~ days are added ~~to~~ after the ~~prescribed~~ period would otherwise expire under Rule 26(a), unless the paper is delivered on the date of service stated in the proof of 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's.

A. Chief Judge Easterbrook's suggestion: abolish the three-day rule

In commenting last year on the time-computation project, Chief Judge Easterbrook suggested that in addition to the proposed changes, the three-day rule contained in Appellate Rule 26(c) should be abolished. He argued that the three-day rule is particularly incongruous for electronic service, and that adding three days to a period thwarts the goal served by the time-computation project's preference for setting periods in multiples of seven days. Robert J. Newmeyer, an administrative law clerk to Judge Roger T. Benitez of the U.S. District Court for the Southern District of California, similarly suggested that Civil Rule 6(d)'s three-day rule be abolished.

As the Appellate Rules Deadlines Subcommittee reported last spring, the suggestion that the three-day rule be eliminated is well worth considering. 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). Over the past nine years, there have been lengthy 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 periodically since at least the spring of 1999. More recently, the time-computation project also discussed the matter. 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 e-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 as districts or circuits move to make CM/ECF mandatory for counsel, counsel might no longer (as a practical matter) have 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). However, the concern remains that counsel might strategically e-serve on a Friday night in order to inconvenience an opponent. Thus, though some of the rationales for including e-service in the three-day rule may have become less persuasive over time, the concern over possible strategic misuse of e-filing persists.

In the courts of appeals the shift to CM/ECF is not yet complete. As of September 2008

the Fourth, Sixth, Eighth and Ninth Circuits were accepting CM/ECF filings.[2] At this point, the bankruptcy courts and district courts have much more experience with CM/ECF than do the courts of appeals.

B. Suggestions concerning Civil Rule 6(d) and backward-counted deadlines

Two other comments – by the Committee on Civil Litigation of the U.S. District Court for the Eastern District of New York ("EDNY Committee") and by Alexander Manners, a vice president of CompuLaw LLC – obliquely relate to the issues considered here. Those two comments highlight the incongruities that can arise under Civil Rule 6(d) with respect to backward-counted time periods. Such backward-counted periods will end on the same date no matter what method of service the opponent has used (which means that the opponent can effectively shorten the litigant's time to respond by employing service by mail).

The only backward-counted deadlines in the Appellate Rules are those for reply briefs, and the reply brief deadlines seem unlikely to cause the same degree of concern as deadlines for motion papers under the Civil Rules. In response to the EDNY Committee's points about backward-counted deadlines, the Appellate Rules Deadlines Subcommittee considered whether the Appellate Rules' timing for reply briefs[3] should be transmuted into a forward-counted period and concluded that such a change is unnecessary. The EDNY Committee focused its concern on the Civil Rules' deadlines for motion papers, and did not mention the Appellate Rules' deadlines for reply briefs. This is not surprising, since it may be questioned how frequently appellate briefing and argument schedules are compressed enough to trigger the backward-counted deadlines for reply briefs. Currently, the presumptive deadline for reply briefs is the earlier of (1) 14 days after the prior brief is served, or (2) 3 days before argument. Under the proposals published for comment, the presumptive deadline for reply briefs will be the earlier of (1) 14 days after the prior brief is served, or (2) 7 days before argument. Deadline (1) will ordinarily be the salient deadline, because deadline (2) will only become relevant when argument follows very close on the heels of briefing. Given the infrequency with which deadline (2) is likely to apply,

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[2] See Press Release, Case Management / Electronic Case Files (CM/ECF), June 2008, available at http://www.pacer.psc.uscourts.gov/documents/press.pdf (last visited September 19, 2008) (stating that as of June 2008 the Fourth, Sixth and Eighth Circuits were accepting electronic filings); see also Administrative Order Regarding Electronic Filing in All Ninth Circuit Cases, 8/28/08, available at http://www.ca9.uscourts.gov/ca9/Documents.nsf/ecf-admin-order.pdf (last visited September 26, 2008) (stating that certain types of filings would be accepted via CM/ECF starting in September 2008).

[3] Under Appellate Rules 28.1(f) and 31(a), a reply brief must be filed "at least 3 days before argument, unless the court, for good cause, allows a later filing." The time-computation proposals would change the three-day period to seven days.

there seems to be no reason to consider eliminating the backward-counted deadlines in Rules 28.1(f) and 31(a). This is especially true given that those deadlines can be extended by the court "for good cause."

It therefore seems unnecessary for the Committee to consider the problems associated with backward-counted deadlines when considering whether and how to modify Appellate Rule 26(c)'s three-day rule.

II. Conclusion

It would be useful for the Committee to give preliminary consideration to the suggestion that Appellate Rule 26(c)'s three-day rule be altered or abolished. Unless there is some strong reason why the Appellate Rules present exceptional considerations, it seems best to conform Rule 26(c)'s approach to that taken in the time-counting rules that apply in the lower courts. Thus, it seems preferable that any change to FRAP 26(c)'s three-day rule be coordinated with the Bankruptcy, Civil and Criminal Rules Committees. The Appellate Rules Committee's tentative views on the matter can be communicated to those Committees, with a view to discussing whether a joint project concerning the three-day rule would be desirable.

Encls.

07-CV-004

07-CR-003

07-AP-003

07-BR-015

"Frank H. Easterbrook" <frank.easterbrook@acsalaska.net>
12/12/2007 02 29 AM

To Rules_Comments@ao uscourts gov
cc
Subject August 2007 Rules Package

I have only a few brief comments on these proposals.

The time-computation rules are nicely done. I recommended changes along these lines during my time on the Standing Committee and am pleased to see that the task is largely complete. These amendments should take effect in 2009, "only" 16 years after a majority of the Standing Committee urged that changes of this kind be accomplished as soon as possible.

The benefits of using real days are so apparent that I am left to scratch my head about the survival (and proposed amendment in this cycle) of Fed. R. App. P. 26(c), which adds 3 days whenever time is calculated from a document's service rather than its filing. Why should this rule persist? Build the time into the deadline for briefs; don't leave it up in the air whether three days should be added to some other period. (For 3 days are *not* added if the document is "delivered" on the service date.)

The rule makes little sense. It was originally designed to accommodate delay in the Postal Service. Today briefs and similar documents regularly are delivered by FedEx or courier; increasingly they are delivered electronically with zero waiting. Yet Rule 26(c), which says that no days are added if a courier plops the document on counsel's desk, provides that 3 days *are* added if the document arrives as an email attachment, or via message from a court's e-filing site That's inconsistent.

My court has concluded that the entire routine is absurd and has overridden Rule 26(c)--not by a local rule, which wouldn't be cricket (see Fed. R. App. P. 47(a)(1)), but by setting a briefing schedule by order in almost every case. Each order gives a date on which the brief must be *filed*

When a deadline applies to filing rather than service, Rule 26(c) drops out of the picture. Although the Seventh Circuit has been doing this for more than 20 years, lawyers regularly are confused by the difference between "filing" dates, to which Rule 26(c) does not apply, and "service" dates, to which it does, so each of these orders includes a warning that the conversion to a filing date means that no time is added on account of service by mail.

That the Seventh Circuit must add this proviso to each order shows the potential for confusion caused by the differing rules for computation of time following filing versus service.

Note, by the way, that the three extra days *also* interferes with the goal of allocating time in 7-day parcels, which then end on weekdays. Adding three days to a 30-day or 45-day period is not likely to increase the chance that the last day will be a weekend, but adding 3 days to a 14-day period (used for some motions) will.

So the Standing Committee should complete the time-computation project by rescinding rather than amending Rule 26(c), with adjustments in other deadlines if appellees and respondents otherwise would have too little time.

One other brief comment, concerning both Fed. R. App. P. 4(a)(1)(B) and Fed. R. App. P. 40(a)(1). The draft amendments to these two rules refer to "the United States; a United States agency; [and] a United States officer". United States is a proper noun; the first usage ("the United States") is therefore correct. Treating a proper noun as an adjective ("a United States agency") is not correct; it is an example of noun plague. We should not have stylistic backsliding so soon after the style project rewrote all of these rules. "Federal agency" is better, using a real adjective as an adjective. If you have some compelling need to use "United States," then say "agency of the United States" (etc.). Sometimes Congress writes this error into a statute ("United States Court of Appeals"), and there is nothing the judiciary can do about the legislature's poor drafting. But the Constitution gets it right ("We the People of the United States"; "the Congress of the United States"; "the judicial Power of the United States"; "the Chief Justice of the United States"), and the federal judiciary should do no less

Frank H. Easterbrook

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TAB 13A

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MEMORANDUM

DATE: March 25, 2013

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.[1] 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 March 2009 memorandum 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. Part I summarizes developments in the courts of appeals, employing the taxonomy introduced in the March 2009 memo.[2]

[1] 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.

[2] Part I is an updated version of the discussion that appeared in my August 2012 memorandum, included among the agenda materials for the Committee's fall 2012 meeting. This version includes the following

Part II discusses the Court's recent decision in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), and concludes that that decision cannot be taken as an implicit endorsement of the Second Circuit's conditional-finality approach.

Also enclosed with this memo is a set of sketches prepared by Professor Cooper in connection with the Civil / Appellate Subcommittee's 2010 discussions of this topic.

I. Developments in the courts of appeals

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.

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.[3]

Peripheral claims conditionally dismissed with prejudice. 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). The Supreme Court reversed on the merits. *See Gabelli v. SEC*, 133 S. Ct. 1216 (2013). I discuss *Gabelli* in Part II.

The March 2009 memo listed, as circuits that have disapproved the conditional-prejudice 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

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new decisions: the Fourth Circuit's decision in *Blitz* (footnote 7 of this memo); the Seventh Circuit's decisions in *On Command Video* (footnote 5) and *Abbott* (footnote 10); and the Eighth Circuit's decisions in *Ruppert* (footnote 4) and *West American* (footnote 11 and accompanying text).

[3] *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.").

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 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.[4] 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.[5]

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[4] *See also* Ruppert v. Principal Life Ins. Co., 705 F.3d 839, 842-43 (8th Cir. 2013) (following *Clos*).

As examples of the court's prior condemnations of attempts to manufacture appellate jurisdiction, the *Clos* 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 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* and *Ruppert* provide much clearer rejections of that approach.

[5] The court applied the same principle in *On Command Video Corp. v. Roti*, 705 F.3d 267 (7th Cir. 2013). The district court granted the plaintiff summary judgment on its veil-piercing claim, and dismissed the

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.

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.[6]

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:[7]

> 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 D*oss 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

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plaintiff's fraud claim with leave to re-file it if the award on the veil-piercing claim was reversed. *See id.* at 270. Applying *Arrow Gear*, the court of appeals dismissed defendant's appeal; only after the district court entered a separate final judgment on the veil-piercing claim under Civil Rule 54(b) did the court of appeals have jurisdiction over the appeal concerning that claim. *See id.* at 270-71.

[6] 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.

[7] *Cf.* Blitz v. Napolitano, 700 F.3d 733, 737-38 (4th Cir. 2012) (dismissal of complaint for lack of subject matter jurisdiction, without prejudice to re-filing matter by means of a petition for review in a court of appeals, was an appealable final judgment under 28 U.S.C. § 1291).

> (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.

Arrow Gear, 629 F.3d at 636-37.[8]

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

[8] *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.

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 appellant had tried to manipulate the court's appellate jurisdiction.

Since the time of the March 2009 memo, the published[9] 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.[10] Similarly, the Eighth Circuit issued a decision in which it invoked its line of cases disapproving "the use of dismissals without prejudice to manufacture appellate jurisdiction," but took jurisdiction over the appeal based on counsel's agreement at oral argument to the conversion of the dismissal to a with-prejudice dismissal.[11]

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'

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[9] In preparing this memo, I limited my research to published appellate opinions.

[10] *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."); Abbott v. Sangamon County, 705 F.3d 706, 713 n.1 (7th Cir. 2013). 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").

[11] West American Ins. Co. v. RLI Ins. Co., 698 F.3d 1069, 1071 n.1 (8th Cir. 2012).

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.

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.").

II. The Supreme Court's decision in *Gabelli*

The Supreme Court's decision in *Gabelli v. SEC*, 133 S. Ct. 1216 (2013), included no discussion of the question of appellate jurisdiction. Thus, the decision does not tell us the Court's view on whether a conditional dismissal suffices to achieve finality.

The Second Circuit reaffirmed its endorsement of the conditional-finality approach – but also limited its reach – in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011). 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. On the merits, the court of appeals reversed, holding, inter alia, that the "discovery rule" rendered timely the SEC's civil-penalty claim under the Advisers Act. *See id.* at 60-61.

The defendants sought review of the court of appeals' decision in *Gabelli*; their petition concerned the merits (specifically, the court's holding concerning the "discovery rule") and did not mention the court of appeals' discussion of appellate jurisdiction. *See* Petition for a Writ of Certiorari, *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) (No. 11-1274), 2012 WL 1419938. In the merits briefing, the SEC's brief included the following discussion concerning appellate jurisdiction:

> After the district court dismissed the bulk of the Commission's claims, the SEC conditionally dismissed its remaining claim for disgorgement. The SEC agreed to reassert that disgorgement claim only if the district court's ruling on the motion to dismiss was reversed on appeal and the Commission was permitted to proceed with its other claims. *See* J.A. 105-106. Some courts of appeals have held that this type of conditional dismissal does not produce a final, appealable judgment. *Compare Clos v. Corrections Corp. of Am.*, 597 F.3d 925, 928 (8th Cir. 2010); *Federal Home Loan Mortg. Corp. v. Scottsdale Ins. Co.*, 316 F.3d 431, 440 (3d Cir. 2003), *with* Doe v. United States, 513 F.3d 1348, 1354 (Fed. Cir. 2008); *Purdy v. Zeldes*, 337 F.3d 253, 258 (2d Cir. 2003). Here, however, the Commission has been willing to abandon its disgorgement claim altogether in order to ensure that the judgment is appealable as to the other claims. *See* 1:08-CV-3868, Docket entry No. 36, at 2-3 (S.D.N.Y. June 15, 2010). In that circumstance, courts have agreed that a judgment is appealable. *See, e.g., India Breweries, Inc. v. Miller Brewing Co.*, 612 F.3d 651, 657-658 (7th Cir. 2010); *Federal Home Loan Mortg. Corp.*, 316 F.3d at 440.

Brief for the Respondent at 7 n.3, *Gabelli v. SEC*, 133 S. Ct. 1216 (2013) (No. 11-1274), 2012 WL 6131633. It should be noted that, when the SEC's brief stated that the SEC "has been willing to abandon its disgorgement claim altogether," the brief did not actually mean that the SEC *did* abandon the claim altogether. Rather, in the cited document, the SEC expressed willingness to do so if the district court rejected the SEC's first choice, which was a conditional dismissal with prejudice.[12] In fact, the district court granted the conditional dismissal with prejudice that was the SEC's first choice.[13]

[12] *See* Memorandum in Support of Plaintiff Securities and Exchange Commission's Motion to Dismiss Without Prejudice the Remaining Remedy of Disgorgement, or, in the Alternative, to File an Amended

No further mention was made of this jurisdictional issue in the briefing or at oral argument. Nor does the Court's opinion mention the question. The opinion notes that "[t]he District Court … dismissed the SEC's civil penalty claim as time barred," *Gabelli*, 133 S. Ct. at 1220, and adds: "The SEC also sought injunctive relief and disgorgement, claims the District Court found timely …. Those issues are not before us," *id.* at 1220 n.1.[14]

The Court's jurisdiction in *Gabelli* rested on 28 U.S.C. § 1254(1), which authorizes review by writ of certiorari of "[c]ases in the courts of appeals." In order for the case to be "in the court[] of appeals" within the meaning of this statute, the court of appeals had to have jurisdiction over the appeal.[15] Although neither party questioned the existence of appellate jurisdiction, "federal courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press."[16] A litigant might attempt to argue that the Court's decision on the merits in *Gabelli* could therefore be taken as an implicit endorsement of the conditional-finality approach.[17] However, "[t]he Court often grants certiorari to decide particular legal issues

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Complaint at 2- 3, SEC v. Gabelli, No. 1:08-cv-03868-DAB (S.D.N.Y. June 15, 2010), ECF No. 36 ("[P]laintiff's request to dismiss voluntarily the remaining remedy of disgorgement without prejudice should be granted. In the alternative, if the Court denies plaintiff's request to dismiss the disgorgement remedy without prejudice, plaintiff's request to file an amended complaint deleting the requested remedy of disgorgement should be granted and final judgment should be entered.").

[13] *See* SEC v. Gabelli, No. 1:08-cv-03868-DAB (S.D.N.Y July 29, 2010), ECF No. 42 ("Plaintiff's remaining remedy of disgorgement under the Investment Advisers Act of 1940 is DISMISSED without prejudice to refiling only if it obtains a reversal on appeal of any claim or remedy dismissed by the Court in its March 17, 2010 Memorandum and Order.").

[14] As of this writing, the Court's judgment or mandate has not yet issued, and it remains to be seen whether the SEC will seek to reassert its disgorgement claim on remand. It appears that such reassertion would be consistent with the terms of the conditional dismissal: Although the SEC lost on the civil-penalty claim, that disposition apparently leaves undisturbed the court of appeals' resurrection of the SEC's injunctive-relief claim. The district court's conditional-dismissal order specified the condition (that would resuscitate the SEC's disgorgement claim) as "a reversal on appeal of any claim or remedy dismissed by the Court in its March 17, 2010 Memorandum and Order." *See supra* note 13. Given that the March 17, 2010 memorandum and order dismissed the claim for injunctive relief, it seems that the SEC may be able to re-file its disgorgement claim.

[15] *See, e.g.*, United States v. Nixon, 418 U.S. 683, 690 (1974) (examining whether the order being appealed was a final judgment under 28 U.S.C. § 1291, in order to determine whether case was "in" court of appeals within meaning of 28 U.S.C. § 1254(1)).

[16] Henderson ex rel. Henderson v. Shinseki, 131 S. Ct. 1197, 1202 (2011).

[17] *Cf., e.g.*, Bowen v. Massachusetts, 487 U.S. 879, 882-83 (1988) ("All of the Courts of Appeals that have confronted this precise question have agreed that district courts do have jurisdiction in such cases…. We implicitly answered the question in the same way when we accepted jurisdiction and decided the merits in *Connecticut Dept. of Income Maintenance v. Heckler*, 471 U.S. 524 … (1985).").

Even if the Court considered the question of jurisdiction in *Gabelli*, it might have found jurisdiction based on a different theory. Perhaps the Court might have taken the footnote in the SEC's brief to be stating that the SEC *in fact was* agreeing "to abandon its disgorgement claim altogether," a measure that could produce an appealable final judgment even apart from the conditional-finality doctrine. As noted above, I do not read the SEC's brief that way, and the circuits that allow for this sort of post hoc conversion of a without-prejudice dismissal into a with-prejudice dismissal appear to require a more explicit

while assuming without deciding the validity of antecedent propositions … , and such assumptions – even on jurisdictional issues – are not binding in future cases that directly raise the questions."[18]

Thus, the Court's decision in *Gabelli* does not appear to alter the doctrinal landscape sketched in Part I of this memo.

III. Conclusion

At its fall 2012 meeting, the Committee decided to defer further discussion of this item in case the Court's decision in *Gabelli* produced a ruling on the topic. No ruling having resulted from *Gabelli*, the question before the Committee is how, if at all, to proceed with this item. The enclosed sketches by Professor Cooper illustrate possibilities for Civil Rules amendments. It should be noted, as well, that manufactured-finality issues can arise in criminal cases. Could an amendment to the Appellate Rules address this topic with respect to both civil and criminal appeals? Coordination with the Civil and Criminal Rules Committees would be necessary in considering such a possible amendment.

Encls.

abandonment of the relevant claim. (That practice is noted in Part I of this memo. *See* notes 10 - 11 and accompanying text.)

[18] United States v. Verdugo-Urquidez, 494 U.S. 259, 272 (1990).

TAB 13B

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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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Simplified Manufactured Finality

This set of sketches addresses only the simplest variations on manufactured finality. No sketch attempts to capture a consensus reflecting whatever common features may be found in present decisions. More importantly, no attempt is made to address the many possible complications that would be addressed by a comprehensive rule. Three major potential elements are ignored: whether or when to require consent of all parties, or at least any party who would be exposed to an immediate appeal; whether or when to require the court's consent; and what to do about partial finality in cases involving multiple parties. The potential costs of simplifying any potential rule are noted in a few pages after the sketches are presented.

This order of presentation does not imply any judgment as to the best choice among three general possibilities: (1) adopt a simplified rule or rules; (2) adopt a more complex rule; or (3) do nothing because a simplified rule may do more harm than good, while a more complicated rule is too difficult to draft. Although the present muddle on some issues is something of a problem for lawyers who litigate in multiple circuits, there may not be much need to help any particular circuit out of any particular confusion it may have developed.

I Sketches

These sketches address several possible approaches, either alone or in some combination. One approach would be to adopt a rule that recognizes dismissal with prejudice but does not explicitly address conditional prejudice or dismissal without prejudice. Another approach would be to allow manufactured finality only on dismissal of everything that remains in the action with binding prejudice. If the orders that prompted the dismissal are reversed, the only things revived by reversal are those addressed by the reversed orders. That approach could include an explicit prohibition on manufacturing finality by dismissing any part of an action without prejudice or with conditional prejudice. Yet another approach would be to recognize conditional prejudice — the matters dismissed cannot be revived if the challenged orders are affirmed, but can be revived as a matter of right if any of the challenged orders is reversed.

As noted at the outset, none of these sketches takes account of consent by other parties. The party who wishes to manufacture finality has to accomplish dismissal of everything that remains in the action; if that can be accomplished without the consent of other parties, so it will be done. Nor do the sketches require consent of either the trial court or the court of appeals. Accordingly there is no room to recognize judicial discretion at either level.

(1) Adopt Only Absolute Prejudice

Almost all courts recognize a plaintiff's ability to achieve

finality by a voluntary dismissal with prejudice that preserves the right to appeal pre-dismissal orders. This approach could be memorialized in a rule. The rule might say nothing more, leaving it to developing practice to work through the practice of "conditional prejudice" that allows abandoned matters to be resurrected if the plaintiff wins on appeal. Or the rule might attempt to kill off the conditional prejudice opportunity. The possibilities are illustrated here and in item (2):

Rule X. **A party asserting a claim for relief can establish a final judgment by voluntarily dismissing with prejudice all claims and parties remaining in the action.**

This sketch is not limited to dismissal by "A plaintiff." If only counterclaims remain in the action, for example, a defendant could invoke it. It says nothing about conditional prejudice. It is not clear where it would best fit in the rules. The most likely place may be as a new Rule 41(a)(2), renumbering present (2) as (3). But it might be better to add it to Rule 54, either as a new paragraph in subdivision (b) or as a separate subdivision (c). A place might instead be found in the Appellate Rules, but that could be confusing without a large-scale reconsideration of the ways in which the Civil and Appellate Rules have been integrated. Rules 54 and 58 are the most prominent examples, but not the only ones.

An alternative approach might add something to provide reassurance that the plaintiff, having voluntarily dismissed, still can appeal. Among the possibilities, this sketch focuses on dismissing all the plaintiff's claims, or perhaps all the plaintiff's claims against fewer than all remaining parties. It is limited to a plaintiff, rather than "a party asserting a claim for relief," but that choice is easily reversed. And it offers an alternative that anticipates more complicated rules by allowing dismissal of all claims against a particular adverse party.

RULE 54.1. FINALITY BY DISMISSAL. On request by a plaintiff who specifies orders [or other matters] that it wishes to appeal, the court must enter final judgment with prejudice dismissing all claims by the plaintiff [version 1: against all parties]{version 2: against one or more adverse parties}.

(2) EXPRESSLY ELIMINATE CONDITIONAL PREJUDICE

It is not easy to draft a rule that unambiguously eliminates the "conditional prejudice" approach. The difficulty is that a simple model like the one below does not say explicitly that the "prejudice" cannot be subject to a condition subsequent that reversal of a pre-dismissal ruling will revive the matters dismissed. The Committee Note would say that the rule is intended to eliminate the concept of conditional prejudice, but there are good reasons to avoid substituting Note observations for rule text.

The simple model simply rearranges the draft that refers only

to dismissal with prejudice:

Rule X. **A party asserting a claim for relief can establish a final judgment by voluntary dismissal only by dismissing with prejudice all claims and parties remaining in the action.**

An attempt to extirpate conditional prejudice might be included in Rule 41. One possibility:

(B) *Effect*. **(i)** Unless the notice or stipulation states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed any federal- or state-court action based on or including the same claim, a notice of dismissal operates as an adjudication on the merits.

(ii) A notice or stipulation may not provide that a dismissal with prejudice as to a claim or party is conditioned on affirmance on appeal as to other claims or parties or on the failure of any party to appeal.

(3) CONDITIONAL PREJUDICE

Rule X. **A party asserting a claim for relief can achieve a final judgment by a notice [or stipulation] that specifies orders the party wishes to appeal and that [conditionally] dismisses with prejudice all claims and parties remaining in the action. The party may appeal as to the specified orders.**[1] **If the judgment is reversed the party may reinstate the claims and parties included in the [conditional] dismissal.**[2]

This provision might be fit into Rule 54(b) rather than a new Rule 54.1. Rule 41(a) also might be a suitable location. Clarity would be advanced by dividing the present rule into paragraphs and

[1] Should there be a provision for separate appeals by other parties? "Any party may appeal as to the specified orders"?

For that matter, need there be an express recognition of separate appeals — some other party may have lost on some other order, and want to appeal. For example, the court dismisses one of the plaintiff's claims, and also dismisses the defendant's counterclaim: "Any party may appeal as to the specified orders, and any other party may appeal as to any other order [made before the dismissal]"?

[2] Need the rule text say that the party cannot reinstate as to any order affirmed on appeal? That is the intent. Perhaps a statement in the Committee Note will do the job.

To make assurance doubly sure, something like this could be woven into the rule text: "The dismissal becomes an unconditional dismissal with prejudice if the judgment is affirmed; the dismissal must be vacated if the judgment is vacated or reversed."

adding this as a separate paragraph.

(4) RULE 41(A)(1) ALTERNATIVE, REAL OR CONDITIONAL PREJUDICE:

A somewhat different drafting approach could work with real prejudice or with conditional prejudice. This version does that by requiring that a dismissal aimed at appeal be with prejudice in item (ii), but then adds an optional provision in (B) making the prejudice conditional.

(1) *By the Plaintiff.*

(A) *Without a Court Order*. Subject to Rules 23(e), 23.1(c), 23.2, and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; ~~or~~

(ii) a notice of dismissal with [conditional] prejudice that specifies orders [or other matters] the plaintiff wishes to appeal;[3] or

(iii) a stipulation of dismissal signed by all parties who have appeared.

(B) *Effect*.

(i) Unless a notice **under Rule 41(a)(1)(A)(i)** or stipulation **[under Rule 41(a)(1)(A)(iii)]** states otherwise, the dismissal is without prejudice. But if the plaintiff previously dismissed * * * .

(ii) A notice under Rule 41(a)(1)(A)(ii) [{is with prejudice, but the notice} must be vacated if any of the specified orders is reversed {on appeal}].

(5) COMBINATION: ELIMINATE WITHOUT PREJUDICE, ALLOW CONDITIONAL

The Rule 41 draft sketched above is intended to eliminate dismissal without prejudice as a means of manufacturing finality. The dismissal must be with prejudice, or — if (1)(B)(ii) is adopted — with conditional prejudice. But if the rule text and Committee Note emphasis seem less than certain, an explicit statement might be adopted by rule. Rather than attempt to squeeze that into Rule 41 at the moment, this illustration simply copies one of the alternatives in sketch (2):

Rule X. **A party asserting a claim for relief can establish a final judgment by voluntary dismissal only by dismissing with prejudice all claims and parties remaining in the action or by dismissing with conditional prejudice under Rule**

[3] This could be "a notice of dismissal that reserves the right to appeal specified orders." Several courts have addressed the question as one of appeal standing, generally concluding that consent to dismissal does not waive the right to appeal when the would-be appellant expressly reserves the right to appeal. E.g., McMillian v. Sheraton Chicago Hotel & Towers, 567 F.3d 839 (7th Cir.2009).

41(a)(1)(B)(ii).

II Complications

A simplified rule has the advantage of simplicity. And it might accomplish some good. There are, after all, many cases that involve only one plaintiff and one defendant, whether with one claim or multiple claims.

But there are substantial costs in taking a simplified approach. What happens in more complex settings that do not fit within the rule? Is manufactured finality prohibited? Is it left to continuing evolution in the case law? Will the evolution be affected, perhaps in unpredictable ways, by analogy to the rule and its silences? A Committee Note might recognize that courts remain free to address situations not covered by the rule. A Note saying that the rule preempts all alternative approaches to manufactured finality might run the risks of legislating by Note rather than rule text.

The costs of moving beyond a simplified rule, however, are easy to identify. Manufacturing "finality" on terms that do not conclude all trial-court proceedings creates all the risks of interlocutory appeals. The trial court has a real interest in managing the whole litigation, and in determining when an appeal as to part of the action is compatible with — or perhaps a support for — effective case management. The Rule 54(b) model that uses the district judge as "dispatcher" reflects important values. The parties who remain in the action, and even the party who becomes appellee in the part severed by manufactured finality, have parallel interests. If all parties agree on the terms of manufactured finality, the district court's role may be diminished even when the manufactured terms do not resolve all parts of the action.

The following brief reflection on these questions does not offer examples of rule text that might recognize the need for party consent or judicial control. Some sketches were provided in an earlier memorandum, and can be revived if interest moves in that direction.

PARTY CONSENT

Consent by another party does not seem important in the simple case that involves one plaintiff, one claim supported by various theories or forms of proof, and one defendant. The court might, for example, make a ruling in limine that excludes important evidence. Or it might dismiss several theories, but leave the claim alive as to a theory that — although viable — has little chance of success. Because there is only one "claim" within the meaning of Rule 54(b), the court cannot enter a final judgment. But if the plaintiff is willing to dismiss the entire action with prejudice, staking everything on appeal and reversal of the unfavorable rulings, it may make sense to allow unilateral finality. Many cases allow that now.

More complicated settings raise more important questions about party consent. Suppose there are two defendants. Unfavorable

rulings greatly diminish the prospects of recovery against one, but do not affect the other. Each defendant has interests of the sort underlying the final-judgment rule. If the plaintiff can achieve finality as to one defendant without the consent of either and without the court's control, appeal as to the one defendant raises the prospect of disrupted trial-court proceedings, or partial ongoing trial-court proceedings that may be undone by the eventual appeal ruling, or multiple appeals. These problems proliferate as the number of parties and claims expands.

Requiring consent of all parties would provide a substantial safeguard against these risks. It would be easy to draft a blanket requirement. It would not be so easy to attempt a more sophisticated version that requires consent of some parties but not all. If consent of all parties is required, however, there is a risk that some would seize the opportunity for strategic reasons, bargaining for collateral concessions that have nothing to do with the calculus of finality.

Party consent can be a means of achieving immediate appealability in some cases without need to amend the rules. A joint request to enter judgment under Rule 54(b) may be persuasive, although there is some constraint in the requirement that the court have finally decided at least one "claim," or all claims among a pair of parties. Or the parties may consent to a judgment, reserving the right to appeal, a tactic honored in several but not all circuits. More complicated strategies also may be available.

COURT CONSENT

The court may have interests in sound case management that depart from the parties' interests. These interests may not be important in the simple case. Although the court will be required to take up a stale case if its pre-dismissal rulings are reversed, that may be better than the most likely alternatives — completion of the case through trial, appeal, reversal, and remand; or surrender by a party afflicted by orders that would have been reversed if the opportunity for appeal were available without the burden of exhausting the trial-court process.

More complex cases increase the court's interests, perhaps greatly. A mandatory stay of all proceedings pending appeal by one party may impose great costs on the court and other parties. Plunging ahead pending appeal may impose equally grave, although different, costs. Allowing a party to create a right to appeal without any court control may be unwise.

As with party consent, court control may be managed to some extent without any rules changes. Section 1292(b) interlocutory appeals are constrained by conditions that may thwart some desirable appeals, but they are available. Rule 54(b) may be stretched a bit, allowing entry of judgment that a strict view of the rule would forbid. Inventive use may be made of Rule 41(a)(2), allowing dismissal by court order on terms that the court considers proper. Those possibilities bear on the need to pursue a "manufactured finality" rule, but do not provide

a substitute for it. They also open up the possibility of sidestepping manufactured finality by seeking to expand Rule 54(b) or to revise § 1292(b). (Although not entirely clear, it seems likely that § 1292(e) authorizes adoption of court rules that in effect amend § 1292(b). But the potential confusion suggests statutory revision would be better.)

MULTIPARTY, MULTICLAIM CASES

The simplest situation is noted above. If a plaintiff can manufacture finality as to one of two defendants, the remaining defendant is exposed to the cost and risk of proceeding alone in the trial court while the appeal is pending, or to the multiple burdens imposed by a stay pending appeal. A comparably simple situation is presented by a case involving one plaintiff, one claim, one defendant, and one counterclaim. Rule 41(a)(2) may address that situation implicitly — the court can order dismissal over the defendant's objection only if the counterclaim can remain for independent adjudication. But should the terms of dismissal include manufactured finality as to the plaintiff's claim?

More complex cases increase the threat to the values served by the final-judgment rule.

One approach would be to allow manufactured finality only by arranging final disposition of all claims among all parties. That result could be achieved by unilateral action only if the plaintiff is the only party asserting any claims and is willing to put them all at risk, or even to sacrifice all of those not involved in the adverse orders that prompt the urge to appeal. Once counterclaims, crossclaims, and third-party claims appear, the plaintiff often cannot unilaterally dispose of the entire action. It is likely possible to draft a rule that would enable the plaintiff to dispose of all claims as to one or more parties, but not all; drafting would be easier if consent were required of the parties exposed to finality and appeal. It is a fair question, however, whether other parties and the court should be held hostage to action by only some of the parties.

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

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

These items concern the possibility of amending the Rules – in the wake of *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) – to provide for appellate review of attorney-client privilege rulings. I enclose my fall 2010 memo concerning Item No. 09-AP-D, along with a letter from Amy M. Smith, Esq. (the proponent of Item No. 11-AP-F).

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The Committee discussed the first of these items at its spring and fall 2010 meetings. Participants discussed whether a project on this topic should focus specifically on the question of appeals relating to attorney-client privilege rulings or whether the project should consider additional areas, such as appeals from denials of official immunity.

The Committee decided to commence by focusing on the question of appeals from privilege rulings, and to seek input on this topic from the Civil, Criminal and Evidence Rules Committees. The proposal that gave rise to Item No. 11-AP-F was circulated to the other Advisory Committees in late 2011; the other Committees have not, to my knowledge, moved forward with that proposal thus far.

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MEMORANDUM

DATE: September 16, 2010

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 09-AP-D

Item No. 09-AP-D arises from John Kester's suggestion that the Committee consider whether the Supreme Court's decision in *Mohawk Industries, Inc. v. Carpenter*, 130 S. Ct. 599 (2009), warrants a rulemaking response. The Committee's discussion at the spring meeting yielded a number of possible avenues for exploration. This memo briefly maps those avenues;[1] further exploration of them will await guidance concerning the directions that the Committee wishes to pursue.

Attorney-client privilege rulings. There appeared to be substantial interest, at the Committee's spring meeting, in considering the question of immediate appeals from attorney-client privilege rulings. When exploring this question, it would seem helpful to consider the extent to which the Committee's work can be informed by empirical data. What data, for example, may exist or may be gathered concerning the extent to which fears of an erroneous district court rejection of attorney-client privilege decrease the frankness of attorney-client communications; or the extent to which erroneous district court rejections of attorney-client privilege provide discovering parties with undue settlement leverage; or the extent to which immediate appeals might be misused to inflict expense and delay on an opponent? What can data from the Third, Ninth, and D.C. Circuits (which, prior to *Mohawk Industries*, permitted collateral-order appeals from privilege rulings) tell us about the number of appeals that might be taken under a rule permitting immediate appeals from privilege rulings? What are district judges' views concerning the extent to which immediate appeals from such rulings might disrupt trial proceedings, and concerning possible ways to mitigate such a risk?

A proposed rule addressing this topic will raise scope questions. Should such a rule focus only on attorney-client privilege rulings? Should it also encompass orders rejecting claims of work product protection? Orders rejecting other types of privilege claims (such as marital privilege or doctor-patient privilege)? Other momentous discovery rulings?

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[1] The memo reflects both the Committee's discussions and some very helpful preliminary reflections provided by Professor Cooper.

Overall scope of inquiry. Discussion at the spring meeting noted two possible approaches. One would focus specifically on the question of appeals relating to attorney-client privilege rulings. The other would consider additional possible fields of inquiry, such as appeals from denials of official immunity.

One could, in fact, broaden the inquiry further still. For example, in a forthcoming article, Professor James Pfander and a co-author, David Pekarek Krohn, advocate the creation through rulemaking of an avenue for immediate appeal when all parties concur in seeking such an appeal and the district court agrees.[2] They summarize their argument as follows:

> We argue that the district court should be empowered to certify a question for interlocutory review (categorically) whenever the parties to the litigation so agree (in the exercise of joint discretion). Drawing on the case-selection literature, we show that the parties will often have a shared financial interest in interlocutory review in cases where they recognize that a decisive issue of law will survive any trial court disposition. Where the costs of preparing the case for trial are substantial and the risks of appellate invalidation significant, the parties have more to gain than lose through appellate review. What's more, the orders chosen by agreement of the parties make good candidates for immediate appellate review. Agreed-upon review will occur only as to orders that the parties regard as close and as unlikely to disappear into the black box of jury deliberations.[3]

Official-immunity rulings. As many have observed, the current doctrine governing the appealability of official-immunity rulings is rife with complexity and uncertainty. One area in which changes might be welcome concerns the scope of the appeal, and in particular, the question of whether the appellate court can examine the summary-judgment record when reviewing a denial of qualified immunity.[4] A host of other questions could also be addressed; for example, what guidelines should govern the district court's decision whether to proceed pending

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[2] *See* James E. Pfander and David R. Pekarek Krohn, *Interlocutory Review by Agreement of the Parties: A Preliminary Analysis*, __ Nw. U. L. Rev. __ (forthcoming 2011).

[3] *Id.* at 1.

[4] *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995) ("[A] defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial."); *Behrens v. Pelletier*, 516 U.S. 299, 313 (1996) ("*Johnson* permits petitioner to claim on appeal that all of the conduct which the District Court deemed sufficiently supported for purposes of summary judgment met the *Harlow* standard of 'objective legal reasonableness.'"). *Compare Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1947 (2009) ("The concerns that animated the decision in *Johnson* are absent when an appellate court considers the disposition of a motion to dismiss a complaint for insufficient pleadings.").

the determination of the appeal?[5]

As with attorney-client privilege rulings, so too here, the question of the proposal's scope would arise. Should the rule cover other sorts of immunity rulings in addition to official immunity?[6] Sovereign immunity provides one possible candidate, and there exist a number of others.

Other types of rulings. Discovery-related and immunity-related rulings do not exhaust the list of rulings that might be considered for treatment in a rule addressing immediate appeals.[7] As this project moves forward, it will be necessary to decide whether to include any additional topics within its scope.

Benefits of the rulemaking process. The rulemaking process provides possible advantages that might not be as readily available to a court crafting avenues for immediate appeal through the collateral-order doctrine. On one hand, rulemaking would not be constrained

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[5] *See, e.g.*, *Behrens*, 516 U.S. at 310-11 (noting that the district court "appropriately certified petitioner's immunity appeal as 'frivolous' in light of the Court of Appeals' (unfortunately erroneous) one-appeal precedent" and that "[t]his practice, which has been embraced by several Circuits, enables the district court to retain jurisdiction pending summary disposition of the appeal, and thereby minimizes disruption of the ongoing proceedings").

[6] In this memo, for the purposes of simplicity, I use the terms "official immunity" and "qualified immunity" interchangeably. The former term encompasses both qualified and absolute immunity, but it appears likely that qualified-immunity rulings generate far greater numbers of immediate appeals than absolute-immunity rulings. It may make sense for any rulemaking response that addresses qualified-immunity rulings to address absolute-immunity rulings as well. But that question merits further exploration if a project encompassing official-immunity rulings moves forward. For example, because absolute-immunity rulings tend to turn on the function that the defendant was performing when committing the alleged acts giving rise to the suit, *see, e.g.*, *Buckley v. Fitzsimmons*, 509 U.S. 259, 273 (1993) (prosecutorial immunity); *Stump v. Sparkman*, 435 U.S. 349, 362 (1978) (judicial immunity); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (legislative immunity), rulings on the applicability of absolute immunity seem intuitively less likely to be closely tied to the disputed merits of the underlying claims. If that is true, then absolute-immunity appeals may pose significantly fewer challenging policy issues than do qualified-immunity appeals concerning the appropriateness of an immediate appeal.

[7] For example, it was suggested at the spring meeting that one might consider addressing the appealability of orders remanding a matter to an administrative agency for further consideration. *See, e.g.*, *Occidental Petroleum Corp. v. S.E.C.*, 873 F.2d 325, 330 (D.C. Cir. 1989) (stating that such an order is immediately appealable "where the agency to which the case is remanded seeks to appeal and it would have no opportunity to appeal after the proceedings on remand").

by the collateral-order doctrine's stated requirement that the subject matter of the appeal be separate from the underlying merits of the case. On the other hand, rulemaking would permit the calibration of immediate appeals; a rule could, for example, require permission from the district court or the court of appeals or both before a particular type of immediate appeal could be taken.[8] A rule could, perhaps, provide for an immediate appeal of a given type to be expedited, although this would raise questions concerning intrusion into the appellate courts' ability to manage their dockets. A rule could address the specter of multiple appeals by providing (for example) that only one pretrial appeal is permitted from rulings of a given type.[9] A rule might distinguish between different contexts; for example, it was suggested during the Committee's spring meeting that immediate appeals from privilege rulings might be more disruptive of trial-court proceedings in criminal cases than in civil cases.

Limitations of the rulemaking process. The most obvious limitation on the rulemaking process is that set by 28 U.S.C. § 2072(b), which provides that rules promulgated through the Rules Enabling Act process "shall not abridge, enlarge or modify any substantive right." To take one example of the implications of this limit, the way in which the Court has conceptualized immediate appeals from the denial of official immunity[10] could provide the basis for an argument that abolishing such appeals would abridge defendants' substantive rights.[11]

This is not to say that the Committee should necessarily avoid considering matters that

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[8] *See, e.g.*, Civil Rule 23(f); *cf.* 28 U.S.C. § 1292(b).

[9] For example, imagine that the district court denies a defendant's initial motion to dismiss on qualified-immunity grounds and later denies the defendant's summary-judgment motion on qualified-immunity grounds. Perhaps a rule might specify whether, having appealed from the first of these rulings, the defendant is entitled also to appeal from the second prior to trial. For current doctrine on this point, see *Behrens*, 516 U.S. at 301, 307 (rejecting the contention that "a defendant's immediate appeal of an unfavorable qualified-immunity ruling on his motion to dismiss deprives the court of appeals of jurisdiction over a second appeal, also based on qualified immunity, immediately following denial of summary judgment").

[10] *See, e.g.*, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial."); *see also id*. at 525-26 (stating that qualified immunity is founded on concerns about attracting capable people to government service, ensuring officials' zealous performance of their duties, and protecting such officials from undue distractions).

[11] *But cf. Johnson v. Fankell*, 520 U.S. 911, 921 (1997) (in the process of determining that a state court need not provide an immediate appeal from the denial of qualified immunity from suit under 42 U.S.C. § 1983, reasoning that "[t]he right to have the trial court rule on the merits of the qualified immunity defense presumably has its source in § 1983, but the right to immediate appellate review of that ruling in a federal case has its source in § 1291").

approach this boundary; but such scope concerns might warrant discussion of whether any proposed solution is best achieved through rulemaking or through legislation. There are, of course, precedents for employing the rulemaking process to develop a proposed legislative solution to a given problem. And even if the Committee decided not to propose the idea of legislation, an immediate-appeals project could turn out to be a useful exercise to explore the current doctrinal landscape and to assess the possibilities for reform.

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March 5, 2010

11-AP-F

10-CV-A

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

Re: Suggestion and Recommendation

Dear Mr. McCabe:

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

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

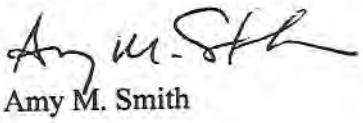
In 1998, the Supreme Court employed the rulemaking authority in Section 1292(e) in promulgating Federal Rule of Civil Procedure 23(f). Rule 23(f) permits an interlocutory appeal from an order granting or denying class certification at the sole discretion of the court of appeals. The current version of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

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

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

Thank you for your attention to this matter.

Very truly yours,



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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-E

This item arises from Professor Katyal's observation that Appellate Rule 35(b)(2) sets the length limit for a petition for rehearing en banc in pages rather than words. Professor Katyal reports that some lawyers manipulate length limits that are set in pages by altering fonts and line spacing. The 1998 amendments to the Appellate Rules set type/volume length limits for merits briefs; those limits are currently set forth in Rules 32(a)(7) and 28.1(e). However, limits denoted in pages remain in Rules 5, 21, 27, and 35. In fact, there currently are more rules of appellate procedure that apply a page limit than there are rules that apply a type/volume limit. Professor Katyal suggests that the time has come to reconsider that choice.

Technological developments have made it much easier to count words. The type/volume limit is harder to manipulate than a page limit.[1] On the other hand, the type/volume limit does entail an added item – a certificate of compliance. And some pro se litigants continue to file handwritten briefs. Because some briefs will be handwritten or typed on a typewriter, it is necessary to determine how to handle the length limits for such briefs.

The approach reflected in Rule 32(a)(7) would suggest the adoption of a particular type/volume limit, *cf.* Rule 32(a)(7)(B), and the adoption of a safe harbor denominated in pages, *cf.* Rule 32(a)(7)(A). In that model, for the safe harbor to serve its function as a safe harbor (rather than a loophole), there needs to be a difference between the effective length under the type/volume limit and the effective length under the page limit.[2] In the

[1] However, Ben Robinson pointed out to me a recent blog post noting that Word and WordPerfect can produce different word counts for the same text. *See* Don Cruse, *Worried About Word Counts? Your Choice of Word Processor Matters a Great Deal*, available at http://www.scotxblog.com/writing/worried-about-word-counts-your-choice-of-word-processor-matters-a-great-deal/ (last visited March 17, 2013).

[2] During the Committee's fall 2012 discussion of this topic, the Supreme Court's rules were mentioned as a possible point of comparison. For that reason, I looked to see what happened to the Rule 33.2(b) page limits when the Supreme Court switched to word counts in Rule 33.1 in 2007. The answer is that the Rule 33.2(b) page limits were the same both before and after the 2007 amendments (namely, 40 pages for petitions and briefs in opposition, and 15 pages for replies and supplemental briefs). The page limits for those filing non-booklet-style papers used to be considerably more permissive than they now are. I enclose a chart showing the changes in the Supreme Court's length limits over the years (in the electronic version

1998 amendments that put Rule 32(a)(7) in place, the Committee chose to shorten the effective length under the page limit (to 30 pages for a principal brief) and to select a type/volume limit that approximated the pre-1998 page limit of 50 pages.[3]

If the Committee decides to adopt the type/volume-limit-plus-safe-harbor approach for the length limits in Rules 5, 21, 27, 35, and 40, it will face a choice concerning the implementation of that approach. Should the proposal choose a safe-harbor limit that is shorter than the present page limit, and a type/volume limit that approximates the current page limit? Or should the proposal set the safe-harbor limit at the current page limit, and choose a type/volume limit that nets out to something longer than the current page limit? Going longer (with the type/volume length) might raise concerns among judges who object to the added length; going shorter (with the safe-harbor page limits) might raise concerns about access to justice for the (largely poor and pro se) filers who would be using the safe-harbor limit rather than the type/volume limit.

To avoid that dilemma, it might be worthwhile to consider a different model, in which the page limit is available only to those who prepare their briefs without the use of a word processor.[4] Briefs written by hand or typed on a typewriter are unlikely to squeeze unduly large amounts of text onto a given page. And lawyers with access to computers are unlikely to hand-write their briefs or have them typed on a typewriter merely to circumvent type/volume limits.

To frame the Committee's discussion of the options, here is a table setting forth the current length limits in each Rule, along with possible alternatives. For the third and fifth columns, I derived a type/volume limit for Rules 5, 21, 27, 35, and 40 by assuming that one page is equivalent to 280 words or to 26 lines of text, and multiplying the current page limits by those numbers.[5] To produce a shorter safe harbor for the third column, I multiplied the current page limit by three-fifths.[6] To produce a longer type/volume limit for the fourth column, I multiplied the type/volume limits from the third column by 5/3.[7] The fifth column illustrates the possible approach of setting a page limit for non-computer briefs and an equivalent type/volume limit for computer briefs; both of these limits are based on the current length limits. The alternative length limits are stated in simple terms for illustration purposes, and do not include language about items excluded

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of the chart, the colors denote different time periods, while the bold borders mark aspects of the length limits that differed from the limit that applied to a previous time period). The switch for non-booklet-style length limits occurred in 1999, well before the Court adopted word limits for booklet-style filings. I have not been able to find a source that explains the rationale of the 1999 changes.

[3] *See* 1998 Committee Note to Appellate Rule 32(a)(7).

[4] *Cf., e.g.*, Cal. Rules of Court Rule 8.204(c) ("(1) A brief produced on a computer must not exceed 14,000 words, including footnotes.… (2) A brief produced on a typewriter must not exceed 50 pages.").

[5] I did not attempt to verify this supposition using actual briefs. Rather, I took as my starting point the statement in the 1998 Committee Note to Rule 32(a)(7) that the type/volume limits in Rule 32(a)(7)(B) "approximate the current 50-page limit," and divided those limits by 50 to obtain the word and line equivalents of a single page.

[6] I chose this multiplier because it reflects the 30-page / 50-page differential described in the 1998 Committee Note quoted in the preceding footnote. Obviously, the choice of a multiplier would be another issue for the Committee to consider if it moves forward with this set of amendments.

[7] Again, I chose this multiplier to recreate the differential reflected in the 1998 Committee Note.

from the count; as the second column indicates, the current Rules' treatment of excluded items is not entirely uniform.

Document and governing Rule	Current limit(s)	**Safe harbor shorter** than current limit; **type/volume equivalent** to current limit	**Safe harbor equal** to current limit; **type/volume longer** than equivalent of current limit	**Safe harbor equal** to current limit; **type/volume equivalent** to current limit
Principal brief: Rule 32(a)(7) Appellant's principal brief, or response and reply brief, on cross-appeal: Rule 28.1(e)	30 pages, or 14,000 words, or 1,300 lines of text [N.B.: Rule 32(a)(7)(B)(iii) lists items excluded from type/volume limit; Rule 28.1(e) does not]	n.a.	n.a.	n.a.
Reply brief: Rule 32(a)(7) Appellee's reply brief on cross-appeal: Rule 28.1(e)	15 pages, or 7,000 words, or 650 lines of text [N.B.: Rule 32(a)(7)(B)(iii) lists items excluded from type/volume limit; Rule 28.1(e) does not]	n.a.	n.a.	n.a.
Appellee's principal and response brief on cross-appeal: Rule 28.1(e)	35 pages, or 16,500 words, or 1,500 lines of text	n.a.	n.a.	n.a.
Amicus brief on merits: Rule 29(d)	Presumptively, 15 pages, or 7,000 words, or 650 lines of text	n.a.	n.a.	n.a.

Document and governing Rule	Current limit(s)	**Safe harbor shorter** than current limit; **type/volume equivalent** to current limit	**Safe harbor equal** to current limit; **type/volume longer** than equivalent of current limit	**Safe harbor equal** to current limit; **type/volume equivalent** to current limit
Petition for permission to appeal; answer; cross-petition: Rule 5(c)	Presumptively, "20 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E)"	12 pages, or 5,600 words, or 520 lines of text	20 pages, or 9,333 words, or 866 lines of text	Non-computer briefs: 20 pages Computer briefs: 5,600 words, or 520 lines of text
Papers on an application for an extraordinary writ: Rule 21(d)	Presumptively, "30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C)"	18 pages, or 8,400 words, or 780 lines of text	30 pages, or 14,000 words, or 1,300 lines of text	Non-computer briefs: 30 pages Computer briefs: 8,400 words, or 780 lines of text
Motion or response: Rule 27(d)(2)	Presumptively, "20 pages, exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B)"	12 pages, or 5,600 words, or 520 lines of text	20 pages, or 9,333 words, or 866 lines of text	Non-computer briefs: 20 pages Computer briefs: 5,600 words, or 520 lines of text

Document and governing Rule	Current limit(s)	**Safe harbor shorter** than current limit; **type/volume equivalent** to current limit	**Safe harbor equal** to current limit; **type/volume longer** than equivalent of current limit	**Safe harbor equal** to current limit; **type/volume equivalent** to current limit
Reply to a response to a motion: Rule 27(d)(2)	10 pages	6 pages, or 2,800 words, or 260 lines of text	10 pages, or 4,666 words, or 433 lines of text	Non-computer briefs: 10 pages Computer briefs: 2,800 words, or 260 lines of text
Petition for hearing or rehearing en banc: Rule 35(b)(2)	Presumptively, "15 pages, excluding material not counted under Rule 32"	9 pages, or 4,200 words, or 390 lines of text	15 pages, or 7,000 words, or 650 lines of text	Non-computer briefs: 15 pages Computer briefs: 4,200 words, or 390 lines of text
Petition for panel rehearing: Rule 40(b)	Presumptively, 15 pages	9 pages, or 4,200 words, or 390 lines of text	15 pages, or 7,000 words, or 650 lines of text	Non-computer briefs: 15 pages Computer briefs: 4,200 words, or 390 lines of text

Encl.

	pre-1999: typographic printing	pre-1999: typed & double-spaced	1999-2007: booklet format	1999-2007: 8 1/2 x 11 inch paper	2007-2010: booklet format	2007-2010: 8 1/2 x 11 inch paper	Current: booklet format	Current: 8 1/2 x 11 inch paper
Cert petition	30	65	30	40	9,000	40	9,000	40
Opposition	30	65	30	40	9,000	40	9,000	40
Reply to brief in opposition	10	20	10	15	3,000	15	3,000	15
Supplemental brief	10	20	10	15	3,000	15	3,000	15
Pet'r's merits brief	50	110	50		15,000		15,000	
Respondent's merits brief	50	110	50		15,000		15,000	
Merits - reply brief	20	45	20		7,500		6,000	

TAB 16

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TAB 16A

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-F

The Appellate Rules Committee has before it two proposals concerning class-action-objector appeals. The first – docketed as Item No. 12-AP-F – was formally submitted to the Committee by Professors Brian Fitzpatrick, Alan Morrison, and Brian Wolfman; I enclose a copy of their August 2012 letter to Judge Sutton. They suggest that Appellate Rule 42 should be amended to bar the dismissal of such appeals if the appellant received anything of value in exchange for the dismissal. The Committee has received two letters from attorneys who support this proposal; one of those letters, from Vincent J. Esades, Esq., is enclosed.[1] Professor Fitzpatrick's views are also reflected in Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009).

The second proposal is set forth in a law review article by Professor John E. Lopatka and Judge D. Brooks Smith. *See* John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What To Do About Them?*, 39 Fla. St. U. L. Rev. 865 (2012). Their proposal would amend Appellate Rules 7 and 39 to presumptively require – in connection with appeals by unnamed class members – a bond for costs on appeal that includes delay costs and attorney fees attributable to the pendency of the appeal, and to presumptively require the imposition of those costs and fees in the event that the judgment is affirmed.[2]

[1] The second letter, from Daniel R. Karon, Esq., appears to track verbatim the wording of Mr. Esades' letter; I am omitting it in order to conserve space, but please let me know if you would like a copy.

[2] Specifically, Professor Lopatka and Judge Smith propose the following:

- Amend Federal Rule of Appellate Procedure 39 to add the following subdivision (f): "Notwithstanding other subdivisions of this rule, whenever a nonnamed member of a class certified under Federal Rule of Civil Procedure 23 appeals a judgment approving a settlement of the class action and the judgment is affirmed, the appellate court will tax the appellant the full costs of appeal imposed on others, including all costs of delay, attorney's fees incurred as a result of the appeal, and costs described in subdivision (e) and 28 U.S.C. § 1920, unless the court finds that appellant raised substantial issues of law and did not appeal primarily to obtain a payment for withdrawing the appeal. If the court so finds, it will tax appellant the costs specified in subdivision (e) and 28 U.S.C. § 1920."

In connection with its study of a prior proposal concerning Appellate Rule 7, the Committee asked Marie Leary of the Federal Judicial Center to study Rule 7 cost bonds; her findings noted some substantial cost bonds imposed in connection with appeals in class actions. I enclose a copy of her 2008 study, "Federal Judicial Center Exploratory Study of the Appellate Cost Bond Provisions of Rule 7 of the Federal Rules of Appellate Procedure."

Encls.

- Amend Federal Rule of Appellate Procedure 7 to add the following subdivision: "Whenever a nonnamed member of a class certified under Federal Rule of Civil Procedure 23 appeals a judgment approving a settlement of the class action, the district court will require the appellant to file a bond in the amount of the expected costs specified in Rule 39(f) unless the court finds that (1) appellant raises substantial issues of law and does not appeal primarily to obtain a payment for withdrawing the appeal and (2) appellant would be financially unable to file a bond in that amount. If the court so finds, the court will impose a bond in whatever amount it deems necessary to protect the interests of the class, but in no event will the bond be less than the costs specified in Rule 39(e) and 28 U.S.C. § 1920."

- Amend Federal Rule of Appellate Procedure 3 to add the following subdivision: "A court of appeals may not hear an appeal brought by a nonnamed member of a class certified under Federal Rule of Procedure 23 seeking review of a judgment approving a settlement of the class action, an order under Rule 7 requiring the appellant to file a bond, or the amount of such a bond unless the appellant has filed any bond required by the district court under Rule 7."

39 Fla. St. U. L. Rev. at 928.

TAB 16B

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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

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.

VINCENT J. ESADES
VESADES@HEINSMILLS.COM

March 12, 2013

Advisory Committee on Appellate Rules
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle N.E.
Washington, D.C. 20544
Via Email: Rules_Support@ao.uscourts.gov

Re: Item No. 12-AP-F
Proposed Amendment to Rule 42

Dear Committee Members:

To address the growing problem posed by frivolous objections to class action settlements approved by district courts, I write in support of the proposed amendment to Federal Rule of Appellate Procedure 42 submitted by Professors Fitzpatrick, Wolfman and Morrison. (*See* letter to Hon. Steven M. Colloton from Brian T. Fitzpatrick, *et al.*, dated August 22, 2012.) This amendment would prohibit objectors from dismissing their appeals in exchange for money, thus eliminating any incentive to file baseless appeals.

As attorneys who regularly represent plaintiff classes, I am keenly aware that the lure of cash payments is, to some class members and their counsel, an irresistible attraction to file a baseless objection and ensuing appeal. Without affording any benefit to the class as a whole, these appeals needlessly delay class distributions, impose additional defense costs, extort cash payoffs, and burden the courts of appeals. The proposed amendment would rid class litigation of these harms without any of the drawbacks of other potential solutions.

The Problem

The need for this proposed reform is great and urgent. The practice of extorting payments in exchange for dropping appeals is epidemic. Today, meritless objections to class settlements, and appeals from the denial of these objections, are filed in virtually every large class action.

Many are formulaic, filed by serial, or "professional," objectors who ply their trade by recycling tired objections from those filed in other actions.[1]

Frivolous objections to settlements made at the district court level are not the problem – those objections are dealt with swiftly and do not cause much delay. The intent of a professional objector, however, is not to succeed at the district court level, but rather to preserve the objection to use as leverage during a long, drawn-out appeal period. Unless these objections are promptly resolved, an inevitable consequence is unwarranted delay in achieving the objective of class actions: to compensate injured class members. Class members who file frivolous appeals know that their actions delay distribution of settlement proceeds to deserving class members – and exploit the fact that the prospect of delay places substantial pressure on class counsel to resolve their objections, regardless of merit.

The resolution these objectors invariably seek is a cash payment from class counsel – or, rarely, defendants – in exchange for abandoning their challenges. And too often they succeed in exacting a payment, because paying off the objector is the only way to avoid further delay. This "objector blackmail," as the practice has been called,[2] rewards only those class members who hold the litigation and release of settlement funds hostage. Unless remedied, this practice will continue to subordinate the interests of the class to those of a few selfish members. Current law allows it to flourish.[3]

Not only does objector blackmail delay class relief and burden class counsel, it also subverts the orderly process of adjudicating class actions as contemplated by the civil and appellate rules. While objections well-grounded in law and fact serve a salutary purpose consonant with the goals of class litigation, conferring a benefit on the entire class, sham co-opt

[1] Serial objection by template has not escaped judicial attention. *See, e.g., In re Initial Public Offering Sec. Litig.*, 671 F.Supp.2d 467, 497 n. 219 (S.D.N.Y. 2009) (noting that an objector had been criticized by other courts for submitting "canned objections"); *Shaw v. Toshiba Am. Information Sys., Inc.*, 91 F. Supp. 2d 942, 973-74 & n.18 (S.D. Tex. 2000) ("[S]ome of the objections were obviously canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests....").

[2] *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009).

[3] Numerous courts have recognized the abuse by blackmailing objectors. *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"); *Trombley v. Bank of America Corp.*, No. 08–CV–456, 2011 WL 3740488, at * 5 (D.R.I. Aug. 24, 2011) ("Courts have recognized the problems caused by so-called professional objectors, who assert meritless objections in large class action settlement proceedings to extort fees or other payments."); *In re United Health Group Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009) (finding that the objectors' "goal was, and is, to hijack as many dollars for themselves as they can wrest from a negotiated settlement."); *O'Keefe v. Mercedes–Benz U.S.A., LLC*, 214 F.R.D. 266, 295 n. 26 (E.D. Pa. 2003) ("Federal courts are increasingly weary of professional objectors."); *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"); *Snell v. Allianz Life Ins. Co.*, 200 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").

class litigation and defeat its ends. Their proponents are parasitic interlopers who pursue private agendas at odds with the true work of class litigation. Without providing any value to other class members, they clog court dockets, multiply litigation costs, and deprive defendants of the finality they bargained for.

The Proposed Solution

The proliferation of baseless objections cries out for a solution that effectively deters them without also discouraging valid objections.[4] The proposed amendment to Rule 42 would accomplish this goal by prohibiting objectors from dismissing their appeals in return for remuneration – something not sought by legitimate objectors. The amendment would add the following new section to the existing rule:

> (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.

The proposed language would achieve its objective in two ways. First, by requiring the court of appeals to approve the dismissal of any appeal from a class action settlement, the proposed amendment would bring all objection withdrawals into the light of judicial scrutiny, regardless of procedural stage. The change would mirror the 2003 amendment to Federal Rule of Civil Procedure 23, which requires district courts to approve the withdrawal of any objections to class action settlements. *See* Fed. R. Civ. P. 23(e)(5). Because the amended Rule 23 does not reach the withdrawal of objections on appeal, objectors who wish to extort a payment need only wait to appeal. Amending Rule 42 as suggested would close this loophole.

Second, by conditioning approval of dismissal on a certification that no money changed hands, the new rule would abolish the blackmail incentive altogether. With the lure of a monetary side-deal gone, illegitimate objectors will have no reason to pursue an objection, while objectors truly concerned with the merits of their challenges will remain motivated to have them adjudicated.

Imposing this requirement uniformly on all objections does not penalize meritorious ones. It merely ensures that dropping an appeal will not confer a private benefit on the appellant,

[4] Other proposed solutions have proved ineffective or risk tarring all objections with the same brush. These solutions (e.g., imposing sanctions for frivolous objections and appeals, requiring objectors to post bonds to appeal, and accelerating the payment of fees to class counsel) are thoroughly discussed in Brian T. Fitzpatrick, *supra* n.1, and will not be covered here.

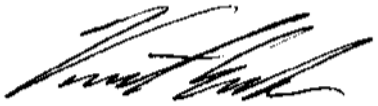
and that—consistent with the purposes underlying Rule 23—the terms of any agreement resolving the appeal will benefit the class as a whole.

It is important to recognize what the proposed amendment would not change. In contrast to a cash payment from class counsel or a defendant, an objector who incurs attorney's fees and costs in connection with reaping a benefit to the class is entitled to be reimbursed even when an appeal is dismissed. Federal courts widely recognize the authority of district courts to award fees and costs.[5] The proposed amendment would not preclude an award of fees and costs to an objector whose challenge has bestowed a benefit on the class. The rule is aimed only at eliminating private gain.

For these reasons, I respectfully urge the Committee to recommend adoption of the proposed amendment to Rule 42.

Very truly yours,

HEINS MILLS & OLSON, P.L.C.



Vincent J. Esades

c: Prof. Catherine T. Struve
(Email: cstruve@law.upenn.edu.)

[5] *See, e.g., Rodriguez v. Disner*, 688 F.3d 645 (9th Cir. 2012).

Federal Judicial Center Exploratory Study of the Appellate Cost Bond Provisions of Rule 7 of the Federal Rules of Appellate Procedure

Results of a Three District Exploratory Study and Proposal for Further Study
Presented to the
The Advisory Committee on Appellate Rules
of the Judicial Conference of the United States

Marie Leary

Federal Judicial Center
April 2008

Contents

I. Introduction

At its Fall 2007 meeting, the Appellate Rules Advisory Committee [the Committee] discussed the current circuit split over whether Federal Rule of Appellate Procedure 7 [FRAP 7] authorizes the inclusion of attorney fees in a bond for costs on appeal. This item has been brought back before the Committee as it determines whether, in light of recent case law developments, to proceed with a proposed amendment approved by the Committee in 2003 which made clear that FRAP 7 bond "costs" do not include attorney fees.

Before proceeding, the Committee requested that the Federal Judicial Center [FJC] consider the possibility of empirical research on FRAP 7 bond activity in the federal courts. This report[1] describes an exploratory study undertaken by the FJC of FRAP 7 bond activity in three federal district courts: the Southern District of New York [NYS], the Central District of California [CAC], and the Eastern District of Michigan [MIE]. These districts are in circuits that permit attorney fees to be included in FRAP 7 cost bonds.

Although data from only three districts were examined, we learned that data pertaining to the bond amount, the components comprising the bond amount including attorney fees, and the authority for their inclusion cannot be retrieved from docket reports alone. Thus, one of the first lessons of the exploratory study is that the best approach to conducting empirical research on this issue is to sample cases with FRAP 7 bonds in a sample of the districts selected based on FRAP 7 circuit law. Focusing on a limited number of districts will facilitate obtaining motions papers and orders from the courts, without which many of the questions raised by the Committee cannot be answered.

II. Limitations of Exploratory Study and Possible Questions for Further Research

In order to decide whether or not to adopt the Center's recommendation for further research, the Committee must first decide which type of empirical data on FRAP 7 cost bonds will be most useful to it as it moves forward in its deliberations on this issue.

The first step in the exploratory study was to identify cases with at least one motion or sua sponte order to impose a FRAP 7 bond for anticipated costs on appeal. An electronic search of the CM/ECF replication databases[2] for NYS, CAC and MIE for fiscal years 1996 through 2006 produced relatively low numbers of cases in each district: 20 cases in NYS, 9 in CAC, and 13 in MIE. In terms of overall appellate activity in these districts, these figures represent much less than one percent of all appeals in the study period. The search also identified a few cases in each district that were possible FRAP 7

[1] Other members of the Research Division of the Federal Judicial Center who have contributed to this report include Emery G. Lee III, George Cort, and Thomas E. Willging.

[2] The search terms used were "FRAP 7" OR "F.R.A.P. 7" OR "Rule 7" OR "F.R.App. P. 7" OR "Fed. R. App. P. 7" OR ("Bond" AND "Cost") OR ("Bond" AND "Appeal") OR ("Bond" AND "Appell") OR "Federal Rule of Appellate Procedure 7" (with a "hit" for any docket entry including any of the terms or pairs of terms). For a detailed description of the process used to identify the sample of cases in the exploratory study, *see* Appendix I Methods.

cases, but these cases could not be positively identified as including FRAP 7 motions without access to case documents.

Automated docket-level data was then collected for this small sample of cases, employing the protocol described in this report. However, much of the information needed to answer the Committee's questions with respect to FRAP 7 bonds was not available from the brief docket entries. For example, questions with respect to the reasons for the bond offered in FRAP 7 motions and the authority judges relied upon to include components such as attorney fees in the FRAP 7 bond amount can only be answered if the specifics of the motions and rulings are available. In most cases, the motions papers and orders were not available in CM/ECF.

Assuming that it is this more substantive data on FRAP 7 motions and bonds that the Committee is ultimately interested in, the FJC would recommend limiting the number of districts studied to a manageable sample of districts purposefully chosen on the bases of FRAP 7 bond-specific considerations. The selection of the study would begin by including districts in circuits permitting attorney fees to be included in a FRAP 7 bond amount[3], districts in circuits that do not permit attorney fees to be included in a FRAP 7 bond[4], and districts in circuits that have not addressed whether attorney fees should be included in a FRAP 7 bond. Selection of districts could also take into account the number of appeals and the prevalence of class action filings in the district to name a few relevant considerations. For this limited sample, the Center would then attempt to obtain all of the needed documents not available through PACER from the districts. This would allow for a more in-depth comprehensive study of the FRAP 7 activity in these chosen districts in order to best address the Committee's primary question of whether and when attorney fees are included in bonds and what are the rationales for including such fees.

Keeping in mind the Center's resource limitations and the Committee's time constraints, it may also make sense to decrease the study period to FRAP 7 activity in cases filed between fiscal years 2001 and 2006. Recent cases are more likely to produce data on contemporary conditions and practices and are also more likely to have electronic document links available under CM/ECF. One obvious drawback to proceeding in this manner is the time that it will take for the sample districts to respond to the requests for documents.

This proposal assumes that the Committee's primary interest is to learn about whether attorney fees were included in bond requests and the reasons for including or not including attorney fees in FRAP 7 bonds and to compare the experiences of districts in circuits with different rules. On the other hand, the Committee's ultimate goal may be to gain comprehensive national data on procedural issues associated with FRAP 7 bonds, such as:

- the frequency with which FRAP 7 motions have been made and granted in the district courts,
- the types of cases where FRAP 7 activity arise,
- the types of parties making motions for and subject to FRAP 7 bond, or
- the final outcomes of the appeals for which a FRAP 7 bond was granted or

[3] Second Circuit, Sixth Circuit, Ninth Circuit, and Eleventh Circuit.
[4] D.C. Circuit and Third Circuit.

denied.

An alternative approach then would be to design a study that focuses on the requests and orders for a FRAP 7 bond and that describes the procedural progress of the appeal, rather than one that focuses on the rationale for and the components of the bond that was requested and ordered. Following this approach, we would include the majority of or all of the districts in the initial phase one search for cases with FRAP 7 activity. Once our database of cases is identified, we would limit the data collection in phase two (as was done in the exploratory study) to information found in docket entries and any documents available through PACER. The advantages of this approach are that it would be less resource intensive in that the information would all be derived from PACER and since the data collected is procedural in nature, the error rate due to inter-coder reliability would be relatively lower.

III. The Exploratory Study: The Research Data Collection Protocol[5]

In addition to the question of the frequency of FRAP 7 activity, other issues raised at the Committee's discussion at the Fall 2007 meeting included:

- the types of cases FRAP 7 bonds are required in,
- types of litigants required to pay a FRAP 7 bond,
- the frequency with which a court imposes a FRAP 7 bond,
- the total amount of the bond and what components comprise this total, and
- whether attorney fees were included in the bond amount.

After identifying cases in the three exploratory study districts that appeared to have FRAP 7 bond activity, we then collected as much relevant data as were electronically available on each case for further analysis using the protocol described below. A FileMaker® database was created from this protocol to allow the coder to record the information in a database for further analysis.

Part One of the protocol collects identifying information for each case such as caption, district, docket number, nature of suit, filing and closing dates, case origin, jurisdiction, disposition of the case and procedural progress at disposition.

Part Two of the protocol relies upon information derived from docket entries as well as available relevant documents such as motions, responses and rulings. Given the time constraints, the data inputted for the exploratory study from the cases identified in NYS, CAC and MIE came exclusively from docket entries and relevant documents immediately available through PACER. We found that the information needed to answer the questions of most interest to the Committee is usually found in the full motions and rulings and cannot be adequately derived from docket entries alone. Thus, the exploratory study was limited in its access to key documents for most of the cases analyzed.

Part Two of the protocol focused on the motion for a FRAP 7 bond[6]. Information was gathered on the identity of the party (ies) who filed the motion and whether the party

[5] *See* Appendix II: Draft Protocol for Further FJC Study of FRAP 7 Appellate Cost Bonds [on file with the author].

sought IFP status in either the district or appellate court. We captured information about the party opposing the motion. We also coded whether the case was filed as a class action, if so whether it was certified, and the type of judgment that was appealed. Where available, we also coded reasons for bringing the FRAP 7 bond motion. The response categories include those factors most courts list when deciding whether or not to impose a FRAP 7 bond. The final series of questions pertaining to the motion relate to the requested bond amount and whether the motion indicated if the amount requested included or should include: (1) costs attributable to a possible stay of the judgment being appealed (such as costs, attorney fees, and sanctions included in or interest on the underlying judgment)[7]; and/or (2) anticipated costs attributable to the appeal itself (such as specific costs, attorney fees, and sanctions incurred as a result of the appeal or additional costs from delay/disruption of settlement fund administration). If the information was available, we coded, the amount attributable to and authority cited for each separate component of the total requested bond amount.

Section C pertains to the ruling on the motion and includes questions on the bond amount. A final question asks whether the court stated its reasons for its ruling—either denying the request, granting the request for the amount stated in the motion, or granting the motion but increasing or decreasing the amount of the bond required.

If the ruling on the FRAP 7 bond motion was appealed by either party, our data protocol contained the same series of questions on the court of appeals ruling as pertained to the district court's ruling on the original motion. Finally, we coded information regarding:

- whether or not the bond was ever filed (if ordered), what the final outcome of the appeal was for which the FRAP 7 cost bond was requested,
- how costs were treated at the end of the appeal, and
- whether any sanctions were imposed against either party to the FRAP 7 cost bond before, during or after the appellate proceedings.

[6] If more than one motion or sua sponte order for a FRAP 7 cost bond is filed with respect to a given appeal, only the information from the last motion or order filed and ruled on is used to answer the questions in Part Two of the protocol. However, if FRAP 7 bonds were either required or requested with respect to more than one appeal in the same case, a separate record will be created for each appeal.

[7] Technically, this first set of costs attributable to a possible stay of judgment should not be included in FRAP 7 cost bonds, though they might be eligible for inclusion in a bond required under Federal Rule of Civil Procedure 62 and/or FRAP 8. But in her extremely helpful and thorough review of the protocol in its draft stages, Professor Struve pointed out that it makes sense to code for both sets of costs since some courts erroneously include some items in FRAP 7 bonds that they technically shouldn't include (because they are not costs "on appeal"). Further, she noted that if a party moves for a stay of the underlying judgment pending appeal, and a court requires both a supersedeas bond in connection with the stay under FRCP 62 and/or FRAP 8 and a FRAP 7 bond for costs on appeal, the court might include the amounts attributable to both of these in one single bond.

IV. Exploratory Study: Summary of Findings

Given the small number of FRAP 7 cases identified in the exploratory study[8], the following findings are limited to a description of the sampled cases only. These findings cannot be generalized to the population of FRAP 7 cases, even in the three study districts. In other words, the following discussion is intended only to illustrate the kind of data and questions that an expanded research proposal might address.

The most consistent finding is that motions and sua sponte show cause orders to impose FRAP 7 bonds were rare in the three districts, both in absolute numbers (43) and in percentage of appeals that involved FRAP 7 motions. The percentage of appeals that involved such requests or orders ranged from 0.05 percent to 0.15 percent. In other words, FRAP 7 activity occurred at a rate of between 5 and 15 times per 10,000 appeals in the three districts over the ten-year period from 1996 to 2006.

Again, bearing in mind the limitations of our exploratory study, the small number of appeals (N=43) with definite FRAP 7 activity and the lack of available documents, other findings were:

- FRAP 7 bonds were more likely to be imposed in response to requests in class action litigation (80% of requests (N= 8)) than in all appeals (51% (N=17)).
- Securities, intellectual property, civil rights, and contracts cases were the largest categories of cases with FRAP 7 motions or sua sponte orders; securities and antitrust cases accounted for eight of the ten class actions examined.
- Defendants were slightly more likely than plaintiffs to be the party moving for a FRAP 7 bond in non-class action appeals; in class action appeals, FRAP 7 activity most often took the form of a motion by plaintiffs or a joint motion.
- Represented individual litigants and corporate entities comprised most of the FRAP 7 movants. Individual litigants were slightly more likely to have their requests granted. Class representatives had by far the highest success rate, with 86% of their motions granted.
- Targets of motions in class actions were most often interveners or objectors (80% (N=8)). In non-class litigation, plaintiffs were more than twice as likely as defendants to be the targets of FRAP 7 motions. Three appellants subject to FRAP 7 motions filed for IFP status in both the district and appellate courts; two motions were granted and one was denied in both courts.
- Three motions targeted prisoners proceeding pro se and two of those motions were granted—again as with IFP motions, the numbers are too small to support any generalizable conclusion.
- The average bond amount sought was $65,869 for all cases for which information was available (56% (N= 24)) and the average sought for seven certified class action appeals was $113,378. Components of those requests were most often attorney fees and other costs incurred or anticipated as a result of the appeal.
- For the twelve cases in which information was available, courts granted the full request in three cases; reduced the request in seven cases; and doubled the request

[8] For a detailed description of the process used to identify the sample of cases in the exploratory study, *see* Appendix I Exploratory Study Methods.

in two cases. All but one of those bonds was based on anticipated costs and attorney fees during the appeal. In two class action appeals, substantial portions of bonds of hundreds of thousands of dollars were attributable to anticipated delays and increased costs in administering a class settlement.

- Judges cited fee-shifting statutes as the authority for five of seven cases for which information was available. Judges cited sanctioning power as the authority in two cases.
- FRAP 7 bonds were challenged on appeal in six instances. None of the appeals was successful in overturning the imposition of the bond itself.
- Evidence regarding posting of bonds was only available in about half of the cases. In cases with available information the bond was usually posted in full, but in a few instance, a partial bond was posted without explanation.
- Only one of the underlying appeals resulted in vacating an order and remanding the case to the district court. All other appeals concluded with affirmances of the district court, dismissal on procedural grounds, or voluntary dismissal. Cases in which a bond had been imposed fared no better or worse than cases in which no bond was imposed. In one class action appeal, an objector voluntarily dismissed the appeal after being ordered to pay a $1,240,500 bond.

A. FRAP 7 Motions Brought and Granted

FRAP 7 bonds were more likely to be imposed in response to requests in class action litigation than in all appeals. Table 1 below presents a breakdown of the number of FRAP 7 motions brought and granted in all three districts in the exploratory study and by individual district. The data appear to show that in 25 appeals from all three districts (58%), the court granted a party's motion or sua sponte ordered a FRAP 7 cost bond: 55% of the appeals from NYS, 46% from MI-E and 80% of the appeals from CAC. In the ten certified class actions in the exploratory study, FRAP 7 motions or show cause orders were granted in 80% of the appeals as opposed to 51% of the non-class action appeals.

Table 1. FRAP 7 Motions and Show Cause Orders, by District and Class Certification Status

	Motions/Show Cause Orders	Sua Sponte Granted	Motion Granted	Percentage[1]
All	43[2]	4	21	58
NY-S	20	4	7	55
MI-E	13	0	6	46
CA-C	10	0	8	80
Class Actions[3]	10	1	7	80
NY-S	5	1	3	80
MI-E	2	0	1	50
CA-C	3	0	3	100
Non-Class Actions	33	3	14	51
NY-S	15	3	4	47
MI-E	11	0	5	45
CA-C	7	0	5	71

[1] Percentage of appeals in the category in which a FRAP 7 motion was granted or in which the court ordered a FRAP 7 bond sua sponte.

[2] There were 41 unique cases with FRAP 7 motions associated with one appeal per case. One case in CAC involved FRAP 7 motions associated with two unique appeals, thus this case is counted twice since the studies' unit for analysis is the appeal and not the case.

[3] There were class allegations in 11 of the cases giving rise to the sampled appeals, but class certification was granted in 10 of the underlying cases.

B. Types of Cases with FRAP 7 Activity

Securities, intellectual property, civil rights, and contracts cases were the largest categories of cases with FRAP 7 motions or sua sponte orders; securities and antitrust cases accounted for eight of the ten class actions examined. As shown in Table 2 below, securities and intellectual property cases comprise the largest nature of suit groupings of cases identified as having FRAP 7 activity in our three pilot districts (a combined 38% of all appeals). Civil rights and contract cases are the next large categories (28% combined). This pattern is also present in the individual district breakdowns, except for MIE where torts and "other" cases share in the largest nature of suit categories with civil rights cases. For the ten certified class actions among the 43 cases identified as having FRAP 7 activity, six (60%) of them were securities cases followed by two antitrust cases and one

each civil rights and torts case. Focusing on the 25 appeals in which a FRAP 7 bond was ordered, the largest single nature of suit grouping is securities cases (24%) followed by civil rights and contracts cases (16% each) and intellectual property cases (12%).

Table 2. Nature of Suit by District of Cases with FRAP 7 Activity

	NY-S	MI-E	CA-C	Percentage[1]
All appeals	**20**	**13**	**10**	**100**
Antitrust	1	1		5
Bankruptcy Appeal	1			2
Civil Rights	3	2	1	14
Contracts	3	1	2	14
ERISA		1		2
Fraud		1		2
Intellectual Property	6		2	19
Prisoner Civil Rights		1	1	5
Prison Conditions	1			2
RICO		1	1	5
Securities	4	1	3	19
Torts	1	2		7
Other		2		5
Class Actions[3]	**5**	**2**	**3**	**100**
Antitrust	1	1	0	20
Civil Rights	1	0	0	10
Securities	3	0	3	60
Torts	0	1	0	10
FRAP 7 Bonds Ordered	**11**	**6**	**8**	**100**
Antitrust	1	1	0	8
Civil Rights	1	2	1	16
Contracts	3	0	1	16
Intellectual Property	2	0	1	12
Prisoner Civil Rights	0	1	1	8
RICO	0	1	1	8
Securities	3	0	3	24
Torts	1	0	0	4
Other	0	1	0	4

[1] Percentage of appeals in the nature of suit category from all appeals with FRAP 7 activity, from only certified class actions with FRAP 7 activity, and from only cases where a FRAP 7 bond was ordered.
[2] There were class allegations in 11 of the cases giving rise to the sampled appeals, but class certification was granted in 10 of the underlying cases.

C. Parties Moving for FRAP 7 Bond (Identity of Appellee)

Defendants were slightly more likely than plaintiffs to be the party moving for a FRAP 7 bond in non-class action appeals; in class action appeals, FRAP 7 activity most often took the form of a motion by plaintiffs or a joint motion. Our preliminary data from the 43 appeals with FRAP 7 activity identified from NYS, MIE and CAC shows that the defendant was the party moving for the FRAP 7 bond in 58% of these appeals, 63 percent if one includes joint motions. Further, the defendant was the moving party in 67% of non-

class actions. For class actions, the plaintiff brought the FRAP 7 motion in half of the appeals and the defendant was the moving party in 20% of them; 40% if joint motions are included.

Excluding two joint motions which were granted, the bond was granted in 56% of the appeals in which the defendant was the movant (fourteen out of twenty-five appeals). When the plaintiff was the moving party, the FRAP 7 bond motion was granted in 45% of the appeals (five out of eleven appeals). In class actions, the bond was granted in half of the appeals in which the defendant was the moving party (one out of two appeals) while 80% of the appeals were granted in which the plaintiff was the movant (four out of five appeals). For FRAP 7 bonds ordered in non-class actions, the bond was granted in 59% of the appeals for which the defendant was the movant (thirteen out of twenty-two appeals), and the plaintiff was the movant in 17% of these appeals resulting in a FRAP 7 bond being ordered (one out of six appeals).

Table 3. Parties Moving for FRAP 7 Bond, by District and Class Certification

	NY-S	MI-E	CA-C	All
Total	20	13	10	43[1]
Sua Sponte/Show Cause Order	4	0	0	4
Plaintiff	5	4	2	11
Defendant	11	9	5	25
Joint Motion	0	0	2	2
Intervener/Objector	0	0	0	0
Other	0	0	1	1
Class Actions Total[2]	5	2	3	10
Sua Sponte/Show Cause Order	1	0	0	1
Plaintiff(s)	2	2	1	5
Defendant(s)	2	0	0	2
Joint Motion	0	0	2	2
Intervener/Objector	0	0	0	0
Other	0	0	0	0
Non-Class Actions Total	15	11	7	33
Sua Sponte/Show Cause Order	3	0	0	3
Plaintiff(s)	3	2	1	6
Defendant(s)	9	9	5	22
Joint Motion	0	0	0	0
Intervener/Objector	0	0	0	0
Other	0	0	1	1

[1] There were 41 unique cases with FRAP 7 motions associated with one appeal per case. One case in CAC involved FRAP 7 motions associated with two unique appeals, thus this case is counted twice since the studies' unit for analysis is the appeal and not the case.

[2] There were class allegations in 11 of the cases giving rise to the sampled appeals, but class certification was granted in 10 of the underlying cases.

What types of plaintiffs, defendants, or other parties brought the FRAP 7 bond motions? Represented individual litigants and corporate entities comprised most of the FRAP 7 movants. Individual litigants were slightly more likely to have their requests granted. Class representative had by far the highest success rate, with 86% of their motions granted. Taking into account that more than one party may join a FRAP 7 motion, data for the three pilot districts show that corporate entities (40%) and represented individuals (32%) were the largest groupings by party type moving for a FRAP 7 bond. In the motions where at least one party was a represented individual(s), 52.9% of these motions were granted; 86% of the motions brought by class representatives (all in class action appeals) were granted; 43% of the appeals where the moving party included a corporate entity were granted; and 80% of the motions involving a government party were granted.

D. Parties Subject to FRAP 7 Motion (Identity of Appellant)

Targets of motions in class actions were most often interveners or objectors (80%). In non-class litigation, plaintiffs were more than twice as likely as defendants to be the targets of FRAP 7 motions. The party or parties subject to a FRAP 7 motion in 53% of the 43 unique appeals identified in the pilot districts was the plaintiff(s) followed by the defendant(s) in 26% of the appeals. In the ten certified class actions in the study, it was the intervener or objector as the appellant subject to the bond in 80% of these appeals. Keeping in mind the caveats stated earlier about not extrapolating the findings from these three pilot districts to the broader universe of FRAP 7 motions, our data for the three districts show that in class actions, six of the eight motions brought "against" an intervener/objector party(ies) were granted, for a 75% grant rate. In non-class actions, 12 of the motions "against" plaintiffs were granted, for a 52% grant rate. Two motions "against" defendants were granted, for a 20% grant rate.

Table 4. Parties Subject to FRAP 7 Motion, by District and Class Certification

	NY-S	MI-E	CA-C	All
All appeals	20	13	10	43[1]
Plaintiff(s)	10	8	5	23
Defendant(s)	6	3	2	11
Intervener/Objector(s)	4	2	2	8
Other	0	0	1	1
Class Actions Total[2]	5	2	3	10
Plaintiff(s)	0	0	0	0
Defendant(s)	1	0	0	1
Intervener/Objector(s)	4	2	2	8
Other	0	0	1	1
Non-Class Actions Total	15	11	7	33
Plaintiff(s)	10	8	5	23
Defendant(s)	5	3	2	10
Intervener/Objector	0	0	0	0
Other	0	0	1	0

[1] There were 41 unique cases with FRAP 7 motions associated with one appeal per case. One case in CAC involved FRAP 7 motions associated with two unique appeals, thus this case is counted twice since the studies' unit for analysis is the appeal and not the case.
[2] There were class allegations in 11 of the cases giving rise to the sampled appeals, but class certification was granted in 10 of the underlying cases.

Looking at the types of parties asked to post a FRAP 7 bond from our small universe of districts and keeping in mind that more than one type of party can bring an appeal in a case, it appears that represented individuals (42%), corporate entities (12%) and pro se individuals (19%) were the most likely subject to the bond motion. When the appellant was a represented individual, the bond motion was granted in 45.5% of the appeals; 50% of the appeals in which a pro se individual was the appellant were granted; and 68% of the appeals (two out of three appeals) involving a pro se prisoner subject to the bond were granted. Three appellants subject to the FRAP 7 motion filed for IFP status in both the district and appellate courts. Two of these motions for IFP status filed in the district and appellate court were granted in both courts; one was denied in both courts. Again, we caution against reaching any conclusions from this small number of cases. The fact that two of three FRAP 7 motions "against" pro se prisoners were granted cannot be taken as evidence that this is how often such motions "against" prisoners are typically granted. Three cases is only anecdotal evidence.

E. Amounts Requested in Motions for FRAP 7 Bond

As depicted in Table 5 below, the mean overall bond amount was $65,869 for all cases for which information was available (56% (N=24)), while the overall mean for the seven certified class actions requesting a specific bond amount was $113,378. Components of those requests were most often attorney fees and other costs incurred or anticipated as a result of the appeal.

From the 43 appeals we identified in the three pilot districts as having at least one motion for a FRAP 7 bond, 24 of these appeals (56%) requested that the court require the appellant to post a bond in a specific named amount. Remember that only documents accessible through PACER were relied upon, thus it must be noted that in ten of these 24 cases the information on the bond amount request was obtained solely from the docket not the motion itself.

Table 5. Requested Bond Amounts in FRAP 7 Motions

	Number of appeals requesting specific bond amount	**Mean Bond Amount Requested**
(Overall) Appeals	24	$65,869
NYS	11	$56,627
MIE	8	$73,343
CAC	5	$74,240
(Overall) Class Actions	7	$113,378
NYS	3	$42,636
MIE	2	$223,871
CAC	2	$109,000

F. Components of Bond in FRAP 7 Motion

The protocol asks whether the appellee's FRAP 7 bond motion indicates whether the amount requested included or should include a number of listed components. Responses to this inquiry are very limited because "unable to determine because motion not available" was checked for this question in 67.4% of the 43 FRAP 7 appeals identified in the pilot districts. In those appeals where information about what the movant included in the requested bond amount, or proposed should be included in a bond amount, was discernable from docket information or available motions, costs attributable to a possible stay of the judgment being appealed was a component of the requested bond in only three occurrences. Two of these bond motions included attorney fees awarded in the underlying judgment, and one requested bond amount included sanctions awarded in the underlying judgment.

Bond motions including anticipated costs attributable to the appeal itself were more numerous in comparison. The two components of this category that movants included most often in their bond motions were specific costs incurred or anticipated will be incurred as a result of the appeal itself such as printing or copying costs for trial transcripts (9 or 21% of total appeals) and attorney fees incurred or anticipated as a result of the appeal (11 or 26% of total appeals). When broken out by district and limited to the one-third of all cases for which information was available, 20% of the NYS bond requests included anticipated attorney fees in the bond amount, as did 31% of MIE appeals and 30% of CAC appeals.

Table 6. Components of Requested Bond in FRAP 7 Motions

	NYS (20)	MIE(13)	CAC(10)
Costs attributable to possible stay of judgment being appealed:			
(1) specific costs included in underlying judgment	0	0	0
(2) attorney fees included in underlying judgment	1	1	0
(3) sanctions included in underlying judgment	0	1	0
(4) interest on underlying judgment	0	0	0
(5) other	0	0	0
Anticipated costs attributable to appeal itself:			
(1) Specific costs incurred due to appeal	1	6	2
(2) attorney fees incurred as result of appeal	4	4	3
(3) sanctions incurred as result of appeal	1	2	0
(4) additional costs from delay/disruption	1	2	0
(5) other	0	2	2

G. Amount of FRAP 7 Bonds Granted

What was the correlation between the bond amount requested in the appellee's motion and the amount the court ordered the appellant to pay? For the twelve cases in which information was available, courts granted the full request in three cases; reduced the request in seven cases; and doubled the request in two cases. All but one of those bonds was based on anticipated costs and attorney fees during the appeal. In two class action appeals, substantial portions of bonds of hundreds of thousands of dollars were attributable to anticipated delays and increased costs in administering a class settlement.

Although the court granted a bond request in 25 out of 43 of the appeals identified in the three pilot districts, we only have information on bond amounts granted and ordered for twelve appeals. In NYS, two bond motions were granted at the requested amount, and three were reduced (from $75,000 to $25,000; from $75,000 to $50,000; and from $30,000 to $25,000)[9]. In MIE, one bond was granted in the requested amount, and two were reduced (one substantially from $427,743 to $174,429)[10]. In CAC, two bond requests were reduced (from $50,000 to $6,000[11] and from $100,000 to $5,000[12]), and two were doubled (from $104,000 to $208,000, and from 114,000 to $228,000)[13].

[9] Because the rulings were not available for these appeals, we were unable to research the reasons for the reductions.

[10] Although the amount of the appeal bond granted by the court included specified costs ($1,000), anticipated attorneys fees ($50,000) and administrative costs for delay ($123,000), the court reduced the requested bond amount in light of the plaintiffs motion for an expedited appeal that the objector/appellant assured the court she would not oppose which decreased the anticipated delay from 16-months to a projected 6-months. *See* Sams v. Hoechst, No. 99-73190 (E.D. Mich. June 25, 1999) (Corrected Order No.82 Granting Plaintiffs' Motion for Imposition of an Appeal Bond Under FRAP 7) (part of *In re:* Cardizem CD Antitrust Litig., No. 99-1278 (E.D. Mich. June 25, 1999). On appeal, the Sixth Circuit upheld the $174,000 appeal bond that included anticipated attorneys' fees and administrative costs for delay. *In re* Cardizem CD Antitrust Litig., 391 F.3d 812 (6th Cir. 2004).

[11] Even though court alluded to frivolousness of the appeal in granting the bond request, court refused to order plaintiff to post a $50,000 appeal bond as requested because it would not serve the interests of justice since the court denied the plaintiff's motion to proceed ifp on appeal. Lewis v. Bayh, No. 04-2950 (C. D. Cal. Feb. 26, 2007) (Order Granting Defendant's Motion to Require Appellant to File a Bond to Ensure Payment of Costs on Appeal).

[12] The party who brought FRAP 7 motion requested a $100,000 bond amount including: (1) $20,000 in anticipated attorney fees; (2) $1,697.20 for transcripts for the appeal already incurred; (3) $500 for anticipated costs for an additional transcript; (4) $10,000 for anticipated costs of the appeal. The court ruled that the bond amount could not include attorneys' fees because they are not defined as costs under the Lanham Act thus these anticipated fees can't be included in a FRAP 7 bond. The court further found that defendants did not prove how they came up with the requested bond amount. BRWC LLC v. Van De Water, No. 04-466 (C.D. Cal. July 28, 2006) (Order Granting Defendant's Motion to Require Appellant to Post Bond for Costs and Attorney's Fees on Appeal).

[13] In both appeals the court doubled the requested bond amount as sanctions against the objector and the co-counsel law firm for filing meritless and frivolous appeals. *In re* Heritage Bond Litig., 2005 WL 2401111 (C.D. Cal. Sept. 12, 2005). The inclusion of attorney's fees in the FRAP 7 bond amount was overturned on appeal since the court found the underlying statutes (provisions of PSLRA) were not fee-shifting statutes that defined costs as including attorney's fees. 233 Fed.Appx. 627, 2007 WL 1340633 (9th Cir. May 8, 2007).

H. Components of Granted FRAP 7 Bond Amounts

We had access to the ruling in only eleven of the 43 appeals in which the court ordered a bond so our ability to present an accurate summary of what courts included in the final bond amount is very limited. Only one appeal from NYS included costs attributable to the underlying judgment in the final bond amount[14]. Anticipated costs on appeal (seven appeals) and attorney fees anticipated on appeal (all eleven appeals) were the two components included most often in the bond amount ordered. When specified in the ruling, authority for including specific costs in the bond amount was FRAP 39 in all three districts. Anticipated named costs on appeal included printing and copying costs, filing and brief preparation costs, and costs for the trial transcript.

Table 7. Components of FRAP 7 Bonds Ordered by Court

	NYS (20)	MIE(13)	CAC(10)
Costs attributable to possible stay of judgment being appealed:			
(1) specific costs included in underlying judgment	1	0	0
(2) attorney fees included in underlying judgment	0	0	0
(3) sanctions included in underlying judgment	0	0	0
(4) interest on underlying judgment	0	0	0
(5) other	0	0	0
Anticipated costs attributable to appeal itself:			
(1) Specific costs incurred due to appeal	2	2	3
(2) attorney fees incurred as result of appeal	3	3	5
(3) sanctions incurred as result of appeal	0	0	3
(4) additional costs from delay/disruption	0	1	1
(5) other	1	1	0

Judges cited fee-shifting statutes as the authority for five of seven cases for which information was available. Judges cited sanctioning power as the authority in two cases. In NYS, the authority cited in the only ruling available among the three appeals which included attorney fees in the bond amount was Title VII as the fee-shifting statute authorizing attorney fees as part of recoverable costs under the rational of *Adsani v.*

[14] The court ordered the plaintiff to post a $7,500 bond to cover the judgment for the costs already incurred ($4,057) and anticipated costs of opposing the appeal. Green v. Doukas, No. 97-8288 (S.D. N.Y. Nov. 7, 1997) (information obtained from docket). The Second circuit refused to vacate the district court's order holding that the district court did not act improperly in including these costs in the amount of the bond to be posted pursuant to FRAP 7. Green v. Doukas, No. 02-7136 (2d Cir. July 1, 2003) (information from docket).

Miller[15]. In MIE, one case relied on the fee-shifting statute rationale explained in *Adsani* and *Pedraza;* however, one case included attorney fees under the court's inherent power to sanction a party for acting in bad faith. The court stated that it is within the court's discretion to include attorney fees in a cost bond when district court judge has determined the appeal to be frivolous.[16] In CAC, the fee-shifting statute rationale was the authority cited in three of the available rulings including attorneys' fees in the FRAP 7 bond. However, one case included attorney fees resulting from the appeal to cover a potential FRAP 38 award following a potential finding of frivolousness under 28 USC 1927.[17] After a settlement was reached in this securities fraud class action, class plaintiffs moved to require the objectors to post an appeal bond after objectors appealed the court's judgment. The court ordered a bond of $1,240,500, which was never posted; the appeal was voluntarily dismissed by the appellant. Note that the Ninth Circuit has since held in *Azizian v. Federated Dep't Stores, Inc.*[18] that a district court cannot include appellate attorneys' fees that might be awarded if the court of appeals holds that the appeal was frivolous under FRAP 38.[19] Thus, the three CAC appeals where the court included amounts for sanctions the court anticipated would be awarded against the appellant on appeal under FRAP 38 and 28 USC 1927 would no longer be permitted[20].

Two accessible rulings granting FRAP 7 bonds included anticipated additional costs from delay or disruption of the settlement fund administration in the bond amount. A MIE appeal bond of $174,429 included $123,429 for increased administrative costs incurred in the disbursement of the settlement funds due to the delay caused by objector's appeal.[21] The CAC district court decided that costs of delay and disruption of the settlement administration process (determined to be $517, 700) should be included in the FRAP 7 bond amount under a broad interpretation of FRAP 7 in the class settlement

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[15] 139 F.3d 67 (2d Cir. 1998). Watson v. E.S. Sutton, Inc., No. 02-2739 (S.D. N.Y. Dec. 6, 2006) (Interim Order).

[16] Horacek v. Hawkey, No. 01-71674 (E.D. Mich. Aug. 18, 2003) (Order Granting Defendant's Motion For Bond For Costs on Appeal).

[17] Kurtz v. Broadcom, No. 01-275 (C.D. Cal. Dec. 5, 2005) (Order Granting Class Plaintiff's Motion To Require Appeal Bond). The court decided the amount of bond should include attorney's fees to defend the appeal under FRAP 38 (to cover a potential FRAP 38 award) and under a potential finding of frivolousness under 28 USC Sec. 1927 and an amount to secure potential double costs for frivolous appeal under FRAP 38.

[18] 2007 WL 2389841 (9th Cir. Aug. 23, 2007).

[19] *Id.*, at *1.

[20] *In re* Heritage Bond Litig., 2005 WL 2401111 (C.D. Cal. Sept. 12, 2005) (The district court granted the lead plaintiffs motion (in a securities class action that had settled) to impose a FRAP 7 bond on : (1) co-counsel law firms that had appealed the award of attorneys' fees to ensure payment of the anticipated award of fees and costs on appeal and as a sanction of filing an unfounded and meritless appeal; court awarded two times requested amount of $104,000=$208,000; (2) an objector to the global settlement in the class action to provide some level of security to lead plaintiffs in light of frivolousness of objector's appeal; court awarded two times requested amount of $114,000=$228,000.); Kurtz v. Broadcom, No. 01-275 (C.D. Cal. Dec. 5, 2005) (Order Granting Class Plaintiff's Motion To Require Appeal Bond) (Court decided amount of bond should include, in addition to other components, an amount ($620,250) to secure potential double costs for a frivolous appeal under FRAP 38.)

[21] *See* Sams v. Hoechst, No. 99-73190 (E.D. Mich. June 25, 1999) (Corrected Order No.82 Granting Plaintiffs' Motion for Imposition of an Appeal Bond Under FRAP 7) (part of *In re:* Cardizem CD Antitrust Litig., No. 99-1278 (E.D. Mich. June 25, 1999). On appeal, the Sixth Circuit upheld the $174,000 appeal bond that included anticipated attorneys' fees and administrative costs for delay. Court found that the FRAP 7 bond serves purpose of a supersedeas bond since objector's appeal stays judgment. *In re* Cardizem CD Antitrust Litig., 391 F.3d 812 (6th Cir. 2004).

context. Adopting the rationale of *In re Cardizem*, the court found that the FRAP 7 bond serves the purpose of a supersedeas bond since the objector's appeal effectively postpones distribution of the entire judgment over a year.[22]

I. Appeal of the Bond Order

FRAP 7 bonds were challenged on appeal in six instances. None of the appeals was successful in overturning the imposition of the bond, although the amount was successfully challenged in one case. The courts' order for appellants to post a FRAP 7 bond before proceeding with their underlying appeal was itself appealed in six of the 25 underlying appeals where such a ruling was made. A pro se plaintiff was the appellant in three of these six appeals. In five of the six appeals, the district court's decision to impose the bond was upheld; in one case the appeal of the bond and the underlying appeal were dismissed on other procedural grounds and the bond was not paid. In three of the five cases where the bond was upheld on appeal, the appellate court upheld the amount of the bond as ordered by the district court. In one case, the Federal Circuit upheld the bond in the amount of $500, reduced significantly from the $25,000 plaintiff was ordered to pay in the district court. However, this reduction did not occur as a result of an appeal of the bond by the appellant but as a result of a motion to dismiss by appellees' for plaintiff's failure to pay the bond as ordered. The appellant paid the $500 bond and the underlying appeal proceeded. The reasoning behind the reduction of the bond was not discernible because the appellate court order was not available.[23]

The appellate court's reasoning for upholding the bond on appeal was available in only two of the appeals, both of which focused on analysis of whether the underlying statute allowed fee-shifting. In a MIE class action, the Sixth Circuit upheld the district court's decision ordering an objector to pay a $174,429 bond, including anticipated attorneys' fees.[24] When the appellant failed to pay the bond, the appeal was dismissed. After an objector in a class action appealed the order by the CAC district court to pay a $228,000 FRAP 7 bond, the Ninth Circuit upheld the imposition of the bond but vacated and remanded for recalculation of the FRAP 7 bond without inclusion of attorneys' fees holding that FRAP 7 does allow a district court to impose a bond that includes attorneys' fees as "costs" if there is an applicable fee-shifting statute in the underlying action that specifically defines costs to include attorney fees. However, the court found that provisions of the PSLRA that contemplated award of attorney fees to a successful plaintiffs' attorney were not fee-shifting statutes that defined costs as including attorney fees.[25] The underlying appeal is still pending.

J. Posting of FRAP 7 Bond

Evidence regarding posting of bonds was only available in about half of the cases. In cases with available information the bond was usually posted in full, but in a few instance, a partial bond was posted without explanation. Our data shows that in ten

[22] Kurtz v. Broadcom, No. 01-275 (C.D. Cal. Dec. 5, 2005) (Order Granting Class Plaintiff's Motion To Require Appeal Bond).
[23] Abraskin v. Caldor-Store 75, No. 98-3835 (S.D. N.Y. May 29, 1998), *affirmed on appeal sub nom*. Abraskin v. Entrecap Corp., No. 99-1510 (Fed. Ct. App. Aug. 1, 2000).
[24] *In re* Cardizem CD Antitrust Litig., 391 F.3d 812 (6th Cir. 2004).
[25] *In re* Heritage Bond Litig., 233 Fed.Appx. 627, 2007 WL 1340633 (9th Cir. May 8, 2007).

appeals out of the 12 appeals where information was available and where the court ordered a bond to be paid, the appellant posted the bond in full. In two appeals, the bond was paid in less than the full amount ordered[26]. No evidence regarding payment was found in the docket or other available documents in the other thirteen cases where a FRAP 7 bond was ordered. See Table 8 below for a district breakdown of the payment of ordered bonds. For the eight appeals identified as certified class actions in which the court ordered a FRAP 7 bond, the appellant posted the bond in full as ordered in three appeals; and paid an amount less then the amount ordered in two appeals. No evidence of payment was available for the remaining three class actions ordered to post an appellate bond.

Table 8. Posting of FRAP 7 Bond

	NYS	MIE	CAC
Overall FRAP 7 Bonds Ordered:	11	6	8
Bond Posted in Full	6	2	2
Bond Posted in Less Than Full Amount	2	0	0
FRAP 7 Bonds Ordered in Class Actions:	4	1	3
Bond Posted in Full	2	1	0
Bond Posted in Less Than Full Amount	2	0	0

K. Final Outcome of Appeal

Overall, 19 (44%) of the 43 appeals for which a FRAP 7 cost bond was requested proceeded to a decision on appeal—18 (42%) of these were affirmed by the appellate court and one was vacated and remanded to the district court. Overall, 18 (42%) of all appeals were dismissed. Four of these were dismissed because the appellant failed to pay the bond as ordered.[27] The other fourteen appeals (33%) were dismissed on other procedural grounds (4), on appellee's motion (2) or voluntarily by the appellant (8). Of the eight cases voluntarily dismissed by the appellant, a FRAP 7 bond was ordered in three cases, the court denied the FRAP 7 motion in three cases, the FRAP 7 motion was withdrawn in one case and it is unclear from the docket or available records whether the

[26] In one NYS appeal, a $70,000 bond was ordered; the defendant posted a $50,000 bond (no reason given for reduced payment in record or available documents). In another NYS case, plaintiff and his attorney were ordered to pay a $65,000 bond; the attorney paid his ordered portion of $15,000 but the plaintiff did not post the remaining $50,000 (no reason given for reduced payment in record or available documents).

[27] Second Circuit dismissed a NYS appeal (class action) after objector failed to pay the $25,000 FRAP 7 bond as ordered. The Sixth Circuit dismissed a MIE appeal after plaintiff failed to pay a $9,810 FRAP 7 bond. Another MIE appeal (class action) was dismissed after the objector failed to pay the $174,429 FRAP 7 appeal bond as ordered. *See In re* Cardizem CD Antitrust Litig., 391 F.3d 812 (6th Cir. 2004) (appellant made no effort in district court to justify her failure to post the bond and failed to demonstrate the bond amount would constitute a barrier to her appeal). After upholding a $5,000 appeal bond imposed by MIE district court, Sixth Circuit dismissed the appeal for plaintiff's failure to post the bond. *Id.*

motion was granted or denied, although the docket shows that appellants posted a FRAP 7 bond. The appeal is still pending final ruling in six cases (14%).

Table 9. Final Outcome of FRAP 7 Appeals

	NYS	MIE	CAC
Overall appeals with FRAP 7 Activity	20	13	10
Appeal dismissed for appellant's failure to pay bond	1	3	0
Appeal dismissed on other procedural grounds	3	0	1
Appeal dismissed on appellee's motion	2	0	0
Appeal voluntarily dismissed by appellant	6	1	1
Appeal proceeded to decision on merits (affirmed, reversed, vacated and remanded)	7	8	4
Appeal still pending	1	1	4
FRAP 7 Bonds Ordered	11	6	8
Appeal dismissed for appellant's failure to pay bond	1	3	0
Appeal dismissed on other procedural grounds	2	0	1
Appeal dismissed on appellee's motion	1	0	0
Appeal voluntarily dismissed by appellant	2	0	1
Appeal proceeded to decision on merits (affirmed, reversed, vacated and remanded)	4	3	2
Appeal still pending	1	0	4
FRAP 7 Appeals Bond Paid in Full or Less Than Full Amount:	8	2	2
Appeal dismissed for appellant's failure to pay bond	0	0	0
Appeal dismissed on other procedural grounds	0	0	1
Appeal dismissed on appellee's motion	0	0	0
Appeal voluntarily dismissed by appellant	2	0	0
Appeal proceeded to decision on merits (affirmed, reversed, vacated and remanded)	5[1]	1	1
Appeal still pending	1	1	0

[1]In NYS, there are 5 appeals which proceeded to a decision on the merits after the appellant posted a bond even though the table shows only 4 appeals from the 11 NYS cases where the court ordered a bond paid; only 4 cases were ruled on because in 1 case the docket showed the appellant posted a FRAP 7 bond even though it didn't show whether the motion was granted or denied.

Only one of the underlying appeals produced an outcome that could be characterized as a victory for the appellant. Focusing on the 25 appeals for which the court ordered the appellant to post a FRAP 7 bond, (11) 44% of these appeals were dismissed, (9) 36% proceeded to a decision on the merits of the appeal, and (5) 20% are still pending. Of those appeals dismissed, four were dismissed due to the appellant's failure to pay the bond, three were dismissed on other procedural grounds, one on the appellee's motion, and three were voluntarily dismissed by the appellant. In two of the cases in which the appellant voluntarily dismissed the appeal, the appellant paid the bond in full prior to dismissing the appeal. The third appeal was a CAC class action in which the objector voluntarily dismissed the appeal after being ordered to pay a $1,240,500 bond.[28] The data also shows that in the twelve cases from our study where the appellant posted the bond in full or in part, half of these appeals were decided on the merits, 34% were dismissed (one on other procedural grounds and two voluntarily by the appellant) and 16% are still pending.

V. Conclusions and Possible Options for Committee Action

One of the purposes of this report is to focus the Committee's attention on the options available for further Center research on the FRAP 7 bond question, as well as to obtain the Committee's direction for such research. The results of the exploratory study lead us to recommend different approaches for further empirical research depending upon the type of additional FRAP 7 data the Committee deems most important for its further deliberations. Gathering data on FRAP 7 issues of a substantive nature (i.e., reasons for FRAP 7 bond motions and rulings, amount of bond requested and granted, components of and authority for the bond amount including attorney fees) requires access to motions papers and orders. To obtain this data from a sufficient sample of cases, we must narrow the study to a limited number of districts chosen based upon current FRAP 7 circuit law. The above study would include for those districts FRAP 7 procedural data such as type of case, type and identify of parties, ruling on the motion, payment of the bond, appeal of FRAP 7 bond orders, and final outcome of the underlying appeal can be derived from the docket report alone. If, however, the Committee wants to emphasize procedural data, the Center would be able to obtain such data from a majority or perhaps all of the districts. The Center cannot due to resource constraints, however, pursue an option that would entail collecting both procedural and substantive data from all cases in all districts. We ask the Committee to express its preference.

More specifically, the options for further Center research are:

1) Conduct in-depth research, like the exploratory study described above, in a larger sample of districts representing circuits with one of the three types of rules (attorney fees allowed; attorney fees not allowed; and no rulings on attorney fees in FRAP 7 bonds). Such a study would produce data of the type generated in the exploratory study, plus additional data on motions, opinions, and orders documenting the reasons for the rulings and would provide insight into the elements that are included in the bonds that were imposed. The Center

[28] Kurtz v. Broadcom, No. 01-275 (C.D. Cal. Dec. 5, 2005) (Order Granting Class Plaintiff's Motion To Require Appeal Bond).

recommends pursuing this type of study to collect data on factors that the Committee has expressed interest in collecting and analyzing.

2) Conduct a study in more than a sample of districts, perhaps all districts, but limiting such a study to procedural information that can be obtained from the automated docket records. Thus, such a study would not include information about reasons for which the bonds were ordered, nor would the study generate findings about the specific elements included in the bonds that were imposed. The Center recommends that the Committee ask the Center to conduct such a study only if the Committee's interest is limited to procedural information.
3) That the Center design a variation of the studies proposed in 1 and 2.

After discussing the nature of the data the Committee would find most helpful, the FJC would like the Committee's input on the general two-part structure of the proposed empirical study in general and on the structure and content of the protocol in specific. Are there any additional issues related to the imposition of a FRAP 7 cost bond not captured by the topics covered in the protocol? Does the line of questioning in the protocol sufficiently address the issues that are covered? Is the protocol over-inclusive in that it covers topics the Committee has no interest in at this time thus warranting a scaled down version to be used in further research? Of course, the answer to many of these inquiries will depend on the empirical approach followed.

Appendix I:
Exploratory Study Methods

In order to identify cases filed or removed in a district court between fiscal year 1996 and 2006 in which FRAP 7-related activities occurred required the use of a text-based search of the Case Management Electronic Case Filing [CM/ECF] replication databases maintained by the courts. This targeted CM/ECF search produced a list of cases in a particular district for the time period identified in which the following terms occurred in at least one docket entry: "FRAP 7" OR "F.R.A.P. 7" OR "Rule 7" OR "F.R.App. P. 7" OR "Fed. R. App. P. 7" OR ("Bond" AND "Cost") OR ("Bond" AND "Appeal") OR ("Bond" AND "Appell") OR "Federal Rule of Appellate Procedure 7" (with a "hit" for any docket entry including any of the terms or pairs of terms). Next, PACER was used to pull up the full docket report of those cases identified to verify that the case indeed included a motion or order for a cost bond pursuant to Federal Rule of Appellate Procedure 7. This review/reading of docket records allowed for the elimination of false positives from the sample, i.e., a request for a bond pending appeal in a habeas case, a request for a supersedeas bond under FRCP 62, imposition of a bond in cases involving injunctive relief and seizure of property, etc.

This method of identifying all discussions of FRAP 7 bond requests, whether or not the court ultimately imposes a bond requirement enables us to identify all (or at least a very high percentage of all) FRAP 7 activity in the federal courts in the study period. To escape this search, a case with FRAP 7 activity would have to be a case in which the search terms listed above never appeared in a docket entry. Thus, using Pacer to further refine this list as described above, for each district searched we were left with a database of two types of cases: (1) cases with definite activity related to a motion or order for a FRAP 7 cost bond on appeal[29]; and (2) cases which involved activity related to a cost bond but because the relevant documents were not available through PACER it was not possible to determine whether or not the cost bond discussion involved FRAP 7. Only the first type of cases (i.e., those with definite FRAP 7 activity) were included in the final database of cases for a particular district[30].

For the exploratory study, the text-based search described above was conducted in the CM/ECF replication databases for three districts—NYS, CAC, and MIE. For each of the three districts, the number of cases in the final database representing definitive FRAP 7 activity was surprisingly low.

In NYS, the original search of the CM/ECF replication database produced 485 potential "hits" (cases with at least one of the search terms in at least one docket entry). After eliminating false positives, only 20 cases with definitive FRAP 7 activity remain with three cases falling into the "uncertain" category because the documents needed to make a correct determination were not accessible on PACER. There were 15,161 cases[31]

[29] A case with definitive FRAP 7 activity is defined for purposes of this study as one that includes at least one motion (by a party or sua sponte) for a cost bond on appeal brought pursuant to FRAP 7 and may include opposition to the motion, a ruling on the motion, appeal of that ruling, or other similar FRAP 7-related motions or orders.

[30] The last step in arriving at the final database for each district involves the elimination of member cases involved in inter-and intra- district consolidations, leaving only single cases or lead cases.

[31] These data are taken from the Federal Judicial Center's Integrated DataBase for Federal Appeals.

appealed to the Second Circuit from NYS between fiscal year 1996 and 2006. Thus, in NYS, 0.13% of appeals involved cases with FRAP 7 activity.

The original CM/ECF search of the CAC replication database identified 875 potential "hits". Eliminating false positives and two member cases, only nine definitive FRAP 7 cases remain in the final population for analysis. Three cases were listed as "uncertain". Between fiscal year 1996 and 2006, 18,463 cases[32] were appealed to the Ninth Circuit from CAC. Thus, cases with FRAP 7 activity comprised 0.05% of appeals in CAC.

In MIE, the original search of the CM/ECF replication database produced 226 potential "hits" dwindled down to 13 cases positive for FRAP 7 activity after eliminating false positives and 16 member cases. Seven cases were categorized as "uncertain" because key documents were unlinked in PACER. There were 8,615 cases[33] appealed to the Sixth Circuit from MIE between fiscal year 1996 and 2006. Thus, in MIE 0.15% of appeals involved cases with FRAP 7 activity.

[32] *Id.*
[33] *Id.*

TAB 17

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 13-AP-A

This item concerns a suggestion by Dr. Roger I. Roots that Appellate Rule 29(a) be amended "to require that any party seeking to file an *amicus curiae* brief must obtain leave of court or state that all parties have consented to its filing." I enclose a copy of Dr. Roots' letter setting forth the text of the proposed amended Rule. Dr. Roots argues that this amendment "is needed to make the Federal Rules of Appellate Procedure more fair, equitable and consistent with a true adversarial system of justice." He states that current Rule 29(a) – which authorizes "[t]he United States or its officer or agency or a state" to file an amicus brief without party consent or court leave – "favors the government and signals to users of the federal courts that government is treated as a favored interest in federal litigation."

Governmental amici have always been treated specially under Appellate Rule 29; the only change in Rule 29's list of exempt governmental filers came in 1998, with the addition of the District of Columbia to the list of exempt filers. When initially adopted as part of the original Appellate Rules (which took effect in 1968), Appellate Rule 29(a) exempted from the party-consent-or-court-leave provision "the United States or an officer or agency thereof" and "a State, Territory or Commonwealth." The original Committee Note did not explain why the Rule exempted these government filers from the requirement of party consent or court leave; the Committee Note cited five local circuit rules and then stated that Rule 29 "follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42." The Committee Note to the original Rule 29 also did not explain why, unlike the Supreme Court's comparable rule,[1] it did not exempt local-government amici from the requirement of party consent or court leave. The 1998 amendments to Rule 29 added the District of Columbia to the list of exempt amicus filers. In 2010, a new subdivision (b) was added to Appellate Rule 1, defining "state," for purposes of the Appellate Rules, to include "the District of Columbia and any United States commonwealth or territory." Simultaneously, Rule 29(a) was revised to delete (as redundant) the Rule's prior listing of Territories, Commonwealths and the District of Columbia in the set of exempt amicus filers.

[1] *See* Stephen R. McAllister, *The Supreme Court's Treatment of Sovereigns as Amici Curiae*, 13 Green Bag 2d 289, 291-92 (2010) (reporting that "for over 70 years the Court has included three and only three categories of 'sovereigns' in its amicus curiae brief rules: (1) the United States; (2) the States (and territories); and (3) local governments").

Dr. Roots relies in part on the observation, by Professors Kearney and Merrill, that amicus filings by the United States Solicitor General tend to influence the United States Supreme Court's decisions. Professors Kearney and Merrill provide the following analysis of "the dramatic success of the Solicitor General as an amicus filer":[2]

> [T]here are a variety of explanations for the Solicitor General's success with amicus briefs, including the possibility that the Justices defer to the views of the Solicitor General for strategic reasons and the possibility that the Justices defer because they assume that the executive branch will tend to endorse politically popular positions. But these explanations are weak…. Both the Justices themselves and close observers of the Solicitor General's office attribute the high rate of success to the Solicitor General's reputation for objectivity in accurately stating the law. It is reasonable to assume that this is at least part of the explanation for the Solicitor General's remarkable success as an amicus filer ….[3]

To the extent that the Solicitor General's influence in the U.S. Supreme Court is attributable to the Solicitor General's "reputation for objectivity in accurately stating the law," that does not seem to support Dr. Roots' argument against facilitating amicus participation by the United States.

However, Dr. Roots' proposal provides an occasion for examining the reasons for treating amicus filings by the United States and a state differently from amicus filings by other litigants. Though unmentioned in the original Committee Note, perhaps considerations of separation of powers and federalism influenced the decision to exempt those parties from the requirements of party consent or court leave.[4]

Encl.

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[2] They also found evidence that support from state-government amici influences results, though not as strongly as support from the United States Solicitor General. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. Pa. L. Rev. 743, 809 (2000) (reporting that during the period from 1946 through 1995, "[w]hen the States file amicus briefs supporting the petitioner, and no State appears as a different kind of amicus, they show modest success overall, securing a p-win rate about 5% higher than the benchmark rate"); *id.* at 810 ("The States have been moderately more active, and successful, on the respondent's side…. [M]easured over all five decades the respondents supported by States have bettered the benchmark rate by nearly 9%.").

[3] Kearney & Merrill, *supra* note 2, at 818-19 (footnote omitted).

[4] *Cf.* 28 U.S.C. § 2403(a) (authorizing intervention by the United States in cases "wherein the constitutionality of any Act of Congress affecting the public interest is drawn in question"); *id.* § 2403(b) (authorizing intervention by a state in cases "wherein the constitutionality of any statute of that State affecting the public interest is drawn in question"); Appellate Rule 44(a) ("If a party questions the constitutionality of an Act of Congress in a proceeding in which the United States or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the circuit clerk immediately upon the filing of the record or as soon as the question is raised in the court of appeals. The clerk must then certify that fact to the Attorney General."); Appellate Rule 44(b) (similar provision regarding notice to state attorney general with respect to constitutional challenge to state statute).

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13-AP-A

Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Thurgood Marshall Federal Judiciary Building
Washington, D.C. 20544
(202) 502-1820

March 15, 2013

Dear Committee:

My name is Roger Roots and I am an attorney in private practice and an Assistant Professor of Criminal Justice at Jarvis Christian College in Hawkins, Texas. I would like to propose a rule change to Rule 29(a) of the Federal Rules of Appellate Procedure. At present the Rule reads as follows:

Rule 29. Brief of an Amicus Curiae

(a) When Permitted. The United States or its officer or agency, or a State, Territory, Commonwealth, or the District of Columbia may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

I propose that the Rule be changed to require that any party seeking to file an *amicus curiae* brief must obtain leave of court or state that all parties have consented to its filing. Thus, my proposal would read:

Rule 29. Brief of an Amicus Curiae

(b) When Permitted. Any amicus curiae may file an amicus-curiae brief only by leave of court or if the brief states that all parties have consented to its filing.

This change is needed to make the Federal Rules of Appellate Procedure more fair, equitable and consistent with a true adversarial system of justice. The present rule favors the government and signals to users of the federal courts that government is treated as a favored interest in federal litigation.

We know from empirical evidence that the filing of *amicus curiae* briefs on behalf of the

government is associated with successful case outcomes for the government, at least in the Supreme Court. Over most of the past century, *amicus* filers in the Supreme Court have had a success rate of around .550, "that is, they filed briefs supporting the winning side 55% of the time."[1] And the Solicitor General—the Justice Department official who represents the United States before the Supreme Court—is by far the most consistently successful *amicus* brief filer of all time.[2]

I urge the Committee overseeing the Federal Rules of Appellate Procedure to consider, discuss and adopt my proposed rule change in order to eliminate the lopsidedness of current Rule 29(a). I will assist in any way. Thanks in advance for your consideration.

Sincerely,

Roger I. Roots
Roger I. Roots

[1] Joseph D. Kearney and Thomas W. Merrill, The Influence of Amicus Curiae Briefs on the Supreme Court, 148 U. Pa. L. Rev. 743, 769-70 (2000).
[2] See id. at 751.

TAB 18

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TAB 18A

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 13-AP-B

Roy T. Englert, Jr., has proposed that the Committee consider amending the Appellate Rules "to address the permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc, in Circuits that permit such filings." He emphasizes that he does not propose a Rule that would tell courts "*whether* to permit such filings," but rather a Rule that would "resolve questions of timing and length" in instances where such filings are permitted.

The Committee's most recent discussions of a proposal to address amicus briefs with respect to panel rehearing and rehearing en banc took place in 2007-2009.

I enclose Mr. Englert's letter and excerpts from the minutes of the relevant 2007-2009 Committee meetings.

Encls.

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TAB 18B

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March 18, 2013

Hon. Steven M. Colloton
Chair, Advisory Committee
on Appellate Rules
United States Circuit Judge
110 East Court Avenue, Suite 461
Des Moines, Iowa 50309

Dear Judge Colloton:

I write to urge the Advisory Committee to consider amending the Federal Rules of Appellate Procedure to address the permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc, in Circuits that permit such filings. My suggestion is to leave the question whether to accept such amicus briefs up to each Circuit, but to resolve questions of timing and length explicitly in FRAP. Please allow me briefly to explain the confusion that exists under the current Rules and why I believe removing that uncertainty would be beneficial to the Courts of Appeals and to litigants.

The problem is well illustrated by *Fry* v. *Exelon Corp. Cash Balance Pension Plan*, 576 F.3d 723 (7th Cir. 2009), which was decided shortly after the Appellate Rules Committee's previous consideration of these issues. Appellate Rule 29(d) states, in relevant part, that "[e]xcept by the court's permission, an amicus brief may be no more than one-half of the maximum length authorized by these rules for a party's principal brief." Rule 29(e) states, in relevant part, that "[a]n amicus curiae must file its brief . . . no later than 7 days after the principal brief of the party being supported is filed." In *Fry*, Judge Easterbrook (writing for a unanimous panel) relied on the use of the phrase "principal brief" in subparagraphs (d) and (e) to conclude that the rule does not encompass amicus filings in support of a rehearing "petition." 576 F.3d at 725. Therefore, there is no requirement that an amicus brief be limited to one-half the permissible length of a rehearing petition, but also no 7-day grace period, after the filing of a rehearing petition, within which to file a supporting amicus brief.

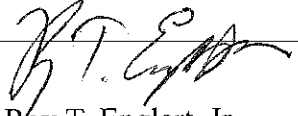
Despite the analysis of *Fry* – analysis that I personally find unassailable – it is not unusual to find that a Clerk's Office or a Local Rule either limits the length of rehearing-stage

amicus briefs to 7-1/2 pages, or authorizes their filing 7 days after the rehearing petition, in apparent reliance on the very same reading of the phrase "principal brief" in Rule 29 that the *Fry* Court rejected. To be certain that an amicus brief will be accepted by both the Clerk's Office and the Court itself, one must limit it to 7-1/2 pages (lest someone construe "principal brief" to include rehearing petitions, making Rule 29(d) applicable) *and* file simultaneously with the rehearing petition (lest someone construe "principal brief" to exclude rehearing petitions, making Rule 29(e) inapplicable). In practice, most amici follow whatever advice they get from the Clerk's Office, running the risk that one or more judges will later disagree, and in practice most judges refrain from second-guessing Clerk's Offices on these questions, so in pragmatic terms the system works reasonably well. Yet it works reasonable well *only* at the expense of accepting uncertainty in reading the Appellate Rules and, if the Seventh Circuit and I are right, at the expense of persistently misreading the Appellate Rules.

When this subject was considered at multiple Advisory Committee meetings several years ago, before *Fry* was decided, it was suggested that the absence of a specific provision regarding amicus briefs in support of rehearing appropriately leaves each Circuit the flexibility to discourage or prohibit such filings. The premise for that assertion, as I understand it, was that amicus briefs in support of rehearing in the Courts of Appeals are analogous to amicus briefs in support of rehearing in the Supreme Court and are therefore of little value. In my view, that analogy is inapt. Rehearing in the Supreme Court occurs once every decade or so – and thus there is little reason to encourage the filing of such petitions, much less amicus briefs in support of them – but rehearing in the Courts of Appeals is relatively common. Every Circuit rehears one or more cases each year, and courts devote significant attention to determining which cases to rehear. Amicus briefs serve an important signaling function about which cases are truly important, just as they do at the certiorari stage in the U.S. Supreme Court. Nevertheless, in deference to individual Circuits' apparently strong desires to chart their own paths with respect to the desirability of amicus briefs, I do not propose a rule that would constrain a court's ultimate decision whether to accept a particular filing. But a provision clearly establishing <u>when</u> such briefs are due (if permitted at all) and <u>how long</u> they ought to be would remove uncertainty; would unify practice across the Circuits; and would prevent determination of important practical questions through Circuit-by-Circuit interpretation of a Rule that is now, at best, ambiguous and, at worst, being systematically misapplied to govern a situation in which it has no applicability.

Thank you for considering this request. Please do not hesitate to let me know if there is any additional information or assistance I might provide.

Respectfully,



Roy T. Englert, Jr.

Excerpt from Fall 2007 minutes:

2. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing)

Judge Stewart invited the Reporter to discuss the proposal concerning amicus briefs with respect to panel rehearing and rehearing en banc. The Reporter thanked Mr. Levy for raising a number of good questions which the Appellate Rules do not currently address: Can such amicus briefs be filed at all? Can they be filed with the consent of the parties, or is permission of the court by motion required? What is the maximum length for such briefs? And when are they due -- at the same time as the petition or 7 days later?

The Reporter noted that Rule 29's text does not explicitly answer any of these questions. The 1998 Committee Note, which dates from the amendment that introduced the 7-day stagger in briefing deadlines, observes that the court may grant permission to file an amicus brief in a context where a party does not file a principal brief -- for example, in support of a petition for rehearing. The Note states that in such a situation, the court will set a filing deadline.

The Reporter's research indicates that five circuits -- the First, Second, Fourth, Sixth, and Eighth -- currently have no local rule or other provision addressing the matter. The Fourth Circuit, however, has indicated in a 2006 decision that it disfavors requests to file an amicus brief in the first instance at the stage of a request for rehearing. The other eight circuits have local rules or provisions that address various aspects of the matter; the local rule recently adopted by the Ninth Circuit provides the most detailed and comprehensive treatment.

On the question of whether amicus briefs can be filed at all, it is interesting as a point of comparison to note that the Supreme Court does not permit amicus briefs with respect to rehearing. The D.C. Circuit permits amicus briefs on rehearing only by invitation of the court. The Fourth Circuit, as noted, disfavors amicus filings on rehearing if the amicus did not seek to participate in earlier briefing. Some circuits may limit amicus filings at the rehearing stage if the filing would result in a judge's disqualification. A number of circuits, though, do have local rules or provisions that -- by regulating the submission of amicus briefs on rehearing -- display an assumption that such briefs will sometimes be filed.

On the issue of whether a motion is required, or whether party consent suffices, circuits take varying approaches. The Ninth Circuit's rule tracks Appellate Rule 29(a)'s approach. In the Eleventh Circuit, government amici need neither party consent nor court

permission, but other amici must obtain court permission. In the Federal Circuit, court permission is always required.

At least three circuits have provisions regulating the length of the briefs. Two circuits specifically address the question of timing for amicus briefs on the question of whether rehearing should be granted, while three circuits have addressed the timing of amicus briefs during briefing that ensues after a grant of rehearing en banc. A variety of other circuit-specific provisions address other aspects of amicus filings with respect to rehearing.

A national rule on the subject could provide practitioners with guidance and reduce circuit-to-circuit variations. But a national rule would alter local practices in some circuits in a way that might conflict with some judges' preferences. The Reporter noted that if the Committee decides to consider a adopting a national rule, it should consider whether the national rule should address all or only some of the questions just mentioned, and should also consider whether the practice concerning rehearing should differ in some respects from Appellate Rule 29's approach to amicus briefs more generally.

Mr. Levy explained that he suggested that this item be placed on the Committee's agenda because he is often asked about the practice for amicus filings with respect to rehearing. Moreover, at the time that he raised the question, two circuits were looking at the possibility of making local rules on the subject, and he wondered whether the Committee might wish to consider a national rule. Mr. Levy noted that he disagrees with the Fourth Circuit's view, in that he believes that an amicus's lack of prior involvement should not disqualify the amicus from participating at the rehearing stage.

Professor Coquillette asked whether it is felt that the current diversity in circuit practice is justified by variations in local conditions. Mr. Levy noted that circuits differ with respect to their willingness to grant rehearing en banc. A judge noted that even if there are no inherent local variations, differences among circuits with respect to amicus filings may grow out of different histories, in particular circuits, with respect to en bancs. The judge asked Mr. Levy whether his concerns would be assuaged if each circuit made clear its approach to amicus filings in relation to rehearing. Mr. Levy responded that such clarity would go a long way toward meeting his concerns; later in the discussion, however, he noted that he would not favor an outcome in which additional circuits decided to bar the amicus filings. On that basis, he stated, he would prefer a national rule permitting such filings to a more gradual circuit-by-circuit approach.

Mr. Fulbruge recounted that the frequency of en bancs varies by circuit. Judge Stewart observed that the Fifth Circuit actually blocks out time in the yearly schedule for en banc arguments. Mr. Fulbruge reported that in the Fifth Circuit, both requests for and grants of

rehearing (either panel or en banc) have declined over time. He noted that there have been some issues in the Fifth Circuit relating to the possibility that some entities seek to file amicus briefs with the object of causing a recusal. Mr. Letter observed that the Fifth Circuit's rule addresses the disqualification issue but does not answer the other questions posed by Mr. Levy. Mr. Letter noted the argument that amicus filings (concerning rehearing) by the DOJ may be authorized by 28 U.S.C. § 516; but he observed that certainty on the question would be useful. A judge member stated that his impression is that younger judges are more likely to vote for en bancs. Seven years ago, he recalled, en bancs were a relatively rare occurrence in his circuit, but that has changed after the recent appointments to the circuit.

Judge Rosenthal suggested that if the main problem is that there are gaps in the circuits' local rules, the Committee might work with CACM to coordinate a request to the circuits to clarify their requirements. A member asked whether the Committee might wish to consider adopting a default rule that would govern in the absence of a circuit-specific requirement. Professor Coquillette noted that one option is to develop a model for a uniform local rule on the subject. Another member stated that, in considering the matter, it would be useful to know whether judges think that amicus briefs concerning rehearing are actually useful. Judge Stewart observed that it would be hard to discern judges' views on that question, and that cultures vary from circuit to circuit; for example, the Seventh Circuit seems less likely than other circuits to welcome amicus filings. He noted that in some instances, amicus briefs have been filed that were more helpful than the parties' briefs; thus, he would not favor a rule that barred amicus filings. An attorney member suggested that the D.C. Circuit might feel that their situation differs from that of other circuits, because the D.C. Circuit does not grant rehearing en banc all that often, and if it permitted amicus filings with respect to rehearing it might receive many more than some other circuits do. (On the other hand, the member noted that if one is drawing a comparison to Supreme Court practice, one should not only look at the practice with respect to rehearing, since a more apt analogy might be the practice with respect to certiorari petitions.) An attorney member agreed that judges' preferences vary with respect to amicus briefs; he also noted, though, that there is a virtue in allowing amici to air their views.

Judge Rosenthal cautioned that the Committee should think carefully about whether the question is one that is appropriate for a national rule. There can be a danger to trying to have it both ways -- i.e., to adopt a default rule but to allow local rulemakers to opt out. That approach was tried with respect to Civil Rule 26(a), and what happened was that the district courts opted out in droves -- which was particularly problematic in that instance given Civil Rule 26(a)'s potential impact. Professor Coquillette recalled that the local opt-out in Rule 26(a) was forced on the rulemakers by others; he observed that the Civil Rules Committee currently faces similar pressures with respect to local practices on summary judgment.

A member suggested that the question is whether the Committee feels that this matter is more like briefing rules (as to which the Committee has allowed, but discouraged, local requirements) or more like citation of unpublished opinions (as to which the Committee adopted a national rule); he stated that he believes persuasion is the better approach to take in this instance. Professor Coquillette noted, as a precedent, that CACM has in the past developed model local rules, for example, with respect to electronic filing.

An attorney member observed that a national rule permitting amicus filings concerning rehearing would not be as intrusive on circuit preferences as a national rule preempting all circuit-specific briefing requirements: If judges don't want to read the resulting amicus filings, he suggested, they need not do so. Mr. Letter stated that this issue does not seem comparable to the variation in circuit briefing rules; here, it would be better for there to be a rule that governs, even if it is not a national rule. He noted that the government almost never opposes amicus filings in the court of appeals. A judge responded that if judges know that they will not read amicus filings on a particular topic, it would seem wrong to have a local rule that allows those filings. He noted that the circuits' response to Judge Stewart's letter concerning circuit-specific briefing requirements shows that it would be difficult to induce the circuits to address the amicus-brief issue without a nudge; working with CACM, he suggested, could be an effective way to provide such a nudge. Mr. Rabiej noted that a model local rule could be developed either by CACM or by the Advisory Committee; he observed that the track record for adoption of proposed local rules has not been all that good. Professor Coquillette noted that he had offered CACM's experience by way of example, and not to indicate that he thought CACM should necessarily be the entity to perform the drafting. Mr. McCabe noted that the best outcome, in terms of adoption, was the model local rule on electronic filing; but he observed that that result has been the exception. A judge suggested that the key is to present the circuits with a list of the questions that local circuit rules should answer -- rather than to tell the circuits how they should answer each of those questions.

Judge Rosenthal commented that even if the circuits take no action on the suggestion, one would be no worse off than before. She suggested that a request to the circuits would be most effective if the Committee makes a persuasive case concerning the need for local rules; thus, for example, if the ABA Section on Litigation voiced support for the proposal, that would be helpful.

Mr. Levy moved that the Committee decide to adopt a national rule on amicus filings with respect to rehearing, with the rule's content to be determined subsequently. Mr. Letter seconded the motion. An attorney member stated that the Committee should consult the D.C. Circuit for its views before publishing a proposed rule. Mr. Letter volunteered to contact the D.C. Circuit's Clerk. A member questioned whether the Committee should vote on Mr. Levy's motion without first deciding the content of the proposed rule. Mr. Letter suggested that the motion should be amended to state that the Committee would retain the matter on its study agenda and consider it further at the next

meeting. The member who had raised the question stated that he would be amenable to that approach, but that if the proposal turns out to be one for a national rule he would vote against it. After this discussion, Mr. Levy withdrew the motion.

By consensus, the Committee retained Item 06-08 on its study agenda. The Reporter will work with Mr. Letter and Mr. Levy to develop a proposal for the Committee's consideration at the spring meeting.

Excerpt from Spring 2008 minutes:

D. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)

Judge Stewart noted that Mr. Levy had done great work in developing for the Committee's consideration the proposed amendments concerning amicus briefs with respect to rehearing. He invited Mr. Levy to present his proposal.

Mr. Levy noted that he was motivated to make this proposal because he periodically receives inquiries concerning whether amicus briefs can be filed in the rehearing context and, if so, what the requirements are. There are two reasons why courts ought to permit amicus filings in the rehearing context. Such filings can broaden the court's perspective and thus can usefully inform its decision. Moreover, permitting amicus filings can lead would-be amici to feel that the process is fair because they were allowed to be heard. From a practitioner's viewpoint, it does not seem as though permitting such filings would burden the court; those filings would be short and would be filed on a tight time frame. Mr. Levy argued that this issue is appropriate for a nationally uniform rule, and that in comparison to other possible topics for rulemaking, this one does not seem as central to judges' day-to-day work.

The Reporter noted that Fritz Fulbruge had obtained useful feedback from the appellate clerks on the circuits' current practices. Mr. Fulbruge observed that there is a valid reason to have a national rule, in the sense that there is currently disuniformity among the circuits. The proposal could provide helpful clarification.

Mr. Letter questioned whether the proposal should cover amicus filings prior to a court's grant of rehearing. He noted that the United States has in the past made amicus filings in support of rehearing, but his recollection is that these occurred only in unique areas involving the government, such as supporting rehearing on behalf of a qui tam relator under the False Claims Act. He suggested that an important consideration is what the judges think of the proposal. He asserted that if the court grants rehearing but orders no new briefing by the parties, it would be odd to let amici file briefs at that stage. He raised

the broader point that it might be useful to consider whether it would be appropriate to adopt a rule providing that the parties will be permitted to submit new briefs once rehearing en banc is granted. Mr. Letter also noted that the DOJ had done an internal study concerning practices with respect to rehearing, and found enormous circuit-to-circuit variations in the likelihood that rehearing en banc will be granted. He questioned whether that variation might weigh against the adoption of a national rule.

A judge observed that amicus filings in the rehearing context could be useful if they help the court to understand whether and why a particular case poses an important issue; but he noted that other judges may well disagree. Another judge remarked that the Eighth Circuit does not encourage amicus filings on rehearing petitions; he noted the concern that having a rule on the subject could encourage more such filings, and he suggested that a national rule would not be helpful.

An attorney member stated that she did not feel strongly about the proposal, but that amicus filings do occur in the rehearing context and that there are always questions as to the permitted length and the time limits for filing. She suggested that it would be useful to provide clarification on such points. She observed, though, that it seems problematic to permit new amici to file at the en banc stage if the court does not permit the parties to file new briefs. A judge noted that the Fifth Circuit always orders new briefing at the en banc stage; he observed that many en bancs in the Fifth Circuit are generated by the judges rather than by the parties. He noted that for judges who were not on the panel that initially heard the appeal, new briefs are helpful. A practitioner observed that the likelihood of rehearing en banc often seems more closely tied to the court's internal dynamics than to the lawyers' arguments.

A judge member stated that the practitioners' discussion of this issue had convinced him that there is a need for clarification of the practices governing amicus filings in the rehearing context. He therefore believes that each circuit should adopt a local rule on the topic. But he would be troubled by the adoption of a national rule because there is so much room for differing views, especially in a circuit that does not often decide to en banc cases. He suggested that the Committee wait and see how the local rules on this point develop. He agreed with a member's earlier observation that amicus briefs in the rehearing context are more useful when they spell out why the decision is an important one. An attorney member agreed that the circuit practices regarding en banc grants vary widely; she asked whether the Committee could encourage the circuits to adopt local rules on point.

A judge observed that the circuits are more likely to adopt such local rules if they hear from attorney groups that the lack of such rules is causing hardship. Mr. Levy suggested that groups such as the American Academy of Appellate Lawyers might be able to help;

he stated that he would still prefer a national rule, but that local rules would be better than nothing.

A judge member observed that the Supreme Court's Rule 44.5 prohibits amicus briefs in connection with petitions for rehearing. Mr. Levy responded that the proper analogy, in Supreme Court practice, is not to petitions for rehearing but to petitions for certiorari; and there, amicus briefs are permitted. Another lawyer member observed that one reason why the Supreme Court bars amicus filings in connection with rehearing petitions is that the Court knows it almost never grants petitions for rehearing. Another member observed that the D.C. Circuit -- which has a reputation of not granting petitions for rehearing en banc -- has now begun to grant such petitions occasionally.

That member stated that he would like to think seriously about adopting a national rule stating that when rehearing en banc is granted, the court will permit further briefing by the parties. A judge responded, though, with a counter-example. In the Tenth Circuit, there is a practice of pre-circulation of panel opinions before they are filed. If the judges who are not on the panel disagree with the panel opinion, the court might decide to en banc the appeal initially. In such a sua sponte grant of en banc consideration, the parties would not have had an opportunity to learn anything from the panel opinion. Another judge expressed reluctance to tie the court's hands; he suggested that there might be instances where the court needs to go en banc (for example, because there is a clearly undesirable circuit precedent) but does not need further input from the parties. An attorney member responded that these concerns could be addressed if the rule requires the court in most instances to permit additional briefing, but allows exceptions to that requirement.

Judge Stewart observed that the proposals concerning further briefing by the parties when en banc rehearing is granted were distinct from the current agenda item concerning amicus filings. On the latter topic, Mr. Levy suggested that as a fallback position he would favor encouraging the adoption of local circuit rules. A judge suggested that this goal might be furthered by inducing an attorney organization to advocate the adoption of such local rules; he also observed that the Committee might gain useful information if judge members called some colleagues in circuits that do not have a local rule on point and asked why not. A member questioned whether the circuits would pay attention to such requests; he wondered whether the Committee might wish to consider circulating a proposal to place a default provision in Rule 29 in order to prompt circuits to take action to opt out; circulating such a proposal to judges on the various courts of appeals might be more likely to focus attention on the need for local rules.

By consensus, the matter was retained on the study agenda. Judge Sutton volunteered to contact selected judges for their views on the local rule question, and Mr. Levy, Mr.

Letter and Ms. Mahoney agreed that they would work with the Reporter to contact attorney organizations to encourage them to seek the adoption of local rules.

Excerpt from Fall 2008 minutes:

D. Item No. 06-08 (proposed FRAP rule concerning amicus briefs with respect to rehearing en banc)

Judge Stewart invited the Reporter to summarize the status of the inquiries concerning this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. At the Committee's Spring 2008 meeting there was no consensus on whether a national rule would be desirable, but members did suggest that circuits should consider adopting local rules on the issue. Members noted that it would be useful to ask judges in circuits which do not currently have a local rule on point why no such local rule exists. Members also observed that circuits without local rules on the subject are most likely to adopt such rules if attorney groups advocate their adoption.

Accordingly, the Committee's discussion at the Spring 2008 meeting gave rise to a number of lines of inquiry. Mr. Letter raised the issue with the federal appellate chiefs from around the country to see what their experience has been and whether the lack of local rules on the topic seems problematic. Judge Sutton raised the issue with the Sixth Circuit's local rules committee and also contacted some judges in the circuits that do not have a local rule on point to inquire why they do not have one. And Mr. Fulbruge consulted his fellow Circuit Clerks for their input on the practice in their respective circuits.

Mr. Letter reported that the question of amicus filings in connection with rehearing is not much of an issue for the United States Attorney offices; the question is much more likely to arise for the litigating divisions in Main DOJ. He noted that the DOJ does find local rules like those of the Ninth and Eleventh Circuits useful, because they provide needed clarity on whether motions are required in order to file such amicus briefs and on questions of brief length and timing.

Judge Sutton contacted circuit judges in the circuits (First, Second, Fourth, Sixth, and Eighth) which do not currently have a local rule on point. In his conversations with those judges, a number of themes emerged. Judges noted that even without a local rule on point a would-be amicus can always make a motion for leave to file the brief. Most circuits will usually grant such a motion unless the filing would cause a recusal. (The Eighth Circuit, he noted, may be somewhat less receptive and does not always grant leave.) Some judges feel that adopting a local rule would be undesirable because it could encourage amicus

filings. And in courts which do not generally allow additional briefing after granting rehearing en banc, permitting amicus filings at that point would create a need to review the court's policy with respect to party filings at that stage as well.

Mr. Fulbruge's survey of the circuit clerks disclosed that some seven of the clerks who responded do not favor the adoption of a national rule. Two clerks see no need for a local rule, but two other clerks feel that it would be useful for circuits to consider adopting one.

Mr. Levy stated that even though the Committee does not seem inclined to adopt a national rule, it would be useful to encourage the adoption of local rules. Though this would not achieve uniformity, it would bring clarity to an area where questions frequently arise. A judge member observed that judges and practitioners have different perspectives on this issue. He suggested that local rules would be useful, and that the best way to encourage their adoption would be for the suggestions to come from attorney organizations.

Mr. Levy asked whether each circuit has a local rules committee. Judge Stewart stated that each circuit technically does have such a committee, and that he had identified those committees for the purpose of sending them copies of his letter to the chief judges concerning circuit-specific briefing requirements. Mr. Fulbruge noted that the Fifth Circuit's local rules committee is not used as much as those in some other circuits (such as the Seventh Circuit).

A district judge member stated that he opposes the adoption of a national rule, and he also questioned why the Committee should encourage the adoption of local rules on this topic. An attorney member responded that local rules could usefully provide answers to the questions that attorneys commonly have about such briefs (concerning the need for a motion, and concerning length and timing); she wondered whether an appropriate measure might be a letter from the Advisory Committee to the chairs of the circuits' local rulemaking committees.

Professor Coquillette observed that, in general, the Standing Committee's policy has been not to encourage local rulemaking as a solution unless there is a good reason for local variation. An appellate judge observed that there are indeed variations in local circuit culture that affect the courts' treatment of amicus briefs in connection with rehearing.

Mr. Fulbruge noted that circuit clerks who oppose adoption of a local rule on this point are concerned that a local rule would encourage amicus filings. Mr. Levy noted that a local rule, if adopted, need not encourage filings; for example, it could state that party consent is not enough and that a motion is required. Mr. Levy observed that one

important function of local rules is to instruct practitioners. Mr. Letter agreed that this issue comes up constantly in his practice and that having a local rule would inform practitioners as to what they are supposed to do.

Professor Coquillette asked whether the adoption of local rules on this point would be justified by circuit-to-circuit variation -- for example, by variations in the size of the circuit, the circuit's geographical range, and the types of litigation commonly seen in the circuit. Mr. Levy responded that in his view such variation does exist. A district judge member disagreed; he suggested that at most, the Committee might send the minutes of the meeting to the chief judges of each circuit (so as to apprise them of the discussion) but without any recommendation by the Committee. Then, he suggested, practitioners who are interested in the adoption of such local rules can work to seek their adoption. An appellate judge responded that he sees things somewhat differently, since there is already a lot of local variation in briefing practice. The district judge member responded that it is one thing for the Committee to tolerate variation, and another for the Committee to recommend the proliferation of local rules. The appellate judge member responded that his research had brought to light some rather surprising local practices. For example, some circuits which require a motion for leave send that motion to the original panel -- the members of which might be expected to be unreceptive to the arguments of an amicus who wishes to submit a brief in support of rehearing en banc. The appellate judge member agreed, though, that the key factor in the adoption of local rules on this issue will be the support of practitioners who push for the adoption of such rules.

Mr. Levy noted that the D.C. Circuit has an active practitioners' committee; he suggested that it would be useful for the Appellate Rules Committee to state that the issue is worth thinking about. A member countered, however, that the recent experience with the issue of local circuit briefing rules weighs against the notion of asking the Chair to write a letter to the chief judges of the circuits; the member noted that such a letter would only be useful if it contained a detailed suggestion, yet if the letter were to contain a detailed suggestion that might make it seem that the Committee is promoting the adoption of local rules on the issue. Professor Coquillette noted that the response in his home circuit indicates that Judge Stewart's letter on local briefing rules has had an effect. Professor Coquillette reviewed some relevant history concerning local rules. Local rules are adopted without the report-and-wait process which is used for the national rules, and thus in 1988 Congress became concerned about the proliferation of local rules because such rules are adopted without congressional oversight. Professor Coquillette observed that on occasions when the Committees have considered an issue important enough for a national rule, the Committees have not been persuaded by the argument that the issue is one treated differently in different circuits due to local legal culture (he cited the example of new Appellate Rule 32.1 concerning unpublished opinions). He also noted that the ABA's Section on Litigation has tended to prefer the adoption of uniform national rules rather than local rules because the need to look at local rules is a burden on practitioners.

An attorney member asked whether -- if the Committee were to communicate directly with the local rules advisory committees -- that would offend the judges in the relevant circuit. An appellate judge observed that contacting the practitioners who serve on local rules committees may not be particularly useful, because lawyers who are accustomed to practicing in a given circuit are less likely to seek clarification of a circuit's practices than lawyers who practice nationwide. Mr. Levy noted that one relevant national organization would be the American Academy of Appellate Lawyers.

A district judge member expressed opposition to the idea of contacting local rules advisory committees directly; he suggested that, instead, practitioners should be the ones to make such contacts. At most, he stated, he would be willing to support communicating with the chief judges of the circuits, not with the local rules advisory committees. Judge Rosenthal noted that she did not recall any instances in which an Advisory Committee or the Standing Committee communicated directly with local rules advisory committees. She noted that it would be interesting to consider the 1990s experience under the Civil Justice Reform Act. Mr. Levy suggested that perhaps a first letter could be sent to the chief judges of the circuits, and then that letter could be followed by one to the local rules advisory committees. Mr. McCabe questioned whether the AO has a current list of the local rules advisory committee members; Mr. Rabiej noted that the AO does have a list of the local rules committees for the district courts.

An attorney member concurred in the prior observation that practitioners on the local rules advisory committees are unlikely to advocate the adoption of local rules on the issue. He suggested that -- given the low probability that a letter from the Committee would lead to the adoption of local rules on the point -- if the Committee has an institutional interest in not encouraging the proliferation of local rules, the Committee should take no action.

Mr. Levy moved that the Committee resolve to draft a letter (the specifics of which the Committee could consider at its Spring 2009 meeting) to the chief judges of each circuit advising them of the Committee's discussion and asking them to consider adopting a local rule on amicus briefs with respect to rehearing. He suggested that the letter might include a copy of sample local rules on the subject. Mr. Letter seconded the motion. A district judge member stated that he would vote against such a motion because he expected to disagree with what he anticipated Mr. Levy would suggest including in the substance of the letter. Mr. Levy responded that if the motion were to pass, it would be possible to prepare proposed alternative drafts of the letter. The motion failed by a vote of five to three. No further motions were made with respect to this item.

Excerpt from Spring 2009 minutes:

h. Item No. 06-08 (amicus briefs with respect to rehearing)

Judge Stewart invited the Reporter to summarize this item, which concerns Mr. Levy's suggestion that the Committee consider amending the Appellate Rules to clarify the procedure for amicus briefs with respect to rehearing. The Committee had discussed this item at its three previous meetings (in fall 2007, spring 2008 and fall 2008). By consensus, the Committee removed this item from its study agenda.

TAB 19

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MEMORANDUM

DATE: March 25, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 13-AP-C

This item arises from the suggestion by three members of the Supreme Court that "the Advisory Committees on Federal Rules of Civil and Appellate Procedures might consider whether uniform rules for expediting … proceedings [under the Hague Convention on the Civil Aspects of International Child Abduction] are in order." Chafin v. Chafin, 133 S. Ct. 1017, 1029 n.3 (2013) (Ginsburg, J., joined by Scalia & Breyer, JJ., concurring). I enclose a copy of the *Chafin* opinions.

The Hague Convention on the Civil Aspects of International Child Abduction ("Convention") – which the United States has ratified – "generally requires courts in the United States to order children returned to their countries of habitual residence, if the courts find that the children have been wrongfully removed to or retained in the United States." *Id.* at 1021 (unanimous opinion). Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA"). *See id.* In *Chafin*, the Court held that the return of a child to her country of habitual residence did not render moot an appeal from the order mandating that return. *See id.* at 1028 ("[R]eturn does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent.").

In response to "the concern that shuttling children back and forth between parents and across international borders may be detrimental to those children," the Court observed that "courts can achieve the ends of the Convention and ICARA – and protect the well-being of the affected children – through the familiar judicial tools of expediting proceedings and granting stays where appropriate." *Id.* at 1026-27. The Court emphasized the need for speedy disposition of ICARA proceedings:

> Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation. Many courts already do so. See Federal Judicial Center, J. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 116, n. 435 (2012) (listing courts that expedite appeals). Cases in American courts often take over two years

> from filing to resolution; for a six-year-old … , that is one-third of her lifetime. Expedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child.

Id. at 1027-28.

The cases to which the Court referred – in its citation to footnote 435 in the Federal Judicial Center study – are cases in which the court expedited the disposition of a particular appeal.[1] None of those opinions cited a local circuit rule requiring speedy processing of this particular category of appeal, and a quick search did not disclose any such local provisions.[2] Appellate Rule 2 authorizes a court of appeals to "suspend any provision of [the Appellate Rules] in a particular case and order proceedings as it directs," in order, inter alia, "to expedite its decision." Accordingly, the courts of appeals clearly possess authority to expedite ICARA appeals, and the cases cited in footnote 1 illustrate the courts' use of this authority.[3]

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[1] *See* Nicolson v. Pappalardo, 605 F.3d 100, 103 (1st Cir. 2010) ("The [district] court ordered S.G.N.'s return to Australia. Pappalardo appealed to this court which granted a temporary stay but expedited this appeal."); Simcox v. Simcox, 511 F.3d 594, 601 (6th Cir. 2007) ("This court granted a stay of the district court's order pending expedited appeal, citing the evidence of physical abuse, Mr. Simcox's threats to subject Mrs. Simcox to criminal prosecution, and the nearly year-long delay between the time of the alleged abduction and Mr. Simcox's filing a petition for return."); Koch v. Koch, 450 F.3d 703, 709-10 (7th Cir. 2006) ("We granted a stay pending the resolution of the appeal, and ordered expedited briefing, in keeping with the intent of the Convention to provide prompt resolution to these disputes."); Kijowska v. Haines, 463 F.3d 583, 589-90 (7th Cir. 2006) ("The Hague Convention and its implementing federal statute do not set forth a standard for the granting of stays pending appeal of orders directing (or refusing to direct) the return of children to foreign countries…. It was best to continue the stay in force until the appeal was decided, but to accelerate the appeal proceedings, as we did."); Gaudin v. Remis, 415 F.3d 1028, 1037 (9th Cir. 2005) ("[T]he older of the two children will turn sixteen next year, at which time his custody will no longer be subject to the Hague Convention's provisions…. Accordingly, the district court shall, so far as possible, expedite consideration of the case. Any subsequent appeal shall be assigned to this panel, and either party may move for an expedited briefing schedule on appeal."); Sealed Appellant v. Sealed Appellee, 394 F.3d 338, 341 (5th Cir. 2004) (deciding an "expedited appeal"); Holder v. Holder, 392 F.3d 1009, 1023 & n.13 (9th Cir. 2004) (stressing need for speedy disposition of Convention cases and noting that the court decided the appeal three days after the case was submitted); Danaipour v. McLarey, 286 F.3d 1, 11 (1st Cir. 2002) (expedited appeal decided less than a month after argument); Diorinou v. Mezitis, 237 F.3d 133, 138 (2d Cir. 2001) (expedited appeal); England v. England, 234 F.3d 268, 269 (5th Cir. 2000) (expedited appeal); Whallon v. Lynn, 230 F.3d 450, 454 (1st Cir. 2000) (expedited appeal); Lops v. Lops, 140 F.3d 927, 935 (11th Cir. 1998) (expedited appeal); Charalambous v. Charalambous, 627 F.3d 462, 464 (1st Cir. 2010) (expedited appeal). *But cf.* Whiting v. Krassner, 391 F.3d 540, 543 (3d Cir. 2004) (noting that the court of appeals had denied appellant's motions for a stay and for an expedited appeal). (*Charalambous*, the last case listed in the preceding string cite, is not cited in footnote 435 of the FJC study but is discussed in the study's text on the same page.)

[2] I searched Westlaw's USC database on March 19, 2013, using the following search: PR,CI,TI(CIRCUIT & APPEALS) & (ICARA CONVENTION CHILD).

[3] Courts also use this authority, on occasion, to expedite the issuance of the mandate.

In *Cuellar v. Joyce*, 596 F.3d 505 (9th Cir. 2010), the court of appeals reversed the district court's denial of relief under the Convention; ordered the father to return the child to the mother on the third business day after issuance of the opinion; directed the district court to "take all steps necessary to ensure that [the father] complies with this order, including, if necessary, ordering intervention of the United States Marshals Service"; and ordered that "[t]he mandate shall issue at once." Id. at 512.

In *Gitter v. Gitter*, 396 F.3d 124 (2d Cir. 2005), the court of appeals remanded for reconsideration of the denial of a petition seeking return of a child under the Convention, and stated: "This panel will

Obviously, there are compelling reasons for courts to determine ICARA proceedings as quickly as possible. The question is whether that degree of speed should be mandated by rule, or whether the courts of appeals should continue to have discretion concerning the best way to implement the speedy disposition of ICARA appeals. In a time when the courts of appeals face staffing, resource, and docket pressures, setting inflexible docket priorities might lead to unfortunate results in some instances. Thus, as the enclosed memorandum by Benjamin Robinson recounts, the Judicial Conference has developed a policy against statutory mandates concerning case-processing priorities. Rule-based mandates could raise similar concerns.

One question might be whether there are ways, short of a Rule amendment, for the Judicial Conference Committees to raise awareness concerning best practices in the disposition of ICARA appeals.

Encls.

retain jurisdiction of the appeal and await the district court's report. In view of the urgency of proceedings of this nature, we encourage the district court to deal promptly with the question. The mandate shall issue at once." *Id.* at 136.

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TAB 19B

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Supreme Court of the United States
Jeffrey Lee CHAFIN, Petitioner
v.
Lynne Hales CHAFIN.

No. 11–1347.
Argued Dec. 5, 2012.
Decided Feb. 19, 2013.

ROBERTS, C.J., delivered the opinion for a unanimous Court. GINSBURG, J., filed a concurring opinion, in which SCALIA and BREYER, JJ., joined.

Michael E. Manely, Marietta, GA, for Petitioner.

Nicole A. Saharsky, for the United States, as amicus curiae, by special leave of the Court, supporting the Petitioner.

Stephen J. Cullen, Washington, DC, for Respondent.

Michael E. Manely, Counsel of Record, John P. Smith, The Manely Firm, P.C., Marietta, GA, Stephanos Bibas, James A. Feldman, Nancy Bregstein Gordon, Philadelphia, PA, Stephen B. Kinnaird, Lisa A. Nowlin, Sean M. Smith, Michelle E. Yetter, Paul Hastings LLP, Washington, DC, for Petitioner Jeffrey Lee Chafin.

***1021** Bruce A. Boyer, Counsel of Record, Civitas ChildLaw Center, Chicago, IL, Timothy Scott, QC, David Williams, Jacqueline Renton, Counsel for The Centre for Family Law and Practice.

Chief Justice ROBERTS delivered the opinion of the Court.

The Hague Convention on the Civil Aspects of International Child Abduction generally requires courts in the United States to order children returned to their countries of habitual residence, if the courts find that the children have been wrongfully removed to or retained in the United States. The question is whether, after a child is returned pursuant to such an order, any appeal of the order is moot.

I

A

The Hague Conference on Private International Law adopted the Hague Convention on the Civil Aspects of International Child Abduction in 1980. T.I.A.S. No. 11670, S. Treaty Doc. No. 99–11. In 1988, the United States ratified the treaty and passed implementing legislation, known as the International Child Abduction Remedies Act (ICARA), 102 Stat. 437, 42 U.S.C. § 11601 *et seq.* See generally *Abbott v. Abbott*, 560 U.S. ——, —— – ——, 130 S.Ct. 1983, 1989–1990, 176 L.Ed.2d 78 (2010).

The Convention seeks "to secure the prompt return of children wrongfully removed to or retained in any Contracting State" and "to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1, S. Treaty Doc. No. 99–11, at 7. Article 3 of the Convention provides that the "removal or the retention of a child is to be considered wrongful" when "it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention" and "at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention." *Ibid.*

Article 12 then states:

"Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith." *Id.,* at 9.

There are several exceptions to that command. Return is not required if the parent seeking it was not exercising custody rights at the time of removal or had consented to removal, if there is a "grave risk" that return will result in harm, if the child is mature and objects to return, or if return would conflict with fundamental principles of freedom and human rights in the state from which return is requested. Arts. 13, 20, *id.,* at 10, 11. Finally, the Convention directs Contracting States to "designate a Central Authority to discharge the duties which are imposed by the Convention." Art. 6, *id.,* at 8; see also Art. 7, *ibid*.

Congress established procedures for implementing the Convention in ICARA. See 42 U.S.C. § 11601(b)(1). The Act ***1022** grants federal and state courts concurrent jurisdiction over actions arising under the Convention, § 11603(a), and directs them to "decide the case in accordance with the Convention," § 11603(d). If those courts find children to have been wrongfully removed or retained, the children "are to be promptly returned." § 11601(a)(4). ICARA also provides that courts ordering children returned generally must require defendants to pay various expenses incurred by plaintiffs, including court costs, legal fees, and transportation costs associated with the return of the children. § 11607(b)(3). ICARA instructs the President to designate the U.S. Central Authority, § 11606(a), and the President has designated the Office of Children's Issues in the State Department's Bureau of Consular Affairs, 22 CFR § 94.2 (2012).

Eighty-nine nations are party to the Convention as of this writing. Hague Conference on Private Int'l Law, Status Table, Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, http:// www. hcch. net. In the 2009 fiscal year, 324 children removed to or retained in other countries were returned to the United States under the Convention, while 154 children removed to or retained in the United States were returned to their countries of habitual residence. Dept. of State, Report on Compliance with the Hague Convention on the Civil Aspects of International Child Abduction 6 (2010).

B

Petitioner Jeffrey Lee Chafin is a citizen of the United States and a sergeant first class in the U.S. Army. While stationed in Germany in 2006, he married respondent Lynne Hales Chafin, a citizen of the United Kingdom. Their daughter E.C. was born the following year.

Later in 2007, Mr. Chafin was deployed to Afghanistan, and Ms. Chafin took E.C. to Scotland. Mr. Chafin was eventually transferred to Huntsville, Alabama, and in February 2010, Ms. Chafin traveled to Alabama with E.C. Soon thereafter, however, Mr. Chafin filed for divorce and for child custody in Alabama state court. Towards the end of the year, Ms. Chafin was arrested for domestic violence, an incident that alerted U.S. Citizenship and Immigration Services to the fact that she had overstayed her visa. She was deported in February 2011, and E.C. remained in Mr. Chafin's care for several more months.

In May 2011, Ms. Chafin initiated this case in the U.S. District Court for the Northern District of Alabama. She filed a petition under the Convention and ICARA seeking an order for E.C.'s return to Scotland. On October 11 and 12, 2011, the District Court held a bench trial. Upon the close of arguments, the court ruled in favor of Ms. Chafin, concluding that E.C.'s country of habitual residence was Scotland and granting the petition for return. Mr. Chafin immediately moved for a stay pending appeal, but the court denied his request. Within hours, Ms. Chafin left the country with E.C., headed for Scotland. By December 2011, she had initiated custody proceedings there. The Scottish court soon granted her interim custody and a preliminary injunction, prohibiting Mr. Chafin from removing E.C. from Scotland. In the meantime, Mr. Chafin had appealed the District Court order to the Court of Appeals for the Eleventh

Circuit.

In February 2012, the Eleventh Circuit dismissed Mr. Chafin's appeal as moot in a one-paragraph order, citing *Bekier v. Bekier*, 248 F.3d 1051 (2001). App. to Pet. for Cert. 1–2. In *Bekier*, the Eleventh Circuit had concluded that an appeal of a Convention return order was moot when the child had been returned to the foreign country, ***1023** because the court "became powerless" to grant relief. 248 F.3d, at 1055. In accordance with *Bekier*, the Court of Appeals remanded this case to the District Court with instructions to dismiss the suit as moot and vacate its order.

On remand, the District Court did so, and also ordered Mr. Chafin to pay Ms. Chafin over $94,000 in court costs, attorney's fees, and travel expenses. Meanwhile, the Alabama state court had dismissed the child custody proceeding initiated by Mr. Chafin for lack of jurisdiction. The Alabama Court of Civil Appeals affirmed, relying in part on the U.S. District Court's finding that the child's habitual residence was not Alabama, but Scotland.

We granted certiorari to review the judgment of the Court of Appeals for the Eleventh Circuit. 567 U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (2012).

II

Article III of the Constitution restricts the power of federal courts to "Cases" and "Controversies." Accordingly, "[t]o invoke the jurisdiction of a federal court, a litigant must have suffered, or be threatened with, an actual injury traceable to the defendant and likely to be redressed by a favorable judicial decision." *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990). Federal courts may not "decide questions that cannot affect the rights of litigants in the case before them" or give "opinion[s] advising what the law would be upon a hypothetical state of facts." *Ibid.* (quoting *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971) (*per curiam*); internal quotation marks omitted). The "case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis*, 494 U.S., at 477, 110 S.Ct. 1249. "[I]t is not enough that a dispute was very much alive when suit was filed"; the parties must "continue to have a 'personal stake' " in the ultimate disposition of the lawsuit. *Id.*, at 477–478, 110 S.Ct. 1249 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 101, 103 S.Ct. 1660, 75 L.Ed.2d 675 (1983); some internal quotation marks omitted).

There is thus no case or controversy, and a suit becomes moot, "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. ——, ——, 133 S.Ct. 721, 726, 184 L.Ed.2d 553 (2013) (quoting *Murphy v. Hunt*, 455 U.S. 478, 481, 102 S.Ct. 1181, 71 L.Ed.2d 353 (1982) (*per curiam*); some internal quotation marks omitted). But a case "becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Service Employees*, 567 U.S. ——, ——, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012) (internal quotation marks omitted); see also *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12, 113 S.Ct. 447, 121 L.Ed.2d 313 (1992) ("if an event occurs while a case is pending on appeal that makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party, the appeal must be dismissed" (quoting *Mills v. Green*, 159 U.S. 651, 653, 16 S.Ct. 132, 40 L.Ed. 293 (1895))). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Knox*, *supra*, at 1019, 132 S.Ct., at 2287 (internal quotation marks and brackets omitted).

III

This dispute is still very much alive. Mr. Chafin continues to contend that his daughter's country of habitual residence is the United States, while Ms. ***1024** Chafin maintains that E.C.'s home is in Scotland. Mr. Chafin also argues that even if E.C.'s habitual residence was Scotland, she should not have been returned because the Convention's defenses to return apply. Mr. Chafin seeks custody of E.C., and wants to pursue that relief in the United States, while Ms. Chafin is pursuing that right for herself in Scotland. And Mr. Chafin wants the orders that he pay Ms. Chafin over $94,000 vacated, while Ms. Chafin asserts the money is rightfully owed.

On many levels, the Chafins continue to vigorously contest the question of where their daughter will be raised.

This is not a case where a decision would address "a hypothetical state of facts." *Lewis, supra,* at 477, 110 S.Ct. 1249 (quoting *Rice, supra,* at 246, 92 S.Ct. 402; internal quotation marks omitted). And there is not the slightest doubt that there continues to exist between the parties "that concrete adverseness which sharpens the presentation of issues." *Camreta v. Greene,* 563 U.S. ——, ——, 131 S.Ct. 2020, 2028, 179 L.Ed.2d 1118 (2011) (quoting *Lyons, supra,* at 101, 103 S.Ct. 1660; internal quotations marks omitted).

A

At this point in the ongoing dispute, Mr. Chafin seeks reversal of the District Court determination that E.C.'s habitual residence was Scotland and, if that determination is reversed, an order that E.C. be returned to the United States (or "re-return," as the parties have put it). In short, Mr. Chafin is asking for typical appellate relief: that the Court of Appeals reverse the District Court and that the District Court undo what it has done. See *Arkadelphia Milling Co. v. St. Louis Southwestern R. Co.*, 249 U.S. 134, 145–146, 39 S.Ct. 237, 63 L.Ed. 517 (1919); *Northwestern Fuel Co. v. Brock*, 139 U.S. 216, 219, 11 S.Ct. 523, 35 L.Ed. 151 (1891) ("Jurisdiction to correct what had been wrongfully done must remain with the court so long as the parties and the case are properly before it, either in the first instance or when remanded to it by an appellate tribunal"). The question is whether such relief would be effectual in this case.

Ms. Chafin argues that this case is moot because the District Court lacks the authority to issue a re-return order either under the Convention or pursuant to its inherent equitable powers. But that argument—which goes to the meaning of the Convention and the legal availability of a certain kind of relief—confuses mootness with the merits. In *Powell v. McCormack*, 395 U.S. 486, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969), this Court held that a claim for backpay saved the case from mootness, even though the defendants argued that the backpay claim had been brought in the wrong court and therefore could not result in relief. As the Court explained, "this argument ... confuses mootness with whether [the plaintiff] has established a right to recover ..., a question which it is inappropriate to treat at this stage of the litigation." *Id.*, at 500, 89 S.Ct. 1944. Mr. Chafin's claim for re-return—under the Convention itself or according to general equitable principles—cannot be dismissed as so implausible that it is insufficient to preserve jurisdiction, see *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998), and his prospects of success are therefore not pertinent to the mootness inquiry.

As to the effectiveness of any relief, Ms. Chafin asserts that even if the habitual residence ruling were reversed and the District Court were to issue a re-return order, that relief would be ineffectual because Scotland would simply ignore it.[FN1] ***1025** But even if Scotland were to ignore a U.S. re-return order, or decline to assist in enforcing it, this case would not be moot. The U.S. courts continue to have personal jurisdiction over Ms. Chafin, may command her to take action even outside the United States, and may back up any such command with sanctions. See *Steele v. Bulova Watch Co.*, 344 U.S. 280, 289, 73 S.Ct. 252, 97 L.Ed. 319 (1952); cf. *Leman v. Krentler–Arnold Hinge Last Co.*, 284 U.S. 448, 451–452, 52 S.Ct. 238, 76 L.Ed. 389 (1932). No law of physics prevents E.C.'s return from Scotland, see *Fawcett v. McRoberts*, 326 F.3d 491, 496 (C.A.4 2003), abrogated on other grounds by *Abbott v. Abbott*, 560 U.S. ——, 130 S.Ct. 1983, 176 L.Ed.2d 789 (2010), and Ms. Chafin might decide to comply with an order against her and return E.C. to the United States, see, *e.g., Larbie v. Larbie,* 690 F.3d 295, 303–304 (C.A.5 2012) (mother who had taken child to United Kingdom complied with Texas court sanctions order and order to return child to United States for trial), cert. pending, No. 12–304.[FN2] After all, the consequence of compliance presumably would not be relinquishment of custody rights, but simply custody proceedings in a different forum.

> FN1. Whether Scotland would do so is unclear; Ms. Chafin cited no authority for her assertion in her brief or at oral argument. In a recently issued decision from the Family Division of the High Court of Justice of England and Wales, a judge of that court rejected the "concept of automatic re-return of a child in response to the overturn of [a] Hague order." *DL v. EL,* [2013] EWHC 49, ¶ 59 (Judgt. of Jan. 17). The judge in that case did not ignore the pertinent re-return order—issued by the District Court in *Larbie v. Larbie*, 690 F.3d 295 (C.A.5 2012), cert. pending, No. 12–304—but did not consider it binding in light of the proceedings in England.
>
> Earlier in those proceedings, the Family Division of the High Court directed the parties to provide this

Court with a joint statement on the status of those proceedings. This Court is grateful for that consideration.

FN2. Ms. Chafin suggests that the Scottish court's *ne exeat* order prohibits E.C. from leaving Scotland. The *ne exeat* order, however, only prohibits Mr. Chafin from removing E.C. from Scotland; it does not constrain Ms. Chafin in the same way.

Enforcement of the order may be uncertain if Ms. Chafin chooses to defy it, but such uncertainty does not typically render cases moot. Courts often adjudicate disputes where the practical impact of any decision is not assured. For example, courts issue default judgments against defendants who failed to appear or participate in the proceedings and therefore seem less likely to comply. See Fed. Rule Civ. Proc. 55. Similarly, the fact that a defendant is insolvent does not moot a claim for damages. See 13C C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3533.3, p. 3 (3d ed.2008) (cases not moot "even though the defendant does not seem able to pay any portion of the damages claimed"). Courts also decide cases against foreign nations, whose choices to respect final rulings are not guaranteed. See, *e.g.*, *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 159 L.Ed.2d 1 (2004) (suit against Austria for return of paintings); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S.Ct. 2160, 119 L.Ed.2d 394 (1992) (suit against Argentina for repayment of bonds). And we have heard the Government's appeal from the reversal of a conviction, even though the defendants had been deported, reducing the practical impact of any decision; we concluded that the case was not moot because the defendants might "re-enter this country on their own" and encounter the consequences of our ruling. *United States v. Villamonte–Marquez*, 462 U.S. 579, 581, n. 2, 103 S.Ct. 2573, 77 L.Ed.2d 22 (1983).

So too here. A re-return order may not result in the return of E.C. to the United ***1026** States, just as an order that an insolvent defendant pay $100 million may not make the plaintiff rich. But it cannot be said that the parties here have no "concrete interest" in whether Mr. Chafin secures a re-return order. *Knox*, 567 U.S., at ——, 132 S.Ct., at 2287 (internal quotation marks omitted). "[H]owever small" that concrete interest may be due to potential difficulties in enforcement, it is not simply a matter of academic debate, and is enough to save this case from mootness. *Ibid.* (internal quotation marks omitted).

B

Mr. Chafin also seeks, if he prevails, vacatur of the District Court's expense orders. The District Court ordered Mr. Chafin to pay Ms. Chafin over $94,000 in court costs, attorney's fees, and travel expenses. See Civ. No. 11–1461 (ND Ala., Mar. 7, 2012), pp. 15–16; Civ. No. 11–1461 (ND Ala., June 5, 2012), p. 2. That award was predicated on the District Court's earlier judgment allowing Ms. Chafin to return with her daughter to Scotland. See Civ. No. 11–1461 (ND Ala., Mar. 7, 2012), pp. 2–3, and n. 2.[FN3] Thus, in conjunction with reversal of the judgment, Mr. Chafin desires vacatur of the award. That too is common relief on appeal, see, *e.g.*, *Fawcett, supra*, at 501, n. 6 (reversing costs and fees award when reversing on the issue of wrongful removal), and the mootness inquiry comes down to its effectiveness.

FN3. The award was predicated on the earlier judgment even though that judgment was vacated. The District Court cited Eleventh Circuit cases for the proposition that if a plaintiff obtains relief before a district court and the case becomes moot on appeal, the plaintiff is still a prevailing party entitled to attorney's fees. We express no view on that question. The fact remains that the District Court ordered Mr. Chafin to pay attorney's fees and travel expenses based on its earlier ruling. A reversal, as opposed to vacatur, of the earlier ruling could change the prevailing party calculus and afford Mr. Chafin effective relief.

At oral argument, Ms. Chafin contended that such relief was "gone in this case," and that the case was therefore moot, because Mr. Chafin had failed to pursue an appeal of the expense orders, which had been entered as separate judgments. Tr. of Oral Arg. 33; see Civ. No. 11–1461 (ND Ala., Mar. 7, 2012); Civ. No. 11–1461 (ND Ala., June 5, 2012). But this is another argument on the merits. Mr. Chafin's requested relief is not so implausible that it may be disregarded on the question of jurisdiction; there is authority for the proposition that failure to appeal such judgments separately does not preclude relief. See 15B Wright, Miller, & Cooper, *supra,* § 3915.6, at 230, and n. 39.5 (2d ed.,

Supp.2012) (citing cases). It is thus for lower courts at later stages of the litigation to decide whether Mr. Chafin is in fact entitled to the relief he seeks—vacatur of the expense orders.

Such relief would of course not be " 'fully satisfactory,' " but with respect to the case as whole, "even the availability of a 'partial remedy' is 'sufficient to prevent [a] case from being moot.' " *Calderon v. Moore*, 518 U.S. 149, 150, 116 S.Ct. 2066, 135 L.Ed.2d 453 (1996) (*per curiam*) (quoting *Church of Scientology*, 506 U.S., at 13, 113 S.Ct. 447).

IV

Ms. Chafin is correct to emphasize that both the Hague Convention and ICARA stress the importance of the prompt return of children wrongfully removed or retained. We are also sympathetic to the concern that shuttling children back and forth between parents and across international borders may be detrimental to those children. But courts can achieve the ends of the Convention and ICARA—and protect the well-being of the affected children***1027** —through the familiar judicial tools of expediting proceedings and granting stays where appropriate. There is no need to manipulate constitutional doctrine and hold these cases moot. Indeed, doing so may very well undermine the goals of the treaty and harm the children it is meant to protect.

If these cases were to become moot upon return, courts would be more likely to grant stays as a matter of course, to prevent the loss of any right to appeal. See, *e.g.*, *Garrison v. Hudson*, 468 U.S. 1301, 1302, 104 S.Ct. 3496, 82 L.Ed.2d 804 (1984) (Burger, C.J., in chambers) ("When ... the normal course of appellate review might otherwise cause the case to become moot, issuance of a stay is warranted" (citation and internal quotation marks omitted)); *Nicolson v. Pappalardo,* Civ. No. 10–1125 (C.A.1, Feb. 19, 2010) ("Without necessarily finding a clear probability that appellant will prevail, we grant the stay because ... a risk exists that the case could effectively be mooted by the child's departure"). In cases in which a stay would not be granted but for the prospect of mootness, a child would lose precious months when she could have been readjusting to life in her country of habitual residence, even though the appeal had little chance of success. Such routine stays due to mootness would be likely but would conflict with the Convention's mandate of prompt return to a child's country of habitual residence.

Routine stays could also increase the number of appeals. Currently, only about 15% of Hague Convention cases are appealed. Hague Conference on Private Int'l Law, N. Lowe, A Statistical Analysis of Applications Made in 2008 Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Pt. III–National Reports 207 (2011). If losing parents were effectively guaranteed a stay, it seems likely that more would appeal, a scenario that would undermine the goal of prompt return and the best interests of children who should in fact be returned. A mootness holding here might also encourage flight in future Hague Convention cases, as prevailing parents try to flee the jurisdiction to moot the case. See *Bekier*, 248 F.3d, at 1055 (mootness holding "to some degree conflicts with the purposes of the Convention: to prevent parents from fleeing jurisdictions to find a more favorable judicial forum").

Courts should apply the four traditional stay factors in considering whether to stay a return order: " '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.' " *Nken v. Holder*, 556 U.S. 418, 434, 129 S.Ct. 1749, 173 L.Ed.2d 550 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776, 107 S.Ct. 2113, 95 L.Ed.2d 724 (1987)). In every case under the Hague Convention, the well-being of a child is at stake; application of the traditional stay factors ensures that each case will receive the individualized treatment necessary for appropriate consideration of the child's best interests.

Importantly, whether at the district or appellate court level, courts can and should take steps to decide these cases as expeditiously as possible, for the sake of the children who find themselves in such an unfortunate situation. Many courts already do so. See Federal Judicial Center, J. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 116, n. 435 (2012) (listing courts that expedite appeals).***1028**

Cases in American courts often take over two years from filing to resolution; for a six-year-old such as E. C., that is one-third of her lifetime. Expedition will help minimize the extent to which uncertainty adds to the challenges confronting both parents and child.

* * *

The Hague Convention mandates the prompt return of children to their countries of habitual residence. But such return does not render this case moot; there is a live dispute between the parties over where their child will be raised, and there is a possibility of effectual relief for the prevailing parent. The courts below therefore continue to have jurisdiction to adjudicate the merits of the parties' respective claims.

The judgment of the United States Court of Appeals for the Eleventh Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice GINSBURG, with whom Justice SCALIA and Justice BREYER join, concurring.

The driving objective of the Hague Convention on the Civil Aspects of International Child Abduction (Convention) is to facilitate custody adjudications, promptly and exclusively, in the place where the child habitually resides. See Convention, Oct. 25, 1980, T.I.A.S. No. 11670, Arts. 1, 3, S. Treaty Doc. No. 99–11, p. 7 (Treaty Doc.). To that end, the Convention instructs Contracting States to use "the most expeditious procedures available" to secure the return of a child wrongfully removed or retained away from her place of habitual residence. Art. 2, *ibid*.; see Art. 11, *id.,* at 9 (indicating six weeks as the target time for decision of a return-order petition); Hague Conference on Private International Law, Guide to Good Practice Under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I–Central Authority Practice, § 1.5.1, p. 19 (2010) (Guide to Good Practice) ("Expeditious procedures are essential at all stages of the Convention process."). While "[the] obligation to process return applications expeditiously ... extends to appeal procedures," *id.,* Part IV–Enforcement, § 2.2, ¶ 51, at 13, the Convention does not prescribe modes of, or time frames for, appellate review of first instance decisions. It therefore rests with each Contracting State to ensure that appeals proceed with dispatch.

Although alert to the premium the Convention places on prompt return, see 42 U.S.C. § 11601(a)(4), Congress did not specifically address appeal proceedings in the legislation implementing the Convention. The case before us illustrates the protraction likely to ensue when the finality of a return order is left in limbo.

Upon determining that the daughter of Jeffrey Chafin and Lynne Chafin resided in Scotland, the District Court denied Mr. Chafin's request for a stay pending appeal, and authorized the child's immediate departure for Scotland. The Eleventh Circuit, viewing the matter as a *fait accompli,* dismissed the appeal filed by Mr. Chafin as moot.[FN1] As the Court's opinion explains, ***1029** the Eleventh Circuit erred in holding that the child's removal to Scotland rendered further adjudication in the U.S. meaningless. Reversal of the District Court's return order, I agree, could provide Mr. Chafin with meaningful relief. A determination that the child's habitual residence was Alabama, not Scotland, would open the way for an order directing Ms. Chafin to "re-return" the child to the United States and for Mr. Chafin to seek a custody adjudication in an Alabama state court.[FN2] But that prospect is unsettling. "[S]huttling children back and forth between parents and across international borders may be detrimental to those children," *ante,* at 1026, whose welfare led the Contracting States to draw up the Convention, see 1980 Conférence de La Haye de droit international privé, Enlèvement d'enfants, E. Pérez–Vera, Explanatory Report, in 3 Actes et Documents de la Quatorzième session, ¶ 23, p. 431 (1982). And the advent of rival custody proceedings in Scotland and Alabama is just what the Convention aimed to stave off.

FN1. The Court of Appeals instructed the District Court to vacate the return order, thus leaving the child's

habitual residence undetermined. The Convention envisions an adjudication of habitual residence by the return forum so that the forum abroad may proceed, immediately, to the adjudication of custody. See Convention, Arts. 1, 16, 19, Treaty Doc., at 7, 10, 11. See also *DL v. EL,* [2013] EWHC 49 (Family Div.), ¶ 36 (Judgt. of Jan. 17) ("[T]he objective of Hague is the child's prompt return to the country of the child's habitual residence so that that country's courts can determine welfare issues."); Silberman, Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence, 38 U.C.D.L.Rev. 1049, 1054 (2005) (typing the "return" remedy as "provisional," because "proceedings on the merits of the custody dispute are contemplated in the State of the child's habitual residence once the child is returned there").

FN2. As the Court observes, *ante,* at 1024 – 1025, n. 1, a judge of the Family Division of the High Court of Justice of England and Wales recently concluded that "the concept of automatic re-return of a child in response to the overturn of [a] Hague order pursuant to which [the child] came [to England] is unsupported by law or principle, and would ... be deeply inimical to [the child's] best interests." *DL v. EL,* [2013] EWHC 49, ¶ 59(e). If Mr. Chafin were able to secure a reversal of the District Court's return order, the Scottish court adjudicating the custody dispute might similarly conclude that the child should not be re-returned to Alabama, notwithstanding any U.S. court order to the contrary, and that jurisdiction over her welfare should remain with the Scottish court.

This case highlights the need for both speed and certainty in Convention decisionmaking. Most Contracting States permit challenges to first instance return orders. See Guide to Good Practice, Part IV–Enforcement, § 2.3, ¶ 57, at 14. How might appellate review proceed consistent with the Convention's emphasis on expedition? According to a Federal Judicial Center guide, "[e]xpedited procedures for briefing and handling of [return-order] appeals have become common in most circuits." J. Garbolino, The 1980 Hague Convention on the Civil Aspects of International Child Abduction: A Guide for Judges 116 (2012).[FN3] As an example, the guide describes *Charalambous v. Charalambous,* 627 F.3d 462 (C.A.1 2010) (*per curiam*), in which the Court of Appeals stayed a return order, expedited the appeal, and issued a final judgment affirming the return order 57 days after its entry. Once appellate review established the finality of the return order, custody could be litigated in the child's place of habitual residence with no risk of a rival proceeding elsewhere.

FN3. For the federal courts, the Advisory Committees on Federal Rules of Civil and Appellate Procedures might consider whether uniform rules for expediting Convention proceedings are in order. Cf. *ante,* at 1028 (noting that "[c]ases in American courts often take over two years from filing to resolution").

But as the Court indicates, stays, even of short duration, should not be granted "as a matter of course," for they inevitably entail loss of "precious months when [the child] could have been readjusting to life in her country of habitual residence." *Ante,* at 1027; see Tr. of Oral Arg. 39. See also *DL v. EL,* [2013] EWHC 49 (Family Div.), ***1030** ¶ 38 (Judgt. of Jan. 17) ("[Children] find themselves in a sort of Hague triangle limbo, marooned in a jurisdiction from which their return has been ordered but becalmed by extended uncertainty whether they will in the event go or stay."). Where no stay is ordered, the risk of a two-front battle over custody will remain real. See *supra,* at 1028 – 1029. See also *Larbie v. Larbie,* 690 F.3d 295 (C.A.5 2012) (vacating return order following appeal in which no stay was sought). [FN4]

FN4. The *Larbie* litigation, known by another name in the English courts, illustrates that the risk of rival custody proceedings, and conflicting judgments, is hardly theoretical. Compare *Larbie,* 690 F.3d 295, with *DL v. EL,* [2013] EWHC 49.

Amicus Centre for Family Law and Policy calls our attention to the management of Convention hearings and appeals in England and Wales and suggests that procedures there may be instructive. See Brief for Centre for Family Law and Policy 22–24 (Centre Brief). To pursue an appeal from a return order in those domains, leave must be obtained from the first instance judge or the Court of Appeal. Family Procedure Rules 2010, Rule 30.3 (U.K.). Leave will be granted only where "the appeal would have a real prospect of success; or ... there is some other compelling reason

why the appeal should be heard." *Ibid.* Although an appeal does not trigger an automatic stay, see Rule 30.8, if leave to appeal is granted, we are informed, a stay is ordinarily ordered by the court that granted leave. Centre Brief 23; Guide to Good Practice, Part IV–Enforcement, ¶ 74, at 19–20, n. 111. Appeals are then fast-tracked with a target of six weeks for disposition. Centre Brief 24. See also *DL v. EL*, [2013] EWHC 49, ¶¶ 42–43 (describing the English practice and observing that "[t]he whole process is ... very swift, and the resultant period of delay and uncertainty much curtailed by comparison with [the United States]").

By rendering a return order effectively final absent leave to appeal, the rules governing Convention proceedings in England and Wales aim for speedy implementation without turning away appellants whose pleas may have merit. And by providing for stays when an appeal is well founded, the system reduces the risk of rival custody proceedings. Congressional action would be necessary if return-order appeals are not to be available in U.S. courts as a matter of right, but legislation requiring leave to appeal would not be entirely novel. See 28 U.S.C. § 2253(c) (absent a certificate of appealability from a circuit justice or judge, an appeal may not be taken from the final decision of a district judge in a habeas corpus proceeding or a proceeding under 28 U.S.C. § 2255); cf. Guide to Good Practice, Part IV–Enforcement, § 2.5, at 16 (suggesting that, to promote expedition, Contracting States might consider a requirement of leave to appeal); *id.*, Part II–Implementing Measures, § 6.6, at 37 (measures to promote speed within the appeals process include "limiting the time for appeal from an adverse decision [and] requiring permission for appeal" (footnote omitted)).

Lynne Chafin filed her petition for a return order in May 2011. E.C. was then four years old. E.C. is now six and uncertainty still lingers about the proper forum for adjudication of her parents' custody dispute. Protraction so marked is hardly consonant with the Convention's objectives. On remand, the Court rightly instructs, the Court of Appeals should decide the case "as expeditiously as possible," *ante*, at 1027. For future cases, rulemakers and legislators might pay sustained attention to the means by which the United States can best serve the Convention's ***1031** aims: "to secure the prompt return of children wrongfully removed to or retained in" this Nation; and "to ensure that rights of custody ... under the law of one Contracting State are effectively respected in the other Contracting States." Art. 1, Treaty Doc., at 7.

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TO: EHC

FROM: BJR

DATE: September 27, 2012 (rev. Oct. 3, 2012)

RE: Background on Judicial Conference Position Opposing Fixed Civil Litigation Deadlines

The Mississippi Attorney General has suggested civil rules amendments that would, among other things, "requir[e] the automatic remand of cases in which the district court takes no action on a motion to remand within 30 days." *Civil Rules Suggestion 12-CV-C*. This memorandum briefly summarizes (1) the Judicial Conference position on statutorily imposed litigation priority, expediting, or time-limitation rules; and (2) recent, related legislative proposals that have drawn the Conference's opposition.

When faced with legislation seeking to prioritize types of civil actions and decision-making, the Judicial Conference has consistently opposed provisions imposing litigation priority, expediting, or time-limitation rules on specified cases brought in the federal courts. The Conference views 28 U.S.C. § 1657 as sufficiently recognizing the appropriateness of federal courts generally determining case management priorities and the desire to expedite consideration of limited types of actions. *Rpt. of the Comm. on Federal-State Jurisdiction* A-5 (Sept. 1998); JCUS-SEP 90, p. 80.

Since 1990, legislation setting docket and case management priorities has been studied most closely by the Conference's Committee on Federal-State Jurisdiction. But, as detailed below, the Conference's position on this issue was firmly established by 1981. The position developed from concerns that:

> (1) proliferation of statutory priorities means there will be no priorities; (2) individual cases within a class of cases inevitably have different priority treatment needs; (3) priorities are best set on a case-by-case basis as dictated by the exigent circumstances of the case and the status of the court docket; and (4) mandatory priorities, expedition, and time limits for specific types of cases are inimical to effective case management.

Letter from James C. Duff, Secretary, Judicial Conf. of the United States, to Lamar Smith (R-TX), Ranking Member, Comm. on the Judiciary, U.S. House of Representatives (Nov. 10, 2009) (expressing Judicial Conference views concerning the *Tribal Law and Order Act* of 2009).[1] The

[1] Section 103(b) of that Act authorized and encouraged each U.S. Attorney serving a district that includes Indian country "to coordinate with the applicable United States magistrate and district courts...to ensure the provision of docket time for prosecutions of Indian country crimes." Tribal Law and Order Act of 2009, H.R. 1924.

In 2010, the Judicial Conference's Executive Committee approved a recommendation from the Judicial Conference Committee on Criminal Law to "oppose the establishment of statutory litigation priorities that would call for the expediting of certain types of criminal cases." *Rpt. of the Comm. on Crim. Law* 16 (Mar. 2010). Like its approach to legislation affecting the civil docket, the Conference takes the position that the *Speedy Trial Act*, 18

Conference's formal opposition to statutory civil litigation priorities developed in part from judicial improvements and legislative reforms first called for by the American Bar Association (ABA). In February 1977, the ABA House of Delegates adopted the following resolution:

> BE IT RESOLVED, That the American Bar Association endorses the repeal by the Congress of all statutory provisions which require that any class or category of civil cases, other than habeas corpus matters, be heard by the United States Courts of Appeals and the United States District Courts on a priority basis; and
>
> BE IT FURTHER RESOLVED, That the American Bar Association endorses the principle that the Circuit Council of each United States Courts of Appeals set calendar priorities for that Circuit.

See Mandatory Appellate Jurisdiction of the Supreme Court—Abolition of Civil Priorities—Jurors Rights: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Admin. of Justice of the House Comm. on the Judiciary, 97th Cong., 1st Sess. 74 (1982) [hereinafter *Hearing*] (prepared statement of Benjamin L. Zelenko). Following this resolution, the U.S. Department of Justice's Office for Improvements in the Administration of Justice pursued several attempts to develop reform legislation that same year. *Hearing* at 82.

On August 4, 1981, Congressman Robert W. Kastenmeier (D-WI) introduced H.R. 4396 (97th Cong.), the Federal Courts Civil Priorities Act, observing that because of the large caseloads in the federal courts, the number of priority cases had increased to the extent that many non-priority civil cases could not be docketed for hearings at all, or suffered inordinate delays. *See Rpt. of the Comm. on Court Admin. and Case Mgmt.* 11 (Sept. 1981); *Hearing* 26. Consistent with the ABA resolutions, Rep. Kastenmeier's bill sought to repeal virtually all of the civil expediting provisions applicable to either the district or appellate courts. The bill's initial phrase, "[n]otwithstanding any law to the contrary," sought to ensure prospectively that any priority provision later slipped into the code would be of no effect. *Hearing* at 96.

The Judicial Conference welcomed the legislation and at its September 1981 session approved the bill based on a recommendation from the Committee on Courts Administration. JCUS-MAR 1981, p. 68. In June 1982, on behalf of the Judicial Conference, Judge Elmo B. Hunter, U.S. District Judge for the Western District of Missouri and Chairman of the Committee on Court Administration, testified in support of the bill before the House Judiciary Committee's Subcommittee on Courts, Civil Liberties, and the Administration of Justice. *See Hearings* 29-30 (recommending that all civil case priorities "be placed in a single section in the judiciary title of the United States Code . . . under proposed new section, 1657."). Judge Hunter noted that Chief Justice Warren E. Burger had previously expressed to the same subcommittee concerns about the welter of acts requiring expedited case handling. *Id*. at 43. And representatives from the U.S. Department of Justice, ABA, and the Association of the Bar of the City of New York echoed Judge Hunter's testimony supporting the bill. *See, e.g.*, *id*. at 110-12, 121-26 (testimony of Deputy Assistant Attorney General Timothy J. Finn). Ultimately, the *Federal Courts Civil*

U.S.C. § 3161, establishes the appropriate time limits for all criminal cases. *Id*. Prior to H.R. 1924, it appears the Conference had not been called upon to articulate opposition to the prioritization of certain types of criminal cases.

Priorities Act was read and referred to the House Judiciary Committee but did not become law. It was reintroduced as H.R. 5645 (98th Cong.) on May 10, 1984, and was passed only by the House.

But, in November 1984, Congress added Section 1657 to Title 28 using language substantively identical to that used in H.R. 4396. *See* 28 U.S.C § 1657 ("Notwithstanding any other provision of law . . ."). The enactment of Section 1657(a) directed "each court of the United States to determine the order in which civil actions are heard and determined," with limited exceptions for (1) habeas corpus actions; (2) actions concerning recalcitrant grand jury witnesses; (3) any action for temporary or preliminary injunctive relief; and (4) other actions if "good cause" for calendar priority is shown (for purposes of the statute, good cause is shown if a federal Constitutional right or a federal statutory right, including rights under 5 U.S.C. § 552 (FOIA), would benefit from expedited treatment). Before Section 1657 became law, more than eighty separate federal statutes authorized civil actions and, at the same time, gave the authorized civil actions calendar priority, making it difficult to obey one statute without violating another. *See Hearing* 181-90 (collecting statutes). Its addition to the United States Code abrogated most of these individual prioritizing statutes.

A temporary and apparently voluntary moratorium on legislative proposals to impose litigation priorities followed the enactment of Section 1657. But in 1990, the Committee on Federal-State Jurisdiction revisited the issue because a pending Department of Interior appropriations bill sought to give priority over all other civil actions to any federal court action that challenged a timber sale in a forest with the northern spotted owl. The legislation also required the courts to render a final decision on the merits in such cases within forty-five days. *Rpt. of the Comm. on Federal-State Jurisdiction* 3-4 (Mar. 1990). At its March 1990 session, the Conference voted to oppose reenactment of these provisions, observing that "[e]stablishing civil priorities, and imposing time limits on the judicial decision-making process, are inimical to effective civil case management and unduly hamper exercise of the necessary discretion in the performance of judicial functions." JCUS-MAR 1990, p. 19.

The Conference focused further attention on the issue of litigation priorities and expediting provisions in legislation at its next meeting, in September 1990. At the time, the Senate had incorporated into S. 1970 (101st Cong.), the major crime legislation passed by the Senate on July 11, 1990, litigation priority provisions concerning habeas corpus and Section 2255 motions in capital cases and thrift institution bailout litigation. The legislation sought to impose the following time limits for resolving habeas corpus petition litigation in capital cases: the district court would have to determine any such petition within 110 days of filing; a court of appeals would have to determine an appeal of a grant, denial, or partial denial of such a petition within ninety days after the notice of appeal is filed; and the Supreme Court would have to act on any petition for a writ of certiorari within ninety days after the petition is filed. The bill also contained priority provisions for judicial handling of Section 2255 motions in federal capital cases.

With respect to the thrift institution bailout litigation, the amendments to S. 1970 specified that (1) consistent with 28 U.S.C. § 1657, a court of the United States shall expedite the consideration of any case brought by the Federal Deposit Insurance Corporation against

directors, officers, employees, and those providing services to an insured institution, stating that "[a]s far as practicable the court shall give such a case priority on its docket;" (2) the hearing in an appeal in such a case "shall be conducted not later than 60 days after the date of filing of the notice of appeal" and "the appeal shall be decided not later than 90 days after the date of the notice of appeal;" and (3) the court may modify these schedules and limitations in a particular case "based on a specific finding that the ends of justice that would be served by making such a modification would outweigh the best interest of the public in having the case resolved expeditiously." *See Rpt. of the Comm. on Federal-State Jurisdiction* 4 (Sept. 1990) (discussing S. 1970 and past Judicial Conference positions on statutory civil priority issues). Responding to the bill, the Conference "reiterated its strong opposition to legislative provisions imposing statutory litigation priority, expediting, or time limitation rules on specified classes of civil cases [and] strongly opposed any attempt to impose statutory time limits for disposition of specified cases in the district courts, the courts of appeals or the Supreme Court." JCUS-SEP 1990, p. 80.

The "Judicial Improvement Act of 1998" (S. 2163, 105th Congress) again resurrected the docket prioritization issue. That legislation was introduced in June 1998, by Senator Orrin Hatch (R-UT), Chair of the Senate Judiciary Committee, and Senators John Ashcroft (R-MO), Spencer Abraham (R-MI), Strom Thurmond (R-SC), Jeff Sessions (R-AL), and Jon Kyl (R-AZ). Section 3(a) of the bill included an automatic termination provision modeled upon the Prison Litigation Reform Act and provided for the automatic termination of any court ordered relief or decree, if the federal district court failed to rule on a motion to terminate within sixty days. The Federal-State Jurisdiction Committee determined that the sixty-day time limit included in section 3(a) was inconsistent with previous Conference positions regarding the statutory imposition of litigation priorities and recommended that the Judicial Conference oppose the time limit because it would likely "impede the effective administration of justice." *Rpt. of the Comm. on Federal-State Jurisdiction* A-9 (Sept. 1998).

Most recently, in March 2005, Senator Lamar Alexander (R-TN) introduced the "Federal Consent Decree Fairness Act," S. 489 (109th Congress). The purpose of the bill was to create "term limits" for consent decrees and to narrow them to "encourage the courts to get the decision-making back in the hands of the elected officials as soon as possible." 151 Cong. Rec. S2064 (daily ed. Mar. 4, 2005). The legislation would have created a new section 1660 of Title 28, to allow state or local officials sued in their official capacities to file a motion to modify or vacate a consent decree (limited to those involving state or local officials and not private settlements) upon the earlier of four years after it was originally entered, or at the expiration of the term of office of the highest elected state or local official who authorized the government to consent. Section (b)(3) of the new section 1660 would have required the court to rule on such motions within 90 days. If the court did not, then pursuant to section (b)(4), the consent decree would have no force or effect beginning on the ninety-first day after the motion was filed until the date on which the court enters a ruling on the motion. Consistent with past opposition, the Committee on Federal-State Jurisdiction requested that the Director of the AO send a letter to Congress opposing the ninety-day deadline in the legislation. That letter was transmitted to selected members of the House and Senate Judiciary Committees, as well as the primary sponsors of the legislation, on June 22, 2005. *Rpt. of the Comm. on Federal-State Jurisdiction* 14-15 (Sept. 2005).