ADVISORY COMMITTEE
ON
APPELLATE RULES

Newark, NJ
October 3-4, 2013

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October 3 and 4, 2013
Newark, NJ

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Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
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Advisory Committee on Appellate Rules
Table of Agenda Items — September 2013

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

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 Discussed and retained on agenda 04/13
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 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13
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 Approved by Supreme Court 04/13
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

FRAP Item	Proposal	Source	Current Status
09-AP-B	Amend FRAP 1(b) to include federally recognized Indian tribes within the definition of "state"	Daniel I.S.J. Rey-Bear, Esq.	Discussed and retained on agenda 04/09 Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 10/11 Discussed and retained on agenda 04/12; Committee will revisit in 2017
09-AP-C	Consider possible FRAP amendments in the light of project to revise Part VIII of the Bankruptcy Rules	Bankruptcy Rules Committee	Discussed and retained on agenda 11/09 Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed jointly with Bankruptcy Rules Committee and retained on agenda 04/11 Discussed and retained on agenda 10/11 Draft approved 04/12 for submission to Standing Committee Approved for publication by Standing Committee 06/12 Published for comment 08/12 Draft approved 04/13 for submission to Standing Committee Approved by Standing Committee 06/13
09-AP-D	Consider implications of Mohawk Industries, Inc. v. Carpenter	John Kester, Esq.	Discussed and retained on agenda 04/10 Discussed and retained on agenda 10/10 Discussed and retained on agenda 04/13
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 Approved by Supreme Court 04/13
11-AP-C	Amend FRAP 3(d)(1) to take account of electronic filing	Harvey D. Ellis, Jr., Esq.	Discussed and retained on agenda 04/13
11-AP-D	Consider changes to FRAP in light of CM/ECF	Hon. Jeffrey S. Sutton	Discussed and retained on agenda 10/11 Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13

FRAP Item	Proposal	Source	Current Status
11-AP-F	Consider amendment authorizing discretionary interlocutory appeals from attorney-client privilege rulings	Amy M. Smith, Esq.	Discussed and retained on agenda 04/13
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 Discussed and retained on agenda 04/13
12-AP-F	Consider amending FRAP 42 to address class action appeals	Professors Brian T. Fitzpatrick and Brian Wolfman and Dean Alan B. Morrison	Discussed and retained on agenda 09/12 Discussed and retained on agenda 04/13
13-AP-B	Amend FRAP to address permissible length and timing of an amicus brief in support of a petition for rehearing and/or rehearing en banc	Roy T. Englert, Jr., Esq.	Discussed and retained on agenda 04/13
13-AP-C	Consider possible rules for expediting proceedings under Hague Convention on the Civil Aspects of International Child Abduction	Hon. Steven M. Colloton	Discussed by Appellate Rules Committee 04/13 Discussed by Standing Committee 06/13
13-AP-D	Revise Rule 6(b)(2)(B)(iii)'s list of contents of record on appeal, and revise Rule 3(d)(1) in light of electronic filing	Hon. S. Martin Teel, Jr.	Referred to CM/ECF Subcommittee 09/13
13-AP-E	Consider treatment of audiorecordings of appellate arguments	Appellate Rules Committee	Awaiting initial discussion
13-AP-F	Consider items included for purposes of length limit in Rule 35(b)(2)	Gregory G. Garre, Esq.	Awaiting initial discussion

FRAP Item	Proposal	Source	Current Status
13-AP-G	Consider clarifying which items can be excluded when calculating length under Rule 28.1(e)	Appellate Rules Committee	Awaiting initial discussion
13-AP-H	Consider possible amendments to FRAP 41 in light of Bell v. Thompson, 545 U.S. 794 (2005), and Ryan v. Schad, 133 S. Ct. 2548 (2013)	Hon. Steven M. Colloton	Awaiting initial discussion

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

I. Introductions

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

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

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

II. Approval of Minutes of September 2012 Meeting

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

III. Report on January 2013 Meeting of Standing Committee

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

IV. Other Information Items

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

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

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

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

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

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

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

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

VI. Discussion Items

A. Items Proposed for Removal from Agenda

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. Items for Further Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

By consensus, the Committee decided to keep this item on its agenda. The Reporter undertook to work with Judge Dow, Mr. Letter, and Mr. Byron to draft illustrative alternatives for an amendment to Rule 4(a)(4) – one draft that would implement the majority view concerning the meaning of "timely," and another that would implement the Sixth Circuit's view.

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

Judge Colloton invited the Reporter to introduce this item, which concerns the operation of Rule 4(c)(1)'s inmate-filing provision. The first sentence of Rule 4(c)(1) applies the prison-mailbox rule to notices of appeal. The second sentence states that the inmate, to receive the benefit of this rule, must use the "system designed for legal mail" if the institution has one. The third sentence states that timeliness "may be shown" by a declaration or notarized statement setting out the date of deposit and attesting that first-class postage was prepaid. Judge Diane Wood asked the Committee to consider clarifying whether this Rule requires prepayment of postage as a condition of timeliness. Research revealed that there also may be confusion in the law about whether the declaration discussed in the third sentence is required in all instances and, if so, when it must be furnished.

The doctrinal backdrop for this inquiry includes prisoners' constitutional right of access to court under *Bounds v. Smith*, 430 U.S. 817 (1977). The Court has ruled that *Bounds* requires that inmates be provided with the "tools … to attack their sentences, directly or collaterally, and … to challenge the conditions of their confinement." *Lewis v. Casey*, 518 U.S. 343, 355 (1996). Although courts have recognized (or assumed) that there is a federal constitutional right to some amount of free postage for an indigent inmate's legal mail, the constitutionally required amount may be relatively small. The Reporter noted that the Sixth Circuit, in a 2010 decision, found a *Bounds* violation where a defendant's attempt to file a direct appeal of his state-court judgment of conviction was thwarted by prison officials' delay in mailing his appeal papers and by the absence of a prison-mailbox rule under state law.

The Committee's agenda materials set forth some possible drafting alternatives for amendments to Rule 4(c)(1). The Rule could be amended to extend clearly the postage-prepayment requirement to all prison-mailbox filings. An argument in favor of such a change is that it could speed the processing of appeals by preventing delays in the transit of the notice of appeal; counter-arguments would stem from the facts that inmates have fewer opportunities to earn money than non-inmates and that inmates lack the alternative of delivering the notice of appeal to the court by hand. The latter concerns would suggest that if the Committee were to propose an amendment cementing a postage-prepayment requirement, it should also consider including a provision for excusing compliance in appropriate circumstances. The materials also sketched a possible amendment that would restrict the postage-prepayment requirement to instances

when the inmate does not use a legal mail system, but it is unclear why such a choice would be desirable. Another possible type of amendment would make clear whether the declaration or notarized statement is always required, and, if so, whether it must be included with the notice of appeal or whether it can be provided later. Another question is whether it would be possible to clarify what is meant by a "system designed for legal mail"; but a clearer alternative seems difficult to formulate. Finally, another possible type of amendment would clarify whether Rule 4(c)(1) applies to filings by an inmate who has a lawyer.

Judge Colloton observed that the 1993 Committee Note to Rule 4(c) stated that this inmate-filing provision was "similar to that in Supreme Court Rule 29.2." There may have been some ambiguity in the original Rule, he suggested, with respect to the requirement of a declaration. In 1998 the second sentence of Rule 4(c)(1) – referring a "system designed for legal mail" – was added. The 1998 Committee Note to Rule 4(c) explained: "Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc." Judge Colloton pointed out that "often" is different from "always." He asked whether it is always the case that a piece of mail processed through an institution's legal mail system will have a date stamp, such that it would be unnecessary to have a declaration by the inmate concerning the date of deposit.

Mr. Gans stated that simplicity is key for rules concerning inmate filings. He reported that inmates tend to assume that all of their filings are governed by *Houston v. Lack*, 487 U.S. 266 (1988). Judge Colloton asked whether the Clerk's Office checks inmate mailings for a date stamp. Mr. Gans responded that his office does typically look at the envelope, which is usually scanned in as a PDF file by the District Clerk's Office. The Federal Bureau of Prisons, he noted, does mark the envelopes containing inmate mailings. He reported that his office typically does not see a declaration by the inmate concerning the date of deposit of the mailing; usually the issue does not arise unless the appellee moves to dismiss the appeal. Sometimes the court of appeals remands the case to the district court for the district court to make a finding concerning when the notice of appeal was filed.

An appellate judge member suggested that the provision concerning legal mail systems adds complexity. Another member questioned why the Rule should require payment of postage, and why the institution should not be required to cover the cost of postage for a notice of appeal. Covering the cost of postage, this member suggested, would be cheaper than litigating the question of whether there was good cause to excuse the inmate from paying the postage. Mr. Letter summarized the Federal Bureau of Prisons policy. Under this policy, inmates are generally responsible for paying their own postage costs, but the institution will provide stamps for legal mail (subject to possible limitation by the warden). Mr. Gans noted that, before inmates arrive in a Federal Bureau of Prisons facility, they may be held temporarily in a facility (such as a county jail) where different mail practices apply. An appellate judge agreed that it would be very rare for an inmate to arrive in an institution run by the Federal Bureau of Prisons within the 14-day period for filing a notice of appeal. Mr. Letter observed that federal public defenders file

notices of appeal on behalf of their clients as a matter of course. Mr. Gans responded, though, that retained or appointed counsel might not follow this practice.

An appellate judge member observed that the Committee is not in a position to require an institution to pay the cost of postage for inmates filing a notice of appeal. Another member responded that the Rule could be amended to address the question that does fall within the Committee's purview – namely, whether a notice of appeal that was timely deposited in the institution's mail system is considered timely filed despite subsequent delays caused by nonpayment of postage. If the Rule were amended to provide that such a notice is timely, this member conceded, the effect would likely be that the institution would decide to pay the postage costs itself. This member expressed concern at the possibility that a defendant's appeal might fall through the cracks, and he questioned why the system requires criminal defendants to file a notice of appeal rather than assuming that they will wish to take an appeal. Another participant noted that Rule 4(c)(1) applies to both civil and criminal cases.

An attorney participant stated that he favored making the rules clearer and easier to apply. However, he asked whether the Supreme Court has encountered difficulties in applying its Rule 29.2. A member responded that the filing of certiorari petitions presents different issues because a certiorari petition (unlike a notice of appeal) is not a one-page document.

Mr. Letter questioned whether a Rule could require the government to pay inmates' postage costs; such a requirement, he suggested, could raise questions of sovereign immunity. An appellate judge member responded that a Rule could address the issue by stating that a notice of appeal could be timely even if the lack of postage delayed its arrival at the courthouse. Another appellate judge asked why such a filing should be timely if the inmate had the money to pay for postage and failed to do so. The other appellate judge responded that a bright-line rule providing for timeliness would allow courts to avoid expending judicial efforts on the question of whether the inmate had the resources to pay for postage. Another member added that, under such an approach, the inmate would still need to deposit the notice of appeal in the institution's mail system within the filing deadline.

A district judge member observed that, in civil cases, inmates who lose in the district court are typically litigating pro se. Another member suggested holding this item on the Committee's agenda and conducting research on the origins of the postage-prepayment requirement. An appellate judge suggested that it would also be useful to research whether any similar issues have arisen under the Supreme Court's Rule 29.2. Another appellate judge noted that while the second sentence in Supreme Court Rule 29.2 refers to the statement or declaration noting the date the document was deposited in the mail system and stating that postage has been prepaid, the third sentence provides further steps for the Clerk to take if "[i]f the postmark is missing or not legible." An attorney participant stated that inmates do not have a constitutional right to require the government to pay for postage; he suggested that it would be useful to see whether other Rules discuss prepayment of postage. An appellate judge asked whether there is

information on the frequency with which inmates lose their appeal rights because of the wording of the current Rule 4(c)(1). The Reporter responded that the caselaw provides some examples; for instance, in *United States v. Ceballos-Martinez*, 371 F.3d 713 (10th Cir. 2004), the defendant's notice of appeal was postmarked with a date prior to the deadline for filing the notice of appeal, but the court held his appeal untimely because he had failed to provide a declaration or notarized statement setting forth the notice's date of deposit with prison officials and attesting that first-class postage was pre-paid.

An appellate judge member suggested that it would be useful to revise the Rule to clarify the idea that the declaration *suffices*, but is not required, to show compliance with the Rule. The Reporter suggested that Rule 32(a)(7)(C)(ii) might provide a useful model.

An appellate judge member asked whether amending the Rule to make clear that there is no postage-prepayment requirement would touch off conflicts between inmates and prison authorities. An attorney participant suggested that it would be odd to eliminate the postage-prepayment requirement for notices of appeal but not for briefs. The Reporter noted that the deadline for filing a notice of appeal is jurisdictional in civil cases. Mr. Gans observed, however, that if a litigant fails to meet an appellate briefing deadline, the litigant only receives one opportunity to show cause why the appeal should not be dismissed.

With respect to the effects of amending the Rule to clarify that there is no postage-prepayment requirement, the Reporter suggested that it might be useful to study how practice has developed in the Seventh and Tenth Circuits, where the caselaw provides that prepayment of postage is not required if the inmate uses the legal mail system. An appellate judge member asked why the Rule should *require* an inmate to use an institution's legal mail system in order to get the benefit of the inmate-filing rule. Another appellate judge agreed that this is a good question.

Judge Colloton observed that several possibilities may be on the table. First, the discussion touched upon the possibility of amending Rule 4(c)(1) to eliminate any requirement that postage be prepaid. Second, the discussion raised the question whether the second sentence of Rule 4(c)(1) (requiring use of an institution's legal mail system) makes sense. There was also the question of the declaration referred to in the third sentence of Rule 4(c)(1); participants in the discussion did not seem to think that the declaration should be required if there was another way to tell that the notice was timely deposited in the mail system. Another approach might focus on bringing Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

A district judge member suggested that one approach could be to provide that the notice of appeal is timely whether or not postage is paid by the inmate, and that if institution pays the postage on the inmate's behalf, the institution can debit the postage cost from the inmate's institutional account. To get the benefit of such a provision, this member suggested, the inmate could be required to certify that he or she is indigent. Almost all such litigants, the member stated, are proceeding *in forma pauperis*.

Judge Colloton asked whether any Committee members would be willing to work with the Reporter to draft alternatives in advance of the next meeting. Justice Eid, Professor Barrett, and Mr. Letter volunteered to assist with this task.

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

Judge Colloton reported that the Standing Committee was in the process of convening a subcommittee to consider possible amendments to each set of national Rules to take further account of electronic filing issues. Professor Coquillette stated that he would be coordinating the subcommittee's efforts, and that Professor Capra would serve as the subcommittee's reporter. Most of the other Advisory Committees, he noted, were appointing a representative to serve on the subcommittee.

Judge Colloton invited the Reporter to introduce the collection of existing agenda items that relate to electronic filing. The Reporter reminded the Committee that all of the circuits had completed their transition to the CM/ECF system. She observed that the project to revise Part VIII of the Bankruptcy Rules (which the Committee had discussed earlier in the day) provided a model for ways in which the Rules could be amended to take account of electronic filing. With input from the other Circuit Clerks, Mr. Green (who was Mr. Gans's predecessor as the Circuit Clerks' representative on the Committee) had prepared a list of Appellate Rules that could be considered in this connection. Relevant topics included requirements for service by the clerk; filing or service by parties; the treatment of the record; the treatment of the appendix; the format of briefs and other papers; and the number of required copies. One issue that had been raised by a number of commentators concerned the "three-day rule" in Appellate Rule 26(c), which adds three days to a given period if that period is measured after service and service is accomplished electronically or by a non-electronic means that does not result in delivery on the date of service.

Judge Colloton invited the Committee members to suggest topics that might be ripe for study. The three-day rule might be one such topic. With respect to the appendix, there may be varying views; some judges may prefer an electronic appendix while others will continue to prefer paper.

As to the three-day rule, Mr. Letter pointed out that eliminating this provision in instances where the paper is served electronically could cause problems for lawyers whose opponents electronically serve them at 11:59 p.m. Perhaps, he suggested, the rule could be amended to eliminate the three-day rule for electronically served papers but to provide one extra day for responding to a paper that is electronically served after noon. Mr. Gans responded that such a rule would be difficult for clerks to enforce; moreover, if late-night electronic service causes a problem in a given case the court could grant a one-day extension. In the Eighth Circuit, he noted, the Clerk's Office serves some documents electronically on behalf of inmate litigants; but this practice is not universal among other circuits. Pro se prisoner litigation, Mr. Gans reported, constitutes roughly a third of the Eighth Circuit's docket. Mr. Gans suggested that the three-day rule is no longer

necessary but that if the Rule were amended the change would result in some transition costs.

A member stated that, although lawyers have an ingrained habit of relying on the three-day rule, it does not make sense in the case of electronically served papers. An appellate judge asked how often service is accomplished by U.S. Mail. Mr. Gans reported that, in the Eighth Circuit, over a period of years, only a handful of lawyers had been exempted from using the CM/ECF system. Mr. Letter pointed out that in a number of circuits there will continue to be papers served in paper form by pro se litigants. Those papers are typically delayed in reaching federal-government lawyers because all mail that comes to the DOJ is screened on its way in for security reasons.

An appellate judge member noted two possible ways of amending Rule 26(c) to address the question of electronic service. One option would be to delete the last sentence of the Rule, which currently states that "[f]or purposes of this Rule 26(c), a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service." An alternative would be to revise that sentence by deleting the "not." Mr. Gans stated that he preferred the latter approach.

The Reporter observed that, although the application of the three-day rule to electronically-served papers has garnered the most criticism, Chief Judge Easterbrook also has voiced a more general objection to the three-day rule – namely, that it interferes with the Rules' general preference for setting time periods in multiples of seven days. Mr. Gans stated that the continuing prevalence of paper filings by pro se litigants provides a valid argument in favor of maintaining the three-day rule for documents served by mail. An appellate judge asked whether such pro se papers typically require an extensive response by opposing counsel. Mr. Letter predicted that if the three-day rule is eliminated altogether, the change will require the government to file more motions for extension of time.

Mr. Byron pointed out that the Standing Committee's electronic-filing subcommittee would no doubt consider the question of what to do about the three-day rules in the Appellate, Bankruptcy, Civil, and Criminal Rules. Mr. Gans noted that it is important for the three-day rule to function the same way in all of these sets of Rules.

Judge Colloton asked Committee members for their views concerning the treatment of the appendix. The Reporter observed that circuits vary widely in their practices, with some requiring appendices and some requiring "record excerpts" instead. There is a question whether it is possible for the Rules to nudge circuits toward the use of electronic appendices. Mr. Gans observed that court employees do not want to be the ones to print the appendix.

Judge Colloton encouraged Committee members to share any additional thoughts on this topic, and to let him know if they were interested in serving on the newly-formed subcommittee.

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

Judge Colloton introduced this topic, which concerns the efforts of a would-be appellant to "manufacture" appellate jurisdiction over an appeal from the disposition of fewer than all the claims in an action by dismissing the remaining claims. Judge Colloton reminded the Committee that, as of fall 2012, it had appeared possible that the Court would shed light on this topic when deciding *Gabelli v. SEC*, 133 S. Ct. 1216 (2013). As it turned out, however, the Court's decision in *Gabelli* did not speak to the manufactured-finality issue.

Judge Colloton had chaired the Civil / Appellate Subcommittee, which previously considered this topic. He noted that a majority of the Subcommittee members had agreed that it would be desirable to bring clarity to this question of appellate jurisdiction, and had felt that this was an appropriate topic for rulemaking. However, the Subcommittee had failed to reach consensus on how to clarify the law in this area. A majority of the circuits have ruled that a dismissal of the remaining claims without prejudice does not suffice to render the judgment final. And a majority of circuits to consider the question have ruled that a dismissal of the remaining claims with conditional prejudice (i.e., a dismissal that is final as to the remaining claims unless the appellant wins on appeal as to the central claim) does not suffice to render the judgment final. Some circuits look at whether the appellant dismissed the remaining claims with the intent to manipulate appellate jurisdiction – a standard that presents problems of administrability.

Judge Colloton pointed out that the agenda materials included some sketches that Professor Cooper had prepared for the Civil / Appellate Subcommittee's consideration. As a basis for discussion, Judge Colloton suggested considering the possibility of an amendment that would adopt the strict view that a dismissal without prejudice does not achieve finality. Such an approach would help to avoid piecemeal litigation; and avenues for taking an immediate appeal are already provided by Civil Rule 54(b) and by 28 U.S.C. § 1292(b). Judge Colloton drew the Committee's attention to one of Professor Cooper's sketches: "A party asserting a claim for relief can establish a final judgment by voluntary dismissal only by dismissing with prejudice all claims and parties remaining in the action." He asked the Committee members to comment on this possibility.

An appellate judge member stated that he liked the idea of having a clear rule. An attorney member expressed agreement, and stated that some of the existing approaches to manufactured finality felt like methods for gaming the system; an attorney participant concurred in this view. Another member, however, questioned how big a problem the current caselaw is posing in practice; are there many abuses, or are lawyers using existing caselaw to serve the legitimate needs of their clients? Mr. Letter noted that the issue comes up frequently and has generated plenty of caselaw. An appellate judge stated that he did not know how often appellants use the vehicle of manufactured finality in order to take an appeal; he observed that the Second Circuit first recognized conditional prejudice as an avenue for creating finality a decade ago, in *Purdy v. Zeldes*, 337 F.3d 253 (2d Cir. 2003).

Mr. Letter pointed out that some district judges may be unwilling to direct entry of judgment as to fewer than all claims or parties under Civil Rule 54(b). An appellate judge member suggested that it would be worthwhile to understand the reasons why circuits that take a relatively permissive approach to manufactured finality have decided to do so. In complex patent cases, this member noted, there may be an interest in clearing the way for appellate review on the main issue in the case. A district judge member noted that he has directed entry of judgment under Civil Rule 54(b) in cases where the appeal would be taken to the Federal Circuit.

An appellate judge member stated that he favored the sketch pointed out by Judge Colloton. The district judge member agreed.

It was determined that the Chair and the Reporter would contact Judge Campbell and Professor Cooper and ask if the Civil Rules Committee would give consideration to the possibility of adopting a rule amendment along the lines of the sketch.

Later in the meeting, the discussion returned to the topic of manufactured finality. Mr. Letter pointed out that in False Claims Act cases, the government frequently files both a False Claims Act claim (which carries treble damages) and a common-law claim (which does not). If the False Claims Act claim is dismissed, the case may or may not be worth trying on the common-law claim by itself. If an appeal is taken and the court of appeals upholds the dismissal of the False Claims Act claim, sometimes the government might wish to pursue the common-law claim (though in many cases it would instead simply dismiss that claim). Mr. Letter reported that some district judges may be unwilling to direct entry of final judgment as to the False Claims Act claim under Civil Rule 54(b), because they do not wish to try the common-law claim. Mr. Letter stated that he would need to verify the DOJ's position concerning the manufactured-finality issue, but that he suspected that the DOJ would not support a rule change modeled on the sketch.

An appellate judge member expressed skepticism about the value of permitting appeals in the type of scenario described by Mr. Letter. Another appellate judge member asked whether any court has explored an approach that would permit a dismissal without prejudice to result in finality so long as it is clear that the statute of limitations continues to run while the appeal is litigated. The statute of limitations on the voluntarily-dismissed claims, he suggested, could provide some discipline for parties who seek to use manufactured finality to take an appeal.

6. Item No. 12-AP-E (length limits)

Judge Colloton turned the Committee's attention to this item, which concerns the question of how to formulate length limits in the Appellate Rules. Most of the Appellate Rules that set length limits, Judge Colloton observed, set those limits in terms of pages rather than type/volume limits. The Reporter pointed out that the Committee's agenda materials included a chart showing possible ways to reformulate the length limits that are currently set in pages. One column showed a type/volume limit designed to roughly

approximate the current page limit, coupled with the alternative of a shorter page limit. The next column showed a type/volume limit that would provide greater length than the current page limit, coupled with the alternative of the current page limit. And the final column showed a type/volume limit – for papers produced using a computer – that was designed to approximate the current page limit; for papers produced without the aid of a computer, the final column showed the current page limit.

Judge Colloton expressed doubt about the viability of the approaches sketched in the first two columns. Professor Katyal stated that the Supreme Court's switch (in 2007) to using word counts was a great move. Setting length limits in pages invites litigants to game the system and also wastes lawyers' time. Professor Katyal suggested that the approach illustrated in the third column – setting length limits in pages only for typewritten briefs – was an elegant solution. An attorney participant stated a preference for page limits and expressed nostalgia for the prior version of the Supreme Court Rules. Judge Colloton noted that Professor Katyal, in raising this issue, had focused on rehearing petitions; he asked Professor Katyal whether he felt that other page limits, such as those for motion papers, were also problematic. Professor Katyal responded that in his experience it is the rehearing petition page limits that have posed problems, but that it would be best to express all the Rules' length limits in the same units.

Mr. Byron noted that although it is impracticable for a litigant to count the words in a typewritten paper, it is possible to use the alternative type/volume method by counting the number of lines of text in the paper. Mr. Byron queried whether courts would want to treat motions the same way as rehearing petitions for purposes of the length limits. The Supreme Court's rules, he suggested, treat motions differently from rehearing petitions. Professor Katyal responded that the Supreme Court's Rules do not set page limits for motions or applications. There are page limits, he reported, for certiorari-stage pleadings that are prepared on letter-size paper pursuant to Supreme Court Rule 33.2(b); that is because most of those documents are in *in forma pauperis* cases and many are prepared by prisoners who may hand-write their petitions.

The discussion turned to the basis for developing the numbers shown in the columns in the chart. The Reporter explained that, for illustrative purposes, she had assumed the correctness of the statement in the 1998 Committee Note to Rule 32(a)(7) that the type/volume limits in Rule 32(a)(7)(B) "approximate the current 50-page limit," and had divided those limits by 50 to obtain the word and line equivalents of a single page. Mr. Letter stated, however, that the Committee Note was incorrect in suggesting that a length of 14,000 words was equivalent to a length of 50 pages. As he recalled, 50 pages was the equivalent of some 12,500 words. An appellate judge member suggested that perhaps the difference reflected the fact that additional lines might be included (when length limits are set in pages) by placing material in a footnote instead of in the text.

Mr. Letter suggested that, while litigants are tempted to manipulate the length of briefs, the temptation is less with respect to rehearing petitions and motions because those documents are shorter. He also suggested that clerks may prefer page limits because they are easier to administer. He reported that he had seen lawyers manipulate the length

limits for rehearing petitions, but that this occurred less frequently with such petitions than it had with briefs. Professor Katyal responded that, especially when a litigant is seeking rehearing en banc, the brevity of the page limit generates an incentive to manipulate the limit. Mr. Letter asked Professor Katyal whether he advocated a word limit, for rehearing petitions, that would yield petitions longer than the current 15 pages. Professor Katyal responded that the limit should be equivalent to 15 pages.

A member asked Mr. Gans whether the burden – for the Clerk's Office – of verifying compliance with type/volume limits would be less for papers filed electronically. Mr. Gans responded that electronic word counts work differently for PDF documents than for Word or WordPerfect documents. To count the words in a PDF, it becomes necessary to convert the file to another format; rather than do so, the Clerk's Office asks the attorney to submit a version in either Word or WordPerfect. Participants discussed the possibility that a filer could manipulate the performance of the word-counting software. Mr. Letter suggested that word limits, too, could lead lawyers to waste time cutting words in order to fit within a given limit. Professor Katyal responded, however, that at least the activity of cutting words to comply with a word limit affects the substance of the filing, whereas the activity of fitting more words on a page to comply with a page limit bears no relation to the substance of the filing.

Mr. Garre noted a question that has arisen concerning the operation of the length limit for petitions for rehearing en banc: Does the statement required by Rule 35(b)(1) count for purposes of the 15-page limit set by Rule 35(b)(2)? He reported that the circuits take varying approaches to this question; the Federal Circuit requires the statement to count. Mr. Garre agreed to survey circuit practices on this issue in preparation for the Committee's next meeting. The Chair wondered what is the basis for excluding the statement from the length limit, since the "petition" must not exceed fifteen pages and the "petition must *begin with*" the statement.

Mr. Letter suggested that frequent Rule amendments are undesirable, and he noted that Rule 32(a)(7)'s provisions are still relatively new. An appellate judge member expressed agreement with this view. Justice Eid noted that the Colorado Supreme Court uses word limits and periodically checks briefs for compliance with those limits. She undertook to provide a comparison with the Colorado Supreme Court's rules for the next meeting.

An appellate judge asked whether setting length limits in words creates more work for the Clerk's Office. Mr. Gans predicted that attorneys would in some instances fail to file the required certification. He asked whether the proposal on the table related only to petitions for rehearing or to all of the documents for which length limits are currently set in pages. Professor Katyal responded that it would make sense for all the length limits to take a consistent approach. Although the rule change would give rise to some transition problems, he suggested, the switch to type/volume limits is inevitable. An attorney member agreed that consistency is desirable.

Judge Colloton noted that, if the frequency of rule changes is a concern, proposed amendments can be held for bundling with other proposals. Turning to the option of switching to a type/volume limit, he asked Committee members whether they favored the model used in Rule 32(a)(7), where in effect the length limits for handwritten briefs were shortened, or whether they instead favored the approach shown in the rightmost column of the chart, that is, a model that seeks equivalence between documents prepared on computers and documents prepared on typewriters or by hand. One participant expressed support for the approach shown in the final column of the chart, which would set limits using different methods for typewritten papers than for papers prepared on a computer. An attorney participant asked how one would operationalize that approach; would the litigant have to certify that a computer had not been used in preparing the paper? He suggested that one could avoid making a distinction between papers that were or were not prepared on a computer by instead requiring those submitting typewritten papers to comply with the line-counting option in a type/volume limit. An appellate judge noted, however, that the latter expedient would not address the issue of handwritten briefs; he asked whether concerns over handwritten briefs had been discussed during the development of the 1998 amendments. Mr. Byron stated that rules concerning CM/ECF typically require litigants to obtain a waiver in order to avoid using the CM/ECF system, and he asked whether the Rules concerning length limits could distinguish among filers based on whether they were CM/ECF users or not.

Judge Colloton suggested that it would be useful to prepare alternative drafts of amendments – one set that would impose length limits modeled on Rule 32(a)(7)'s approach (as shown in the leftmost of the three columns) and another set that would track the approach illustrated in the rightmost column. He also asked whether, if the approach in the rightmost column were adopted for the provisions that currently employ page limits, that approach should be considered for Rule 32(a)(7) as well. An appellate judge member responded that it is important to avoid undue length in briefs, and that it would not bother him if the length limits for briefs were set using a different method than the length limits for other papers.

A district judge member observed that the approach shown in the rightmost column would treat pro se filings more similarly to filings by counsel in terms of length; under Rule 32(a)(7)'s approach, by contrast, a pro se filer who uses the page limits option gets less space. On the other hand, this member said, many pro se filers may not need the extra length. An appellate judge member noted that attorneys tend to use the entire permitted length even when a shorter paper would suffice. An attorney participant questioned why short length limits would unduly burden pro se litigants. Mr. Letter observed that pro se briefs tend to be less complicated than briefs prepared by counsel, and suggested that this might render Rule 32(a)(7)'s 30-page limit less of a hardship than it might otherwise appear.

The attorney participant suggested that it might be useful to research whether briefs filed under Rule 32(a)(7)'s 14,000-word length limit are longer than than they were before. An appellate judge member recalled that the way that lawyers fit additional words into the old page limits was by moving portions of the brief from the text into the

footnotes. Mr. Gans stated that the CM/ECF system includes a field for word counts, which he could search in order to produce figures from which to derive an average length. An appellate judge member suggested that the attorney members might be able to survey documents in their firms' archives. Another appellate judge member suggested looking on Westlaw at petitions for rehearing. Judge Colloton asked Mr. Letter whether he recalled this question being studied during the late 1990s by any local rules committees. Mr. Letter responded that word-counting software was at a relatively early stage then.

The Reporter raised one additional issue concerning length limits. Unlike Rule 32(a)(7)(B), Rule 28.1(e) – which sets length limits for briefs in connection with cross-appeals – does not include a list of items that can be excluded for purposes of calculating length. Rule 28.1(a) excludes Rule 32(a)(7)(B) from applying to cross-appeals. Judge Colloton asked the Committee members whether it would be useful to clarify the Rule. Two attorney members stated that they have assumed the same exclusions apply to briefs on cross-appeals. Judge Colloton suggested that the question concerning Rule 28.1(e) be kept on the Committee's docket for future consideration as a housekeeping amendment.

7. Item No. 12-AP-F (class action objector appeals)

Judge Colloton reminded the Committee that he had invited Professor John E. Lopatka, who is the A. Robert Noll Distinguished Professor of Law at Pennsylvania State University Law School, and Professor Brian T. Fitzpatrick, who is a Professor of Law at Vanderbilt Law School, to speak with the Committee about the topic of appeals by class action objectors. Judge Colloton invited the Reporter to briefly introduce this topic.

The Reporter observed that the basics of the problem are well known. In reviewing class action settlements, judges need good information concerning the quality of the settlement. Discussions over the last decade or so have focused on various ways of producing that information, whether through the opt-out mechanism or through encouraging objectors. During the discussions that led to the 2003 amendments to Civil Rule 23, participants noted the difficulty of crafting rules that distinguish between good objectors – who improve the quality of the settlement – and undesirable objectors – who seek merely to extract payments for themselves. There are reports that objectors routinely take appeals from orders approving class settlements. The Court's decision in *Devlin v. Scardelletti*, 536 U.S. 1 (2002) – which allowed a class member to take an appeal even if the member had not intervened below – has facilitated the practice of objector appeals. As a practical matter, such an appeal has the effect of staying the implementation of the settlement. Class counsel may end up offering the objector a payment in order to drop the appeal – a practice that some class action lawyers characterize as a tax on their activities.

The 2003 amendments to Civil Rule 23 included some measures designed to address the behavior of objectors in the district court. Civil Rule 23(e)(5) permits a class member to object to a proposed settlement, and provides that the objection may be withdrawn only with the court's approval. (Interestingly, Civil Rule 23(h)(2), which

permits a class member to object to a request for attorney fees, does not include a requirement of court approval for the withdrawal of such an objection.) The 2003 Committee Note to Civil Rule 23(e) included a passage that seemed apposite to the Committee's current inquiry:

> Subdivision (e)(4)(B) requires court approval for withdrawal of objections made under subdivision (e)(4)(A). Review follows automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class. Review also is required if the objector formally withdraws the objections. If the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.
>
> Approval … may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members. Different considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass. Such objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay. If such objections are surrendered on terms that do not affect the class settlement or the objector's participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.
>
> Once an objector appeals, control of the proceeding lies in the court of appeals. The court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement.

This Committee Note, thus, discussed in general terms the topic of objector appeals. The Reporter noted that the Civil Rules Committee – during the discussions that led up to the 2003 amendments – had considered the possibility of addressing the question of objector appeals in the rule text, but had decided not to do so. The Reporter suggested that the dynamics that had been present at the district court level, and which may now be held in check by Rule 23(e)(5)'s requirement of court review for the withdrawal of objections, may be replicating themselves during the appeal.

Judge Colloton noted that he had asked Ms. Leary to conduct some research on the frequency of objector appeals and their disposition, and he invited Ms. Leary to summarize her preliminary findings. Ms. Leary explained that she had decided to focus on appeals from class settlements in districts within the Seventh Circuit because the district courts in that circuit have an average representative level of class action filings. Ms. Leary used an electronic search of the CM/ECF system in the relevant districts in

order to identify all class action cases in which final approval of a Rule 23-certified class action settlement was granted between January 1, 2008, and March 19, 2013, and after which one or more appeals were taken. Through further analysis, Ms. Leary identified those settled class actions from which an appeal was taken by one or more class members who had objected to the settlement in the district court prior to final approval. Ms. Leary identified 27 appeals by objectors in eight class actions. The appeals were concentrated in a few districts. All 27 of the appeals were voluntarily dismissed on motion under Rule 42(b). Among 21 of those appeals, the average time from inception to dismissal was less than three months. In many of those appeals, the appeals were dismissed before the appellant filed a brief. In many of the appeals, the class representatives asked the district court to require the objector to post a cost bond. In one case, the court ordered the objectors to post cost bonds of $4,500 each; in another case, the court refused to require a bond; and in other cases, the objectors dismissed their appeals before a ruling was made on the bond request.

Judge Colloton expressed the Committee's appreciation for Ms. Leary's research. An appellate judge asked if the data reflected the number of class settlements that were approved in the district court and from which no appeal was taken. Ms. Leary stated that she had not gathered those data, but stated her impression that objections to settlements are relatively rare, and appeals from settlements are likewise relatively rare.

Judge Colloton reminded the Committee that Professor Fitzpatrick, along with Professor Brian Wolfman and Dean Alan Morrison, had submitted a proposal concerning Rule 42 to the Committee in 2012. Professor Lopatka and Judge Brooks Smith, he noted, had coauthored an article in the Florida State University Law Review that proposed amendments to the Rules concerning costs and cost bonds. Judge Colloton had invited Professor Fitzpatrick and Professor Lopatka to present their ideas to the Committee. He turned first to Professor Fitzpatrick, as the proponent of the proposal that was formally pending before the Committee.

Professor Fitzpatrick began by commenting on the empirical data concerning class action objector appeals. Professor Fitzpatrick, in researching his article, *The End of Objector Blackmail?*, 62 Vanderbilt Law Review 1623 (2009), reviewed every class settlement that was approved by a federal district court in 2006. Roughly 10 percent of those settlements were appealed. He suggested that the reason why the other settlements are not appealed is that it is not worthwhile for an objector to seek to hold up a settlement unless the settlement carries the prospect of substantial attorney fees. It is the class counsel, he noted, who would pay the objector to abandon the objection. Accordingly, objections are typically made to the big settlements, where the attorney fees will be large.

Professor Fitzpatrick advocated the adoption of a rule that would entirely bar an objector from dropping an appeal in exchange for anything of value. He argued that Rule 23(e)(5) – which does not bar the dropping of objections but does require court approval for their withdrawal – does not go far enough. Responding to the argument that sometimes objectors might raise an objection that is specific to them rather than generally applicable to the members of the class, Professor Fitzpatrick stated that he has never seen

such an objection. If an objector has an objection that is unique to him, then why is he legitimately a member of the class? Dropping an objector appeal, he asserted, affects all of the class members, by depriving them of positive changes that might have been made to the settlement in response to the objection. In addition, he noted, requiring court approval for dropping an appeal would create a lot of work for the court. Professor Fitzpatrick noted that when class counsel pay objectors to drop their appeals, the effect is equivalent to a tax on class action plaintiffs' lawyers. There are no good data on how big that tax is. But he has heard informal reports from class action lawyers of numbers that range from $ 50,000 to $ 1 million per objector. Addressing possible concerns about his proposal, Professor Fitzpatrick stated that the biggest concern is what would happen if an objector filed an appeal but then reached an agreement with class counsel and simply failed to prosecute the appeal.

Professor Fitzpatrick observed that Professor Lopatka and Judge Smith criticize the idea of banning the dismissal of objectors' appeals on the ground that such a ban would merely alter the timing of objectors' demands, by leading them to bargain with class counsel during the 30-day window between the entry of judgment and the deadline for the notice of appeal. But, Professor Fitzpatrick argued, a ban on the withdrawal of appeals would remove the objector's leverage because the threat to file the appeal would no longer be credible.

Responding to the appeal-bond proposal by Professor Lopatka and Judge Smith, Professor Fitzpatrick asserted that requiring an appeal bond would not prevent meritorious objector appeals from being settled in exchange for a payoff to the objector. He stated that appeal bonds are currently an available tool under Rule 7 and yet they have not curtailed objector blackmail. Moreover, he said, even if the district court imposes an appeal bond, it is possible to appeal the imposition of the bond. An approach that would bar the objector from appealing the bond without first posting the bond would, Professor Fitzpatrick argued, likely violate Due Process. In addition, if would-be appellants lack an effective avenue for securing review of the imposition of a bond requirement, then district judges may become too ready to require such bonds. A bond requirement could prevent a good objector, such as Public Citizen Litigation Group, from taking a meritorious appeal.

Judge Colloton thanked Professor Fitzpatrick, and turned next to Professor Lopatka. Professor Lopatka observed that everyone is in agreement about the nature of the problem concerning objector appeals. As to the scope of the problem, he agreed with Professor Fitzpatrick that data are hard to obtain. Looking only at the number of appeals taken may undercount the problem, because such a count would omit appeals that are threatened but then foregone. In addition, while it would be helpful to know more about the scope of the problem, the fact that such extortionate behavior occurs at all offends the purposes of the justice system.

The interaction between objector and class counsel, he stated, is a bargaining game. Taking an appeal is not costly because the appellate briefs typically do not require

much work. There is a need to change the framework so that objectors' threats to take an appeal become less credible.

Professor Lopatka stated that the cost and appeal bond measures that he and Judge Smith advocated would not eliminate the possibility of extortionate behavior by objectors, but that those measures would change the terms of the bargaining. Responding to Professor Fitzpatrick's point that the current appeal bond requirement has not stemmed objector appeals, Professor Lopatka observed that the circuits currently disagree about the items that can be taken into account when a court sets the amount of a Rule 7 bond. Professor Lopatka and Judge Smith propose amending the Rules to make clear the district court's authority to require a bond in the full amount of all projected costs of delay attributable to the appeal, and to bar the objector from appealing the bond order without first posting the bond. Otherwise, Professor Lopatka argued, an appeal from the bond order would give the objector the same bargaining advantage as an appeal from the underlying settlement approval. But the district court would have discretion, under the proposal, to reduce the amount of the bond if the grounds for appeal seemed legitimate and if a bond in the full amount would effectively bar the appeal.

Professor Lopatka argued that Professor Fitzpatrick's proposal, though ingenious, would likely fail to deprive objectors of their leverage. Professor Lopatka offered a hypothetical: Suppose that an objector files an objection in the district court. The district court rejects the objection. The objector uses the thirty days after entry of judgment to put class counsel to a choice: Either the class counsel can pay the objector, in which event the objector will forgo filing a notice of appeal, or class counsel can refuse, in which event the objector will file the notice of appeal. True, once the objector files the notice of appeal, Professor Fitzpatrick's proposal would prevent the objector from dismissing it in exchange for money. But the appeal would not be very costly for the objector to litigate, and it would impose substantial delay costs on class counsel.

Judge Colloton thanked Professor Lopatka for his comments, and invited the Reporter to summarize some feedback that she had informally obtained from members of the Civil Rules Committee's Rule 23 Subcommittee. The Reporter stated that the Subcommittee took the view that this is a serious issue that is worth attention, and one on which it is important for the two Committees to coordinate their efforts. Subcommittee members believed that the bond mechanism proposed by Professor Lopatka and Judge Smith was too blunt a tool. The Subcommittee also expressed a preference for court review of the withdrawal of an objector appeal, rather than an outright ban on dismissals; but the Subcommittee noted that court review carried the possibility of delay. Individual subcommittee members had provided further feedback, some of which the Reporter highlighted without attempting to provide attribution. One question, she noted, concerned instances in which an objector's appeal is dismissed in return for *both* a payment to the individual objector *and* modification of the settlement that results in better terms for the class. Another question concerned the possibility that banning the withdrawal of an appeal in exchange for payment might shift the time for such withdrawals to the certiorari-petition stage. At least one participant did, though, suggest that Professor Fitzpatrick's proposal was appealing because it took a structural,

incentives-based approach rather than relying on ad hoc decisionmaking by a district judge.

Professor Fitzpatrick responded that, if class counsel and the defendant believe that there are grounds for improving the settlement, they can ask the court of appeals to remand the case so that the district court can review and approve the settlement modification. In such an event, the district court could, if appropriate, award fees to the objector for having produced the improvement in the settlement. Turning to the specter of "zombie appeals" (i.e., appeals that the appellant refuses to pursue but that the court is barred from dismissing), Professor Fitzpatrick stated that the problem would only arise if someone actually accedes to an objector's demands. So long as class counsel has refused to pay anything to the objector, then if the objector fails to prosecute the appeal, the appellees can move for dismissal of the appeal and can provide the required certification that they have paid nothing of value to the objector. As for the possibility that a ban on dismissal of appeals to the court of appeals would simply move the bargaining process to the certiorari-petition stage, Professor Fitzpatrick stated that his impression was that the Supreme Court acts fairly quickly on petitions for certiorari.

Professor Lopatka conceded that raising the cap on the permissible size of appeal bonds might create an obstacle to some legitimate appeals. However, he expressed optimism that district judges would not overuse a more robust appeal-bond tool. As evidence that judges do not seek to insulate their rulings from review, Professor Lopatka noted that district judges sometimes certify interlocutory rulings for immediate appellate review under 28 U.S.C. § 1292(b).

An appellate judge asked Professor Lopatka how he would suggest handling appeals from an order imposing a cost bond. Professor Lopatka suggested that allowing the objector to appeal the cost bond order would be tantamount to allowing the objector to appeal the settlement itself, in the sense that it would permit the objector to hold the settlement hostage. On the other hand, he conceded, perhaps the appeal from the cost bond order could be disposed of more quickly.

An appellate judge member asked whether there are other means to control the conduct of objectors, such as suspending membership in the court's bar for an objector's attorney who behaves unethically. Professor Lopatka responded that district judges have sometimes employed such measures, but that they tend not to want to spend judicial time on it. In addition, he stated, class counsel have sometimes sought sanctions against objectors' attorneys; but that, too, has failed to solve the problem. Professor Coquillette observed that disciplinary proceedings are a blunt instrument for addressing a problem of this nature. ABA Model Rules 3.4 and 8.4 provide a basis for discipline, but people are reluctant to pursue it.

A member stated that he agreed that objector conduct can become salient by affecting the big class action settlements, even if those settlements are a small percentage of the total number of class settlements. But he suggested that, even though the amounts mentioned by Professor Fitzpatrick were large numbers, they were very small in

comparison to the typical amount of attorney fees received by class counsel in connection with a large class action settlement. Professor Fitzpatrick noted that the figures he had cited ($ 50,000 to $ 1 million) were settlements with *single objectors*; in connection with any large class action settlement, there are typically multiple objectors.

A member asked whether an objector might find a way around the proposed ban on appeal dismissals by arguing that, when and if class counsel pay the objector a satisfactory settlement, the objector's appeal becomes moot. Professor Fitzpatrick noted Supreme Court precedents holding that when a district court certifies a class action (or erroneously denies such certification), the class gains its own legal status such that subsequent events mooting the individual plaintiff's claim do not thereby moot the class action.[1] The member observed, however, that the Court had recently refused to apply those precedents in the context of a collective action brought by an employee under the Fair Labor Standards Act on behalf of similarly situated employees.[2]

A district judge member observed that by the time a class settlement is on appeal, the district judge has reviewed and addressed the objections in detail. In the habeas context, this member pointed out, the district judge must grant or deny a certificate of appealability ("COA") at the time that he or she enters a final judgment denying the habeas petition. The member stated that he is forthright in giving an accurate view of the merits of the petitioner's claims when he drafts the ruling on the COA. Perhaps, he suggested, it would be useful to require class action objectors to obtain a COA in order to appeal a class settlement. Such a requirement would leverage the district judge's expertise. Professor Lopatka responded that, when he and Judge Smith first started work on their proposal, they considered advocating a COA requirement. However, they turned to a bond requirement instead because a COA is binary (it does or does not issue) while a bond is more nuanced (because the amount can be adjusted). Also, he suggested, if the district court's denial of the COA is reviewable in the court of appeals, then that too could provide an objector with an opportunity to hold up the settlement. An appellate judge asked why appealing the denial of a COA would differ from appealing the imposition of an appeal bond requirement. Professor Lopatka responded that, in either of those instances, it would make a difference whether the appeal of the preliminary matter could be quickly disposed of. Professor Fitzpatrick suggested that the rule could impose a time limit for the disposition of such appeals; but participants noted the Judicial Conference policy against imposing such time limits by rule.

Mr. Letter stated that the discussion thus far suggested to him that the reason objector appeals can cause problems is that the appeal stays the implementation of the settlement. He asked whether one could address this problem by providing that the implementation will proceed, despite the pending appeal, unless the would-be appellant posts a bond. Professor Fitzpatrick responded that if the order approving the settlement is reversed on appeal, it will be hard to unwind an already-implemented settlement if the payments have already gone to the class members. One measure that partly fills this

[1] *See* Sosna v. Iowa, 419 U.S. 393 (1975), and United States Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).
[2] *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

function, Professor Fitzpatrick noted, is the use of "quick-pay provisions" – i.e., a provision in the settlement that entitles class counsel to receive their fees upon settlement approval despite the pendency of an appeal (but subject to the return of the fees if the order is reversed on appeal). Quick-pay provisions can provide a fairly good solution, he reported, but defendants are reluctant to agree to such provisions unless they receive security that assures the repayment of the fees if the judgment is reversed on appeal. Mr. Letter observed that the difficulty of recouping amounts paid pursuant to a judgment that is ultimately reversed on appeal is not unique to class suits. Professor Fitzpatrick responded that in a large class suit, the costs of administering the settlement can themselves run into the millions of dollars.

Mr. Letter also suggested that this topic seems to present questions of policy that seem more suitable for treatment by Congress than by the rulemaking process. Congress, he observed, would have the power to subpoena repeat objectors and to question them about their practices. Mr. Letter also noted that one could view this topic as a subset of the broader category of instances in which litigants settle nuisance suits because it makes more sense to settle them than to litigate them. Professor Lopatka responded that, even if addressing objector appeals would leave other nuisance litigation unaddressed, that should not be a reason to reject measures that could address objector appeals. As to quick pay provisions, Professor Lopatka stated that it is not yet clear whether they will catch on; some defendants are unwilling to front money to the class counsel before it is clear whether the settlement will be upheld in the event of an appeal. Mr. Letter asked whether a "partial quick pay" mechanism would provide a useful compromise – i.e., whether objectors would lose their leverage if the defendant paid class counsel a portion of their fee pending disposition of the appeal. Professor Lopatka responded that such a measure would reduce the size of the "tax" objectors can impose on class counsel, but would not eliminate it.

An attorney participant asked whether there exist any other rules that prohibit a party from settling a claim in exchange for money. Professor Fitzpatrick stated that he did not know of any. The attorney participant asked Professor Fitzpatrick to clarify whether the court of appeals would have to approve the settlement as well as the dismissal. If the parties can settle something without needing the court to review the settlement, the settlement could then have possible mootness consequences that would affect the question of dismissal.

Professor Fitzpatrick argued that the proposed Rule 42 amendment would yield a framework that the Clerk's Office could readily administer: If the movant filed the required certification, the appeal would be dismissed, and if the certification were not provided, the appeal would not be dismissed. An attorney participant suggested that an alternative approach could require court approval for the dismissal of an appeal and could direct the court, in reviewing a request for approval, to consider whether the appellant received anything of value in exchange for seeking to dismiss the appeal. Professor Fitzpatrick responded that the courts of appeals would likely be unwilling to scrutinize the arrangements that lead an objector to seek dismissal of an appeal. An appellate judge asked whether the task of reviewing the request to dismiss an appeal could be assigned to

the district judge. An attorney participant asked whether it would be useful to require an objector to certify that the appeal was taken in good faith. Professor Fitzpatrick expressed doubt that such a requirement would be effective in addressing abuses.

The Reporter noted that while Rule 23(e)(5) requires court approval for the withdrawal of an objection to a class action settlement, Rule 23(h)(2) does not include a similar provision requiring court approval for the withdrawal of an objection to an award of attorney fees. She asked whether any difference had arisen in practice between objections focused on settlements and objections focused on attorney fees. Professor Fitzpatrick responded that he had not perceived a difference. Ms. Leary pointed out that objectors typically object to both the settlement and the fee award.

An appellate judge member stated that he was concerned by the potential sweep of proposed solutions that had been discussed. He stated that it was important to avoid chilling appeals by good objectors. Professor Lopatka agreed that this is a key concern. The question, he suggested, is whether the district court can distinguish appeals that have merit from those that do not. He reported that district judges tend to think that they can spot professional objectors.

Judge Colloton thanked Professor Fitzpatrick and Professor Lopatka for their contributions to a very helpful discussion. He invited them to share any suggestions for the direction of future empirical research. Professor Fitzpatrick suggested that it could be useful to perform a confidential survey of class action lawyers and ask them about the size of any side payments they have made to objectors; one could perform a similar survey of the objectors' attorneys as well. The Reporter noted the Committee's debt to Ms. Leary for her research, which had been very labor-intensive due to the lack of ready methods for locating the relevant appeals.

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

Judge Colloton introduced these items, which arise from proposals concerning the possibility of amending the Rules – in the wake of *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009) – to provide for appellate review of attorney-client privilege rulings.

Judge Colloton observed that the Supreme Court had indicated, both in *Mohawk Industries* and in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), that the preferred method for determining whether interlocutory orders should be immediately appealable is the Rules Committee process, not further caselaw expansion of the collateral order doctrine. In 1990, Congress amended the Rules Enabling Act to add 28 U.S.C. § 2072(c), which authorizes the rulemakers to "define when a ruling of a district court is final for the purposes of appeal under section 1291." In 1992, Congress amended 28 U.S.C. § 1292 by adding Section 1292(e), which authorizes the rulemakers "to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d)."

Judge Colloton asked the Committee members for their views on whether it would make sense to tackle this general area. Should a project focus on appeals from attorney-client privilege rulings? On other areas where there are conflicts in the caselaw? Judge Colloton suggested that it would be useful to perform research concerning the status of the caselaw; a member agreed with this view. An appellate judge member asked about the Committee's prior discussions of this topic. The Reporter stated that the Committee had considered whether there were areas in addition to attorney-client privilege – for example, qualified immunity – where the law concerning interlocutory review might warrant clarification. But the Committee had decided to start by focusing on attorney-client privilege appeals and to consult the other Advisory Committees for their views. The project had not developed momentum in the other Advisory Committees, but the Evidence Rules Committee had stressed the need for consultation if the Appellate Rules Committee were to proceed in this area.

Professor Coquillette expressed concern about the possible scope of a research project on the law of interlocutory appeals, and suggested the importance of prioritizing the Reporter's tasks. An appellate judge member noted that changes in this area could alter the landscape of appeals. Another appellate judge member suggested consulting academics who have already been writing on this topic.

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

VII. New Business

A. Item No. 13-AP-A (FRAP 29(a) / government amici)

Judge Colloton invited the Reporter to introduce this item, which arises from a suggestion by Dr. Roger I. Roots that Rule 29(a) be amended "to require that *any* party seeking to file an *amicus curiae* brief must obtain leave of court or state that all parties have consented to the filing." Dr. Roots asserts that Rule 29(a)'s current exemptions for certain government amici improperly favor those government entities.

The Reporter noted that governmental amici have always been treated specially under Rule 29. The only change in Rule 29's list of exempt governmental filers came in 1998, with the addition of the District of Columbia. The 1968 Committee Note to Rule 29 does not explain why the Rule exempted governmental filers from the requirement of party consent or court leave. The Committee Note cited five local circuit rules and then stated that Rule 29 "follows the practice of a majority of circuits in requiring leave of court to file an amicus brief except under the circumstances stated therein. Compare Supreme Court Rule 42." Perhaps, the Reporter suggested, the exemption for governmental amici can be explained by considerations of separation of powers and federalism.

Mr. Letter observed that the federal Rules treat the government specially in a number of ways. The federal government makes more filings in federal court than any other litigant. It would be undesirable, he suggested, for the Rules to require the

government to move for leave to file. Not only do comity considerations apply, but also the quality of the government's briefing is high. In fact, the courts of appeals often request briefing from the United States. The DOJ, he noted, litigates on behalf of the people of the United States, and its filings in the courts of appeals require authorization from the Solicitor General.

A member moved to remove this item from the Committee's agenda. The United States, this member agreed, is different from non-governmental litigants both substantively and procedurally. It represents the people, and comity considerations support the exemption. An attorney participant agreed, stating that courts have good reasons to wish to hear from sovereigns as amici and that those sovereigns are not abusing the privilege afforded them by Rule 29(a). The motion was seconded and passed by voice vote without dissent.

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

Judge Colloton invited Judge Chagares to introduce this item, which arises from a proposal by Roy T. Englert, Jr., that the Committee consider amending the Appellate Rules to address amicus filings with respect to petitions for rehearing and/or rehearing en banc. Judge Chagares stressed that the proposal would not require a court of appeals to permit such amicus filings, but rather it would govern procedural questions (such as length and deadlines) in a circuit chooses to permit them. The circuits, he noted, vary in their treatment of such questions. Adopting a rule that addresses the timing and length of amicus filings with respect to rehearing would foster predictability and uniformity. The courts of appeals review rehearing petitions relatively quickly; thus, Judge Chagares suggested, it is important that amicus filings not lengthen the schedule for filing papers. The amicus should coordinate with the petitioner. If a rule concerning these amicus filings were to follow the model set by Rule 29(d), then one would give the amicus half as much length as the petitioner – which would yield a length of seven and a half pages for the amicus filing.

An appellate judge member stated that it would be useful to provide clear rules on length and timing. Another appellate judge noted that, during past discussions, some had suggested that adopting rules on these topics (even rules that merely addressed timing and length) would encourage amicus filings at the rehearing stage. Another appellate judge member reported that, in the Federal Circuit, there is a slightly greater expectation that a rehearing petition might be granted, given the Federal Circuit's unique role in shaping patent law. The judges are interested, he said, in knowing whether the questions at issue in the appeal have broad importance. Amicus filings can be informative on this point, both because the identity of the amicus can shed light on the perceived importance of the issue and because amici can make points that the petitioner may be unable to include in the petition (due to space constraints and the need to cover technical points). A seven-and-a-half page limit for amicus filings, this member suggested, would often be too short. But, he noted, that does not necessarily mean that the issue must be addressed in the Appellate Rules.

Judge Chagares asked Mr. Gans what the Eighth Circuit's practice is. Mr. Gans responded that his office frequently receives questions on these issues and is unable to provide clear guidance. He observed that if a rule allowed a time lag between the petition and the amicus filing, this might be inefficient from the judges' perspective because it might require them to take two looks at the briefing. An appellate judge noted that such a time lag could also interfere with the timing of a response to the petition (if the court orders a response). An attorney member reported that the Fifth Circuit lacks a local rule on point; this produces uncertainty on the lawyers' part and leads them to take the most conservative approach with respect to length and timing. An appellate judge asked whether members would favor requiring the amicus to file at the same time as the party whose position the amicus supports. The attorney member responded that such an approach would not be ideal from the amicus's perspective but that he would not oppose it. Mr. Gans observed that the court can extend the time to file a petition for rehearing or rehearing en banc. Another member stated that amicus filings with respect to rehearing can add value; thus, he suggested, it would be beneficial to adopt rules on this topic, and such rules would be unlikely to cause a flood of amicus filings. This member agreed that seven and a half pages would be too short a limit; 15 pages would be preferable.

Mr. Letter agreed that certainty on these questions would be valuable. But, he suggested, circuit practices may vary widely, such that local rules would make more sense than a national rule. Some circuits, he noted, grant rehearing en banc much more frequently than others. The United States sometimes files amicus briefs with respect to rehearing. To avoid redundancy between the party's filing and the amicus filing, he suggested, it would be better to have a time lag of two to three days rather than requiring the amicus to file on the same day as the party it supports. Amici, he observed, do not always coordinate their filings with the party whose position they support. Mr. Letter suggested a length limit of eight or ten pages rather than fifteen, on the ground that judges might find longer filings burdensome.

An attorney participant stated that, in recent years, amici have become more likely to coordinate their efforts with those of the party whom they support – especially in briefing before the Supreme Court. Thus, he suggested, it should not be problematic to require amici to meet the same deadline as the party whom they support. He stated that seven pages seemed like an adequate length for amicus filings.

An appellate judge noted that the Ninth Circuit has a local rule providing that the amicus must file its brief no later than ten days after the petition. There are at least a couple of circuits, he suggested, that would not like such a rule. The Reporter recalled that – during the Committee's prior discussions of this general topic – Judge Sutton had informally consulted with judges in several circuits, focusing on circuits that did not have local rules on point. Customarily, Judge Colloton observed, the Rules Committees are wary of encouraging the adoption of local rules. Professor Coquillette agreed that the rulemakers have a policy against doing so. A member pointed out that amicus filings with respect to rehearing may be particularly key where no one anticipated the panel's ruling.

Mr. Gans noted that the Eleventh Circuit has a local rule that sets a length limit of fifteen pages and a time limit of ten days after the filing of the petition. An appellate judge member observed that when amici are briefing issues in the Supreme Court, it is already evident what the questions presented are; by contrast, at the stage of rehearing in the court of appeals, amici may be unsure of the precise nature of the questions and it may not be easy for them to coordinate with the party whose position they are supporting. Mr. Letter noted that, in criminal appeals, Rule 40 sets a presumptive 14-day deadline for rehearing petitions. It may be difficult, he suggested, for amici to prepare their filings within that short time period.

Professor Coquillette reminded the Committee that an Appellate Rule will abrogate inconsistent local rules. The Judicial Conference has delegated to the Standing Committee the task of reviewing local rules for consistency with the national Rules. On the occasions when the Standing Committee points out local rules that are inconsistent with a national Rule, controversy results. Mr. Letter asked whether it would be useful for Judge Colloton to poll the Chief Judges of each Circuit to ask whether they favor adoption of a national Rule. Judge Chagares added that it might be useful to poll the Circuit Clerks concerning their local practices.

Judge Colloton proposed that further information be gathered in advance of the Committee's next meeting.

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

Judge Colloton invited the Reporter to introduce this item, which arises from the suggestion by Justice Ginsburg (joined by Justices Scalia and Breyer), in *Chafin v. Chafin*, 133 S. Ct. 1017 (2013), that the Civil and Appellate Rules Committees consider adopting uniform rules to expedite proceedings under the Hague Convention on the Civil Aspects of International Child Abduction ("Convention").[3] Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA"). The Convention requires U.S. courts to order the return of children to their country of habitual residence under specified circumstances. In *Chafin*, the Court held that a child's return to her country of habitual residence did not render moot an appeal from the order directing that return. The Court in *Chafin* stressed the need for speedy disposition of ICARA proceedings, and cited an FJC study which noted that courts have already followed a practice of expediting such proceedings. The cases highlighted in the FJC study were cases in which the court expedited the disposition of a particular appeal; none of those opinions cited a local circuit rule requiring speedy processing of this particular category of appeal, and a quick search by the Reporter did not disclose any such provisions. Rule 2 authorizes a court of appeals to "suspend any provision of [the Appellate Rules] in a particular case and order proceedings as it directs," in order, inter alia, "to expedite its decision." Thus, the courts of appeals currently possess authority to expedite ICARA appeals. The question, the Reporter suggested, is whether to mandate deadlines for such appeals or to leave the matter to the courts' discretion.

[3] *See* Chafin v. Chafin, 133 S. Ct. 1017, 1029 n.3 (2013) (Ginsburg, J., joined by Scalia & Breyer, JJ., concurring).

Professor Coquillette expressed appreciation for the Justices' willingness to refer matters to the Rules Committees. However, he suggested that there are reasons for the Rules Committees to hesitate before attempting to implement specific pieces of legislation. Judge Sutton had discussed this matter with the Civil Rules Advisory Committee, which had decided to take no action. Judge Sutton was contemplating an informal communication with members of the Supreme Court about the matter, but would welcome the Appellate Rules Committee's views on it.

Mr. Letter reported that the United States has filed amicus briefs in a fair number of ICARA cases. To his surprise, the parties in those cases often failed to move to expedite the proceedings. Perhaps, he suggested, the decision in *Chafin* will produce an improvement in the processing of such cases by encouraging the parties to make more motions to expedite. Article 11 of the Convention, he noted, sets a goal of six weeks for the court to reach a decision. Mr. Letter also stated that it is important to make a distinction between the need to expedite the proceedings and the standards for obtaining a stay; the usual standards should govern the question of the stay. A district judge member reported that, in his experience, the parties usually move quickly to commence the proceeding, but that once the proceeding has commenced, there is often an informal stay in order to give the judge time to rule. Mr. Letter noted that Article 12 of the Convention directs the relevant authority, under specified circumstances, to "order the return of the child forthwith."

A member asked whether there are any Rules that set time limits for judicial action. Mr. Robinson said that he was not aware of any; Professor Coquillette agreed. Judge Colloton asked whether there are any data on how long ICARA appeals take. Mr. Letter stated that his impression is that sometimes they can take a surprisingly long time. Ms. Leary observed that it was unlikely that there would be any code that would enable researchers to readily identify ICARA appeals.

An appellate judge reported that, in his circuit, the clerk alerts the judges if an ICARA appeal is filed, and the court then hears that appeal at the next argument panel. Mr. Gans reported that ICARA cases tend to move very quickly in the district court. Ms. Sellers stated that the Judicial Conference Committee on Federal-State Jurisdiction was monitoring the Rules Committees' discussions of ICARA matters so as to be able to update the Committee's state-court representatives concerning the federal courts' approach. Mr. Robinson reported that Judge Fogel (the Director of the FJC) is aware of the issue raised by the *Chafin* Court. Mr. Robinson suggested the possibility of asking the FJC to raise judicial awareness of the need to expedite ICARA proceedings. Judge Colloton suggested that this was an issue on which judicial education would be useful.

An attorney participant asked whether the Committees ever produce commentary without amending a Rule. The closest example that the Reporter could think of was a 2000 pamphlet by Professor Capra, the Reporter for the Evidence Rules Committee, concerning caselaw that had diverged from the text of the Evidence Rules. Professor

Coquillette noted that in that instance, Professor Capra authored the pamphlet and the FJC published it.

A motion was made to remove this item from the Committee's agenda and to notify the Chair of the Standing Committee that the advisory committee concurs in the idea of coordinating through the Standing Committee a response to Members of the Court. The motion was seconded and passed by voice vote without dissent.

VIII. Adjournment

The Appellate Rules Committee adjourned at noon on April 23, 2013.

Respectfully submitted,

Catherine T. Struve
Reporter

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MEMORANDUM

DATE: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 07-AP-E: "Timely" tolling motions and FRAP 4(a)(4)

The Appellate Rules Committee's spring 2013 discussion of *Bowles v. Russell*, 551 U.S. 205 (2007), generated support for considering a possible amendment to address the treatment of tolling motions[1] under Appellate Rule 4(a)(4). Specifically, the Committee expressed interest in whether the developing caselaw concerning the interpretation of the term "timely" in Rule 4(a)(4) may warrant a rulemaking response. Part I of this memo briefly summarizes the relevant circuit splits concerning Rule 4(a)(4). Part II reviews initial choices concerning a possible amendment. Part III sketches drafting alternatives.

I. Circuit splits concerning Rule 4(a)(4)

The idea of the possible amendment arose from the Committee's consideration of two circuit splits that have arisen concerning the treatment of tolling motions under Appellate Rule 4(a)(4). Post-*Bowles* decisions confirm that statutory appeal deadlines are jurisdictional, but that entirely nonstatutory appeal deadlines are instead claim-processing rules. This dichotomy creates complications 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. For example, 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.[2]

[1] One can quarrel with the use of the term "tolling," because in many contexts the "tolling" of a period halts the running of the period and then – after the tolling ceases – allows the *remaining* portion of the period to run. The motions discussed in this memo could be said, instead, to "re-start" the appeal time, because the full appeal period begins to run anew after the disposition of the motion. Because the term "tolling motion" is common shorthand for such motions, I use that term here.

[2] *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

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,[3] Seventh,[4] Ninth,[5] and Eleventh[6] Circuits have issued rulings, since *Bowles*, stating that such a motion does not toll the appeal time. Pre-*Bowles* caselaw from the Second Circuit agrees with this position.[7] However, the Sixth Circuit has held to the contrary,[8] and a decision from the Eighth Circuit also suggests that such a motion would have a tolling effect.[9]

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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.").

[3] *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).").

[4] *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.").

[5] *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….").

[6] *See Advanced Bodycare*, 615 F.3d at 1359 n.15; *Green v. DEA*, 606 F.3d 1296, 1300, 1302 (11th Cir. 2010).

[7] The Second Circuit had ruled, prior to *Bowles*, that a district court's extension of time to move for reconsideration did not render the reconsideration motion (filed outside the then-applicable Rule 59(e) deadline) "timely" for purposes of tolling the time to appeal under Rule 4(a)(4). *See Lichtenberg v. Besicorp Group Inc.*, 204 F.3d 397, 401 (2d Cir. 2000); *see also id*. at 403-04 (holding, over a dissent, that the "unique circumstances" doctrine was inapplicable). The Second Circuit has not cited *Lichtenberg* in a precedential opinion since the Supreme Court decided *Bowles*; however, a nonprecedential opinion applying *Lichtenberg* is the subject of a pending pro se petition for certiorari. *See Gaind v. Cordero*, 515 Fed. Appx. 68, 69 (2d Cir. March 25, 2013), *petition for cert. filed*, Aug. 2, 2013.

I have not attempted a comprehensive search of pre-*Bowles* caselaw; thus, there may be other circuits that addressed this question prior to *Bowles*. I mention the Second Circuit caselaw here only because of the pending certiorari petition.

[8] *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).

[9] *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.").

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;[10] but the D.C. Circuit has held, on the contrary, that Rule 4(a)(4)'s timeliness requirement is a nonjurisdictional claim-processing rule.[11]

II. Initial choices

The circuit splits noted in Part I give rise to two initial questions. Should Rule 4(a)(4) be amended to define the meaning of "timely"? And should the amendment also address the nature of the timeliness requirement?

A. Clarifying the meaning of "timely" in Rule 4(a)(4)

As to the first of these questions, there was support, among participants in the spring 2013 meeting, for clarifying the meaning of "timely" in Rule 4(a)(4). The meaning of this provision, which tolls a jurisdictional appeal period, ideally should be clear and uniform across the circuits. In Part III, I suggest possible alternative amendments to clarify what Rule 4(a)(4) means by "timely."

B. Addressing whether the timeliness requirement is jurisdictional

The answer to the second question seems more complicated. The national Rules promulgated under the Rules Enabling Act[12] do not currently contain any provisions that

[10] *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.

[11] *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"), *cert. denied*, 133 S. Ct. 2855 (2013). 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.").

[12] I note that Appendix F to the Rules of the United States Court of Federal Claims includes the following provision: "Jurisdictional Requirements. The court does not have jurisdiction over a partnership action under this Appendix unless the following conditions are satisfied: …." Rules of the United States Court of Federal Claims app. F, Rule 1(c). This provision, which concerns "actions for readjustment of partnership items under Section 6226 of the Internal Revenue Code (Code) and actions for adjustment of partnership items under Code Section 6228," *id*. Rule 1(a), may simply be a restatement of statutory jurisdictional

explicitly address whether a particular requirement set by Rule is jurisdictional.[13] (The caselaw noted in Part I illustrates that Rules barring a court from extending a deadline do not necessarily show that the deadline in question is jurisdictional.[14]) Given that, under *Bowles*, the jurisdictional nature of an appeal deadline stems from its identification as a *statutory* appeal deadline, it would be odd for a Rule to attempt to define away any view that a particular Rule requirement is jurisdictional. However, it would be possible to account for some of the relevant concerns through the definition of "timely" in Rule 4(a)(4) or through a revision to the extension provision in Rule 4(a)(5).[15]

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requirements. In any event, the existence of this Rule seems to shed no light on the advisability of adopting a provision in the Appellate Rules that addresses whether an Appellate Rule requirement is jurisdictional.

[13] To assess this question, I searched the "USC" database on Westlaw using the following query: PR,CI,TI(FEDERAL & RULES & PROCEDURE) & TE(JURISDICTION!).

The Civil Rules retain the traditional provision that "These rules do not extend or limit the jurisdiction of the district courts or the venue of actions in those courts." Civil Rule 82. Thus, those Rules explicitly disclaim any effect on subject matter jurisdiction. A similar provision in Appellate Rule 1(b) was deleted in 2002 in recognition of the enactment of statutes authorizing rulemaking to alter appellate jurisdiction. *See* 28 U.S.C. §§ 1292(e), 2072(c).

Appellate Rule 4(b)(5) provides in part: "The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion." This provision addresses the allocation of jurisdiction between the district court and the court of appeals; it does not address whether noncompliance with a particular Rule requirement poses a jurisdictional problem. Rule 12.1(b) similarly addresses that allocation of jurisdiction between court levels; it provides in part: "Remand After an Indicative Ruling. If the district court states that it would grant the motion or that the motion raises a substantial issue, the court of appeals may remand for further proceedings but retains jurisdiction unless it expressly dismisses the appeal."

[14] Civil Rule 6(b)(2) forbids a district court from extending "the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b)." But, as noted in Part I, courts have concluded that these deadlines, though mandatory, are not jurisdictional.

[15] The 2005 amendments to Criminal Rules 29, 33, 34, and 45 might provide an analogy. The 2005 Committee Note to Criminal Rule 45 states in part:

> Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.
>
> Currently, Rules 29(c)(1), 33(b)(2), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. [Citations omitted.]
>
> Rule 45(b)(2) currently specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.
>
> Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of time, under those rules, as long as it does so within the seven-day

The Appellate Rules do address the related question of when a court may relieve a litigant of the consequences of noncompliance with the Rules. Rule 2 provides: "On its own or a party's motion, a court of appeals may – to expedite its decision or for other good cause – suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)." Rule 26(b), in turn, provides:

> **Extending Time.** For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. But the court may not extend the time to file:
>
> (1) a notice of appeal (except as authorized in Rule 4) or a petition for permission to appeal; or
>
> (2) a notice of appeal from or a petition to enjoin, set aside, suspend, modify, enforce, or otherwise review an order of an administrative agency, board, commission, or officer of the United States, unless specifically authorized by law.

Rule 4 includes provisions that authorize the district court to extend the time to file notices of appeal in civil and criminal cases,[16] as well as a provision that authorizes the

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> period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

[16] As to civil cases, Rule 4(a)(5) provides:

> Motion for Extension of Time.
> (A) The district court may extend the time to file a notice of appeal if:
> (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
> (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.
> (B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.
> (C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

As to criminal cases, Rule 4(b)(4) provides: "Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)."

district court to reopen the time for appeal in a civil case.[17] A number of other provisions in Rule 4 soften the requirements of that Rule in specified circumstances.[18]

If Rule 4(a)(4)'s timeliness requirement is jurisdictional, then the requirement (1) is not waivable, (2) must be raised by the court sua sponte, and (3) cannot be softened by a "unique circumstances" doctrine.[19] Rather than attempting to provide by Rule that Rule 4(a)(4)'s timeliness requirement is nonjurisdictional, the rulemakers could re-define that requirement in a way that achieves some of the same effects. For example, one could revise Rule 4(a)(4) by adding a provision that authorizes a court to excuse compliance with the timeliness requirement in specified circumstances. Such a provision could, for example, define a "timely" tolling motion to include instances in which the district court erroneously grants an extension of time to make a postjudgment motion and a would-be appellant, in reliance upon that grant, fails to file a timely notice of appeal.[20] Alternatively or additionally, the rule could define the set of "timely" motions to include motions made within a time period to which the appellee had consented. I sketch a possible amendment of this sort in Part III.B.

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[17] *See* Rule 4(a)(6).

[18] *See* Rules 4(a)(2) (premature notices of appeal), 4(a)(3) (cross-appeals), 4(b)(2) (premature notices of appeal), 4(c) (inmate filings), and 4(d) (notice mistakenly filed in court of appeals).

[19] In *Bowles*, the Court rejected Bowles's attempt to rely on the "unique circumstances" doctrine set forth in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962), and *Thompson v. INS*, 375 U.S. 384 (1964). The *Bowles* majority characterized this doctrine as moribund, and it "overrule[d] *Harris Truck Lines* and *Thompson* to the extent they purport to authorize an exception to a jurisdictional rule." *Bowles*, 551 U.S. at 214.

Prior to *Bowles*, the argument for applying the unique circumstances doctrine (in the context addressed by this memo) would have been strong given that of the initial trio of Supreme Court cases establishing the doctrine, two involved erroneous district court assurances concerning the timeliness of postjudgment motions that were in fact untimely. In *Thompson v. INS*, post-trial motions were made after the deadlines set by Rules 52 and 59. The notice of appeal was filed within the appeal deadline computed from the denial of the motions but not within the appeal deadline computed from the original judgment. The court of appeals dismissed the appeal as untimely but the Supreme Court reversed, evidently giving weight to the petitioner's argument "that he relied on the Government's failure to raise a claim of untimeliness when the motions were filed and on the District Court's explicit statement that the motion for a new trial was made 'in ample time'; for if any question had been raised about the timeliness of the motions at that juncture, petitioner could have, and presumably would have, filed the appeal within 60 days of the entry of the original judgment, rather than waiting, as he did, until after the trial court had disposed of the post-trial motions." The Court viewed the case as fitting "squarely within the letter and spirit of *Harris*. Here, as there, petitioner did an act which, if properly done, postponed the deadline for the filing of his appeal. Here, as there, the District Court concluded that the act had been properly done. Here, as there, the petitioner relied on the statement of the District Court and filed the appeal within the assumedly new deadline but beyond the old deadline." *Thompson*, 375 U.S. at 386-87.

In *Wolfsohn v Hankin*, 376 U.S. 203 (1964), the district court signed an order purporting to extend the time to move under Rule 59 for rehearing. The appellant moved for rehearing within the extended time but outside the time set by Rule 59. Less than 30 days after the denial of the motion, she filed the notice of appeal. The court of appeals held that the notice did not effect a timely appeal from the judgment. *Wolfsohn v. Hankin*, 321 F.2d 393, 394 (D.C. Cir. 1963). The Supreme Court reversed, citing *Thompson* and *Harris Truck Lines*. *Wolfsohn*, 376 U.S. at 203.

[20] Admittedly, some of those instances could be addressed under current Rule 4(a)(5) – but only if the would-be appellant recognizes her error no later than 30 days after the expiration of the time to appeal. Thus, the question becomes whether a Rule amendment is warranted to address the plight of litigants who fail to recognize the timeliness problem until more than 30 days after the appeal time runs out.

III. Drafting specifics

In this Part, I tentatively set forth illustrative alternatives for an amendment to Rule 4(a)(4). Part III.A presents sketches of a proposal that would implement the majority view concerning the meaning of "timely," while Part III.B presents a draft that would implement the contrary view. In Part III.C, I suggest that the amendment should eschew any attempt to address whether the timeliness requirement is jurisdictional.

The existence of provisions concerning tolling motions in Rules 4(b)(3) (criminal appeals), 6(b)(2)(A)(i) (certain bankruptcy appeals), and 13(a) (appeals from the Tax Court) raises additional questions about any amendment that would address the notion of timely tolling motions for purposes of Rule 4(a)(4). First, should such an amendment be drafted and placed so as to define "timely" for purposes of all four Rules? Second, if the amendment is drafted and placed so as to explicitly modify only Rule 4(a)(4), will it be read to have any implications for the operation of Rules 4(b)(3), 6(b)(2)(A)(i), and 13(a)? In Part III.D, I argue that the amendment should be limited to appeals to which Rule 4(a)(4) applies, and that – thus limited – it should not cause problems with the other tolling rules.

Finally, in Part III.E, I briefly discuss other Rules that use the term "timely" or that dovetail with Rule 4(a)(4), and I conclude that amendments of the type shown in Parts III.A and III.B should not cause any problematic changes in the operation of those other provisions.

A. Amending Rule 4(a)(4) to implement the majority view of "timely"

To implement the majority view of the meaning of "timely" in Rule 4(a)(4), one might add a definitional provision that reads:

> (C) **Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is made within the time limit set by the relevant Federal Rule of Civil Procedure. A motion made after that time limit is not rendered timely for purposes of this Rule 4(a)(4)(A) by:
>
> > (i) a court order purporting to extend the motion deadline set by the relevant Federal Rule of Civil Procedure, or
> >
> > (ii) another party's consent or failure to object.

This sketch places the new provision as a new Rule 4(a)(4)(C), in order to avoid re-numbering any existing provisions. However, in order to help ensure that readers do not overlook the new definition, it might also be wise to add a cross-reference in Rule 4(a)(4)(A) itself:

> (A) If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure and the motion is timely as

> defined in Rule 4(a)(4)(C), the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

The draft amendments sketched above would provide clarification; they would also further distend Rule 4(a)(4), which is long and intricate already. An alternative, more parsimonious, approach would simply amend Rule 4(a)(4)(A) as shown below, without adding a new definitional subsection:

> If a party ~~timely~~ files in the district court any of the following motions under the Federal Rules of Civil Procedure within the time limit set by the relevant [rule] [Federal Rule of Civil Procedure], the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

If the Committee adopted this approach, the Committee Note could explain that the change to the Rule text was adopted in order to resolve the circuit split concerning the meaning of "timely."

B. Amending Rule 4(a)(4) to implement the contrary view of "timely"

An amendment implementing the contrary view of "timely" might take a number of different forms. It might focus on the existence of purported court permission to file a late motion, or on the opponent's failure to object to the lateness of the motion.[21] Here is a sketch of one possible amendment that incorporate both those concepts:

> (C) **Timely Defined.** For purposes of Rule 4(a)(4)(A), a motion is timely if it is:
>
> > (i) made within the time limit set[22] by the relevant Federal Rule of Civil Procedure; or
> >
> > (ii) made within a time limit purportedly set by court order[23] for making the motion, so long as no party raised an objection to the motion's timeliness within [30] days after the expiration of the time otherwise set by this Rule 4(a) for filing a notice of appeal.

Because this type of amendment would (in many circuits) expand the set of motions that have tolling effect – and would thus have the effect of preserving rather than cutting off

[21] Professor Cooper suggests that it may be advisable to limit such a provision to cases in which the court actually enters an order extending the time to move. It should not suffice, he suggests, "that an untimely motion is denied as untimely, even though no party objected. Nor should it do that an untimely motion is denied without explanation. And probably it should not do that the court considers an untimely motion on the merits, still without objection by any party, and denies it on the merits -- though I am not sure of that."

[22] Professor Cooper has suggested that it would be better to say "made within the time **authorized** by the relevant Federal Rule of Civil Procedure" because "set" sounds rigid.

[23] Professor Cooper queries whether "purportedly set by court order" is the right wording; "designated by the district court" is a possible alternative.

appeal rights – it would seem less necessary to include a cross-reference to the new provision in Rule 4(a)(4)(A).

I bracketed the number 30 in proposed Rule 4(a)(4)(C)(ii) because it might be advisable to set a slightly shorter time limit than 30 days. The idea would be to set a time limit that would allow a would-be appellant to take note of an objection to the timeliness of the motion, and to move under Rule 4(a)(5) for an extension of time to appeal. Under Rule 4(a)(5)(A)(i), the extension motion must be made "no later than 30 days after the time prescribed by this Rule 4(a) expires."

I should note a problem with this draft:[24] Suppose the court purports to extend the motion deadline by 80 days, and the motion is filed 108 days after entry of the judgment. Suppose further that the judgment winner promptly opposes the motion (on Day 110, let us say) on the ground that it is untimely. Under the language sketched above, the motion would be considered "timely" for Appellate Rule 4(a)(4) purposes, despite the judgment winner's objection to its timeliness, because the judgment winner's objection was raised more than 30 days after the appeal time expired.[25] Perhaps this could be addressed by revising this provision so that it counts only an extension that is granted by an order entered within a limited period after the appeal time expires,[26] or (even more restrictively) so that it counts only instances when the motion itself is made within a limited period after the appeal time expires.[27] Such revisions would address this problem, but would add further complexity to an already intricate rule.

C. Addressing the nature of Rule 4(a)(4)'s timeliness requirement

If the Committee were to adopt an amendment along the lines of the one sketched in Part III.B, it is questionable whether there would be any compelling need to address whether Rule 4(a)(4)(A)'s timeliness requirement is jurisdictional. Admittedly, the type of definition sketched in Part III.B would not entirely eliminate the salience of that question. An instance could arise in which a motion is untimely even under the expanded

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[24] I am indebted to Professor Cooper for this point.

[25] By contrast, such a motion would likely be considered *un*timely for the purpose of determining the district court's authority to grant the motion – because the judgment winner's timeliness objection would likely be deemed timely for that purpose. *See, e.g.*, *Dill v. General Am. Life Ins. Co.*, 525 F.3d 612, 618-19 (8th Cir. 2008) (holding that the nonmoving party timely raised an objection to a Rule 50(b) motion's untimeliness by objecting before the district court decided the motion on the merits).

[26] Such a provision might read:

> (ii) made within a time limit purportedly set by court order for making the motion, so long as, within [30] days after the expiration of the time otherwise set by this Rule 4(a) for filing a notice of appeal,
>
> (a) the court order setting the time limit was entered, and
>
> (b) no party raised an objection to the order or to the motion's timeliness.

[27] Such a provision might read:

> (ii) made within a time limit purportedly set by court order for making the motion, so long as, within [30] days after the expiration of the time otherwise set by this Rule 4(a) for filing a notice of appeal,
>
> (a) the motion was made, and
>
> (b) no party raised an objection to the motion's timeliness.

definition sketched in Part III.B, and yet the untimeliness is not raised by the appellee. In that event, the nature of the timeliness requirement would govern whether the court of appeals must raise the timeliness issue on its own. But it is unclear to me why this question would be so troubling that it would merit treatment by Rule amendment – given that the type of amendment sketched in Part III.B would address the situations in which the appellant has a compelling argument that he or she failed to file a timely notice of appeal in reliance on a purported time extension. Moreover, there are other parts of Rule 4(a) that present the same general type of "hybrid" – i.e., a Rule provision, not reflected in Section 2107, that fills a gap in the statutory appeal-deadline scheme.[28] Why address only one such instance and not the others?

By contrast, if the Committee were to adopt an amendment along the lines of the one sketched in Part III.A, then some situations might arise in which an appellant might seek to raise a fairness-based argument for excusing compliance with Rule 4(a)'s timeliness requirement. Suppose the district court purports to grant the appellant's unopposed motion for an extension of time to file a postjudgment motion, and the appellant files a notice of appeal from the underlying judgment six months after entry of that judgment but less than 30 days after entry of the order disposing of the postjudgment motion. Suppose further that the appellee raises no timeliness objection to the appeal. Must the court of appeals raise the timeliness issue sua sponte? If so, can the court of appeals apply the "unique circumstances" doctrine to avoid dismissing the appeal? As noted in Part I, a number of circuits would answer "Yes" to the first question and "No" to the second. The question arises whether it would be possible and desirable to draft a rule amendment that would alter these answers. For the reasons sketched in Part II.B, I tend to think that it would not. If the fairness concerns that would be raised by such an appellant move the Committee, then I think it would be better to address those concerns by modifying the definition of "timely" in Rule 4(a)(4)(A) than to try to address those concerns by defining (in Rule text) whether that timeliness requirement is jurisdictional.

D. Placement of the amendment, and effect on other tolling provisions

The question of the placement of the amendment connects to the question of how the amendment might affect the treatment of tolling motions in criminal, bankruptcy, and tax cases. In Parts III.D.1 – 3, I survey the current treatment of such motions. In Part

[28] 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 [Rule] 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.*, 553 F.3d 1277, 1284 (9th Cir. 2009).

III.D.4, I conclude that the proposed amendment should be placed in Rule 4(a)(4) and that it should be drafted so as to affect only civil appeals in which the timing of any tolling motion is governed by the Civil Rules.

1. Tolling motions in criminal cases

In criminal cases, as in civil cases, certain postjudgment motions toll the time to appeal. Three such types of motions are listed in Rule 4(b)(3)(A):

> If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:
>
> > (i) for judgment of acquittal under Rule 29;
> >
> > (ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or
> >
> > (iii) for arrest of judgment under Rule 34.

Apart from the motions listed in Rule 4(b)(3)(A), caselaw provides that reconsideration or rehearing motions that are made within the movant's appeal deadline also have tolling effect.[29]

The Criminal Rules authorize the district court to extend the deadlines for motions under, inter alia, Rules 29, 33, and 34.[30] Accordingly, I would think there is a strong argument that a Rule 29 or Rule 34 motion made within a properly-ordered extension period would count as "timely" for purposes of Rule 4(b)(3)(A). The same type of

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[29] *See United States v. Healy*, 376 U.S. 75, 77-78 (1964) (providing, in the context of a direct appeal to the U.S. Supreme Court from a district court, an affirmative answer to the question "whether in a criminal case a timely petition for rehearing by the Government filed within the permissible time for appeal renders the judgment not final for purposes of appeal until the court disposes of the petition"); *United States v. Dieter*, 429 U.S. 6, 8 (1976) (applying *Healy* to an appeal from a district court to a court of appeals); *United States v. Ibarra*, 502 U.S. 1, 6-7 (1991).

[30] Criminal Rule 45(b) provides:

> (1) **In General**. When an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made:
> > (A) before the originally prescribed or previously extended time expires; or
> > (B) after the time expires if the party failed to act because of excusable neglect.
>
> (2) **Exception**. The court may not extend the time to take any action under Rule 35, except as stated in that rule.

argument would apply to Rule 33 new trial motions that are not based on newly discovered evidence.[31]

By contrast, Rule 4(b)(3)(A)(ii) makes clear that a Rule 33 new trial motion based on newly discovered evidence has no tolling effect unless made within 14 days after entry of judgment.[32] If I am correct that "timely" motions include motions (under Rules 29 or 34 or under Rule 33 on grounds other than new evidence) made within a court-extended period, then the result might be that considerably longer time windows might exist for the tolling effect of such motions than for the tolling effect of new-evidence motions under Rule 33. Some might consider this disparity to be unfortunate, given that the 14-day cutoff set in Rule 4(b)(3)(A)(ii) was presumably designed to approximate the typical time limit for making other relevant motions. On the other hand, it should be noted that the time period set by Rule 4(b)(3)(A)(ii) for new-evidence motions to have tolling effect – "no later than 14 days after the entry of the judgment" – will sometimes commence running on a later date than the 14-day periods set by Rules 29, 33, and 34.[33]

An additional question concerns what happens if the district court extends the deadline for a motion under Rules 29, 33, or 34 beyond the date that otherwise would be set by Rule 4(b)(1) for filing a notice of appeal. Distinct concerns would arise if the motion for an extension of time is made after the date on which the appeal time elapsed – and even more acute concerns would arise if the belated extension motion is made more than 30 days after the date on which the appeal time elapsed.[34]

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[31] I was only able to find one precedential court of appeals opinion addressing the tolling effect (in a criminal case) of a motion made within a court-extended time period: In *United States v. Owen*, 553 F.3d 161, 165 (2d Cir. 2009), after a February 2005 verdict and a November 2005 judgment of conviction, the defendant filed a pro se motion in December 2005 asserting ineffective assistance of counsel. The district court, without adjudicating that motion, granted defendant's counsel's motion for a new trial based on newly discovered evidence. The court of appeals reversed the new trial grant. Less than 10 days after the entry of the court of appeals' mandate in the district court, the defendant's new counsel filed a notice of appeal from the November 2005 judgment. In January 2009 the court of appeals held that the notice of appeal was not yet effective due to the pendency of the defendant's December 2005 new trial motion. *Id*. at 165. Petitioning for rehearing, the government contended for the first time that the December 2005 new trial motion was untimely. The court of appeals denied the rehearing petition, reasoning that it was possible for the district court to render the new trial motion timely by acting under Criminal Rule 45(b) to extend what was then Rule 33's 7-day motion deadline. *United States v. Owen*, 559 F.3d 82, 84 (2d Cir. 2009).

[32] The Rule's cap on the tolling effect of such motions exists because the time period for making timely Rule 33 motions based on newly-discovered evidence is a long one – currently, three years.

[33] Criminal Rule 29(c)(1) provides: "A defendant may move for a judgment of acquittal, or renew such a motion, within **14 days after a guilty verdict or after the court discharges the jury, whichever is later**." Criminal Rule 33(b)(2) provides: "Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within **14 days after the verdict or finding of guilty**." Rule 34(b) provides: "The defendant must move to arrest judgment within **14 days after the court accepts a verdict or finding of guilty, or after a plea of guilty or nolo contendere**."

[34] Appellate Rule 4(b)(4) provides: "Upon a finding of excusable neglect or good cause, the district court may – before or after the time has expired, with or without motion and notice – extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b)."

2. Tolling motions in bankruptcy cases

An appeal from the final judgment of a district court exercising original jurisdiction in a bankruptcy case is treated like other civil appeals.[35] Accordingly, Rule 4(a)(4) applies to such appeals.[36] By contrast, appeals from the final judgment of a district court or bankruptcy appellate panel ("BAP") exercising appellate jurisdiction in a bankruptcy case are governed by Rule 6(b), which excludes the application of Rule 4(a)(4). Instead, Rule 6(b)(2)(A)(i) provides:

> If a timely motion for rehearing under Bankruptcy Rule 8015[37] 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.

Bankruptcy Rule 8015 currently provides:

> Unless the district court or the bankruptcy appellate panel by local rule or by court order otherwise provides, a motion for rehearing may be filed within 14 days after entry of the judgment of the district court or the bankruptcy appellate panel. If a timely motion for rehearing is filed, the time for appeal to the court of appeals for all parties shall run from the entry of the order denying rehearing or the entry of subsequent judgment.

If the proposed amendments to the Part VIII Bankruptcy Rules take effect, Rule 8015 will be replaced by Rule 8022, which will read in relevant part: "Unless the time is shortened or extended by order or local rule, any motion for rehearing by the district court or BAP must be filed within 14 days after entry of judgment on appeal." (Current Rule 8015's tolling provision will be deleted as redundant in light of the tolling provision in Appellate Rule 6(b)(2)(A)(i).)

It thus seems that practice under Appellate Rule 6(b) and the relevant Part VIII Bankruptcy Rule is similar to criminal practice, in the sense that the deadline for a tolling motion can validly be extended by court order.

3. Tolling motions in tax cases

Appellate Rule 13 governs appeals from the Tax Court. Rule 13(a)(2) provides: "If, under Tax Court rules, a party makes a timely motion to vacate or revise the Tax Court's decision, the time to file a notice of appeal runs from the entry of the order

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[35] *See* Rule 6(a).

[36] Thus, if the Committee is interested in proceeding with an amendment to Rule 4(a)(4), it will be important to consult the Bankruptcy Rules Committee for their views on the proposed amendment.

[37] The reference to Rule 8015 will become a reference to Rule 8022 if the pending amendments to Rule 6 and to the Bankruptcy Part VIII Rules become law.

disposing of the motion or from the entry of a new decision, whichever is later."[38] Tax Court Rule 162 provides: "Any motion to vacate or revise a decision, with or without a new or further trial, shall be filed within 30 days after the decision has been entered, unless the Court shall otherwise permit."

Under these Rules, it seems that – as with practice under the Criminal Rules and the Bankruptcy Part VIII Rules – the deadline for a tolling motion in tax cases can validly be extended by court order.

4. Assessment

The survey of these other tolling provisions leads me to conclude that the proposed amendment should target only the Rule 4(a)(4) tolling mechanism.

This seems particularly clear with respect to the proposal sketched in Part III.A. A major rationale for the majority view of the meaning of "timely" in Rule 4(a)(4) is that the Civil Rules bar extensions of the time to make motions under Civil Rules 50, 52, and 59. As noted in Part II.C, the Criminal Rules take a very different approach, as do the relevant Bankruptcy and Tax Court Rules. Thus, it seems to me that an amendment that adopts the restrictive view of "timely" should be explicitly limited to the context of civil appeals in which the tolling motion is governed by the Civil Rules. I do not think that such an amendment, thus limited, would affect the treatment of tolling motions under Rules 4(b)(3), 6(b)(2)(A)(i), or 13(a). The Committee could add a caveat in the Committee Note to disclaim any intent to affect the operation of those Rules.

I think that the same limitation should apply to an amendment along the lines sketched in Part III.B. Because that amendment is drafted to reflect the court's lack of authority to extend the time limits for postjudgment motions under the Civil Rules, the language of the proposed amendment would not be appropriate for cases governed by the other tolling rules. Here, too, the Committee could use the Committee Note to disclaim any intent to affect those other rules.

E. Effect on the use of "timely" in other parts of the Rules

In addition to Rules 4(b)(3), 6(b)(2)(A)(i), and 13(a), there are a few other Appellate Rules that use the term "timely" or that dovetail with Rule 4(a)(4). For the reasons stated below, I do not think that the proposed amendments sketched in Parts III.A and III.B would cause problems with the functioning of those rules.

1. Rules that dovetail with Rule 4(a)(4)(A)

One use of "timely" occurs in a cross-reference to Rule 4(a)(4)(A): Rule 10(b)(1) provides that the appellant must either order the transcript or state that none will be ordered "[w]ithin 14 days after filing the notice of appeal or entry of an order disposing

[38] Assuming no contrary action by Congress, on December 1, 2013, the pending amendments to Rule 13 will take effect, with the result that Rule 13(a)(2) will become Rule 13(a)(1)(B).

of the last timely remaining motion of a type specified in Rule 4(a)(4)(A), whichever is later …." This cross-reference would still make sense if Rule 4(a)(4) were amended as suggested in either Part III.A or III.B.

The possible amendments to Rule 4(a)(4) sketched in Parts III.A and III.B would affect the operation of Rules 4(a)(4)(B)(i) and 12.1. Under Rule 4(a)(4)(B)(i), the filing of a motion described in Rule 4(a)(4)(A) renders a previously-filed notice of appeal temporarily ineffective until the disposition of the motion. By restricting or expanding the number of instances in which a motion has tolling effect under Rule 4(a)(4)(A), the amendment would restrict or expand the number of cases in which a previously-filed notice of appeal is held in abeyance under Rule 4(a)(4)(B)(i).

Rule 12.1(a) provides: "If a timely motion is made in the district court for relief that it lacks authority to grant because of an appeal that has been docketed and is pending, the movant must promptly notify the circuit clerk if the district court states either that it would grant the motion or that the motion raises a substantial issue." For the reasons just noted, an amendment drafted as shown in Parts III.A or III.B would alter the universe of instances in which Rule 12.1's indicative-ruling procedure would come into play, by altering the number of instances in which a previously-filed notice of appeal is held in abeyance under Rule 4(a)(4)(B)(i).

It is worth considering whether such an amendment would influence courts' analysis of whether a motion is "timely" for purposes of Rule 12.1(a). That question seems most likely to arise if the rulemakers adopt the sort of amendment sketched in Part III.A. Suppose that a notice of appeal is filed on Day 15 after entry of judgment; the district court then purports to extend the time to file a motion for a new trial under Rule 59; and on Day 33, the new trial motion is filed. Suppose further that the judgment winner raises no objection to the timeliness of the new trial motion. The notice of appeal transferred jurisdiction to the court of appeals, and Rule 4(a)(4)(B)(i) did not suspend the effectiveness of the notice of appeal (because this new trial motion would not count as a "motion listed in Rule 4(a)(4)(A)"). The pendency of the appeal deprives the district court of authority to grant the new trial motion. The litigants and the court wish to make use of the indicative-ruling procedure. Is the new trial motion a "timely" one within the meaning of Appellate Rule 12.1(a) and Civil Rule 62.1(a)? Amended language in Rule 4(a)(4)(A) would not directly answer this question. Indeed, one might argue that the definition of "timely" should be different for purposes of the indicative-ruling procedure, because the question in that context is whether the motion is "timely" for purposes of being eligible for consideration *by the district court* – and, as noted in Part I, the developing caselaw views the Rule 59 new trial motion deadline as a waivable claim-processing rule rather than a jurisdictional limit.

2. Other Rules

A number of Rules refer to the "timely" filing of a notice of appeal or a petition for review.[39] A definition of "timely" for purposes of Rule 4(a)(4)'s treatment of tolling

[39] See Rules 3(a)(2); 3(b)(2); 4(a)(3); 4(c)(1); 13(a); and 28(a)(4)(C).

motions seems unlikely to affect the use of "timely" to describe a notice of appeal or petition for review.

The question of timeliness also arises with respect to various filings in the court of appeals. Rules 25(a)(2)(A) – (C) address the "[m]ethod and [t]imeliness" of filings in the court of appeals. Rule 27(b) refers to "[t]imely opposition" to a motion in the court of appeals. Most interestingly, Rules 41(b) and 41(d)(1) refer to a "timely" petition for panel rehearing, for rehearing en banc, or for a stay of mandate.[40]

Petitions for rehearing in the court of appeals might be seen to serve a function analogous to tolling motions in the district court. Supreme Court Rule 13.3 provides:

> The time to file a petition for a writ of certiorari runs from the date of entry of the judgment or order sought to be reviewed, and not from the issuance date of the mandate (or its equivalent under local practice). But if a petition for rehearing is timely filed in the lower court by any party, or if the lower court appropriately entertains an untimely petition for rehearing or *sua sponte* considers rehearing, the time to file the petition for a writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or, if rehearing is granted, the subsequent entry of judgment.

I do not think that a definition of timeliness for purposes of tolling motions under Rule 4(a)(4)(A) would affect the courts' view of what counts as timely for purposes of Rule 41, let alone what counts as timely for purposes of Supreme Court Rule 13.3. The Appellate Rules explicitly authorize the court of appeals to extend the time to seek rehearing,[41] so a definition of timeliness in Rule 4(a)(4)(A) that is designed to address motions with non-extendable deadlines seems entirely inapposite to the timeliness of petitions for rehearing.

IV. Conclusion

It seems worthwhile to consider the possibility of amending Rule 4(a)(4)(A) to address the circuit split concerning the definition of "timely" as used in that Rule. The Committee will no doubt wish to consider how best to craft that amendment so as to avoid unintended effects on the other tolling provisions in the Appellate Rules.

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[40] Rule 41(b) states: "The court's mandate must issue 7 days after the time to file a petition for rehearing expires, or 7 days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time." Rule 41(d)(1) states: "The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise."

[41] *See* Rule 40(a)(1) (setting time limits – for filing a petition for panel rehearing – of 14 days and 45 days, and providing that the 14-day period can be extended "by order or local rule" and the 45-day period can be extended by "order"); Rule 35(c) ("A petition for a rehearing en banc must be filed within the time prescribed by Rule 40 for filing a petition for rehearing.").

TAB 3

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TAB 3A

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MEMORANDUM

DATE: September 10, 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. At the Committee's spring 2013 meeting, participants discussed this suggestion and other possible ways to amend Rule 4(c)(1). Over the summer, Justice Eid, Professor Barrett, and Mr. Letter provided additional input on these questions. This memo summarizes the state of the inquiries to date, and suggests possible amendments that the Committee might consider at the fall 2013 meeting.

Part I of this memo provides an update on our pursuit of the avenues for further research that the Committee identified this past spring. Part II discusses drafting possibilities that were highlighted at the spring meeting, along with insights arising from the discussions with Justice Eid, Professor Barrett, and Mr. Letter over the summer.

As background, I enclose my March 25, 2013 memo and its attachments.

I. Possible avenues for further research

I collect in this Part of the memo the ideas for further research that were discussed at the spring meeting. In some instances, this Part provides answers to the questions raised in the spring; in others, it provides an update on the status of the inquiries.

A. Experience with Supreme Court Rule 29.2

During the spring meeting, at least one participant expressed interest in learning whether any problems have arisen under the U.S. Supreme Court's inmate-filing rule

[1] 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.

(Rule 29.2).[2] Another participant noted that an inmate-filing rule for certiorari petitions raises somewhat different issues than an inmate-filing rule for notices of appeal, because the latter type of document should typically be considerably shorter than the former.[3]

As noted at the spring meeting, the last sentence in Rule 29.2 directs the Clerk to follow up with the filer if "the postmark is missing or not legible." This directive may suggest that – even though the preceding sentence in Rule 29.2 directs inmate filers to include "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" – an inmate filer who flouts this directive might have a second chance at compliance. That is to say, the last sentence of the Rule suggests that when an inmate fails to include the statement or declaration initially, the Clerk may follow up and provide the inmate with an opportunity to redress the omission.

We are inquiring further about these issues so as to gather information in time for the fall meeting.

B. The origins of the postage-prepayment requirement

During the spring meeting, a participant suggested that it would be useful to know the origins of the postage-prepayment requirement. That requirement was part of Rule 4(c) as originally adopted in 1993. The 1993 Committee Note does not discuss postage prepayment, but states more generally that "[t]he language of the amendment is similar to that in Supreme Court Rule 29.2." Because Supreme Court Rule 29.2, then as now, required prepayment of postage,[4] it seems likely that the Committee drew the postage-prepayment requirement from Rule 29.2.[5]

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[2] Rule 29.2 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.**

[3] Admittedly, an inmate who cannot afford to pay the required fees for an appeal to the court of appeals would likely include in the mailing not only the notice of appeal (a one-page document) but also a motion appending an affidavit that provides "the detail prescribed by Form 4," Appellate Rule 24(a)(1). Thus, the mailing that includes the notice of appeal may be, say, seven pages rather than just one.

[4] As of 1993, Supreme Court Rule 29.2 (as amended in 1990) provided in part: "To be timely filed, a document must actually be received by the Clerk within the time specified for filing … or, if being filed by

C. Other rules that discuss prepayment of postage

A participant in the spring meeting expressed interest in knowing whether other national Rules require prepayment of postage. Here, I list such rules, sorted by type. (I generally looked only at national rules; but I do include one local rule in Part I.C.1 because it seemed particularly salient.) Part I.C.1 addresses inmate-filing rules; Part I.C.2 summarizes other filing rules; and Part I.C.3 discusses rules concerning service.

1. Rules concerning filing by inmates

As the Committee is already aware, there are three rules that track quite precisely the wording of Appellate Rule 4(c)(1): Appellate Rule 25(a)(2)(C), which concerns inmate filings in the courts of appeals, and Rule 3(d) in the Rules Governing Section 2254 Cases and the Rules Governing Section 2255 Cases. Supreme Court Rule 29.2, set out in relevant part in footnote 2 above, uses similar but not identical wording. For example, Supreme Court Rule 29.2 does not include a requirement that the inmate use any extant "system designed for legal mail." That requirement is also absent from the other two inmate-filing rules that I have found – a local Third Circuit rule concerning certiorari review of U.S. Virgin Islands Supreme Court rulings[6] and a rule of the U.S. Court of Appeals for Veterans Claims.[7]

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an inmate confined in an institution, be deposited in the institution's internal mail system on or before the last day for filing and be accompanied by a notarized statement or declaration in compliance with 28 U.S.C. § 1746 setting forth the date of deposit and stating that first-class postage has been prepaid."

[5] The minutes of the meeting at which the Advisory Committee adopted the postage-prepayment language contain no specific discussion of *why* the Committee adopted that language, but the account in the minutes is consistent with the conjecture that this language was adopted because it mirrored the language of the Supreme Court's rule. The most pertinent passage states:

> A new draft was prepared for this meeting. The new draft closely tracks the language in the Supreme Court's Rule 29.2. The reporter outlined the differences between the new draft and the previous one. First, the new draft applies to all persons "confined in an institution." The prior draft spoke of persons confined in a "jail, mental hospital, or other institution." Second, the prior draft limited its application to persons "not represented by an attorney." The new draft does not contain that limitation because the Supreme Court's rule does not. Third, the new draft requires that the notice of appeal be accompanied either by a notarized statement or a declaration in compliance with 28 U.S.C. § 1746 setting forth the date of deposit and stating that first class postage had been prepaid.

Minutes of the April 17, 1991, Meeting of the Advisory Committee on Federal Rules of Appellate Procedure at 26.

[6] "In both civil and criminal cases, review of a final decision of the Supreme Court of the Virgin Islands may be sought pursuant to 48 U.S.C. § 1613 by filing a petition for a writ of certiorari with the Clerk of the United States Court of Appeals for the Third Circuit within 60 days from the entry of judgment sought to be reviewed on the docket of the Supreme Court of the Virgin Islands. A petition filed by an incarcerated person will be deemed filed when placed in the prison mail system; the petition must be accompanied by a statement under penalty of perjury stating the date the petition was placed in the prison mail system and stating that first-class postage has been prepaid. In all other cases, the petition must be received by the Clerk in Philadelphia by the sixtieth day." Third Circuit Local Appellate Rule 112.2.

[7] "A document submitted through the U.S. Postal Service by a self-represented appellant who is an inmate confined in an institution is timely filed if the document is deposited in the institution's internal mail system

2. Other filing rules

Few national rules address prepayment of postage in connection with filing more generally. Besides the relevant provisions in the Appellate Rules[8] and the Supreme Court Rules,[9] the only other examples appear in rules governing military appeals[10] and arguably in the Bankruptcy Rules.[11]

3. Service rules

A number of provisions governing service require that postage be prepaid when service is by mail. Such provisions appear in the rules of the Supreme Court[12] and the U.S. Court of Appeals for the Armed Forces,[13] the Bankruptcy Rules,[14] the forms of the Tax Court,[15] the Court of International Trade,[16] and the Court of Federal Claims,[17] and various courts' electronic-filing procedures.[18]

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within the time specified for filing and is accompanied by evidence showing the date of deposit and stating that first-class postage has been prepaid." U.S. Vet. App. R. 25(b)(1)(B).

[8] "A brief or appendix is timely filed, however, if on or before the last day for filing, it is: (i) mailed to the clerk by First-Class Mail, or other class of mail that is at least as expeditious, postage prepaid; or (ii) dispatched to a third-party commercial carrier for delivery to the clerk within 3 days." Appellate Rule 25(a)(2)(B).

[9] "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…." U.S. Supreme Court Rule 29.2.

[10] "If a pleading or other paper is filed by mail, such filing shall consist of depositing the pleading or other paper with the United States Postal Service, with no less than first-class postage prepaid, properly addressed to the Clerk's office. If a pleading or other paper is filed through a third-party commercial carrier, such filing shall consist of delivery to the commercial carrier for delivery within 3 calendar days." U.S. Ct. of App. Armed Forces Rule 36(c).

[11] Bankruptcy Rule 9001 provides: "General Definitions. …. (8) 'Mail' means first class, postage prepaid." However, a quick search disclosed no Rules in Part IX of the Bankruptcy Rules that discuss filing by mail, so it is not clear that this definition would actually come into play in connection with filing.

[12] U.S. Supreme Court Rule 29.3 ("If service is by mail or third-party commercial carrier, it shall consist of depositing the document with the United States Postal Service, with no less than first-class postage prepaid, or delivery to the carrier for delivery within 3 calendar days, addressed to counsel of record at the proper address.").

[13] U.S. Ct. of App. Armed Forces Rule 39(c).

[14] Bankruptcy Rules7004(b), 7004(c).

[15] Tax Court Rules app. I, Form 9.

[16] U.S. Court of Int'l Trade Rules, Form 21.

[17] U.S. Court of Federal Claims Rules, Form 4.

[18] Judicial Panel on Multidistrict Litigation ECF Admin. Policies & Procedures 12.1.1; U.S. Court of Federal Claims Rules, app. B supp., ECF Procedure in Vaccine Act Cases, V.12(b); U.S. Court of Federal Claims Rules app. E, ECF Procedure, V.12(b).

D. Loss of appeal rights due to Rule 4(c)'s current wording

During the spring meetings, a participant asked how often inmates lose their appeal rights due to Rule 4(c)(1)'s current wording. This question is difficult to answer quantitatively. The statistics made available on the AO's website concerning the judicial business of the federal courts do not readily disclose the frequency with which inmate appeals are dismissed on timeliness grounds. And even if such statistics were available, not all such instances would involve a difficulty with the inmate-filing rule.

E. The views of the Circuit Clerks

During the spring meeting, I suggested that it might be useful to learn more about how practice has developed in the Seventh and Tenth Circuits, where the caselaw provides that prepayment of postage is not required if the inmate uses a legal mail system. If filings originating in facilities with legal mail systems are reaching the Clerk's Office without undue delay, this might shed some light on the possible effects of limiting the postage-prepayment requirement.

More generally, it seems wise to seek input from the Circuit Clerks concerning the functioning of the current Rule, as well as their views on potential changes. We will ask Mr. Gans if he can pursue those inquiries in advance of the fall meeting.

F. Research on federal, state, and local facilities

Research to date has provided a clear sense of the relevant Federal Bureau of Prisons policies. We have not yet obtained a detailed sense of how mail is handled at other federal facilities (e.g., those run by U.S. Immigration and Customs Enforcement), but we hope to do so in advance of the fall meeting. Research on state and local facilities has disclosed policies for particular facilities and jurisdictions,[19] but has not provided a comprehensive picture of how mail is handled at non-federal facilities.

Federal regulations provide that "[a]n 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."[20] A program statement provides further detail:

> (1) To prevent abuses of Bureau directives regarding purchase of postage, Wardens will:
>
> ■ Provide an inmate who has neither funds nor postage up to five postage stamps (denomination for first-class, domestic, 1-ounce

[19] Some relevant provisions are summarized in my October 2008 memo, which is among the attachments to my March 2013 memo.
[20] 28 C.F.R. § 540.21(d).

mailing) or the equivalent each week, for legal mail or Administrative Remedy filing

■ Require an inmate who has, for at least two separate months, depleted his/her commissary account, obtained Government-paid postage stamps, and then restored money to the account to complete the form for reimbursement Request for Withdrawal of Inmate's Personal Funds (BP-199) for the amount of postage given for legal mail or Administrative Remedy filings. Commissary staff hold the BP-199 and charge it against the inmate's account as soon as he/she has funds (see the Program Statement Trust Fund Management Manual).

■ Allow an inmate to purchase sufficient postage for legal mail or Administrative Remedy mailings. The amount may not exceed the limit for postage purchases.

(2) The associate warden makes a final determination whether the inmate is to receive postage under the conditions of this subsection. An "inmate without funds" means an inmate without sufficient commissary balance to purchase a postage stamp sufficient for first-class, 1-ounce domestic mailing. This authority may not be delegated below unit manager.[21]

The regulations further state that "[h]oldovers and pre-trial commitments will be provided a reasonable number of stamps for the mailing of letters at government expense."[22] The program statement elaborates: "Three letters per week is suggested as reasonable in most circumstances. Commissary purchase of postage is also available to pretrial inmates. For holdovers, additional Government-furnished postage stamps may be allowed for special needs demonstrated by the inmate."[23]

II. Drafting possibilities

In Part II.A, I review the possibilities that seemed uppermost in the discussion at the spring meeting. Part II.B notes a few additional issues that the Committee may wish to consider. Part II.C offers, for discussion purposes, a sketch of a possible amendment to Rule 4(c)(1).

[21] Program Statement 5265.14 (April 5, 2011), at page 19.
[22] 28 C.F.R. § 540.21(i).
[23] Program Statement 5265.14 (April 5, 2011), at page 20.

A. Possibilities discussed at the spring 2013 meeting

1. Provide that declaration suffices but is not required

During the spring 2013 meeting, participants discussed the possibility of amending the Rule to make clear that the declaration mentioned in the Rule suffices to show timely filing but is not required if timeliness can be shown by other evidence.

During the summer 2013 discussions, participants observed that it is useful for the Rule to include a directive to the inmate to submit the declaration, because the declaration provides helpful information and preserves that information while recollections are fresh. But participants noted that where proof of timely deposit into the institution's mailing system is needed,[24] there should be some opportunity for the inmate to provide that proof even if the inmate initially did not provide a declaration.[25] One possible approach might be to permit the inmate to show good cause why the absence of the declaration should be excused.

However, as noted during the Committee's spring 2013 meeting, a "good cause" standard could give rise to satellite litigation. Instead, one might add language that explicitly contemplates alternative means of showing timeliness: "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. Timely filing also may be shown by other [proof] [evidence] that the notice was timely deposited with first-class postage prepaid."

2. Eliminate requirement concerning use of legal mail system

At the spring meeting, participants questioned the usefulness of the current Rule's requirement 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." The 1998 Committee Note provided this rationale for the requirement: "Some institutions have special internal mail systems

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[24] Where the notice of appeal arrives at court before the due date, no such proof will be needed.

[25] Interestingly, it appears that when the Committee drafted the original 1993 version of the inmate-filing rule, it intended *not* to require that the declaration be submitted simultaneously with the notice of appeal. Then as now, the Supreme Court's rule referred to a document being "timely filed" if it was "accompanied by" the statement or declaration. *See supra* notes 2 & 4. At the Committee's April 1991 meeting, the agenda materials apparently included a draft that incorporated that "accompanied by" language. *See supra* note 5. The Committee excised that language intentionally:

> 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 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.

Minutes of the April 17, 1991, Meeting of the Advisory Committee on Federal Rules of Appellate Procedure at 26-27.

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."

It is true that the use of a mail system that logs the date of the inmate's deposit is desirable.[26] But the Rule itself does not actually refer to a mail system that logs the date; it instead refers to "a system designed for legal mail." Only by recourse to the Committee Note can one obtain the basis for arguing that this phrase is meant to denote a system that logs the date of deposit.

Given that inmates are unlikely to consult the 1998 Committee Note when applying Rule 4(c)(1), it might be desirable to revise the Rule to provide a functional definition instead the current reference to "a system designed for legal mail." For example, the Rule could state: "If the institution has a mail system that will log the date when an inmate deposits a piece of mail with the institution for mailing, the inmate must use that system to receive the benefit of this rule."

An alternative possibility would be to delete this sentence altogether. As noted in Part I.C.1, some inmate-filing rules omit any requirement that the inmate use any available "legal mail" system. Deleting this sentence would bring Rule 4(c)(1) into closer parallel with Supreme Court Rule 29.2.

3. Eliminate requirement of postage prepayment

The spring meeting also included discussion of the possibility of eliminating the postage-prepayment requirement. A more nuanced adjustment would eliminate the postage-prepayment requirement for inmate filers who certify that they are indigent. Another suggestion was that it would be useful to have a rule stating that an institution that pays postage for an inmate's legal mail can debit the inmate's account for the postage cost; however, such a provision presumably falls outside the purview of the Appellate Rules.

The discussions over the summer did not produce support for eliminating the postage-prepayment requirement. It was suggested that, in an appropriate case, an institution's failure to provide postage to an indigent inmate could be addressed by an as-applied constitutional challenge.

[26] As the Court observed in adopting the caselaw prototype for Rule 4(c)(1), "[b]ecause reference to prison mail logs will generally be a straightforward inquiry, making filing turn on the date the pro se prisoner delivers the notice to prison authorities for mailing is a bright-line rule, not an uncertain one." Houston v. Lack, 487 U.S. 266, 275 (1988). But *Houston* did not present the Court with the need to decide what would happen if an inmate failed to use an available system that logged the date of deposit; in *Houston* the pro se prisoner "deposited [the notice of appeal] with the prison authorities for mailing to the District Court," and "[t]his date of deposit was recorded in the prison log of outgoing mail." *Id.* at 268.

4. Revise Rule 4(c)(1) to track Supreme Court Rule 29.2

I set this out as a separate heading mainly because this could be seen as a distinct reason to amend Rule 4(c)(1). The principal change that would be involved in such a revision has already been discussed above – namely, the deletion of the sentence requiring the use of an institution's "legal mail" system.

I should also note that adoption of the possible changes noted in Parts I.A.1 and I.A.3 above would widen the divergence between Rule 4(c)(1) and Supreme Court Rule 29.2.

B. Other drafting issues

Although the discussion at the spring meeting focused largely on the issues noted above, a few additional issues may warrant consideration.

1. Clarify whether the rule applies to represented inmates

As noted in my spring 2013 memo, if the Committee revises the Rule, it might be worthwhile to clarify whether it applies only to pro se inmates or also to represented inmates (when the filing is made by the inmate rather than his or her lawyer). Participants in the summer 2013 discussions were in agreement that the inmate-filing rule should apply to items filed by the inmate, whether or not the inmate is represented. We could not think of any realistic scenario in which that would be likely to be abused by the lawyer who represents the inmate. It may be worth noting that, when drafting the original 1993 version of Rule 4(c)(1), the Committee rejected language that would have limited the rule to unrepresented litigants.[27]

2. Consider promulgating an official form

The Committee may wish to consider promulgating an official form that would walk an inmate through statements that would suffice to establish eligibility for the inmate-filing rule.

Admittedly, there is a current trend away from reliance on official forms. This summer, proposals were published for comment that would abrogate Civil Rule 84 and the Official Forms. The Committee Note to the Rule 84 proposal explains:

> Rule 84 was adopted when the Civil Rules were established in 1938 "to indicate, subject to the provisions of these rules, the simplicity and brevity of statement which the rules contemplate." The purpose of providing illustrations for the rules, although useful when the rules were adopted, has been fulfilled. Accordingly, recognizing that there are many excellent alternative sources for forms, including the Administrative

[27] *See supra* note 5.

Office of the United States Courts, Rule 84 and the Appendix of Forms are no longer necessary and have been abrogated.

The published proposal would, however, preserve present Forms 5 (request to waive service of summons) and 6 (waiver of service of summons) as official forms appended to Civil Rule 4. The Civil Rules proposal seems consistent with an approach that retains a few select forms as an official part of the Rules, and that selects those forms for retention on the basis of their salience to and entwinement with a particular mechanism set by a Rule.

Forms may be especially useful to pro se litigants. And assisting pro se litigants in turn assists the Clerk's Office that must process filings by pro se litigants. Use of an official form concerning inmate filings could reduce the time needed for a clerk or a judge to review the filing.

3. Consider what to propose concerning parallel provisions

If the Committee considers revisions to Rule 4(c)(1), it should also consider whether to propose conforming changes to Rule 25(a)(2)(C). The relevant considerations may differ as between the two rules. For example, filings under Rule 4(c)(1) will typically be shorter than many filings (briefs, petitions, and the like) under Rule 25(a)(2)(C). Thus, the cost of postage may be a more salient factor for the latter than the former. Rule 4(c)(1), because it governs the filing of notices of appeal – a jurisdictional requirement – might seem to present the most compelling case for an inmate-friendly rule that promotes the resolution of appeals on their merits. But the distinction is not as clear as it might at first appear. As Mr. Gans noted at the spring meeting, failure to meet a briefing deadline will result in an order to show cause why the appeal should not be dismissed. Moreover, some types of court of appeals proceedings are initiated by a filing in the court of appeals – i.e., by a filing governed by Rule 25(a)(2)(C) rather than by Rule 4(c)(1). This would be true, for instance, of petitions for permission to appeal (under Rule 5) or petitions for review of agency determinations (under Rule 15). Lack of parallelism between the two Rules might, thus, be undesirable.[28]

More broadly, it seems desirable for inmate-filing rules to be as uniform as possible across the various types of proceedings in which an inmate might be involved. Currently, the inmate-filing rules governing habeas and Section 2255 proceedings track the inmate-filing rules in the Appellate Rules, but all these rules differ somewhat from the Supreme Court's inmate-filing rule. Any inmate-filing principles concerning district-court filings (other than notices of appeal, habeas filings, and Section 2255 filings) are set by caselaw rather than by national rule.[29]

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[28] In addition to the considerations noted in the text, a lack of parallelism could create incongruity in situations where a filing other than a notice of appeal (such as an appellate brief) might be seen to serve as the substantial equivalent of a notice of appeal. For such a brief, qua brief, the relevant inmate-filing rule would be Rule 25(a)(2)(C). But would that be true of the same brief, serving as the equivalent of a notice of appeal?

[29] I have not checked to see whether any districts have local rules concerning the timeliness of inmate filings.

Thus, a project to consider revising Rule 4(c)(1) raises questions about the desirability of parallel treatment in the other contexts where inmate filings occur.

C. A sketch of a possible amendment to Rule 4(c)(1)

In the hopes of bringing together the various strands in the discussion above, I set forth here a sketch of a possible amendment to Rule 4(c)(1). This sketch was drafted subsequent to the discussions over the summer among Justice Eid, Professor Barrett, and Mr. Letter, so they did not have a chance to review it, but I am hopeful that it incorporates a number of insights from those summer discussions.

(c) Appeal by an Inmate Confined in an Institution.

> (1) 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.~~ 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. Timely filing also may be shown by other [proof] [evidence] that the notice was timely deposited with first-class postage prepaid. [Form 7 in the Appendix of Forms is a suggested form of the declaration referred to in this Rule 4(c)(1).]

A sketch of the possible Form 7 appears on the following page. I drafted it for use with Rule 4(c)(1), and thus it refers only to the notice of appeal and not to other types of filings. (If the Committee were to propose a similar amendment to Rule 25(a)(2)(C), then the form could be adjusted accordingly.)

The exercise of drafting the form raises some interesting questions. The form would, arguably, serve a dual function: It would guide the inmate on how to comply with the inmate-filing rule, and it would collect information for the court's use in verifying that compliance. These goals are in some tension. For instance, both the current Rule and the amended language sketched above use the passive voice when discussing postage ("postage has been prepaid"), and it would seem desirable for a court to view the postage-prepayment requirement as met so long as *someone* pays the postage, whether that person is the inmate or the institution. For that purpose, it would be helpful to know that the inmate relied on the institution to affix the postage (based, perhaps, on an institutional policy concerning postage); because that reliance should suffice to comply with the Rule – at least so long as the institution actually does affix the postage – it would be useful for the inmate to have the option to specify that the institution was to affix the postage. However, if we are also encouraging the inmate to enclose the declaration in the same envelope with the notice of appeal, then it seems unrealistic to expect the inmate to be

able to declare that the institution has *already* affixed the postage, since that might well occur after the envelope leaves the inmate's control. Thus, the sketch on the next page gives the inmate the option of asserting an *expectation* that the institution will affix the postage. I offer this for illustrational purposes, but with substantial qualms. I would not wish to encourage inmates to believe that it suffices for them to *expect* that the institution will affix the postage, because it is not at all clear that a mere expectation suffices to meet the requirements of the Rule. So perhaps it would be better for the form not to try to elicit detail, and instead to require merely (in this portion of the declaration) a statement that (tracking the language of the Rule) "first-class postage has been prepaid." But if the form merely tracks the language of the Rule, will it be useful?

Form 7. Declaration of Inmate Filing

[United States District Court for the _____ District of _____]
[United States Court of Appeals for the _____ Circuit][30]

A.B., Plaintiff
v. Case No. _____
C.D., Defendant

1. I am an inmate at _____ *[name the institution where you are confined]*. I make this declaration to explain how and when I filed my notice of appeal. I deposited the notice of appeal in _____ *[name of institution]*'s internal mail system on _____ , _____ *[insert date]* at _____ *[a.m.] [p.m.] [insert time]*. *[Add further detail if possible. It is a good idea to explain how you deposited the envelope in the mail system. For example, "I put the envelope containing the notice of appeal in the lockbox that [name of institution] provides for inmates' legal mail deposits." Or, "I handed the envelope containing the notice of appeal to [name of officer], who is [name of institution's] designated official for receiving inmates' legal mail."]*

_____
_____
_____
_____

2. First-class postage is being prepaid by *[choose one]*:

☐ Me. I put the postage on the envelope before depositing it in the internal mail system. *[Add further detail if possible. For example, it is a good idea to state the amount of the postage.]*

_____
_____

[30] It is recommended that the inmate include this declaration at the time of filing the document. Because notices of appeal are filed in the district court, a declaration accompanying the notice of appeal will be headed by the district court caption. But if the inmate submits this declaration to the court of appeals, the declaration will be headed by the court of appeals caption.

□ _____ *[name of institution]*. I expect _____ *[name of institution]* to put the postage on the envelope because

_____

_____

[explain why you have reason to expect that the institution will put the postage on the envelope. For example, "[Name of institution] puts first-class postage on three letters per month per inmate, and this is my first mailing in the month of August."]

I declare under penalty of perjury that the foregoing is true and correct.[31]

Sign your name here _____

Executed on _____ , ____ *[insert date]*

III. Conclusion

This is a challenging project – as evidenced by its long presence on the Committee's docket. I look forward to the Committee's further discussions of it.

Encl.

[31] Completion of this form yields a declaration that complies with 28 U.S.C. § 1746 (which authorizes use of a declaration under penalty of perjury in place of a sworn statement). 18 U.S.C. § 1621 provides in part that "[w]hoever … in any declaration … under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true; is guilty of perjury and shall, except as otherwise expressly provided by law, be fined under this title or imprisoned not more than five years, or both."

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TAB 3B

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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

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[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

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.
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> 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.

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

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.

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

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: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Possible amendments relating to electronic filing
(Item Nos. 08-AP-A, 08-AP-C, 11-AP-C, 11-AP-D, and 13-AP-D)

As the item numbers that head this memo indicate, the Committee has long had on its docket a number of proposals that relate to the impact of electronic filing and service. This year, the Standing Committee constituted a CM/ECF Subcommittee – with Judge Chagares as its Chair and Professor Capra as its Reporter – in order to consider possible amendments to all five sets of national Rules that would take account of the shift to electronic transmission and storage of documents and information. The Subcommittee deliberated over the summer and decided to recommend that the Advisory Committees draft amendments that will abrogate the "three-day rule" as it applies to electronic service. The Subcommittee also discussed the possibility of drafting amendments that will adjust the Rules so that they (1) define "writings" to include electronic materials and (2) define various actions that can be done with paper documents to include the analogous action performed electronically.[1]

Part I of this memo sketches possible ways to amend Rule 26(c)'s "three-day rule." Part II discusses, in a very preliminary way, the possibility of adopting definitions that would adjust the Rules' paper-based provisions to encompass equivalent documents and actions that are electronic.

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[1] In addition, the Subcommittee discussed a distinction between the Appellate Rules' and Bankruptcy Rules' current e-filing provisions and the analogous provisions in the Civil and Criminal Rules. Appellate Rule 25(a)(2)(D) provides:

> A court of appeals may by local rule **permit or require** papers to be filed, signed, or verified by electronic means that are consistent with technical standards, if any, that the Judicial Conference of the United States establishes. A local rule may require filing by electronic means only if reasonable exceptions are allowed. A paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules.

See also Bankruptcy Rule 5005(a)(2). By contrast, the similar provision in Civil Rule 5(d)(3) authorizes local rules that "allow" e-filing. (Admittedly, Civil Rule 5(d)(3) does also state that "[a] local rule may require electronic filing only if reasonable exceptions are allowed."). During the Subcommittee's discussions, participants favored amending Civil Rule 5(d)(3) and Criminal Rule 49(e) to track more closely the approach taken in the Appellate and Bankruptcy Rules.

At present, it does not appear that such changes would directly affect the Appellate Rules. The possibility exists that the Subcommittee might decide, as the project progresses, to recommend more sweeping changes that would affect the Appellate Rules.

I. Amending the "three-day rule"

Appellate Rule 26(c) sets out the three-day rule for purposes of deadlines set in the Appellate Rules. It provides:

> **(c) Additional Time after Service.** 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. 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.

Under this Rule, the three additional days apply not only to service by mail or commercial carrier, but also to electronic service.

Chief Judge Easterbrook has proposed abolishing the three-day rule,[2] and 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),[3] Criminal Rule 45(c),[4] and Bankruptcy Rule 9006(f).[5] For more than a decade, there have been periodic discussions of whether electronic service ought to be excluded from the three-day rule. The CM/ECF Subcommittee continued those discussions this summer, and concluded that the time has come to amend the three-day rule to exclude electronic service.[6]

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[2] Chief Judge Easterbrook favors eliminating the three-day rule entirely, in part because its application interferes with the Rules' preference for setting time periods in increments of seven days. However, during the Appellate Rules Committee's spring 2013 meeting, participants noted the possible need for more time by those who respond to pro se filings. For example, in cases involving the federal government, pro se papers tend to reach the Department of Justice belatedly because all mail bound for the DOJ is screened for security reasons. If the three-day rule were eliminated, it was suggested, the DOJ would move more frequently for extensions of time to respond to pro se filings.

[3] Civil Rule 6(d) provides: "**Additional Time After Certain Kinds of Service.** When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a)." Civil Rule 5(b)(2)(E) authorizes service of a paper by "sending [the paper] by electronic means if the person consented in writing--in which event service is complete upon transmission, but is not effective if the serving party learns that it did not reach the person to be served."

[4] Criminal Rule 45(c) provides: "**Additional Time After Certain Kinds of Service.** Whenever a party must or may act within a specified period after service and service is made in the manner provided under Federal Rule of Civil Procedure 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under subdivision (a)."

[5] Bankruptcy Rule 9006(f) provides: "Additional time after service by mail or under Rule 5(b)(2)(D), (E), or (F) F.R.Civ.P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after service and that service is by mail or under Rule 5(b)(2)(D), (E), or (F) F.R.Civ.P., three days are added after the prescribed period would otherwise expire under Rule 9006(a)."

[6] The reasons given for including electronic service appear less persuasive 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 seem less urgent in districts (or circuits) where electronic service occurs as part of smoothly-running CM/ECF programs. And in districts or circuits where CM/ECF is mandatory for counsel, there would be no need to give counsel an incentive to consent to electronic service

Accordingly, I focus in Part I.A on the possible alternative methods for accomplishing this change. Part I.B discusses one additional amendment that seems worthwhile if the Committee is proposing to revise Rule 26(c). Part I.C shows two possible choices for an overall amendment to Rule 26(c). Those two drafts reflect the two most plausible alternatives discussed in Part I.A, and also reflect the possible additional amendment discussed in Part I.B. An enclosure to this memo shows, for comparison purposes, the drafts of proposed amendments to the three-day rules in the other sets of Rules.

A. Alternative ways to remove electronic service from the three-day rule

At least three possibilities present themselves. One possibility is to simply delete the final sentence of Rule 26(c), thus:

> **(c) Additional Time after Service.** 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. ~~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.~~

This approach would have the virtue of brevity. It would seem to achieve the result that the Committee wishes to accomplish – that is to say, eliminating the three-day rule when service is electronic. But it might leave some readers with questions. Is a paper electronically "delivered" as soon as the paper is uploaded to CM/ECF, or is it "delivered" to a particular lawyer the next time he accesses his email and sees a message notifying him of the filing in CM/ECF? The Appellate Rules do not define "delivery."[7]

A second alternative would be to retain the current text of Rule 26(c) but to delete the "not," thus:

> **(c) Additional Time after Service.** 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. 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.

(or to avoid giving counsel a disincentive to consent to electronic service) by maintaining the three-day rule for electronic service. There remains a lingering concern that counsel might strategically serve an opponent by electronic means on a Friday night in order to inconvenience the opponent. But a litigant whose opponent uses such a tactic can seek an extension of time to respond. *See* Appellate Rule 26(b) (providing, subject to exceptions that would not be relevant in this context, that "[f]or good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires").

[7] On the other hand, as noted on page 4, Rule 25(c)(4) does define when "[s]ervice by electronic means is complete."

This alternative would make clear that the three-day rule does not apply when a paper is served electronically. But it is a somewhat roundabout way of stating when the three-day rule does and does not apply. Using the concept of date-of-delivery to define when the three-day rule applies – and then defining what the date of delivery is for electronic service – might not be ideal because, elsewhere, the Rules address when electronic service is "complete": Rule 25(c)(4) provides in part that "Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served." Admittedly, both the current text of Rule 26(c) and the alternative sketched above try to make clear that their definition of electronic "delivery" exists only for purposes of Rule 26(c); but it still seems confusing to have one definition of electronic "delivery" in Rule 26(c) and a different definition of "completion" of electronic service in Rule 25(c)(4).

Thus, the Committee may wish to consider a third possibility, which would revise Rule 26(c) so that it tracks the structure of the three-day rules in the other national Rules:

> **(c) Additional Time after <u>Certain Kinds of</u> Service.** When a party may or must act within a specified time after service <u>and service is made under Rule 25(c)(1)(B) (mailing) or (C) (third-party commercial carrier)</u>, 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. 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~~.

At first glance, this option appears to be clearer and simpler. It would also have the advantage of tracking the language used in the other national Rules.[8] Would this mode of delineating the scope of the three-day rule suffer from any ambiguities? It seems to me that the only possible ambiguity might concern the distinction between the methods authorized in Rules 25(c)(1)(A) and 25(c)(1)(C). Rule 25(c)(1)(A) says that the permissible methods of service include "personal, including delivery to a responsible person at the office of counsel." Rule 25(c)(1)(C) lists, as another permissible method, service "by third-party commercial carrier for delivery within 3 days."[9] Would a recipient be in doubt as to which of these methods was employed?[10] It appears that this

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[8] Even if the Committee decides that the deleting-"not" alternative is better than the tracking-the-other-rules alternative, I recommend revising Rule 26(c)'s subtitle to track those in the Civil and Criminal Rules. Specifying that Rule 26(c) applies only to "Certain Kinds of Service" is more precise. Accordingly, both of the two drafts shown in Part I.C include this revision to the subtitle: "**Additional Time after <u>Certain Kinds of</u> Service**."

[9] The Appellate Rules' authorization of service by third-party commercial carrier is not mirrored in the other sets of Rules. Such service is addressed (for purposes of the Civil Rules) only obliquely, by Civil Rule 5(b)(2)(F), which provides for "delivering [the paper] by any other means that the person consented to in writing – in which event service is complete when the person making service delivers it to the agency designated to make delivery."

[10] Rule 25(d)(1) provides:

> A paper presented for filing must contain either of the following:
>
> (A) an acknowledgment of service by the person served; or

concern may have underpinned the choice of wording for Rule 26(c). The minutes of the July 1995 Standing Committee meeting, at which the Committee gave its final approval to that wording,[11] state in part:

> The public comments [concerning proposed amendments to Rule 25] pointed out that it would be difficult as a practical matter for recipients of documents to distinguish between personal service and delivery by commercial carrier. Thus, [the proposed Rule 25] had been further amended to provide that service may be made by commercial carrier if the carrier is to deliver the paper to the party being served within three days of the carrier's receipt of the paper. Rule 26(c) was also amended to provide the 3-day extension regardless of the method of service, unless the document is delivered to the party on the date of service.[12]

In the light of the possibility that a recipient might have trouble discerning whether it had been served under Rule 25(c)(1)(A) or under Rule 25(c)(1)(C), it seems to me that the second alternative sketched above (deleting "not") may be the best choice. However, it seemed useful to consider, as well, the possibility of revising Rule 26(c) so that it tracks the amended three-day rules in the other sets of Rules. Accordingly, I included both of those options when I circulated draft language during discussions with the Reporters for the other Committees and for the CM/ECF Subcommittee, and I set forth both of those options in Part I.C below.

B. Substituting "being served" for "service"

Last month, a proposed amendment to Civil Rule 6(d) was published for comment. I set forth the proposal here, because I think that it would make sense to reflect this proposed change in any proposed amendment to Appellate Rule 26(c). Here is the Civil Rule 6(d) proposal as published:

> (B) proof of service consisting of a statement by the person who made service certifying:
>
> (i) the date and manner of service;
>
> (ii) the names of the persons served; and
>
> (iii) their mail or electronic addresses, facsimile numbers, or the addresses of the places of delivery, as appropriate for the manner of service.

The Rule does not, however, require that the copy that is *served* contain a copy of the proof of service. (Rule 25(d)(3) states that "[p]roof of service may appear on or be affixed to the papers filed.") If the copy served on the litigant includes the proof of service, then that would tell the litigant the "date and manner of service," Rule 25(d)(1)(B)(i); but would that always clarify whether the type of service counts as "personal" or as "third-party commercial carrier"? It *would* ordinarily tell the litigant whether the paper was "delivered on the date of service stated in the proof of service," which is the trigger under Rule 26(c)'s existing three-day rule.

[11] Appellate Rule 26 has, of course, been amended since 1996. But it was the 1996 amendment that added the "unless" clause; after the 1996 amendment, that clause in Rule 26(c) read: "unless the paper is delivered on the date of service stated in the proof of service."

[12] Minutes of the Standing Committee meeting on July 6-7, 1995.

Rule 6. Computing and Extending Time; Time for Motion Papers

* * * * *

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

What is now Rule 6(d) was amended in 2005 "to remove any doubt as to the method for calculating the time to respond after service by mail, leaving with the clerk of court, electronic means, or by other means consented to by the party served." A potential ambiguity was created by substituting "after service" for the earlier references to acting after service "upon the party" if a paper or notice "is served upon the party" by the specified means. "[A]fter service" could be read to refer not only to a party that has been served but also to a party that has made service. That reading would mean that a party who is allowed a specified time to act after making service can extend the time by choosing one of the means of service specified in the rule, something that was never intended by the original rule or the amendment. Rules setting a time to act after making service include Rules 14(a)(1), 15(a)(1)(A), and 38(b)(1). "[A]fter being served" is substituted for "after service" to dispel any possible misreading.

Appellate Rule 26(c) includes the same "being served" language as Civil Rule 6(d). If no other amendments were contemplated for Appellate Rule 26(c), then I would not propose that the Committee consider amending the Rule merely to change "service" to "being served." Most of the service-as-trigger starting points in the Appellate Rules concern deadlines for action *by the person who is served*.[13] In such instances, the Rule's "after service" language is unproblematic.

Admittedly, Rule 10(b)(3)(C) might be read to involve a deadline for action by the person who does the serving (rather than the person who is served). That Rule discusses what happens if the appellant orders less than the entire transcript and the appellee serves a designation of additional parts to be ordered. Rule 10(b)(3)(C) provides that "unless within 14 days after service of that designation [by the appellee] the appellant has ordered all such parts, and has so notified the appellee, the appellee may

[13] *See* Appellate Rules 5(b)(2); 6(b)(2)(B)(ii); 10(b)(3)(B); 10(c); 17(a); 19; 24(a)(5); 27(a)(3)(A); 27(a)(4); 28.1(f)(2); 28.1(f)(3); 28.1(f)(4); 30(c)(1); 31(a)(1); and 39(d)(2).

This list does not include Appellate Rule 30(b)(1), because that Rule provides that the appellee's time limit for serving a designation of additional parts of the record is "within 14 days after receiving the [appellant's] designation." In other words, Rule 30(b)(1) sets a time period that starts running after "receipt" rather than "service."

within the following 14 days either order the parts or move in the district court for an order requiring the appellant to do so." If the appellant does not order the relevant parts of the record, then under this Rule, it appears that the appellee has (in effect) a 28-day deadline (14 + 14) that commences to run upon service of a document by the appellee. In a situation where the appellee uses a service method of a type (such as mail) that can trigger the three-day rule, the period would actually turn out to be a 31-day period (17 + 14). But I do not think that this would give rise to the sort of gamesmanship that the Civil Rule 6(d) amendment is designed to forestall: It is hard to see how the appellee would gain an unfair advantage if the first 14-day period was counted as a 17-day period. Thus, I do not think that this feature of Rule 10(b)(3)(C) provides a reason to amend Rule 26(c) to replace "service" with "being served."[14]

Thus, there might not be adequate reason to amend Appellate Rule 26(c) merely to address this wording issue, because it is difficult to see how the Rule's current use of "after service" would cause problems with the deadlines currently set by the Appellate Rules. On the other hand, it is possible that a deadline adopted in a *future* amendment to the Appellate Rules would run from service of a paper by the person who must comply with the deadline. And, in the meantime, there is some value to ensuring that the three-day rules in each set of Rules employ parallel language to the extent possible. Accordingly, if the Committee moves forward with an amendment of the sort discussed in Part I.A, I recommend also changing "service" to "being served." The sketches in Part I.C reflect this change.

C. Consolidated drafts of two possible alternatives

Here are two sketches that show the top two alternatives discussed in Part I.A, and that also reflect the proposed change discussed in Part I.B:

[14] Moreover, it is not even clear that such an amendment would remove the possibility that the appellee would receive a 31-day period under Rule 10(b)(3)(C): As noted in the text, the reason that the (effectively) 28-day period could become a 31-day period is that the first 14-day component of that period could become a 17-day component. I think that the same would still be true even if Rule 26(c) were amended to refer to "being served." I say this because the first component of the overall 28-day period (under Rule 10(b)(3)(C)) concerns a period for action *by the appellant*; and since it is service *upon the appellant* that triggers the running of the first 14-day component of the overall 28-day period, service by, e.g., mail would still trigger the three-day rule and transmute that 14-day component into a 17-day component.

1. Option one: Delete "not"

Rule 26. Computing and Extending Time

* * *

(c) Additional Time after <u>Certain Kinds of</u> Service. When a party may or must act within a specified time after ~~service~~ <u>being served</u>, 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. 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.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served.

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns. [If we eliminate consent from Rule 25(c)(1)(D), we can add that here.][15]

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Rule 26(c) has also been amended to refer to instances when a party "may or must act … after being served" rather than to instances when a party "may or must act … after service." If, in future, an Appellate Rule sets a deadline for a party to act after *that party*

[15] Rule 25(c)(1)(D) authorizes service "by electronic means, if the party being served consents in writing." Another question that the CM/ECF Subcommittee is likely to consider is whether to propose eliminating this consent requirement.

itself effects service on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

2. Option two: Track the other Rules

Rule 26. Computing and Extending Time

* * *

(c) Additional Time after Certain Kinds of Service. When a party may or must act within a specified time after ~~service~~ being served and service is made under Rule 25(c)(1)(B) (mailing) or (C) (third-party commercial carrier), 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. 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~~.

Committee Note

Rule 26(c) is amended to remove service by electronic means under Rule 25(c)(1)(D) from the modes of service that allow 3 added days to act after being served. Rule 26(c) is also revised to track the structure of the analogous provisions in Civil Rule 6(d), Criminal Rule 45(c), and Bankruptcy Rule 9006(f).

Rule 25(c) was amended in 2002 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns. [If we eliminate consent from Rule 25(c)(1)(D), we can add that here.][16]

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28- day periods that allow "day-of-the-week" counting. Adding 3 days at the end

[16] Rule 25(c)(1)(D) authorizes service "by electronic means, if the party being served consents in writing." Another question that the CM/ECF Subcommittee is likely to consider is whether to propose eliminating this consent requirement.

complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Rule 26(c) has also been amended to refer to instances when a party "may or must act … after being served" rather than to instances when a party "may or must act … after service." If, in future, an Appellate Rule sets a deadline for a party to act after *that party itself effects service* on another person, this change in language will clarify that Rule 26(c)'s three added days are not accorded to the party who effected service.

II. Adjusting rules that were drafted with paper in mind

Apart from the proposed change to the three-day rules, the CM/ECF Subcommittee has started to consider the possibility of changes that would more broadly adapt the Rules to the realities of electronic filing. Such changes will be more challenging to draft than the three-day rule proposal, and the Subcommittee has not yet determined the specifics. Here is a brief preview.

The Reporters have begun to discuss the possibility of formulating a rule that would provide two definitions. First, it would define references to writings so as to encompass electronically stored information. Second, it would define references to filing, sending, and similar actions so as to encompass instances when those actions are accomplished electronically. Professor Capra circulated the following tentative draft as a basis for early discussions:

> **Information in Electronic Form and Action by Electronic Means**
>
> a) Information in Electronic Form: In these rules, [unless otherwise provided] a reference to information in written form includes electronically stored information.
>
> b) Action by Electronic Means: In these rules, [unless otherwise provided] any action that can or must be completed by filing or sending paper may also be accomplished by electronic means [that are consistent with any technical standards established by the Judicial Conference of the United States].

Adopting the first of these definitions will be unproblematic; refining the second definition is likely to prove somewhat more complicated. For purposes of the Appellate Rules, I think that there should be no problem with a rule that defines "information in written form" to include "electronically stored information."[17] The second part of the

[17] Such a definition seems like a broader version of an already-extant provision. Rule 25(a)(2)(D) provides that "[a] paper filed by electronic means in compliance with a local rule constitutes a written paper for the purpose of applying these rules." For similar provisions, see Bankruptcy Rule 5005(a)(2); Civil Rule 5(d)(3).

proposed rule – setting a default rule that "any action that can or must be completed by filing or sending paper may also be accomplished by electronic means" – might necessitate adjustments to some aspects of the Appellate Rules' treatment of timing. The Appellate Rules currently include nuances concerning both the end point of a time period[18] and the starting point of a time period[19] depending on the manner in which a paper is filed or served. Moreover, just as special considerations might arise concerning electronic service of a summons and complaint, special considerations are likely to arise for electronic filing of the notice of appeal. We may have reached the point where electronic filing will work as a default rule for notices of appeal from the district court, but the same is probably not yet true for notices of appeal from the Tax Court.

III. Conclusion

The alteration of the three-day rule provides a starting point for the work of the CM/ECF Subcommittee. That change has long been advocated and seems ripe for adoption. The Subcommittee's broader goals are still developing; currently, it appears likely that one key aspect of the project will be to consider global definitions that can assure that electronic documents and action by electronic means are encompassed in appropriate ways by the Rules' references to written documents and to actions such as filing or sending.

Encl.

[18] As to compliance with the end point of a time period, see Rules 4(c)(1) and 25(a)(2)(D) (inmate filings); 25(a)(2)(A) (for filings by mail, clerk must receive paper within deadline); 25(a)(2)(B) (filings of brief or appendix by mail or third-party carrier must be mailed or dispatched within deadline); 25(c)(4) (mail / carrier service is complete upon delivery; e-service is complete upon transmission absent notice of failure); 26(a)(4) (definition of "last day" varies by type of filing method).

[19] As to starting points for time periods, see Rules 4(c)(2) and (3) (appeals by other parties after inmate files a notice of appeal); 26(c) (three-day rule applies unless the relevant paper is delivered by same-day, non-electronic means).

Rule 6. Computing and Extending Time; Time for Motion Papers

* * *

(d) ADDITIONAL TIME AFTER CERTAIN KINDS OF SERVICE. When a party may or must act within a specified time after being served[1] and service is made under Rule 5(b)(2)(C) (mail), (D) (leaving with the clerk), ~~(E),~~ or (F) (other means consented to),[2] 3 days are added after the period would otherwise expire under Rule 6(a).

Committee Note

Rule 6(d) is amended to remove service by electronic means under Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 5(b)(2) was amended in 2001 to provide for service by electronic means. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns. [If we eliminate consent from Rule 5(b)(2)(E), we can add that here.]

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the

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[1] This anticipates adoption of the proposed amendment published in August, 2013.

[2] The naked cross-references to Rule 5(b)(2) may seem awkward. The parenthetical descriptions are added to relieve much of the flipping back through the rules. It seems likely that e-service will dominate other modes, but absent some descriptions many anxious readers will track down the cross-references just to make sure e-service is not among the means listed. The risk that brief descriptions may mislead or confuse seems minimal. Anyone who wishes to be sure of what a Rule 5(b)(2) subparagraph says can easily find it.

last day is a Saturday, Sunday, or legal holiday.

Rule 45. Computing and Extending Time; Time for Motion Papers

* * *

(c) Additional Time After Certain Kinds of Service. Whenever a party must or may act within a specified time after service and service is made under Federal Rule of Civil Procedure 5(b)(2)(C) (mailing), (D) (leaving with the clerk), ~~(E)~~, or (F) (other means consented to), 3 days are added after the period would otherwise expire under Rule 45(a).

Committee Note

Subdivision (c). Rule 45(c) and Rule 6(d) of the Federal Rules of Civil Procedure contain parallel provisions providing additional time for actions after certain modes of service, identifying those modes by reference to Civil Rule 5(b)(2). Rule 45(c) – like Civil Rule 6(d) – is amended to remove service by electronic means under Rule 5(b)(2)(E) from the forms of service that allow 3 added days to act after being served. The amendment also adds clarifying parentheticals identifying the forms of service for which 3 days will still be added.

Civil Rule 5 was amended in 2001 to allow service by electronic means with the consent of the person served, and a parallel amendment to Rule 45(c) was adopted in 2002. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that

electronic service was authorized only with the consent of the person to be served. Concerns about the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

Rule 9006. Computing and Extending Time; Time for Motion Papers

* * * * *

(f) ADDITIONAL TIME AFTER SERVICE BY MAIL OR UNDER RULE 5(b)(2)(D)~~, (E),~~ OR (F) F.R. CIV. P. When there is a right or requirement to act or undertake some proceedings within a prescribed period after being served[1] and that service is by mail or under Rule 5(b)(2)(D) (leaving with the clerk)~~, (E),~~ or (F) (other means consented to) F.R. Civ. P., three days are added after the prescribed period would otherwise expire under Rule 9006(a).

* * * * *

Committee Note

Subdivision (f) is amended to remove service by electronic means under Civil Rule 5(b)(2)(E) from the modes of service that allow 3 added days to act after being served.

Rule 9006(f) and Civil Rule 6(d) contain similar provisions providing additional time for actions after being served by mail or by certain modes of service that are identified by reference to Civil Rule 5(b)(2). Rule 9006(f)—like Civil Rule 6(d)—is amended to remove the reference to service by electronic means under Rule 5(b)(2)(E). The amendment also adds clarifying parentheticals identifying the forms of service under Rule 5(b)(2) for which 3 days will still be added.

Civil Rule 5(b)—made applicable in bankruptcy proceedings by Rules 7005 and 9014(b)—was amended in 2001 to allow service by electronic means with the consent of the person served. Although electronic transmission seemed virtually instantaneous even then, electronic service was included in the modes of service that allow 3 added days to act after being served. There were concerns that the transmission might be delayed for some time, and particular concerns that incompatible systems might make it difficult or impossible to open attachments. Those concerns have been substantially alleviated by advances in technology and in widespread skill in using electronic transmission.

A parallel reason for allowing the 3 added days was that electronic service was authorized only with the consent of the person to be served. Concerns about

the reliability of electronic transmission might have led to refusals of consent; the 3 added days were calculated to alleviate these concerns.

Diminution of the concerns that prompted the decision to allow the 3 added days for electronic transmission is not the only reason for discarding this indulgence. Many rules have been changed to ease the task of computing time by adopting 7-, 14-, 21-, and 28-day periods that allow "day-of-the-week" counting. Adding 3 days at the end complicated the counting, and increased the occasions for further complication by invoking the provisions that apply when the last day is a Saturday, Sunday, or legal holiday.

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[1] This wording anticipates adoption of the proposed amendment published in August 2013.

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MEMORANDUM

DATE: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 08-AP-J, 08-AP-R, and 09-AP-A

Three items on the Committee's study agenda relate to disclosure requirements and Appellate Rule 26.1. Part I suggests removing one of those items from the Committee's agenda and narrowing the scope of the other two items. Part II notes that it could be worthwhile to study the differences between Rule 26.1's requirements and broader local circuit disclosure requirements.

I. Item Nos. 08-AP-J, 08-AP-R, and 09-AP-A

Item No. 08-AP-J – more fully described in the enclosed October 20, 2008 memo – concerned a 2008 suggestion by the Judicial Conference Committee on Codes of Conduct that the Rules Committees consider possible rule amendments having to do with conflict screening. When the Appellate Rules Committee discussed this in fall 2008, it decided to keep the item on its agenda pending further input from the Codes of Conduct Committee and pending further developments with CM/ECF. Neither the Criminal Rules Committee nor the Bankruptcy Rules Committee proceeded with proposals in response to the Codes of Conduct Committee's suggestion,[1] and it does not appear that the Codes of Conduct Committee pursued the matter further. Two of the three aspects of the Codes of Conduct Committee's inquiry focused on criminal and bankruptcy practice, and the Committee's failure to pursue those aspects further with the relevant Advisory Committees suggests that there is no need for the Appellate Rules Committee to consider them either. The other aspect of the Committee's inquiry concerned possible overlaps and distinctions among Appellate Rule 26.1, local circuit provisions, and prompts in the CM/ECF system; it seems to me that this aspect of the inquiry is the only one that might be worth pursuing at this time.

[1] The minutes of the April 2009 meeting of the Criminal Rules Committee state that that Committee decided not to take action on a possible amendment to Criminal Rule 12.4, and that Judge Tallman undertook to so inform the Chair of the Codes of Conduct Committee. The minutes of the March 2009 meeting of the Bankruptcy Rules Committee state that the Committee was "still awaiting renewal or revision of the request" by the Codes of Conduct Committee. The Reporters for those Committees have confirmed that their Committees have not returned to the issue since.

Item Nos. 08-AP-R and 09-AP-A arise from comments submitted on a proposed amendment to Appellate Rule 29(c).[2] In addition to suggesting revisions to the portion of Rule 29(c) that requires corporate would-be amici to submit "a disclosure statement like that required of parties by Rule 26.1," these commentators also suggested revisions to Rule 26.1 itself.

In Item 09-AP-A, the ABA Council of Appellate Lawyers proposed the following:

> The Advisory Committee ... may wish to consider amending Rule 26.1 to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal.
>
> If Rule 26.1 is amended to include amici curiae, we suggest revising the proposed subdivision (c)(6) to require inclusion of the "same disclosure statement that is required of parties by Rule 26.1" or, alternatively, the "same disclosure statement that Rule 26.1 requires of parties." The word "like" in the present proposal is ambiguous as to whether some degree of difference may be permissible.

As I noted in the enclosed March 27, 2009 memo,[3] the Council's suggestions appear to proceed from the premise stated in the second quoted paragraph – namely, that the current language of Rule 29(c) could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But that concern is somewhat puzzling, because it is difficult to imagine what sort of difference would arise. It seems clear that a corporate amicus would understand that its obligation is to (a) identify any parent corporation and any publicly held corporation that owns 10 % or more of its stock or (b) state there is no such corporation. The Council does not suggest any variations that would be likely to arise under the Rules' current language. Accordingly, the Council's suggested change in language seems unnecessary. I therefore suggest that the Committee consider removing Item 09-AP-A from its agenda.

Item No. 08-AP-R memorializes suggestions made by Chief Judge Easterbrook. He points out that the term "corporation" in Rules 26.1 and 29(c) encompasses entities from which a disclosure is unnecessary because they do not have stock – such as the Catholic Bishop of Chicago. But while the Rule requires such entities to disclose that they have no stock and no parents, that is not necessarily a downside; by requiring that

[2] That amendment, adopting an authorship-and-funding disclosure requirement for most amicus briefs, took effect December 1, 2010.

[3] I have abridged the memo slightly in an effort to avoid redundancy; omissions in the abridged memo are indicated by three asterisks. I have also updated references to a Supreme Court rule and to Appellate Rule 29. However, I did not update the memo's discussion of local circuit rules; that topic is addressed in the enclosed memo by Margaret Zhang.

explicit statement, the Rule makes it easy to tell whether a corporate filer has complied with the disclosure requirement. That is to say, if corporations with no stock were entirely exempt from the disclosure requirement, it might sometimes be difficult to tell whether a corporation omitted a disclosure because it was exempt or whether, instead, it omitted the disclosure erroneously. For that reason, I suggest that the Committee not proceed further with this aspect of Chief Judge Easterbrook's suggestions.

Chief Judge Easterbrook's other critique is that the corporate-disclosure requirements in Rules 26.1 and 29(c) fail to elicit all of the information that would be relevant to a judge in considering whether to recuse.

II. Do Rules 26.1 and 29(c) elicit all the information needed in order to make recusal decisions?

The First, Second, Eighth and Ninth Circuits do not appear to impose any significant additional disclosure requirements beyond those set by Appellate Rule 26.1. The Seventh and Federal Circuits impose a few additional disclosure requirements – for instance, by requiring disclosure of the names of lawyers involved in the case. The D.C., Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits impose considerably broader disclosure requirements than Appellate Rule 26.1 – for example, by expanding the range of entities that must provide disclosure and/or the types of disclosures that must be made concerning entities that are not parties to the appeal.

The enclosed memo by my research assistant, Margaret Zhang, collects local circuit disclosure requirements. Ms. Zhang's memo groups those requirements by type and suggests ways in which those requirements might assist judges in making recusal decisions.

It seems worthwhile for the Committee to study whether to enhance the disclosure requirements of Rule 26.1 to include some of the disclosures required by local rules. If the Committee were to identify likely candidates for addition, we could prepare some draft language and consult with the Committee on Codes of Conduct (and with the other Advisory Committees).

Encls.

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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-J

This memo describes, for the Committee's preliminary consideration, an inquiry received last spring concerning the Judicial Conference's Mandatory Conflict Screening Policy. As outlined in the enclosed letter from Judge Gordon Quist to Judge Rosenthal, the Judicial Conference Committee on Codes of Conduct has tentatively raised three questions with the Standing Committee. These questions may have implications for practice under Appellate Rule 26.1, which requires certain disclosures designed to help judges determine whether a conflict requires their recusal from hearing an appeal.[1]

The basic principle at issue with respect to each of Judge Quist's questions relates to Canon 3C(1) of the Code of Conduct for United States Judges, which provides in part:

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which:
>
> ...
>
> (c) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be affected substantially by the outcome of the proceeding; [or]
>
> (d) the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person:
>
> ...
>
> (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding ....

The inquiry by the Committee on Codes of Conduct raises three issues. The first –

[1] In the district courts, corporate disclosures are required in civil cases by Civil Rule 7.1, in criminal cases by Criminal Rule 12.4, and in bankruptcy cases by Bankruptcy Rule 7007.1.

addressed in Part I of this memo – concerns the similarities and differences among the disclosures required by Appellate Rule 26.1, any disclosures required by a local circuit provision, and any information required by the CM/ECF system in the courts of appeals which are currently operational on CM/ECF. Part II of this memo briefly sketches the second and third issues, which appear to fall within the primary jurisdiction of (respectively) the Bankruptcy Rules Committee and the Criminal Rules Committee.

These questions are not yet ripe for full consideration, because the Committee on Codes of Conduct has been asked for additional information concerning some of the questions stated in Judge Quist's letter. A response from the Committee on Codes of Conduct is expected late this year. Nonetheless, if time permits, it could be useful to give the questions preliminary consideration at the November meeting, albeit on the understanding that this Committee will revisit the issue at the Spring 2009 meeting after receiving further information from the Committee on Codes of Conduct.

I. National rules, local rules, and the CM/ECF system

The first question raised in Judge Quist's letter, as it relates to appellate practice, concerns the interaction among Appellate Rule 26.1, any local circuit disclosure requirements, and the requirements imposed by the CM/ECF system in those circuits where CM/ECF is already operational. Appellate Rule 26.1(a) provides that "[a]ny nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."

Any inquiry into the CM/ECF requirements is necessarily somewhat premature, because the courts of appeals are still in the process of completing the transition to CM/ECF. As of September 2008 the Fourth, Sixth, Eighth and Ninth Circuits were accepting CM/ECF filings.[2] It would presumably be useful for the circuits, in consultation with the Administrative Office, to consider the questions raised by Judge Quist as they adopt and refine their CM/ECF systems. Perhaps the CM/ECF system can be tailored to prompt the user to input all of the information required by Appellate Rule 26.1, plus any additional information required by local circuit provisions.

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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).

One question raised by Judge Quist's letter relates to possible overlap between the CM/ECF system's requirements and Rule 26.1(c)'s requirements. If the CM/ECF system prompts the party to enter its Rule 26.1 disclosure information the first time that the party logs in to the CM/ECF system for the court of appeals, then perhaps it will someday be redundant to require – as Rule 26.1(c) does – that an original and three copies be filed when the Rule 26.1(a) statement is filed before the principal brief. However, such redundancies could probably be addressed by means of a local rule, since Rule 26.1(c) provides that the court can direct the filing of "a different number [of copies] by local rule." In any event, even if automated prompts by the CM/ECF system render obsolete Rule 26.1's requirement of paper copies of the disclosure, the need for Rule 26.1(b)'s continuing disclosure requirement would persist.

Though the Committee Note to original Rule 26.1 attempted to discourage the adoption of circuit-specific disclosure requirements,[3] local rules on the topic are numerous. As of mid-2008, relevant local provisions included D.C. Circuit Rule 26.1; Third Circuit Local Appellate Rule 26.1.1; Fourth Circuit Rule 5; Fourth Circuit Rule 8; Fourth Circuit Rule 9(a); Fourth Circuit Rule 21(b); Fourth Circuit Rule 26.1; Fourth Circuit Rule 27(c); Fourth Circuit Rule 27(d); Fourth Circuit Form A; Fifth Circuit Rule 26.1.1; Fifth Circuit Rule 28.2.1; Sixth Circuit Rule 26.1; Sixth Circuit Rule 28(e); Sixth Circuit Form 6CA-1; Seventh Circuit Rule 26.1; Eighth Circuit Rule 26.1A; Ninth Circuit Rule 21-3; Eleventh Circuit Rule 5-1; Eleventh Circuit Rule 21-1; Eleventh Circuit Rule 26.1-1; Eleventh Circuit Rule 26.1-2; Eleventh Circuit Rule 26.1-3 & accompanying IOP; Eleventh Circuit Rule 27-1(a)(9); Eleventh Circuit Rule 28-1(b); Eleventh Circuit Rule 29-1; Eleventh Circuit Rule 35-5; IOP foll. Eleventh Circuit Rule 42-4; IOP foll. Eleventh Circuit Rule 47-6; Eleventh Circuit Add. II(a); Federal Circuit Rule 26.1; and Federal Circuit Rule 47.4. At least one circuit has adopted local rules requiring electronic submission of disclosure statements.[4] Once further clarification is received from the Committee on Codes of Conduct concerning the specifics of that Committee's inquiry, it may be fruitful to analyze these local circuit requirements. Such an analysis may help to highlight areas for future Appellate Rules Committee consideration.

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[3] The 1989 Committee Note to Rule 26.1 observes: "If a Court of Appeals wishes to require additional information, a court is free to do so by local rule. However, the committee requests the courts to consider the desirability of uniformity and the burden that varying circuit rules creates on attorneys who practice in many circuits." It may be the case that the advent of CM/ECF will ease the burden imposed by differing local circuit rules, in the sense that the CM/ECF prompts will alert attorneys to the nature of the particular circuit's disclosure requirements.

[4] See Eleventh Circuit Rule 26.1-2(b) ("On the same day a certificate is served, the party filing it must also complete the court's web-based certificate at www.ca11.uscourts.gov, providing the information required by that form. Pro se parties are not required or authorized to complete the web-based certificate."); Eleventh Circuit Rule 26.1-2(g) ("On the same day an amended certificate is served, that party must also update the web-based certificate to reflect the amendments.").

II. Issues relating to bankruptcy and criminal practice

The second issue raised in Judge Quist's letter concerns bankruptcy practice. The Committee on Codes of Conduct asks whether the Rules adequately address the challenges of conflict screening in bankruptcy proceedings. The letter observes that "the changing status of creditors and other interested parties during the course of a bankruptcy case makes it more difficult to apply an automated conflict screening program to the bankruptcy courts." This observation seems most directly relevant to Bankruptcy Rule 7007.1. It is not immediately apparent that such concerns would affect the conduct of a bankruptcy-related appeal in a way that would require changes to Appellate Rule 26.1. Rule 26.1's disclosure requirement encompasses "[a]ny nongovernmental corporate party to a proceeding in a court of appeals." Upon initial consideration, there does not seem to be any reason to think that this definition would require broadening. However, the Bankruptcy Rules Committee plans to discuss the question of practice under Bankruptcy Rule 7007.1 at its spring 2009 meeting, and Professor Gibson has promised to alert us if the Bankruptcy Rules Committee discerns a reason to consider changes to Appellate Rule 26.1.

The third issue raised in Judge Quist's letter relates to "the need to obtain restitution information related to criminal victims so that judges can consider whether to recuse." The letter questions whether Criminal Rule 12.4 currently requires sufficient disclosure in this respect. This inquiry obviously falls within the primary jurisdiction of the Criminal Rules Committee; when that Committee considers the question, it will be useful to obtain advice concerning the practice in connection with appeals in which restitution is an issue. It appears that in at least some of those appeals Appellate Rule 26.1 would already require the appropriate disclosures.[5] But it would be advisable to obtain the Criminal Rules Committee's input on whether this will always be true. For example, are there any instances in which an appeal to which the victim is not a party might nonetheless implicate the question of restitution? The Criminal Rules Committee's advice on such questions would help to inform this Committee's further deliberations.

Encl.

[5] Thus, if the victim seeking restitution is a nongovernmental corporate party and that victim is a party to the proceeding in the court of appeals, Appellate Rule 26.1(a)'s disclosure requirement would be triggered.

COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
UNITED STATES DISTRICT COURT
482 GERALD R. FORD FEDERAL BUILDING
110 MICHIGAN STREET, N.W.
GRAND RAPIDS, MI 49503-2363

JUDGE JANICE ROGERS BROWN
JUDGE KAREN K. BROWN
JUDGE CAMERON McGOWAN CURRIE
JUDGE JAY A. GARCIA-GREGORY
JUDGE ANDREW S. HANEN
JUDGE RICHARD G. KOPF
JUDGE ALAN D. LOURIE
JUDGE JAMES F. McCLURE, JR.
JUDGE M. MARGARET McKEOWN
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May 8, 2008

Honorable Lee H. Rosenthal
Chair
Committee on Rules of Practice and Procedure
United States District Court
11535 Bob Casey United States Courthouse
515 Rusk Street
Houston, TX 77002-2600

Re: Conflict Screening Policy Issues

Dear Judge Rosenthal:

In September 2006, the Judicial Conference adopted the Mandatory Conflict Screening Policy (attached). The Judicial Conference Committee on Codes of Conduct, which recommended the adoption of the conflict screening policy, has identified three issues related to conflict screening that may merit the attention of the Standing Committee on Rules. Briefly, these issues all concern potential amendments to the federal rules of procedure that require the disclosure of corporate parent information, information that judges need in order to make informed determinations concerning recusal.[1]

[1] The federal rules of procedure require the parties to file statements disclosing their corporate parents. *See* Fed. R. Civ. P. 7.1, Fed. R. Crim. P. 12.4, Fed. R. App. P. 26.1; Fed. R. Bank. P. 7007.1

The first issue the Committee has identified concerns the scope of the disclosures, and the method used to file them. The district court version of the Case Management/Electronic Case Files (CM/ECF) system now permits attorneys to enter corporate parent information electronically, and allows the attorneys to label corporations as either a "parent" or "affiliate" when entered into the database. Similar adjustments are planned for the bankruptcy court CM/ECF system. Thus, the CM/ECF system now provides attorneys with an electronic method to enter corporate parent information directly into the system, which will ease the burden on clerks' offices to manually enter the information from the disclosure statements filed by attorneys.

At the same time, however, it seems clear that attorneys may be required to prepare and transmit the same information twice: once when preparing the disclosure statement to be filed with the court, and again when entering the information into the CM/ECF database. In addition, because some courts require the disclosure of *expanded* corporate disclosure information that is not required by the federal rules (i.e., information about the parties' corporate affiliates other than corporate parents), there may be differences between the information required in the disclosure statements and the information that attorneys enter in the electronic system. The Committee has been informed that the Administrative Office is examining additional steps that could be taken to address this issue, but the CM/ECF system does not currently have the capability to extract information from a disclosure statement, add it to the CM/ECF conflict screening database, and use that information to perform conflict screening.

Second, the Committee observes that the changing status of creditors and other interested parties during the course of a bankruptcy proceeding may complicate the implementation of conflict screening software in the bankruptcy courts. In a bankruptcy case there are usually numerous creditors who are not considered parties for recusal purposes but who may become parties during the course of the case. A creditor's status could change, for example, with the filing of an "adversary proceeding." A creditor's status may also change with the filing of a "contested matter" that is also adversarial in nature. Moreover, in bankruptcy cases there may be many "interested parties," such as a potential lender or bidder who may pose a financial conflict for the presiding judge. Once a potential conflict is identified, a judge can determine whether it is necessary to withdraw from the matter or the case. The conflict, however, must first be identified. Thus, the changing status of creditors and other interested parties during the course of a bankruptcy case makes it more difficult to apply an automated conflict screening program to the bankruptcy courts.

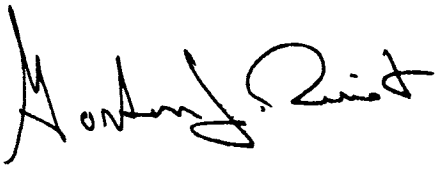
Accordingly, the Committee suggests that the Standing Committee on Rules may wish to consider the special conflict screening issues related to bankruptcy proceedings, especially the potential need for corporate parent information in adversary proceedings and contested matters. I would also note, in this regard, that the Bankruptcy Judges Advisory Group has established a special subcommittee to consider unique issues related to conflict screening for bankruptcy judges.

The third issue the Committee has identified concerns the need to obtain restitution information related to criminal victims so that judges can consider whether to recuse. The Committee has advised that a judge presiding over a criminal case must recuse if the judge has an

interest that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) of the Code of Conduct for United States Judges, or if the judge's impartiality might reasonably be questioned under Canon 3C(1). Obtaining appropriate disclosures from the parties to permit judges to fulfill this potential recusal obligation may require an amendment to the Federal Rules of Criminal Procedure, as current Rule 12.4 does not appear to cover disclosure of information related to restitution. *See* Fed. R. Crim.P. 12.4 (Advisory Committee Notes).

Thank you for considering the issues that the Committee has identified concerning the relationship between the federal rules and the judiciary's Mandatory Conflict Screening Policy. If you have any question, please feel free to contact me.

For the Committee,



Gordon J. Quist
Chairman

Encl.

cc: James C. Duff, Director, Administrative Office of the U.S. Courts

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

JAMES C. DUFF
Director

WASHINGTON, D.C. 20544

October 19, 2006

MEMORANDUM

To: Chief Judges, United States Courts

From: James C. Duff

RE: NEW POLICY ON AUTOMATED CONFLICT SCREENING
(ACTION REQUESTED)

RESPONSE DUE DATES: November 30, 2006 and January 31, 2007

As you are aware, on September 19, 2006, the Judicial Conference adopted a new policy requiring the use of automated conflict screening software to assist judges in identifying financial conflicts of interest (*see Attachment A*). The mandatory policy requires courts to implement automated conflict screening and requires judges and judicial officers to develop a conflicts list, update it on a regular basis, and use it in automated screening (as a supplement to personal review of cases for conflicts). The judiciary's Case Management/Electronic Case Files (CM/ECF) system contains software for this purpose and is the preferred option.

The policy assigns chief judges and circuit councils specific responsibilities that will require immediate attention. **By November 30, 2006,** each chief judge is required to report to their circuit council the status of automated conflict screening in their court, including the number of judicial officers participating in automated screening, and any other information the circuit council seeks. **By January 31, 2007,** each circuit council is required to report to the Judicial Conference a preliminary plan to implement the policy. Courts not subject to the authority of a circuit council are to assume these responsibilities directly.

The Administrative Office will continue to improve existing CM/ECF conflict screening functionality and will provide training and assistance. In addition, I have assembled a working group of AO staff to support your implementation of this policy. They will be working with judges, court staff, and the Federal Judicial Center to develop

and disseminate guidance and materials for use in carrying out these new responsibilities. In that regard, and as a first step, they have developed a checklist for chief judges to use in preparing the November 30, 2006, report to the circuit councils (*see Attachment B*). In addition, the working group is developing the following materials that will be available in the near future:

- a checklist for circuit councils which will identify tasks that should be considered in implementing the policy;
- a checklist of decisions to be made by judges and clerks' office staff as they implement automated conflicts screening in CM/ECF; and
- an illustrative implementation plan, which circuit councils can use as a model for the preliminary plans to be submitted to the Judicial Conference by January 31, 2007.

If questions arise regarding policy guidance or interpretation, please contact Marilyn Holmes or Robert Deyling, Office of General Counsel, (202) 502-1100; for technical questions about the CM/ECF conflict screening software, please contact Gary Bockweg or Cam McCarthy, Office of Court Administration, (202) 502-2500. Peggy Irving, Chief of the Article III Judges Division, is coordinating AO support on these initiatives and she may be contacted for general information. The respective offices within the AO that support your operations are, of course, also available. These individuals, as well as the other members of the working group, will ensure your concerns are responded to quickly and comprehensively.

Attachments

cc: All United States Judges
Circuit Executives
District Court Executives
Clerks, United States Courts

Judicial Conference Policy on Mandatory Conflict Screening

Approved September 19, 2006

The Judicial Conference recognizes the efforts of the many courts which, with the assistance of the Administrative Office, have instituted automated conflict screening. Based on the proven effectiveness of automated screening and the importance of extending its use to all courts, the Judicial Conference adopts a mandatory conflict screening policy. This policy will be administered and directed by the circuit councils under the authority set forth in 28 U.S.C. 332(d)(1) (or by the individual courts not subject to the authority of a circuit council) and will provide that:

(1) The Administrative Office, in cooperation with the courts[1], shall continue developing, refining and deploying the necessary hardware and software for use in automated conflict screening in the Case Management/Electronic Case Files (CM/ECF) system, shall examine methods to improve the screening (including incorporating more sophisticated matching mechanisms and features available in other software), and shall provide information, training, and assistance to facilitate implementation of and participation in the screening.

(2) Each court shall implement automated conflict screening to identify financial conflicts of interest for judicial officers, and to notify the judicial officer (or designee) when a financial conflict is identified, through the screening component of the CM/ECF system (or other software with comparable function approved by the circuit council). The clerk's office shall administer the screening (including obtaining from the parties and entering upon receipt, or causing the parties to enter and update, if feasible, corporate parent information[2] and other relevant information). The clerk's office shall screen for financial conflicts on a regular schedule, including screening new matters as they are filed, and shall make reports as requested by the chief judge of the court and the respective circuit council. Each clerk's office shall also provide information (including periodic reminders to judicial officers), training, and assistance to facilitate participation in the screening.

(3) In addition to each judicial officer's personal review of cases for conflicts, each judicial officer shall develop a list identifying financial conflicts for use in conflict screening[3], shall review and update the list at regular intervals, and shall employ the list personally or with the assistance of court staff to participate in automated conflict screening.

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[1] This Judicial Conference policy extends to courts of appeals, district courts, the Court of International Trade, the Court of Federal Claims, and bankruptcy courts, and to the judicial officers thereof, but does not extend to the Supreme Court.

[2] *See* Fed. R. App. P. 26.1; Fed. R. Civ. P. 7.1; Fed. R. Crim. P. 12.4; Fed. R. Bankr. P. 7007.

[3] A model form is available for this purpose. *See* Form AO-300.

(4) Each chief judge shall report to the respective circuit council by November 30, 2006, with an initial report on the status of automated financial conflict screening in the court, the number of judicial officers participating in automated conflict screening, and any additional information sought by the circuit council. Each circuit council shall report to the Judicial Conference by January 31, 2007, with a preliminary plan for implementation of the mandatory financial conflict screening program within the circuit, and shall thereafter make such further reports as are required by the Judicial Conference.

(5) Each circuit council shall make all necessary and appropriate orders to implement the foregoing mandatory conflict screening policy within the circuit, taking into account the specific circumstances of that circuit and each judicial officer and court within it, and providing for appropriate exceptions (e.g., a seriously ill judge who is not being assigned cases).

(6) Each court not subject to the authority of a circuit council shall assume the responsibilities described above for circuit councils.

CHECKLIST FOR THE CHIEF JUDGE'S REPORT TO THE CIRCUIT COUNCIL ON AUTOMATED CONFLICT SCREENING
(Due November 30, 2006)

On September 19, 2006, the Judicial Conference adopted a new policy mandating the use of automated conflict screening software to identify financial conflicts of interest for judges. Pursuant to the new policy, each chief judge shall make an initial report to the respective circuit council on the status of automated conflict screening in the court, including the number of judicial officers participating in automated conflict screening and any additional information sought by the circuit council. The report is due to the circuit council by November 30, 2006.

To assist chief judges with this report, the following checklist of information has been compiled for each chief judge.

☐ Determine the number of judges on the court using automated conflict screening.

- How many judges use the CM/ECF conflict screening system?
- How many judges use some other automated conflict screening system? (The circuit council might require a general description of the software to determine whether it is comparable to CM/ECF.)

☐ Is there other information the circuit council has requested from the chief judge? (For example, the circuit council might require the name, title, and location of judges not using automated conflict screening, or require the reasons why judges are not using automated conflict screening.)

☐ Are there any other circumstances unique to this court the circuit council should consider when developing the implementation plan?

☐ Prepare and send the report to the circuit council by November 30, 2006.

MEMORANDUM

DATE: March 27, 2009[1]

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 08-AP-R & 09-AP-A

Rule 26.1(a) currently provides that "[a]ny nongovernmental corporate party to a proceeding in a court of appeals must file a statement that identifies any parent corporation and any publicly held corporation that owns 10% or more of its stock or states that there is no such corporation."[2] Rule 29(c) currently states that "[i]f an amicus curiae is a corporation, the brief must include a disclosure statement like that required of parties by Rule 26.1." * * *

In the comments submitted on the proposal to amend Appellate Rule 29(c), two commenters – Chief Judge Frank H. Easterbrook and the ABA's Council of Appellate Lawyers – 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."

This memo discusses those suggestions. Part I briefly reviews the history of Rule 26.1

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[1] *N.B.: This copy of this memo has been lightly edited as of September 10, 2013. To avoid redundancy with other materials in the fall 2013 agenda book, some passages in this memo have been deleted and replaced with asterisks. Discussions of Supreme Court Rule 29.6 (in footnote 3) and of Appellate Rule 29 (in footnote 19) have been updated, as shown by the italicized text in those footnotes. However, Part I.B's discussion of local circuit provisions has not been updated; a discussion of relevant local circuit provisions appears in the separate memo by Margaret Zhang that is also included in the agenda book.*

[2] The rest of Rule 26.1 provides: "(b) Time for Filing; Supplemental Filing. A party must file the Rule 26.1(a) statement with the principal brief or upon filing a motion, response, petition, or answer in the court of appeals, whichever occurs first, unless a local rule requires earlier filing. Even if the statement has already been filed, the party's principal brief must include the statement before the table of contents. A party must supplement its statement whenever the information that must be disclosed under Rule 26.1(a) changes.

"(c) Number of Copies. If the Rule 26.1(a) statement is filed before the principal brief, or if a supplemental statement is filed, the party must file an original and 3 copies unless the court requires a different number by local rule or by order in a particular case."

and notes the existence of similar provisions in other sets of rules; Part I also notes that some circuits have local rules that impose broader disclosure requirements than Rule 26.1. Part II discusses the commenters' suggestions. Part III concludes that the topic is a significant one, and also one as to which the input of other committees is important.

I. A brief history of disclosure provisions

The possibility of setting broader disclosure requirements than those imposed by Rule 26.1 is a topic that has been discussed intermittently for some years. The history of Rule 26.1 illustrates that the topic is a contentious one. Rule 26.1 was narrowed during its original drafting and, after adoption, was amended to narrow its scope still further in some respects. The coordinated deliberations among the Advisory Committees which produced the 2002 amendments to the Civil, Criminal and Appellate Rules included an attempt to provide for broader requirements – but that attempt failed, in part because of the mechanism selected to accomplish it. Part I.A. reviews this history. Part I.B. notes the sharp variation among circuits with respect to local disclosure requirements: Some circuits impose significant additional disclosure requirements, while other circuits do not.

A. National rules

The Supreme Court has had a disclosure rule since 1980; the current rule is Supreme Court Rule 29.6.[3] Appellate Rule 26.1 was adopted in 1989 and was significantly amended in

[3] Supreme Court Rule 29.6 states in part: "Every document, except a joint appendix or amicus curiae brief, filed by or on behalf of a nongovernmental corporation shall contain a corporate disclosure statement identifying the parent corporations and listing any publicly held company that owns 10% or more of the corporation's stock. If there is no parent or publicly held company owning 10% or more of the corporation's stock, a notation to this effect shall be included in the document." *[N.B.: Since the time of this memo, Rule 29.6 has been augmented by the addition of the following after the text just quoted: "If a statement has been included in a document filed earlier in the case, reference may be made to the earlier document (except when the earlier statement appeared in a document prepared under Rule 33.2), and only amendments to the statement to make it current need be included in the document being filed. In addition, whenever there is a material change in the identity of the parent corporation or publicly held companies that own 10% or more of the corporation's stock, counsel shall promptly inform the Clerk by letter and include, within that letter, any amendment needed to make the statement current."]*

1998 and 2002. Civil Rule 7.1[4] and Criminal Rule 12.4[5] – both adopted in 2002 – were patterned after Appellate Rule 26.1. Bankruptcy Rule 7007.1[6] – adopted in 2003 – is worded somewhat differently than the Appellate Rule. Appellate Rule 29(c)'s corporate-disclosure requirement was added in 1998; the 1998 Committee Note to Rule 29 does not discuss this change.

A preliminary version of what would become Appellate Rule 26.1 was evidently broader than the version that ultimately took effect in 1989. As the Spring 1988 minutes explain:

> Prior to its last meeting the Committee approved and circulated a draft rule to the circuits. Ten circuits responded to the draft rule. Five circuits approved of the draft, although three circuits suggested amendments. Five circuits disapproved. The principal objection to the circulated draft was the breadth of disclosure required. In light of the response to the circulated draft, the rule approved by the Committee at its last meeting was more narrowly drawn. The Committee decided that the rule it approved represented a minimum requirement which all circuits should meet, and if the circuits want to require additional information they may do so.[7]

The version of Rule 26.1 that took effect in 1989 was broader in some ways than the current Rule. The 1989 version required "a statement identifying all parent companies, subsidiaries (except wholly-owned subsidiaries), and affiliates that have issued shares to the public." This requirement was altered in 1998; the 1998 amendments introduced language materially similar to the current requirement. The 1998 Committee Note explains:

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[4] Civil Rule 7.1(a) states: "A nongovernmental corporate party must file two copies of a disclosure statement that: (1) identifies any parent corporation and any publicly held corporation owning 10% or more of its stock; or (2) states that there is no such corporation."

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

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

[7] Minutes of the Advisory Committee on Appellate Rules, April 27, 1988, at 2.

The amendment deletes the requirement that a corporate party identify subsidiaries and affiliates that have issued shares to the public. Although several circuit rules require identification of such entities, the Committee believes that such disclosure is unnecessary.

A disclosure statement assists a judge in ascertaining whether or not the judge has an interest that should cause the judge to recuse himself or herself from the case. Given that purpose, disclosure of entities that would not be adversely affected by a decision in the case is unnecessary.

Disclosure of a party's parent corporation is necessary because a judgment against a subsidiary can negatively impact the parent. A judge who owns stock in the parent corporation, therefore, has an interest in litigation involving the subsidiary. The rule requires disclosure of all of a party's parent corporations meaning grandparent and great grandparent corporations as well. For example, if a party is a closely held corporation, the majority shareholder of which is a corporation formed by a publicly traded corporation for the purpose of acquiring and holding the shares of the party, the publicly traded grandparent corporation should be disclosed. Conversely, disclosure of a party's subsidiaries or affiliated corporations is ordinarily unnecessary. For example, if a party is a part owner of a corporation in which a judge owns stock, the possibility is quite remote that the judge might be biased by the fact that the judge and the litigant are co-owners of a corporation.

The amendment, however, adds a requirement that the party lists all its stockholders that are publicly held companies owning 10% or more of the stock of the party. A judgment against a corporate party can adversely affect the value of the company's stock and, therefore, persons owning stock in the party have an interest in the outcome of the litigation. A judge owning stock in a corporate party ordinarily recuses himself or herself. The new requirement takes the analysis one step further and assumes that if a judge owns stock in a publicly held corporation which in turn owns 10% or more of the stock in the party, the judge may have sufficient interest in the litigation to require recusal. The 10% threshold ensures that the corporation in which the judge may own stock is itself sufficiently invested in the party that a judgment adverse to the party could have an adverse impact upon the investing corporation in which the judge may own stock. This requirement is modeled on the Seventh Circuit's disclosure requirement.

In 2002, Rule 26.1(a) was amended "to require that nongovernmental corporate parties who have not been required to file a corporate disclosure statement -- that is, nongovernmental corporate parties who do not have any parent corporations and at least 10% of whose stock is not owned by any publicly held corporation -- inform the court of that fact." 2002 Committee Note to Appellate Rule 26.1(a).

More generally, it is interesting to examine the background to the 2002 Civil, Criminal and Appellate Rules amendments. There was concern that judges needed information to determine whether to recuse themselves in particular cases. The Judicial Conference's Codes of Conduct Committee raised the issue with the Standing Committee, which in turn asked the Advisory Committees to cooperate in developing disclosure provisions for the lower courts. Those efforts produced Civil Rule 7.1, Criminal Rule 12.4, and (in 2003) Bankruptcy Rule 7007.1. The process also involved the cooperation of the Appellate Rules Committee, which considered changes to Appellate Rule 26.1.

In the process that led to the 2002 amendments, participants discussed the possibility of broadening the disclosure requirements to include non-corporate parties. The proposed amendments to Appellate Rule 26.1 that were published for comment included a provision that would have required non-corporate parties to "file a statement that discloses any information that may be publicly designated by the Judicial Conference of the United States."[8] Committee minutes reflect that the Codes of Conduct Committee opposed the adoption of such a provision.[9] A number of public comments also opposed this provision, arguing inter alia that any additional requirements not stated in the Rule would be less accessible to lawyers. The 2002 amendments, as ultimately adopted, do not include that provision.

* * *

B. Local circuit provisions

As the Codes of Conduct Committee's inquiry highlights, consideration of disclosure requirements should also take note of local circuit provisions. The circuits vary widely in their approaches to disclosure.[10]

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[8] The proposal evidently was based on the view that the Judicial Conference was in the best position to determine what, if any, additional requirements to impose, and also on the view that such a provision would provide flexibility.

[9] See Minutes of the Standing Committee on Rules of Practice and Procedure, June 7-8, 2000, at 23 ("Professor Coquillette pointed that there was a fundamental difference of opinion between the Codes of Conduct Committee and the advisory committees. The Codes of Conduct Committee, he said, favored adopting civil and criminal rules that essentially just repeat FED. R. APP. P. 26.1. It contends that the provision allowing the Judicial Conference to require additional information is unnecessary.").

[10] *As explained in footnote 1, the discussion of local circuit provisions has not been updated. For a current discussion of such provisions, please see the memo by Margaret Zhang that is also included in the fall 2013 agenda book.*

The First,[11] Second,[12] Eighth[13] and Ninth[14] Circuits do not appear to impose any significant additional disclosure requirements beyond those set by Appellate Rule 26.1. The Seventh and Federal Circuits impose a few additional disclosure requirements, such as disclosing the names of lawyers involved in the case.[15] The D.C., Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits impose much broader disclosure requirements than Appellate Rule 26.1; I will refer to them as the "broad-disclosure circuits."

The broad-disclosure circuits tend to expand the range of entities that must provide disclosure. So, for example, the D.C. Circuit's rule covers "[a] corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus curiae." D.C. Circuit Rule 26.1(a). One portion of the Third Circuit's disclosure rule covers "[e]very party to an appeal." Third Circuit Local Appellate Rule 26.1.1(b). In non-criminal matters, the Fourth Circuit's disclosure requirements cover every "party ... other than the United States or a party proceeding in forma pauperis."[16] Fourth Circuit Rule 26.1(a)(1)(A). In criminal matters, the Fourth Circuit's requirements cover "corporate part[ies]." Fourth Circuit Rule 26.1(a)(1)(B). The Fifth Circuit's "certificate of interested persons" must be furnished for "all private (non-

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[11] I was unable to find a local provision on point in the First Circuit.

[12] I was unable to find a local provision on point in the Second Circuit.

[13] Eighth Circuit Rule 26.1A merely alters the timing and the number of copies for the Appellate Rule 26.1 statement.

[14] Ninth Circuit Rule 21-3 states that Appellate Rule 26.1's requirements apply to petitions for extraordinary writs. (It is unclear why this statement is necessary, since Appellate Rule 26.1(a) itself states that it applies "to a proceeding in the court of appeals" – a phrase that would seem to encompass extraordinary writ proceedings.) Ninth Circuit Rule 28-2.6 requires a statement identifying related cases; but that requirement does not seem directly relevant to the types of disclosure issues discussed here.

[15] Seventh Circuit Rule 26.1(b) provides in part: "The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court. If any litigant is using a pseudonym, the statement must disclose the litigant's true name." Federal Circuit Rule 47.4 requires disclosure of, inter alia, "[t]he name of the real party in interest if the party named in the caption is not the real party in interest" and "[t]he names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court."

[16] However, the Rule also provides that "a state or local government is not required to file a disclosure statement in a case in which the opposing party is proceeding without counsel." Fourth Circuit Rule 26.1(a)(1).

governmental) parties." Fifth Circuit Rule 28.2.1. The Sixth Circuit's requirement covers "all parties and amici curiae" in non-criminal matters and "all corporate defendants in a criminal case." Sixth Circuit Rule 26.1(a). The Tenth Circuit's "certification of interested parties" must accompany "[e]ach entry of appearance." Tenth Circuit Rule 46.1(D). The Eleventh Circuit requires all parties and amici to file the "certificate of interested parties." Eleventh Circuit Rule 26.1-1.

The broad-disclosure circuits also expand the types of disclosures that must be made concerning entities that are not parties to the appeal. Appellate Rule 26.1 requires identification of "any parent corporation" and "any publicly held corporation that owns 10 % or more" of the disclosing corporation's "stock." The D.C. Circuit builds on this approach but broadens it – for example, by referring to "a 10 % or greater ownership interest (such as stock or partnership shares) in the entity." D.C. Circuit Rule 26.1(a).[17] Some circuits take an even broader approach. The Third Circuit requires disclosure of "every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest." Third Circuit Rule 26.1.1(b). Likewise, in the Fourth Circuit a party must identify "any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement." Fourth Circuit Rule 26.1(a)(2). The Fifth Circuit requires "a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation." Fifth Circuit Rule 28.2.1. The Sixth Circuit requires disclosure "[w]henever, by reason of insurance, a franchise agreement, or indemnity agreement, a publicly owned corporation or its affiliate, not a party to the appeal, nor an amicus, has a substantial financial interest in the outcome of litigation." Sixth Circuit Rule 26.1(b)(2). In the Tenth Circuit, "[t]he certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation." Tenth Circuit Rule 46.1(D)(2). And the Eleventh Circuit requires "a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party." Eleventh Circuit Rule 26.1-1.

This is only a partial listing of the variations; there are others. For instance, some of the broad-disclosure circuits require each disclosure to encompass all known interests, whether they relate to the entity making the disclosure or to another party. See, e.g., Fifth Circuit Rule 28.2.1(a); Eleventh Circuit Rule 26.1-1. And some of the broad-disclosure circuits include special requirements for bankruptcy appeals, see Third Circuit Rule 26.1.1(c); Eleventh Circuit

[17] Likewise, one subpart of the Sixth Circuit's rule covers corporate parties or amici that are "subsidiar[ies] or affiliate[s] of any publicly owned corporation not named in the appeal." Sixth Circuit Rule 26.1(b)(1).

Rule 26.1-1, or for criminal appeals, see Eleventh Circuit Rule 26.1-1.

II. Suggestions concerning Appellate Rule 26.1 and proposed Appellate Rule 29(c)(6)

Part II.A. of this memo discusses Chief Judge Easterbrook's suggestions. Part II.B. discusses the suggestions by the ABA's Council of Appellate Lawyers.

A. Chief Judge Easterbrook's suggestions

Chief Judge Easterbrook focuses on the use of the term "corporation" in both Rule 26.1 and Rule 29(c). He argues that the term is both over- and under-inclusive.

As to the first of these critiques, Chief Judge Easterbrook states:

> On the one hand, many entities are organized as corporations even though they do not have stock (and hence cannot have "parent" corporations[)]. Many municipalities are corporations. Harvard University is a corporation, as is the Catholic Bishop of Chicago (a corporation sole), but the University of Chicago is organized as a charitable trust rather than as a corporation. There is no need for a special statement of interest from Seattle, Harvard, or a religious prelate.

Presumably, Chief Judge Easterbrook's concern about the Rules' application to municipalities focuses on Rule 29(c). Rule 26.1(a) explicitly limits the disclosure requirement to "nongovernmental" corporate parties. Rule 29(c)'s requirement, however, appears to apply to any "amicus curiae [that] is a corporation." Rule 29(c) does incorporate by reference the substance of Rule 26.1 – "a disclosure statement like that required of parties by Rule 26.1" – so perhaps one can argue that Rule 29(c), too, does not impose a disclosure requirement on municipalities. But such a conclusion would not seem to be compelled by the text of Rule 29(c). So it may be the case that Rule 29(c) requires an amicus that is a municipal corporation to file a disclosure statement. But the only downside, in that event, is that such an amicus must include a statement that there is no parent corporation and no publicly held corporation that owns 10 % or more of its stock. If the Committee wished to eliminate that downside, it could consider amending the relevant language in Rule 29(c) to say "if filed by an amicus curiae that is a nongovernmental corporation, a disclosure statement like that required of parties by Rule 26.1."

Chief Judge Easterbrook is correct to point out that both Rule 26.1(a) and Rule 29(c) require disclosures by a corporation even if the corporation does not have stock. His comment could be taken to suggest that one could exempt corporations that do not have stock from the disclosure obligation without losing any information that would be relevant to a judge's recusal decision. To evaluate this suggestion, it is useful to consider how it would be implemented. Presumably one would implement it by redrafting the rules so as not to cover corporations that do not have stock. But the problem with such a revised rule is that it would create ambiguity when a corporate amicus makes no disclosure. Suppose that Party X, a corporation, includes no

disclosure. The reader may be left to speculate about the reason for the absence of a disclosure – is it (a) because Party X does not have stock, or (b) because Party X overlooked the disclosure requirement? Where Party X is the Catholic Bishop of Chicago, it may be clear that the answer is (a). But without knowing much more about the use of the corporate form in every relevant jurisdiction, it would be difficult to say with confidence that the answer would be equally clear in every other possible instance. The downside of the current language is that some corporate parties will have to include a sentence noting that they have no stock and no parents. But that downside is counter-balanced by the advantage of avoiding ambiguity. I therefore would not suggest changing this aspect of the Rules.

Chief Judge Easterbrook's other critique is that the Rules are under-inclusive because they fail to elicit all information that would be relevant to a judge in considering whether to recuse.[18] As noted in Part I.B., the broad-disclosure circuits agree with Chief Judge Easterbrook and have adopted considerably more expansive local disclosure rules. (Interestingly, the Seventh Circuit does not fall in this category.) There would be advantages to a national rule requiring broader disclosure, to the extent that such a rule helped to elicit more information that assisted in recusal decisions. On the other hand, there would be costs to adopting a broader national requirement; for example, depending on how the requirement was drafted, it could be somewhat burdensome for parties and amici to determine and provide the required disclosure. A full exposition of the relevant considerations lies beyond the scope of this memo.

B. Suggestions by the ABA's Council of Appellate Lawyers

The ABA Council of Appellate Lawyers states:

> The Advisory Committee ... may wish to consider amending Rule 26.1 to apply to any person filing or moving for permission to file a brief as amicus curiae. Otherwise, a judge may consider a motion for permission to file a brief as amicus curiae without being aware of facts that might cause the judge to consider recusal.
>
> If Rule 26.1 is amended to include amici curiae, we suggest revising the proposed subdivision (c)(6) to require inclusion of the "same disclosure statement that is required of parties by Rule 26.1" or, alternatively, the "same disclosure statement that Rule 26.1 requires of parties." The word "like" in the present proposal is ambiguous as to whether some degree of difference may be permissible.

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[18] It appears that Chief Judge Easterbrook has made similar points before. See Report of Advisory Committee on Appellate Rules, May 11, 2001, at 92 (summarizing public comments on proposed amendments to Appellate Rule 26.1 and noting that Judge Easterbrook "strongly supports two aspects of the proposal – extending the disclosure obligation to noncorporate parties and requiring supplementation").

These suggestions appear to proceed from the premise stated in the second quoted paragraph – namely, that the current language of Rule 29(c) could be read to permit "some degree of difference" between the Rule 29(c) corporate-disclosure statement and the Rule 26.1 corporate-disclosure statement. But that concern is somewhat puzzling, because it is difficult to imagine what sort of difference would arise. It seems clear that a corporate amicus would understand that its obligation is to (a) identify any parent corporation and any publicly held corporation that owns 10 % or more of its stock or (b) state there is no such corporation. The Council of Appellate Lawyers does not suggest any variations that would be likely to arise under the Rules' current language. Accordingly, the Council's suggested change in language seems unnecessary.

III. Conclusion

The suggestions raised in Part II warrant the Committee's consideration. Of those suggestions, the most significant is Chief Judge Easterbrook's proposal that the Committee consider broadening the scope of the disclosure requirements.[19] But though that proposal is a thoughtful one, it also raises complex issues.

The history of Appellate Rule 26.1 suggests that, at least in prior years, the interest of some in broadening the disclosure requirement has been counter-balanced by others' preferences for narrowing the requirement. Rule 26.1, as originally adopted, was narrower than the prior version that had been considered by the Committee. The 1998 amendments narrowed Rule 26.1 by deleting the provisions concerning subsidiaries and affiliates (though they also extended the Rule by adding the 10 %-stock-ownership provision). The survey of current local practices suggests that while there could be support for broadening the national rules' disclosure requirements, there also could be opposition.

The current landscape of disclosure requirements highlights the need for consultation with other committees. If the Appellate Rules Committee were to consider proposals to amend Rule 26.1, it would presumably wish to do so in coordination with the Civil, Criminal and Bankruptcy Rules Advisory Committees and also with the Codes of Conduct Committee. The Codes of Conduct Committee has recently raised a number of questions concerning disclosure requirements. The committees' discussion of those questions might also provide a context for seeking input on the issues treated in this memo.

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[19] Chief Judge Easterbrook's concern about the current Rules' *over*breadth is also worth considering. As noted in Part II, the Committee might wish to consider whether that concern could be addressed by amending Rule 29(c)(6) *[as of 2013, the relevant subdivision is Rule 29(c)(1)]* to refer to *nongovernmental* corporations.

MEMORANDUM

DATE: August 15, 2013

TO: Professor Catherine T. Struve

FROM: Margaret Zhang

RE: Disclosure Rules and Judicial Recusals

The Federal Rules of Appellate Procedure require nongovernmental corporate parties and corporate amici to disclose their parent corporations, as well as any publicly held corporations that own 10% or more of their stock. Fed. R. App. P. 26.1; Fed. R. App. P. 29(c)(1). The rules provide minimum disclosure requirements to help judges determine whether they must recuse.[1] Fed. R. App. P. 26.1 advisory committee's note (1989).

However, local rules requiring additional disclosures are numerous.[2] You have asked for a systematic account of the relevant local rules and analysis of whether the local rules assist judges' recusal determinations. This memo classifies local rules' disclosure requirements and shows how the local disclosure rules can help judges determine whether to recuse.

For federal appellate judges, situations compelling recusal are listed in 28 U.S.C. § 47 (2011), 28 U.S.C. § 455 (2011), and Canons 3C and 3D of the Code of Conduct for United States Judges ("Code").[3] In general, judges must recuse when they have actual bias against a party, and

[1] Some give the terms "recusal" and "disqualification" distinct meanings—i.e., a judge recuses when he withdraws sua sponte, but is disqualified when a party's motion triggers withdrawal. *See generally* Charles Gardner Geyh, Fed. Judicial Ctr., Judicial Disqualification: An Analysis of Federal Law 2 (2010).

This memo uses "recusal" and "disqualification" interchangeably, since parties' disclosures could prompt either a judge's recusal sua sponte or disqualification because of a party's motion.

[2] See generally D.C. Cir. R. 26.1; 3d. Cir. L.A.R. 26.1.1; 4th Cir. Loc. R. 26.1; 5th Cir. R. 28.2.1; 6th Cir. R. 26.1; 7th Cir. R. 26.1; 10th Cir. R. 46.1(D); 11th Cir. R. 26.1-1; Fed. Cir. R. 47.4. The local rules cited in this memo are set forth in Appendix A.

[3] These provisions are set forth in Appendix B.

Another recusal statute, 28 U.S.C. § 144 (2011), requires a district court judge to recuse following a party's timely and sufficient affidavit stating that the judge has a personal bias or prejudice. Since 28 U.S.C. § 144 only applies to the district courts, it is not discussed. Similarly, because statutory recusal requirements are inclusive of constitutional recusal requirements, this

also when a reasonable person would question their impartiality.[4] 28 U.S.C. §§ 455(a), 455(b)(1); Code Canon 3C(1). Situations meriting recusal for these reasons are myriad. See, e.g., United States v. Microsoft Corp., 253 F.3d 34, 114–15 (D.C. Cir. 2001) (requiring the judge's recusal due to his improper comments about a pending case). In contrast, 28 U.S.C. § 47, 28 U.S.C. § 455(b), and the other provisions in Canon 3C of the Code describe specific and particular situations when judges must recuse.

Disclosures required by local rules can help judges determine when they must recuse, especially in relation to particular grounds for recusal under 28 U.S.C. § 47, 28 U.S.C. § 455(b), and Canon 3C. Even if disclosures pursuant to local rules do not prompt recusal under these provisions, the disclosures can help judges determine when a reasonable person would question the judges' impartiality under 28 U.S.C. § 455(a). Overall, judges' recusal determinations benefit from disclosures produced by the various local rules.

I. Entities with financial interests in a case's outcome

Beyond disclosure of parent corporations and corporations owning 10% or more of a party's stock, seven circuits require disclosure of other entities with financial interests in a case's outcome. See D.C. Cir. R. 26.1; 3d. Cir. L.A.R. 26.1.1; 4th Cir. Loc. R. 26.1; 5th Cir. R. 28.2.1; 6th Cir. R. 26.1; 10th Cir. R. 46.1(D); 11th Cir. R. 26.1-1. Some circuits' broad rules require disclosure of all financially interested persons, associations, firms, and partnerships. 5th Cir. R. 28.2.1; 10th Cir. R. 46.1(D); 11th Cir. R. 26.1-1. The Eleventh Circuit's rule even requires disclosure of entities that have non-financial interests in a case's outcome.

A judge must recuse when he knows that (1) his minor child residing in his household, (2) his spouse, or (3) the judge himself holds a financial interest in a case.[5] 28 U.S.C. §§ 455(b)(4), 455(d)(4); Code Canons 3C(1)(c), 3C(3)(c). Financial interests requiring recusal can involve non-corporate entities, and even individual persons. The local rules mentioned above require disclosures of just such entities. Therefore, these rules can help judges detect non-corporate financial interests that compel recusal.

Judges must also recuse if they know that a relative within three degrees has a non-financial interest that could be substantially affected by a case's outcome. 28 U.S.C. §§

memo does not discuss recusals required under the Constitution's due process clauses, see, e.g., Caperton v. A.T. Massey Coal Co., 556 U.S. 868 (2009).

[4] A judge's possible lack of impartiality under 28 U.S.C. § 455(a) can be waived by agreement of the parties. 28 U.S.C. § 455(e). To waive a ground for disqualification under 28 U.S.C. § 455(a), the judge's only ground for disqualification must arise under 28 U.S.C. § 455(a), and the judge must fully disclose the basis for disqualification on the record. Id.

[5] See, e.g., Tramonte v. Chrysler Corp., 136 F.3d 1025, 1030 (5th Cir. 1998) ("[W]here a judge, her spouse, or a minor child residing in her household is a member of a putative class, there exists a 'financial interest' in the case mandating recusal under § 455(b)(4).").

455(b)(4), 455(b)(5)(iii); Code Canons 3C(1)(c), 3C(1)(d)(iii). Thus, because the Eleventh Circuit's rule requires parties to disclose all entities with an interest in the case's outcome, the rule can help circuit judges detect non-financial interests requiring their recusal.

II. Law firms and attorneys

Five circuits require parties to disclose law firms and attorneys affiliated with a case. See 5th Cir. R. 28.2.1; 7th Cir. R. 26.1(b); 10th Cir. R. 46.1(D)(4); 11th Cir. R. 26.1-1; Fed. Cir. R. 47.4(a)(4). While the Fifth Circuit merely requires disclosure of opposing counsel, the other circuits all seek exhaustive lists of interested attorneys. For example, the Tenth Circuit requires disclosure of attorneys who previously represented any party in related proceedings—even if those attorneys will not enter appearances for the appeal at issue.

Two types of mandatory judicial recusals relate to judges' relationships with law firms and attorneys. First, judges must recuse if their former private law firm employment coincided with that law firm's interest in the case at issue. 28 U.S.C. § 455(b)(2); Code Canon 3C(1)(b).[6] Second, a judge must recuse when a lawyer in the case is a family member within three degrees of relationship to the judge, even if the lawyer has not entered an appearance in the case. 28 U.S.C. § 455(b)(5)(ii); Code Canon 3C(1)(d)(ii). Judges can more easily detect these situations if they know all the interested law firms and attorneys in a case. Hence, the five local rules requiring attorney disclosures can help judges determine whether to recuse.[7]

III. Victims in criminal appeals

Both the Third and Eleventh Circuits require parties to disclose the victim(s) in criminal appeals. 3d Cir. L.A.R. 26.1.1(d); 11th Cir. R. 26.1-1. Though the Third Circuit merely requires disclosure of organizational victims, it also requires disclosure of corporate victims' parent corporations, and publicly held corporations that own 10% or more of the victims' stock.

Judges' interests in crime victims can prompt recusal, particularly when restitution is at issue. See, e.g., United States v. Rogers, 119 F.3d 1377, 1384 (9th Cir. 1997) (discussing the possibility of recusal because the judge owned stock in the victim bank but holding that, under the circumstances, recusal was not required). A victim is not a "party" under 28 U.S.C.

[6] See generally Preston v. United States, 923 F.2d 731, 734–35 (9th Cir. 1991) (requiring recusal because a judge's former law firm represented an interested party that, while not named in the suit, was subject to discovery and a potential indemnification claim by a named party).

[7] Under 28 U.S.C. § 455(b)(3) and Canon 3C(1)(e) of the Code, sometimes judges must also recuse when former government employment coincided with the case at issue. However, in these situations, judges must recuse only if they were personally involved with the case—not if former colleagues were involved. Thus, attorney disclosure rules will not generally help judges determine whether to recuse because of former government employment.

§ 455(b)(4), which compels recusal when a judge has a financial interest in a party. Id.[8] However, a judge's interest in a victim could sometimes prompt the judge's recusal. See, e.g., United States v. Lauersen, 348 F.3d 329, 336-37 (2d Cir. 2003) ("[W]e believe that recusal is required only where the extent of the judge's interest in the crime victim is so substantial, or the amount that the victim might recover as restitution is so substantial, that an objective observer would have a reasonable basis to doubt the judge's impartiality."), aff'd on other grounds on reh'g, 362 F.3d 160 (2d Cir. 2004), cert. granted & judgment vacated on other grounds, 543 U.S. 1097 (2005). Thus, the Third and Eleventh Circuits' victim disclosure rules can alert judges to situations in criminal appeals where their interests may compel recusal.

IV. Participants in bankruptcy appeals

The Third and Eleventh Circuits also require additional disclosures from parties in bankruptcy appeals. 3d Cir. L.A.R. 26.1.1(c); 11th Cir. R. 26.1-1. In both circuits, parties must disclose the debtor, the members of the creditors' committee, and other active participants in the case.

In bankruptcy appeals, as in other appeals, judges must recuse for any of the reasons in 28 U.S.C. § 47, 28 U.S.C. § 455, and Canon 3C of the Code. However, bankruptcy recusal determinations are more difficult, since the often-numerous creditors can vary in their level of participation. For this reason, the Judicial Conference Committee on Codes of Conduct advises that not every creditor is a party in a bankruptcy case for recusal purposes. Advisory Opinion No. 100, Identifying Parties in Bankruptcy Cases for Purposes of Disqualification (June 2009). Rather, bankruptcy parties are generally limited to "the debtor; a trustee; parties to an adversary proceeding; and participants in a contested matter." Id. The Third and Eleventh Circuit local rules require disclosure of precisely these entities in bankruptcy appeals. Thus, these rules can help judges determine whether they must recuse due to an interest in a bankruptcy party.

V. Judges' previous participation

The Third Circuit requires parties to give notice if any Third Circuit judge previously participated at any stage of the case. 3d Cir. L.A.R. 26.1.2. Similarly, the Eleventh Circuit requires "a complete list of the trial judge(s) . . . that have an interest in the outcome of a particular case or appeal." 11th Cir. R. 26.1-1.

[8] In 2004, the Crime Victims' Rights Act ("Act") gave victims the right to seek mandamus if a district court denies the victims' rights granted under the Act. 18 U.S.C. § 3771(d)(3) (2012). Interpreting the Act, courts have repeatedly held that victims are not parties in the district court who may directly appeal criminal cases. See, e.g., United States v. Fast, 709 F.3d 712, 715–16 (8th Cir. 2013); United States v. Hunter, 548 F.3d 1308, 1310–11 (10th Cir. 2008). However, for recusal purposes, courts have not yet ruled on whether a victim seeking mandamus under the Act is a "party" in the court of appeals.

Under 28 U.S.C. § 47 and Canon 3C(1)(e) of the Code, judges must recuse when they are assigned to preside over an appeal from the decision of a case or issue they decided in a lower court. Therefore, the Third and Eleventh Circuits' disclosure rules can alert appellate judges to cases compelling recusal under 28 U.S.C. § 47 and Canon 3C(1)(e).

VI. Parties' identities

Two local rules require disclosure of parties' identities when those identities are otherwise unknown to the court. Seventh Circuit Rule 26.1(b) requires that parties using pseudonyms disclose their true names. Federal Circuit Rule 47.4(a)(2) requires disclosure of "the real party in interest if the party named in the caption is not the real party in interest."

28 U.S.C. § 455(b) and Canon 3C of the Code require recusal when a judge has certain relationships with or interests in a party to the proceeding. 28 U.S.C. §§ 455(b)(1), 455(b)(4), 455(b)(5); Code Canons 3C(1)(a), 3C(1)(c), 3C(1)(d). For judges to assess their relationships and interests, they must know the parties' identities. By requiring disclosures of certain parties' otherwise-unknown identities, the Seventh and Federal Circuits' rules facilitate judges' recusal determinations.

VII. Organizations' general nature and purpose

For organizational parties and amici, D.C. Circuit Rule 26.1 requires disclosure of the organization's "general nature and purpose, insofar as relevant to the litigation."

VIII. Corporations' stock symbols

The Eleventh Circuit requires that parties list disclosed corporations with their stock ("ticker") symbols. 11th Cir. R. 26.1-3(c).

In 2006, the Judicial Conference adopted a mandatory conflict screening policy, and the policy required courts to detect judges' financial conflicts of interest using automated software. While parties' Rule 26.1 disclosures may name corporations in many ways (e.g., "Apple Inc." or "Apple, Inc." or merely "Apple"), parties likely cite corporations' stock symbols uniformly. Therefore, requiring stock-symbol disclosures can help automated software effectively detect conflicts of interest that compel a judge's recusal.

IX. Disclosures from non-corporate parties and amici

Nine circuits extend disclosure duties not just to corporate parties and amici, but also to non-corporate parties and amici. The D.C. Circuit requires disclosure statements from all organizational entities. D.C. Cir. R. 26.1(a). The other eight circuits' disclosure requirements

extend—barring a handful of exceptions[9]—to every party in an appeal. 3d. Cir. L.A.R. 26.1.1; 4th Cir. Loc. R. 26.1(a)(1)(A); 5th Cir. R. 28.2.1; 6th Cir. R. 26.1(a); 7th Cir. R. 26.1(a); 10th Cir. R. 46.1(D)(1); 11th Cir. R. 26.1-1; Fed. Cir. R. 26.1.

A judge's non-corporate interests can compel recusal. See, e.g., 28 U.S.C. § 455(d)(4) (stating that financial interests requiring recusal include "a relationship as director, adviser, or other active participant in the affairs of a party"). Thus, both corporate and non-corporate disclosures can help judges determine whether to recuse. For this reason, the nine circuits' generally applicable local rules reduce the chance that judges lack notice of grounds for recusal.

Amicus disclosures similarly help judges determine whether to recuse, since an amicus curiae's participation can also compel a judge's recusal. See generally Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist. No. 1, 839 F.2d 1296, 1301–02 (8th Cir. 1988) (raising question of recusal when a judge's former colleague had appeared for an amicus in a previously related case). In general, a judge's interest in a participating amicus will require the judge's recusal if the case's outcome would substantially affect the interest, or if a reasonable person would question the judge's impartiality. Cf. Judicial Conference Committee on Codes of Conduct, Advisory Op. No. 63, Disqualification Based on Interest in Amicus that is a Corporation (June 2009) ("[I]f an interest in an *amicus* would not be substantially affected by the outcome, and if the judge's impartiality might not otherwise reasonably be questioned, stock ownership in an *amicus* is not *per se* a disqualification."). Amicus disclosures may alert judges to interests in an amicus that require a recusal. Hence, amicus disclosure rules can help judges determine whether to recuse.[10]

X. Judges' questioned impartiality

Even if a case does not require a judge's recusal under 28 U.S.C. § 47, 28 U.S.C. § 455(b), or specific portions of Canon 3C, local disclosure rules can alert judges in cases where the judges' impartiality might reasonably be questioned under 28 U.S.C. § 455(a). For example,

[9] The Fourth, Fifth, Sixth, and Federal Circuits except governmental parties from disclosure requirements. 4th Cir. Loc. R. 26.1(a)(1)(A); 5th Cir. R. 28.2.1; 6th Cir. R. 26.1(a); Fed. Cir. R. 26.1. The Seventh, Tenth, and Federal Circuits require disclosures only from parties with appearing attorneys. 7th Cir. R. 26.1(a); 10th Cir. R. 46.1(D)(1); Fed. Cir. R. 26.1.

Similarly, the Fourth Circuit does not require disclosures from parties proceeding in forma pauperis. 4th Cir. Loc. R. 26.1(a)(1)(A). Nonetheless, the Fourth Circuit's rule requires disclosures from all other non-governmental parties in civil, agency, bankruptcy, and mandamus cases; however, in criminal and post-conviction cases, only corporate parties must file disclosures. 4th Cir. Loc. R. 26.1(a)(1)(B).

[10] Amicus disclosures can also help judges determine whether to grant motions for leave to file amicus briefs. For example, in the Second Circuit, judges "ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge." 2d Cir. R. 29.1(a).

United States v. Anderson involved an attorney who recently testified against the presiding judge; the judge was required to recuse. 160 F.3d 231, 234 (5th Cir. 1998). Recusal was required not by 28 U.S.C. § 455(b), but by his questioned impartiality under 28 U.S.C. § 455(a). Id. In cases like Anderson, local rules requiring attorney disclosures can help judges detect grounds for recusal under 28 U.S.C. § 455(a). Likewise, since grounds for recusal under 28 U.S.C. § 455(a) are myriad, the other local disclosure rules can also help judges determine when their questioned impartiality under 28 U.S.C. § 455(a) compels recusal.

In sum, the various local disclosure rules can each help judges determine whether they must recuse from hearing an appeal.[11]

[11] Further empirical study may be desired. To decide whether a disclosure requirement should generalize nationally, it may be helpful to know how well the requirement detects grounds for recusal, and how well it reduces the number of motions for recusal and failure-to-recuse complaints under the Judicial Conduct and Disability Act. Similarly, it may be helpful to examine how disclosure requirements interact with parties' CM/ECF filing requirements.

APPENDIX A
LOCAL DISCLOSURE RULES

D.C. Circuit Rule 26.1

Disclosure Statement

(a) A corporation, association, joint venture, partnership, syndicate, or other similar entity appearing as a party or amicus curiae in any proceeding must file a disclosure statement, at the time specified in FRAP 26.1; Circuit Rules 5, 8, 12, 15, 18, 21, 27, and 35(c); or as otherwise ordered by the court, identifying all parent companies and any publicly-held company that has a 10% or greater ownership interest (such as stock or partnership shares) in the entity. A revised corporate disclosure statement must be filed any time there is a change in corporate ownership interests that would affect the disclosures required by this rule. For the purposes of this rule, "parent companies" include all companies controlling the specified entity directly, or indirectly through intermediaries.

(b) The statement must identify the represented entity's general nature and purpose, insofar as relevant to the litigation. If the entity is an unincorporated entity whose members have no ownership interests, the statement must include the names of any members of the entity that have issued shares or debt securities to the public. No such listing need be made, however, of the names of members of a trade association or professional association. For purposes of this rule, a "trade association" is a continuing association of numerous organizations or individuals operated for the purpose of promoting the general commercial, professional, legislative, or other interests of the membership.

Second Circuit Local Rule 29.1(a)

Leave to File

The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge.

Third Circuit Local Appellate Rule 26.1.1

Disclosure of Corporate Affiliations and Financial Interest

(a) Promptly after the notice of appeal is filed, each corporation that is a party to an appeal, whether in a civil, bankruptcy, or criminal case, must file a corporate affiliate/financial interest disclosure statement on a form provided by the clerk that identifies every publicly owned corporation with which it is affiliated but which is not named in the appeal. The form must be completed whether or not the corporation has anything to report.

(b) Every party to an appeal must identify on the disclosure statement required by FRAP 26.1 every publicly owned corporation not a party to the appeal, if any, that

has a financial interest in the outcome of the litigation and the nature of that interest. The form must be completed only if a party has something to report under this section.

(c) In all bankruptcy appeals, counsel for the debtor or trustee of the bankruptcy estate must promptly file with the clerk a list identifying (1) the debtor, if not named in the caption, (2) the members of the creditors' committees or the top 20 unsecured creditors, and (3) any entity not named in the caption which is an active participant in the proceeding. If the debtor or trustee of the bankruptcy estate is not a party, the appellant must file this list with the clerk.

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

Third Circuit Local Appellate Rule 26.1.2

Notice of Possible Judicial Disqualification

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

(b) A party seeking disqualification of a judge for any other reason must file a motion, which must comply with FRAP 27 and L.A.R. 27.

Fourth Circuit Local Rule 26.1

Disclosure of Corporate Affiliations and Other Entities with a Direct Financial Interest in Litigation

(a) Disclosure Requirements Applicable to Parties, Including Intervenors.

(1) Who Must File.

(A) Civil, Agency, Bankruptcy, and Mandamus Cases. A party in a civil, agency, bankruptcy, or mandamus case, other than the United States or a party proceeding in forma pauperis, must file a disclosure statement, except that a state or local government is not required to file a disclosure

statement in a case in which the opposing party is proceeding without counsel.

(B) Criminal and Post-Conviction Cases. A corporate party in a criminal or postconviction case must file a disclosure statement.

(2) Information to Be Disclosed by Parties, Including Intervenors.

(A) Information Required by FRAP 26.1. A party must identify any parent corporation and any publicly held corporation that owns 10% or more of the party's stock, or state that there is no such corporation.

(B) Information About Other Financial Interests. A party must identify any publicly held corporation, whether or not a party to the present litigation, that has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit sharing agreement, insurance, or indemnity agreement, or state that there is no such corporation.

(C) Information About Other Publicly Held Legal Entities. Whenever required by FRAP 26.1 or this rule to disclose information about a corporation that has issued shares to the public, a party shall also disclose information about similarly situated master limited partnerships, real estate investment trusts, or other legal entities whose shares are publicly held or traded, or state that there are no such entities.

(D) Information About Trade Association Members. A party trade association must identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member.

(b) Disclosure Requirements Applicable to Corporate Amicus Curiae.

(1) Who Must File. If an amicus curiae is a corporation, the amicus curiae brief must include a disclosure statement.

(2) Information to Be Disclosed by Corporate Amicus Curiae. A corporate amicus curiae must disclose the same information that sections (a)(2)(A), (B) & (C) require parties to disclose.

(c) Form. The disclosure statement shall be on a form provided by the clerk. A negative statement is required if a filer has no disclosures to make.

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

(e) Amendment. Filers are required to amend their disclosure statements when necessary to maintain their current accuracy.

Fifth Circuit Rule 28.2.1

Certificate of Interested Persons

The certificate of interested persons required by this rule is broader in scope than the corporate disclosure statement contemplated in FED. R. APP. P. 26.1. The certificate of interested persons provides the court with additional information concerning parties whose participation in a case may raise a recusal issue. A separate corporate disclosure statement is not required. Counsel and unrepresented parties will furnish a certificate for all private (non-governmental) parties, both appellants and appellees, which must be incorporated on the first page of each brief before the table of contents or index, and which must certify a complete list of all persons, associations of persons, firms, partnerships, corporations, guarantors, insurers, affiliates, parent corporations, or other legal entities who or which are financially interested in the outcome of the litigation. If a large group of persons or firms can be specified by a generic description, individual listing is not necessary. Each certificate must also list the names of opposing law firms and/or counsel in the case. The certificate must include all information called for by FED. R. APP. P. 26.1(a). Counsel and unrepresented parties must supplement their certificates of interested persons whenever the information that must be disclosed changes.

(a) Each certificate must list all persons known to counsel to be interested, on all sides of the case, whether or not represented by counsel furnishing the certificate. Counsel has the burden to ascertain and certify the true facts to the court.

(b) The certificate must be in the following form:

(1) Number and Style of Case;

(2) The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal. (Here list names of all such persons and entities and identify their connection and interest.)

_____

Attorney of record for_____

Sixth Circuit Rule 26.1

Corporate Disclosure Statement

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

(b) Financial Interest to Be Disclosed.

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

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

(c) Form and Time of Disclosure. The disclosure statement shall be made on a form provided by the clerk and filed with the brief of a party or amicus or upon filing a motion, response, petition, or answer in this court, whichever first occurs.

Seventh Circuit Rule 26.1

Disclosure Statement

(a) Who Must File. Every attorney for a non-governmental party or amicus curiae, and every private attorney representing a governmental party, must file a statement under this rule. A party or amicus required to file a corporate disclosure statement under Fed. R. App. P. 26.1 may combine the information required by subsection (b) of this rule with the statement required by the national rule.

(b) Contents of Statement. The statement must disclose the names of all law firms whose partners or associates have appeared for the party or amicus in the case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court. If any litigant is using a pseudonym, the statement must disclose the litigant's true name. A disclosure required by the preceding sentence will be kept under seal.

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

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

Tenth Circuit Rule 46.1(D)

Certification of Interested Parties

(1) Certificate. Each entry of appearance must be accompanied by a certificate listing the names of all interested parties not in the caption of the notice of appeal so that the judges may evaluate possible disqualification or recusal.

(2) List. The certificate must list all persons, associations, firms, partnerships, corporations, guarantors, insurers, affiliates, and other legal entities that are financially interested in the outcome of the litigation. For corporations, see Fed. R. App. P. 26.1.

(3) Generic description. An individual listing is not necessary if a large group of persons or firms can be specified by a generic description.

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

(5) No additional parties. If there are no additional parties, entities, or attorneys in any of these categories not previously reported to the court, a report to that effect also is required.

(6) Obligation to amend. The certificate must be kept current.

Eleventh Circuit Rule 26.1-1

Certificate of Interested Persons and Corporate Disclosure Statement: Contents

A certificate shall be furnished by appellants, appellees, intervenors and amicus curiae, including governmental parties, which contains a complete list of the trial judge(s), all attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party. In criminal and criminal-related appeals, the certificate shall also disclose the identity of the victim(s). In bankruptcy appeals, the certificate shall also identify the debtor, the members of the creditor's committee, any entity which is an active participant in the proceedings, and other entities whose stock or equity value may be substantially affected by the outcome of the proceedings.

The certificate contained in the first brief filed must include a complete list of all persons and entities known to that party to have an interest in the outcome of the particular case or appeal. The certificate contained in the second and all subsequent briefs filed must include only persons and entities omitted from the certificate contained in the first brief filed and in any other brief that has been filed. Counsel who believe that the certificate contained in the first brief filed and in any other brief that has been filed is complete may simply certify to that effect.

The certificate contained in each motion or petition filed must include a complete list of all persons and entities known to that party to have an interest in the outcome of the particular case or appeal. The certificate contained in a response or answer to a motion or petition, or a reply to a response, must include only persons and entities that were omitted from the certificate contained in the motion or petition. Counsel who believe that the certificate contained in the motion or petition is complete may simply certify to that effect.

In a petition for en banc consideration, the petitioner's certificate shall also compile and include a complete list of all persons and entities listed on all certificates filed in the appeal prior to the date of filing of the petition for en banc consideration. If the court grants en banc rehearing, the requirements set forth in the second paragraph of this rule also apply to en banc briefs.

Eleventh Circuit Rule 26.1-3

Certificate of Interested Persons and Corporate Disclosure Statement: Format

(a) The certificate described in 11th Cir. R. 26.1-1 must immediately follow the cover page within a brief, and must precede the text in a petition, answer, motion or response.

(b) The certificate must list persons (last name first) and entities in alphabetical order, have only one column, and be double-spaced.

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

(d) At the top of each page the court of appeals docket number and short style must be noted (name of first-listed plaintiff or petitioner v. name of first-listed defendant or respondent). Each page of the certificate must be separately sequentially numbered to indicate the total number of pages comprising the certificate (e.g., C-1 of 3, C-2 of 3, C-3 of 3). These pages do not count against any page limitations imposed on the papers filed.

Federal Circuit Rule 47.4

Certificate of Interest

(a) Purpose; Contents. To determine whether recusal by a judge is necessary or appropriate, an attorney – except an attorney for the United States – for each party, including a party seeking or permitted to intervene, and for each amicus curiae, must file a certificate of interest. The certificate of interest must be filed within 14 days of the date of docketing of the appeal or petition, except that for an intervenor or amicus curiae, the certificate of interest must be filed with the motion and with the brief. A certificate of interest must be in the form set forth in the appendix to these rules, and must contain the information below in the order listed. Negative responses, if applicable, are required as to each item on the form.

(1) The full name of every party or amicus represented in the case by the attorney.

(2) The name of the real party in interest if the party named in the caption is not the real party in interest.

(3) The corporate disclosure statement prescribed in Federal Rule of Appellate Procedure 26.1.

(4) The names of all law firms and the partners and associates that have appeared for the party in the lower tribunal or are expected to appear for the party in this court.

(b) Filing. The certificate must be filed with the entry of appearance. The certificate – first filed – must also be filed with each motion, petition, or response thereto, and in each principal brief and brief amicus curiae.

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

APPENDIX B
GROUNDS FOR RECUSAL

28 U.S.C. § 47 (2011)

Disqualification of Trial Judge to Hear Appeal

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

28 U.S.C. § 455 (2011)

Disqualification of Justice, Judge, or Magistrate Judge

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Code of Conduct for United States Judges

. . .

Canon 3: A Judge Should Perform the Duties of the Office Fairly, Impartially and Diligently

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

. . .

C. Disqualification

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

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

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

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

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

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

(ii) acting as a lawyer in the proceeding;

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

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

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

(2) A judge should keep informed about the judge's personal and fiduciary financial interests and make a reasonable effort to keep informed about the personal financial interests of the judge's spouse and minor children residing in the judge's household.

(3) For the purposes of this section:

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

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

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

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

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

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

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

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

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

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

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N.B.: Materials concerning Item Nos. 09-AP-D and 11-AP-F will be circulated separately.

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TAB 7A

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MEMORANDUM

DATE: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item Nos. 12-AP-E, 13-AP-F, and 13-AP-G

Item No. 12-AP-E arose from the suggestion that the Committee consider changing the page limits in Appellate Rule 35(b)(2) to type-volume limits. The Committee's discussion of this topic has expanded to encompass related questions.[1]

Part I of this memo sketches amendments to the Rules that currently use page limits (Rules 5, 21, 27, 35, and 40). The sketches proffer two models – the "equivalency model," in which handwritten and typewritten documents are allowed the same number of pages as computer-generated documents, and the "Rule 32(a)(7) model," where the "safe harbor" for page limits produces a shorter document than the corresponding type-volume limit.

Part II sketches amendments that would address two questions concerning items that can be excluded when computing length. Part II.A discusses a possible amendment to Rule 28.1(e)(2) (concerning cross-appeals). Part II.B discusses a possible amendment to Rule 35(b)(2) (concerning petitions for hearing or rehearing en banc). More generally, Part II notes some inconsistency in the extent to which the Appellate Rules' length limits address the question of items omitted when computing length.

Part III takes up the question of Rule 32(a)(7)'s length limits for briefs, and notes evidence that the 1998 adoption of the type-volume limits resulted in a loosening of those length limits.

I. Possible amendments to Rules that currently set page limits

At the spring 2013 meeting, the Committee discussed Neal Katyal's suggestion that page limits be replaced with type-volume limits.[2] 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)(B) and 28.1(e)(2). However, limits denoted in pages remain in

[1] Item No. 13-AP-F concerns a suggestion that the Committee consider clarifying which items are included for purposes of the length limit in Rule 35(b)(2). Item No. 13-AP-G concerns the possibility of clarifying which items are included when calculating length under Rule 28.1(e).

[2] I enclose my March 25, 2013 memo on that topic.

Rules 5, 21, 27, 35, and 40.[3] Appellate Rule 35(b)(2) sets the length limit for a petition for hearing or rehearing en banc in pages, and Professor Katyal reports that some lawyers manipulate that limit by altering fonts and line spacing.

Accordingly, at the Committee's spring 2013 meeting, participants discussed possible ways to impose a type-volume limit for lawyers' filings under Rules 5, 21, 27, 35, and 40, while suitably addressing the length limits for filings by pro se litigants and others who lack access to a computer. The Committee's discussion focused on two possibilities. One possible approach would set differently-articulated, but substantively-similar, limits for documents prepared on a computer and for documents prepared by other means; I will call this the "equivalency" model. The other possible approach would track that taken (for merits briefs) in Rule 32(a)(7).

A. The equivalency model

Under this model, the Rules that currently set page limits would be revised to distinguish between handwritten or typewritten briefs, on one hand, and computer-generated briefs, on the other. Rule 32(a)(7)(C) would be amended to extend the certificate-of-compliance requirement to filings under the new type-volume limits in Rules 5, 21, 27, 35, and 40. Conforming amendments would be made to Form 6.

Because the goal would be to set type-volume limits (for computer-generated briefs) that approximate the current page limits, it is necessary to choose an exchange rate (between pages and either words or lines). The project that resulted in the 1998 amendments assumed that a brief would typically have 26 lines of text per page; that assumption seems reasonable, so I have retained that exchange rate for the purposes of the sketches shown here. The 1998 project appears to have assumed that a brief would typically have 280 words per page;[4] however, that estimate seems high. Based on the Committee's discussions and on Michael Gans' research,[5] I proceed in this part of the memo (and in Part I.B) on the assumption that 260 words per page is a better estimate.

[3] 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.

[4] The 1998 Committee Note to Rule 32(a)(7) stated that the type-volume limits in Rule 32(a)(7)(B) "approximate the current 50-page limit"; dividing the 14,000-word limit by 50 produces a words-per-page count of 280.

[5] Mr. Gans' research is summarized in his letter, which I enclose, and is discussed in greater detail in Part III of this memo.

Rule 5. Appeal by Permission

* * *

(c) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~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).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E):

(1) a handwritten or typewritten paper must not exceed 20 pages; and

(2) a paper produced using a computer must comply with Rule 32(a)(7)(C) and not exceed

(A) 5,200 words; or

(B) 520 lines of text printed in a monospaced face.

* * *

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * *

(d) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C):

(1) a handwritten or typewritten paper must not exceed 30 pages; and

(2) a paper produced using a computer must comply with Rule 32(a)(7)(C) and not exceed

(A) 7,800 words; or

(B) 780 lines of text printed in a monospaced face.

Rule 27. Motions

* * *

(d) Form of Papers; Page Limits; and Number of Copies.

* * *

(2) **Page Limits**. Except by the court's permission, and excluding ~~A motion or a response to a motion must not exceed 20 pages, exclusive of~~ the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B)~~, unless the court permits or directs otherwise.~~:

(A) A handwritten or typewritten motion or response to a motion must not exceed 20 pages;

(B) A motion or response to a motion produced using a computer must comply with Rule 32(a)(7)(C) and not exceed

(i) 5,200 words; or

(ii) 520 lines of text printed in a monospaced face;

(C) A handwritten or typewritten reply to a response must not exceed 10 pages; and

(D) A reply produced using a computer must comply with Rule 32(a)(7)(C) and not exceed

(i) 2,600 words; or

(ii) 260 lines of text printed in a monospaced face.

* * *

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * *

(7) Length.

* * *

(C) Certificate of compliance.

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B), and a paper submitted under Rules 5(c)(2), 21(d)(2), 27(d)(2)(B), 27(d)(2)(D), 35(b)(2)(B), or 40(b)(2), must include a certificate by the attorney, or an unrepresented party, that the [brief or paper] [document] complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the [brief or paper] [document]. The certificate must state either:

• the number of words in the [brief or paper] [document]; or

• the number of lines of monospaced type in the [brief or paper] [document].

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rule~~s 28.1(e)(3) and~~ 32(a)(7)(C)(i).

* * *

Rule 35. En Banc Determination

* * *

(b) **Petition for Hearing or Rehearing En Banc**. A party may petition for a hearing or rehearing en banc.

* * *

(2) Except by the court's permission, ~~a petition for an en banc hearing or rehearing must not exceed 15 pages,~~ and excluding material not counted under Rule 32:[6]

(A) a handwritten or typewritten petition for an en banc hearing or rehearing must not exceed 15 pages; and

(B) a petition for an en banc hearing or rehearing produced using a computer must comply with Rule 32(a)(7)(C) and not exceed

(i) 3,900 words; or

[6] To avoid adding undue complexity, I am not illustrating here how one would fit this amendment with either of the proposed alternatives sketched in Parts II.B.1 and II.B.2 (which would address whether the Rule 35(b)(1) statement is counted for purposes of Rule 35(b)(2)'s length limit).

(ii) 390 lines of text printed in a monospaced face.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

* * *

Rule 40. Petition for Panel Rehearing

* * *

(b) **Form of Petition; Length**. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides otherwise~~ Except by the court's permission[, and excluding material not counted under Rule 32][7]:~~,~~

(1) a handwritten or typewritten petition for panel rehearing must not exceed 15 pages; and

(2) a petition for panel rehearing produced using a computer must comply with Rule 32(a)(7)(C) and not exceed

(A) 3,900 words; or

(B) 390 lines of text printed in a monospaced face.

Form 6. Certificate of Compliance with Rule 32(a)

Certificate of Compliance With Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This ~~brief~~ document complies with the type-volume limitation of Fed. R. App. P. ~~32(a)(7)(B)~~ [*insert Rule citation, e.g., 32(a)(7)(B)*] because:

[ ] this ~~brief~~ document contains [*state the number of*] words[, excluding the parts of the ~~brief~~ document exempted by Fed. R. App. P. ~~32(a)(7)(B)(iii)~~ [*insert Rule citation, e.g., 32(a)(7)(B)(iii)*]][8], *or*

[ ] this ~~brief~~ document uses a monospaced typeface and contains [*state the number of*] lines of text[, excluding the parts of the ~~brief~~ document

[7] I include this bracketed language to illustrate how one might clarify what materials should be omitted when applying Rule 40(b)'s length limit. See Part II below.

[8] The phrases concerning exclusions are bracketed in case no exclusions apply.

exempted by Fed. R. App. P. ~~32(a)(7)(B)(iii)~~ [*insert Rule citation, e.g., 32(a)(7)(B)(iii)*]].

2. This ~~brief~~ document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[ ] this ~~brief~~ document has been prepared in a proportionally spaced typeface using [*state name and version of word processing program*] in [*state font size and name of type style*], *or*

[ ] this ~~brief~~ document has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

(s)_____

Attorney for _____

Dated: _____

B. The Rule 32(a)(7) model

If Rule 32(a)(7) is taken as a model for revising the length limits in Rules 5, 21, 27, 35, and 40, then the existing page limits in those rules would be shortened, and an alternative would be added in each rule that would approximate the existing page limits through the use of type-volume limits. As with the sketches in Part I.A, so too here, Rule 32(a)(7)(C) would be amended to extend the certificate-of-compliance requirement to filings under the new type-volume limits, and conforming changes would be made to Form 6.

The type-volume limits shown below are the same as those shown in the sketches in Part I.A. The choice of page limits presents a harder question. As the Committee has noted, under the Rule 32(a)(7) 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. To produce the shortened page limits shown below, I chose a multiplier of three-fifths based on the precedent set by the 1998 amendments;[9] obviously, the choice of a multiplier would be another issue for the Committee to consider if it moves forward with this set of amendments.

[9] I chose this multiplier because it reflects the 30-page / 50-page differential described in the 1998 Committee Note, which explained that "[e]stablishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing 'tricks' available with most personal computers to file a brief far longer than the 'old' 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30-page limit is imposed."

Rule 5. Appeal by Permission

* * *

(c) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~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).~~ An original and 3 copies must be filed unless the court requires a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E), a paper must comply with Rule 32(a)(7)(C) (if applicable) and one of the following limits:

(1) 12 pages;

(2) 5,200 words; or

(3) 520 lines of text printed in a monospaced face.

* * *

Rule 21. Writs of Mandamus and Prohibition, and Other Extraordinary Writs

* * *

(d) **Form of Papers; Number of Copies**. All papers must conform to Rule 32(c)(2). ~~Except by the court's permission, a paper must not exceed 30 pages, exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C).~~ An original and 3 copies must be filed unless the court requires the filing of a different number by local rule or by order in a particular case. Except by the court's permission, and excluding the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C), a paper must comply with Rule 32(a)(7)(C) (if applicable) and one of the following limits:

(1) 18 pages;

(2) 7,800 words; or

(3) 780 lines of text printed in a monospaced face.

Rule 27. Motions

* * *

(d) Form of Papers; Page Limits; and Number of Copies.

* * *

(2) **Page Limits**. Except by the court's permission, and excluding ~~A motion or a response to a motion must not exceed 20 pages, exclusive of~~ the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B)~~, unless the court permits or directs otherwise.~~:

(A) A motion or response to a motion must a paper must comply with Rule 32(a)(7)(C) (if applicable) and one of the following limits:

(i) 12 pages;

(ii) 5,200 words; or

(iii) 520 lines of text printed in a monospaced face; and

(B) A reply to a response must comply with Rule 32(a)(7)(C) (if applicable) and one of the following limits:

(i) ~~not exceed 10~~ 6 pages;

(ii) 2,600 words; or

(iii) 260 lines of text printed in a monospaced face.

* * *

Rule 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

* * *

(7) Length.

* * *

(C) Certificate of compliance.

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B), and a paper submitted under Rules 5(c)(2), 5(c)(3), 21(d)(2), 21(d)(3), 27(d)(2)(A)(ii), 27(d)(2)(A)(iii), 27(d)(2)(B)(ii), 27(d)(2)(B)(iii), 35(b)(2)(B), 35(b)(2)(C), 40(b)(2), or 40(b)(3), must include a certificate by the attorney, or an unrepresented

party, that the [brief or paper] [document] complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the [brief or paper] [document]. The certificate must state either:

• the number of words in the [brief or paper] [document]; or

• the number of lines of monospaced type in the [brief or paper] [document].

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules ~~28.1(e)(3) and~~ 32(a)(7)(C)(i).

* * *

Rule 35. En Banc Determination

* * *

(b) **Petition for Hearing or Rehearing En Banc**. A party may petition for a hearing or rehearing en banc.

* * *

(2) Except by the court's permission, ~~a petition for an en banc hearing or rehearing must not exceed 15 pages,~~ and excluding material not counted under Rule 32,[10] a petition for an en banc hearing or rehearing must comply with Rule 32(a)(7)(C) (if applicable) and one of the following limits:

(A) 9 pages;

(B) 3,900 words; or

(C) 390 lines of text printed in a monospaced face.

(3) For purposes of the ~~page~~ limits in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

[10] To avoid adding undue complexity, I am not illustrating here how one would fit this amendment with either of the proposed alternatives sketched in Parts II.B.1 and II.B.2 (which would address whether the Rule 35(b)(1) statement is counted for purposes of Rule 35(b)(2)'s length limit).

* * *

Rule 40. Petition for Panel Rehearing

* * *

(b) **Form of Petition; Length**. The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. ~~Unless the court permits or a local rule provides otherwise~~ Except by the court's permission[, and excluding material not counted under Rule 32],[11] a petition for panel rehearing must comply with Rule 32(a)(7)(C) (if applicable) and one of the following limits:

(1) ~~not exceed 15~~ 9 pages;

(2) 3,900 words; or

(3) 390 lines of text printed in a monospaced face.

[N.B.: The conforming amendments to Form 6 would be the same, in this model, as those shown in Part I.A for the equivalency model.]

[11] I include this bracketed language to illustrate how one might clarify what materials should be omitted when applying Rule 40(b)'s length limit. See Part II below.

II. Clarifying the question of exclusions

In applying any length limit, lawyers will want to know what to count and what to exclude. As shown in the chart below, some of the length limits in the Appellate Rules address this question, while others do not:

Rule	Length limit	Exclusions specified?
5(c)	20 pages (petition for permission to appeal; answer; cross-petition)	Rule 5(c): "exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 5(b)(1)(E)."
21(d)	30 pages (mandamus petition; response)	Rule 21(d): "exclusive of the disclosure statement, the proof of service, and the accompanying documents required by Rule 21(a)(2)(C)."
27(d)(2)	20 pages (motion; response)	Rule 27(d)(2): "exclusive of the corporate disclosure statement and accompanying documents authorized by Rule 27(a)(2)(B)."
27(d)(2)	10 pages (reply)	No.
28(j)	350 words (letter regarding supplemental authorities; response)	Rule 28(j): "[t]he body of the letter."
28.1(e)(1)	30 pages (appellant's principal brief) 35 pages (appellee's principal and response brief) 30 pages (appellant's response and reply brief) 15 pages (appellee's reply brief)	No.
28.1(e)(2)	14,000 words or 1,300 lines (appellant's principal brief; appellant's response & reply brief) 16,500 words or 1,500 lines (appellee's principal and response brief) 7,000 words or 650 lines (appellee's reply brief)	No.
29(d)	"no more than one-half the maximum length authorized by these rules for a party's principal brief" (amicus briefs)	Yes for type-volume limits, via incorporation of Rule 32(a)(7)(B)(iii).
32(a)(7)(A)	30 pages (principal brief)	No.

Rule	Length limit	Exclusions specified?
	15 pages (reply brief)	
32(a)(7)(B)	14,000 words or 1,300 lines (principal brief) 7,000 words or 650 lines (reply brief	Rule 32(a)(7)(B)(iii): "Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation."
35(b)(2)	15 pages (petition for en banc hearing or rehearing)	Rule 35(b)(2): "excluding material not counted under Rule 32."
40(b)	15 pages (petition for panel rehearing)	No.

This chart suggests a number of questions, two of which were mentioned at the Committee's spring meeting. As noted in Part II.A, it would make sense to revise Rule 28.1(e)(2) so that it parallels Rule 32(a)(7)(B); the type-volume limits for briefs on cross-appeals should be subject to the same exclusions as the type-volume limits for merits briefs in general. As noted in Part II.B, it may make sense to review Rule 35(b)(2) to make clear whether the Rule 35(b)(1) statement does or does not count for purposes of the length limits for petitions for hearing or rehearing en banc.

The chart suggests a few further questions as well. It makes sense that Rule 27(d)(2) would not specify exclusions from the length limit for replies (concerning motions).[12] However, it is not immediately clear why Rules 28.1(e)(1) and 32(a)(7)(A) specify no exclusions for purposes of the safe-harbor page limits on briefs. Prior to the 1998 amendments (which instituted the type-volume system for briefs), Rule 28(g) specified exclusions to the page limits for briefs.[13] The 1998 Committee Note to Rule 32(a)(7) does not explain why those exclusions were not carried over to the page limits in Rule 32(a)(7)(A). It may be the case that, in practice, lawyers simply assume that they can exclude when counting pages (under Rule 32(a)(7)(A)) the same items that they can exclude when counting words or lines (under Rule 32(a)(7)(B)). Some indirect support for that view might be found in the way that Rule 35(b)(2) couches its exclusion; it sets a page limit from which it excludes "material not counted under Rule 32" – which could be taken to suggest, obliquely, that Rule 32(a)(7)(B)(iii)'s exclusions should apply to limits

[12] A reply ordinarily would be unlikely to contain the items that Rule 27(d)(2) excludes from the length limits for motions and responses.

[13] The pre-December 1, 1998 version of Rule 28(g) stated: "Except by permission of the court, or as specified by local rule of the court of appeals, principal briefs must not exceed 50 pages, and reply briefs must not exceed 25 pages, exclusive of pages containing the corporate disclosure statement, table of contents, tables of citations, proof of service, and any addendum containing statutes, rules, regulations, etc."

set in pages as well as to type-volume limits. Some might take the view that a clear statement is better than an oblique suggestion, especially in a provision (like the safe-harbor limit) that is most likely to be employed by pro se litigants. If the Committee thought it useful to clarify that the exclusions apply to the safe-harbor page limits for briefs, such a clarification might be accomplished by modifying and relocating what is now Rule 32(a)(7)(B)(iii),[14] and by modifying the placement and wording of any revision to Rule 28.1(e).[15]

Speaking of the limits on petitions for rehearing, it is unclear why Rule 40(b)'s page limit for petitions for panel rehearing contains no exclusion similar to Rule 35(b)(2)'s page limit for petitions for en banc hearing or rehearing. (The Committee Notes to Rules 35 and 40 shed no light on this question.) It may be useful for the Committee to consider amending Rule 40(b) so that the relevant sentence reads: "Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages, excluding material not counted under Rule 32."

Having mentioned those issues for the sake of completeness, I turn now to the two items to which the Committee has already given preliminary consideration.

A. Rule 28.1(e)

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.

The Committee's discussion at the spring 2013 meeting supported the view 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. But in the context of a larger project that adjusts length limits set by the Appellate Rules, it may be worthwhile to consider amending Rule 28.1(e)(2) to

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[14] Specifically, one could relocate the text of Rule 32(a)(7)(B)(iii) to a new Rule 32(a)(7)(D) that would read:

> Headings, footnotes, and quotations count toward the ~~word and line~~ limitations set by this Rule 32(a)(7). The corporate disclosure statement, table of contents, table of ~~citations~~ authorities, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitations.

If that change were made, then one would make a conforming change to Form 6, which would then refer to "the parts of the brief exempted by Fed. R. App. P. 32(a)(7)~~(B)(iii)~~(D)."

[15] Specifically, one could relocate the proposed amendment sketched in Part II.A of this memo to a new Rule 28.1(e)(4) that would read:

> In applying this Rule 28.1(e), exclude material not counted under Rule 32(a)(7)(D).

incorporate language like that in Rule 32(a)(7)(B)(iii). I sketch below a possible amendment along those lines:

Rule 28.1. Cross-Appeals

* * *

(e) Length.

(1) **Page Limitation**. Unless it complies with Rule 28.1(e)(2) and (3), the appellant's principal brief must not exceed 30 pages; the appellee's principal and response brief, 35 pages; the appellant's response and reply brief, 30 pages; and the appellee's reply brief, 15 pages.

(2) **Type-Volume Limitation**.

(A) The appellant's principal brief or the appellant's response and reply brief is acceptable if:

(i) it contains no more than 14,000 words; or

(ii) it uses a monospaced face and contains no more than 1,300 lines of text.

(B) The appellee's principal and response brief is acceptable if:

(i) it contains no more than 16,500 words; or

(ii) it uses a monospaced face and contains no more than 1,500 lines of text.

(C) The appellee's reply brief is acceptable if it contains no more than half of the type volume specified in Rule 28.1(e)(2)(A).

(D) In applying this Rule 28.1(e)(2), exclude material not counted under Rule 32(a)(7)(B)(iii).

(3) **Certificate of Compliance**. A brief submitted under Rule 28.1(e)(2) must comply with Rule 32(a)(7)(C).

* * *

B. Rule 35(b)(2)

During the Committee's spring 2013 meeting, Mr. Garre noted a question that has arisen concerning the operation of the length limit for petitions for hearing or rehearing en banc: Does the statement required by Rule 35(b)(1) count for purposes of the 15-page limit set by Rule 35(b)(2)? In the absence of guidance from the relevant circuit, one might think that the statement should be counted: Rule 35(b)(2) states that the "petition … must not exceed 15 pages" and Rule 35(b)(1) states that the "petition must begin with" (not "be preceded by") the statement. (Moreover, the fact that Rule 35(b)(2) specifies that "material not counted under Rule 32" should be excluded from the page count might be taken to suggest that *other* items should be *included*.)

Only two local circuit rules shed light on this question,[16] and they take opposite approaches. The Eleventh Circuit excludes the local circuit equivalent of the Rule 35(b)(1) statement from the 15-page length limit;[17] by contrast, the Federal Circuit *includes* its local circuit equivalent of that statement.[18] Although the Eleventh Circuit's

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[16] To find relevant local circuit provisions, I searched the "USC" database on Westlaw using the following query: PR,CI,TI(CIRCUIT & APPEAL!) & (("EN BANC" "IN BANC") & (LENGTH LIMIT! STATEMENT PAGES)).

The Ninth Circuit's rules provide an alternative type-volume limit for rehearing petitions, but do not state what to exclude when computing either the page or type-volume limits. See Ninth Circuit Rule 40-1(a) ("The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text. An answer, when ordered by the Court, shall comply with the same length limitations as the petition.").

[17] Eleventh Circuit IOP 2 accompanying Rule 35 states: "Length. A petition for rehearing en banc, whether or not filed with a petition for rehearing, is limited to 15 pages, exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), (j), and (k)." Eleventh Circuit Rule 35-5(c) requires, "where the party petitioning for en banc consideration is represented by counsel, one or both of the following statements of counsel as applicable:"

> I express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedents of this circuit and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this court: [cite specifically the case or cases]
>
> I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance: [set forth each question in one sentence]

Because the statement required by Eleventh Circuit Rule 35-5(c) is materially similar to the statement required by Appellate Rule 35(b)(1) and is evidently designed to supplant the latter statement, I take these Eleventh Circuit rules as, in effect, excluding the Appellate Rule 35(b)(1) statement from the length limit.

[18] Federal Circuit Rule 35(c)(2) provides that "[t]he following items do not count against the page limitation in Federal Rule of Appellate Procedure 35(b)(2): (A) the certificate of interest; (B) the table of contents; (C) the table of citations; and (D) any addendum containing statutes, rules, regulations, and similar matters." This list notably omits the statement required by Federal Circuit Rule 35(b)(2), which provides:

> A petition that an appeal be reheard en banc must contain one or both of the following statements of counsel at the beginning:

approach might be taken as a departure from the better reading of Appellate Rule 35(b), such a departure is explicitly authorized: Appellate Rule 35(b)(2)'s length limit applies "[e]xcept by the court's permission."

If the Committee decides that it would be useful to resolve the question, then the next issue would be whether to adopt the Federal Circuit's more restrictive approach – including the statement in the page count – or the Eleventh Circuit's more permissive approach – excluding the statement from the page count. It occurred to me that it might be interesting to see how long such statements tend to be, and also whether the average length differs as between the Eleventh Circuit and the Federal Circuit. As a very rough test of this, I searched on Westlaw for en banc rehearing[19] petitions in those two circuits, and examined the 8 most recent such petitions available on Westlaw from each circuit.[20] I counted the words of the relevant statement from each of those petitions by cutting and pasting the statement into a Word document and using Word's counting function.[21] Unsurprisingly, the statements in the Federal Circuit petitions tended to be shorter:

Circuit	Average statement length	Shortest statement	Longest statement
Eleventh Circuit	249 words	91 words	388 words
Federal Circuit	163 words	73 words	267 words

Though I cannot claim that the sample was free from selection bias or that the results were statistically significant, it seems reasonable to assume that excluding the statement from the word count will produce longer petitions, though the average length difference may be less than 250 words.

Sketches illustrating both options are set forth below.

> Based on my professional judgment, I believe the panel decision is contrary to the following decision(s) of the Supreme Court of the United States or the precedent(s) of this court: (cite specific decisions).
>
> Based on my professional judgment, I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance: (set forth each question in a separate sentence).

[19] On the theory that the typical length of the relevant statement in a petition for initial hearing en banc might differ from that of the relevant statement in a petition for rehearing en banc, I looked only at the latter. I included (in my analysis) both petitions that sought solely rehearing en banc and also petitions that combined requests for panel rehearing and rehearing en banc.

[20] I did not look at amicus filings. I looked at only 8 petitions from each circuit because I found only 8 such petitions on Westlaw, from the Eleventh Circuit, during the period from 2000 to the present. To locate the petitions, I searched the CTA11-BRIEF database for "reasoned and studied professional judgment," and I searched the CTAF-BRIEF database for "based on my professional judgment."

[21] I enclose spreadsheets showing the results.

1. Excluding the statement for purposes of the length limit

Rule 35. En Banc Determination

* * *

(b) **Petition for Hearing or Rehearing En Banc**. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, excluding the statement required by Rule 35(b)(1) and material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

* * *

2. Including the statement for purposes of the length limit

Rule 35. En Banc Determination

* * *

(b) **Petition for Hearing or Rehearing En Banc**. A party may petition for a hearing or rehearing en banc.

(1) The petition must begin with a statement that either:

(A) the panel decision conflicts with a decision of the United States Supreme Court or of the court to which the petition is addressed (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or

(B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated; for example, a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue.

(2) Except by the court's permission, a petition for an en banc hearing or rehearing must not exceed 15 pages, including the statement required by Rule 35(b)(1) but excluding material not counted under Rule 32.

(3) For purposes of the page limit in Rule 35(b)(2), if a party files both a petition for panel rehearing and a petition for rehearing en banc, they are considered a single document even if they are filed separately, unless separate filing is required by local rule.

* * *

III. Briefing length limits and the effect of the 1998 amendments

At the Committee's spring 2013 meeting, participants questioned the choice – made in the 1998 amendments – to replace the old 50-page brief length limit with a new 14,000-word type-volume limit. The old page limit, it was suggested, was tighter than the new word limit. Historical evidence for this view was provided by Mr. Letter, who noted that, prior to 1998, the D.C. Circuit had adopted a word limit and had chosen 12,500 words as the appropriate limit.

Over the summer, Michael Gans researched this question further. I enclose his September 3, 2013 letter detailing his findings. In sum, it does seem that the shift from a 50-page limit to a 14,000-word limit resulted in a loosening of the length limit for briefs. Mr. Gans found that, on average, briefs filed under the pre-1998 rules had 259 words per page. If one rounds that to 260 words per page, then the word-limit equivalent, for a 50-page brief, would be 13,000 words.

IV. Conclusion

The Committee's discussions, thus far, have produced three areas for possible action. As noted in Part I, extending the type-volume limits to filings other than briefs will require choices concerning the treatment of documents prepared without the aid of a computer. Part II suggested that the Committee may wish to review and standardize the extent to which the Rules specify items that can be excluded when applying the length limits. And Part III notes the possibility that the Committee may wish to reconsider the number of words specified in the type-volume limits for briefs.

Encls.

Rule 35(b)(1) statements: Eleventh Circuit samples

Cite	Word count
Witcher v. Early, 2013 WL 454166	173
Systems Unlimited, Inc. v. Cisco Systems, Inc., 2007 WL 2210702	302
May v. Nygard Holdings Ltd., 2006 WL 4127798	305
Solantic, LLC v. Neptune Beach, 2005 WL 6523379	227
National Advertising Co v. Miami, 2005 WL 6258425	388
United States v. Giraldo, 2004 WL 3558000	180
Bell v. Levy County, 2003 WL 23917377	326
Helton v. Secretary for the Dep't of Corr., 2000 WL 34467159	91
Sum of the above:	**1992**
Average word count (1992 / 8):	**249**

Rule 35(b)(1) statements: Federal Circuit samples

Cite	Word count
Alcohol Monitoring Systems, Inc. v. Actsoft, Alcohol Monitoring Systems, Inc., 2013 WL 1821843	267
Brilliant Instruments, Inc. v. Guidetech, LLC, 2013 WL 1821841	112
Accent Packaging, Inc. v. Leggett & Platt, Inc., 2013 WL 1821839	166
Soverain Software LLC v. Newegg Inc, 2013 WL 1821838	162
W.C. v. Secretary of Health & Human Svces., 2013 WL 1821855	114
Hall v. Bed, Bath & Beyond, Inc., 2013 WL 1821846	238
Consolidated Edison Co. v. United States, 2013 WL 1821854	170
Pregis Corp v. Kappos, 2013 WL 1821850	73
Sum of the above:	**1302**
Average word count (1302 / 8):	**162.75**

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United States Court of Appeals
For the Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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September 3, 2013

The Honorable Steven M. Colloton
United States Circuit Judge
Des Moines, Iowa

Re: Advisory Committee on Federal Appellate Rules

Dear Judge Colloton:

During this past spring's Advisory Committee meeting, some questions arose concerning the length of briefs and Federal Rule of Appellate Procedure 32(a)(7)(B)(i). You asked me to take a look at the length of briefs under the former version of FRAP 32, FRAP 28(g), which set the length of briefs at 50 pages.

As part of this inquiry, I contacted Mark Langer, the clerk of the D.C. Circuit, regarding his court's adoption of word limits for briefs. Mr. Langer confirmed the information provided in Doug Letter's June 6, 2013 e-mail to Professor Struve, which recounts Mr. Letter's recollections of the DC Circuit Rule Advisory Committee's discussions on the topic. As you will recall, Mr. Letter and some other members of the DC bar conducted informal surveys of their own briefs and determined that 50-page briefs were about 12,500 words in length. Based on this informal survey, the DC Circuit set a 12,500 word limit for principal briefs as an alternative to the 50-page limit. Mr. Langer did not have any backup materials, reports, or statistical analysis to share with the Advisory Committee.

In addition to discussing this with Mr. Langer, I conducted my own study of principal briefs. I retrieved 20 boxes of closed 1995-1998 files from the Federal Archives; these were the last four years in which FRAP 28(g) and its 50-page limit were in effect. These boxes contained 210 attorney-filed briefs. I had my summer intern, Ms. Robyn Parkinson, a first-year student at Westminster College in Fulton, Missouri, perform a full word count for each brief, counting the words in the sections that counted against the page limit under Rule 28(g). (The following sections counted against the page limits: Jurisdictional Statement, Statement

of Issues, Statement of the Case, Statement of Facts, Summary of Argument, Argument, and Conclusion.)

As might be expected, the range of words on a page varied greatly, from as few as 1 to as many as 472. Averaging all of the word counts from all of the briefs, however, yielded an average word count per page of 259 words (and a median of 261 words). Multiplying that average by 50 pages yields a total of 12,950 words. It would appear, therefore, that the informal survey conducted by Mr. Letter and the other members of the DC Circuit Rules Advisory Committee may have slightly underestimated the length of 50-page briefs under the Rule 28(g) by between 3 and 4%.

I also undertook one other study. I used CM/ECF to run a report on the word length of principal briefs filed in the 2008 calendar year. There were 1,175 attorney-filed briefs which reported word length in 2008 (some attorney-filed briefs are filed under the page or line limits and do not report words). Of those 1,175 briefs, 32 (3%) were filed under an order permitting an overlength brief. My count showed 180 briefs (15%) were between 12,500 and 14,000 words, while the remaining 963 briefs were less than 12,500 words in length. In other words, 82% of the principal briefs filed in 2008 under FRAP 32(a)(7)(B)(i) would have been an acceptable length under FRAP Rule 28(g), assuming 50 pages equals 12,500 words. If we use 12,950 words as the equivalent of 50 pages, the number of 2008 briefs which would have been an acceptable length under the old rule rises to 85%, and the number between 12,950 and 14,000 words falls to around 12%.

I hope this information is useful. Please let me know if you wish me to undertake any other studies or analysis.

Sincerely,
Michael E. Gans
Clerk of Court

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

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	

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MEMORANDUM

DATE: September 10, 2013

TO: Advisory Committee on Appellate Rules

FROM: Catherine T. Struve, Reporter

RE: Item No. 12-AP-F

This item concerns proposed Appellate Rules amendments relating to class-action-objector appeals.[1] In this memo, I do not attempt an exhaustive review of the relevant issues. For in-depth treatment of particular facets of the problem, I commend to the Committee the articles by Professor Fitzpatrick[2] and by Judge Smith and Professor Lopatka.[3] Instead, I sketch here a schematic overview of portions of the problem.

The basic conundrum is this: District judges lack full information about the fairness of proposed class-action settlements, and the named parties – who have reached agreement on the settlement – will not always provide full information. Other sources are needed. Class members who object to the proposed settlement can usefully inform the district court's assessment of the settlement, and can also perform a useful function by renewing their objections on appeal. But not all objections have merit, either as complaints about what the objector will receive under the settlement or as complaints about what other class members will receive. Some objectors and their counsel pursue meritless objections mainly or solely to obtain a monetary payment (from the named parties and/or their counsel) in exchange for dropping the objection.

At the district-court level, the Civil Rules attempt to encourage input by class members and attempt to ensure that meritorious objections will receive due attention from the court. Settlement of a class action requires court approval.[4] Class members must receive reasonable notice of the proposed settlement,[5] and the court "may approve [the settlement] only after a hearing and on finding that it is fair, reasonable, and adequate."[6] Rule 23(e)(5) authorizes objections by any member of the class, and

[1] The docket number for this item refers specifically to the proposal submitted to the Committee by Professors Brian Fitzpatrick, Alan Morrison, and Brian Wolfman. However, the Committee has expanded the scope of the project to include possible alternatives as well.
[2] Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009).
[3] John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What To Do About Them?*, 39 Fla. St. U. L. Rev. 865 (2012).
[4] Civil Rule 23(e) provides: "The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."
[5] *See* Civil Rule 23(e)(1).
[6] Civil Rule 23(e)(2).

provides that "the objection may be withdrawn only with the court's approval." Though these rules cannot deter objectors from interposing objections for the purpose of extracting a side payment, Rule 23(e)(5)'s requirement of court approval for objection withdrawal is designed to prevent the extraction of side payments while the case is in the trial court. Valid objections might lead the district court to require modifications in the proposed settlement. Let us suppose that many meritorious objections are satisfactorily addressed by the district court, but that at least a small number of such objections are erroneously rejected by the district court. Let us further suppose (for the sake of simplicity) that all non-meritorious objections are rejected by the district court.

The district court's rejection of the objections creates an opportunity for the objector to appeal from the judgment that approves the settlement. Under *Devlin v. Scardelletti*, 536 U.S. 1 (2002), "nonnamed class members … who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening."[7] *Devlin* itself involved a class certified under Civil Rule 23(b)(1), and the Court noted the relevance of this fact to the question of Devlin's right to appeal: "Particularly in light of the fact that petitioner had no ability to opt out of the settlement … appealing the approval of the settlement is petitioner's only means of protecting himself from being bound by a disposition of his rights he finds unacceptable and that a reviewing court might find legally inadequate."[8] However, the *Devlin* Court summed up its holding in terms that were not limited to non-opt-out classes,[9] and at least four circuits have applied *Devlin* to opt-out class actions.[10] Let us therefore suppose that even if the district court provides class members with a further

[7] *Devlin*, 536 U.S. at 14.
[8] *Id*. at 10-11.
[9] *See supra* text accompanying footnote 7.
[10] *See* Churchill Village, L.L.C. v. Gen. Elec., 361 F.3d 566, 572 (9th Cir. 2004) (reasoning that opting out was not a realistic possibility "[b]ecause each objector's claim is too small to justify individual litigation," and concluding for that reason that "[b]y terminating all class actions relating to the dishwasher recall, the settlement will effectively bind the objectors"); Fidel v. Farley, 534 F.3d 508, 513 (6th Cir. 2008) (following *Churchill Village* and reasoning that "[t]he reality of class action litigation—wherein each class member is generally entitled to only a small damages claim—necessitates the application of *Devlin* to Rule 23(b)(3) class actions"); Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 39-40 (1st Cir. 2009) (in a case involving a class "certified both as a mandatory class and one permitting opt-out rights," concluding that "*Devlin* … is about party status and one who could cease to be a party is still a party until opting out"); In re Integra Realty Resources, Inc., 354 F.3d 1246, 1257-58 (10th Cir. 2004) (holding in the context of a defendant class settlement with an opt-out opportunity that "*Devlin* applies to opt-out class settlements"). *See also, e.g.*, Joan Steinman, *Irregulars: The Appellate Rights of Persons Who Are Not Full-Fledged Parties*, 39 Ga. L. Rev. 411, 455 (2005) (arguing that "the better policy would be *not* to view the decision to forego an opportunity to opt out as a waiver of the right to appeal a settlement approval over one's objections"). *But see* In re Gen. Am. Life Ins. Co. Sales Practices Litig., 302 F.3d 799, 800 (8th Cir. 2002) ("Because the Court relied upon the mandatory character of the class action, we question whether *Devlin*'s holding applies to opt-out class actions certified under Rule 23(b)(3)."). *Cf*. Ballard v. Advance Am., 349 Ark. 545, 549, 79 S.W.3d 835, 837 (Ark. 2002) (reaching result contrary to *Devlin* with respect to attempted appeal from class settlement approved under state class-action rule, and relying in part on the fact that "appellants had the ability to opt out and instead elected to object to the settlement and risk being bound by it, if approved by the court over their objections").

opportunity to opt out after the terms of the settlement are established,[11] an objector whose objection was rejected by the district court can appeal from the judgment approving the settlement.

Marie Leary's preliminary research indicates that – in the universe of cases that she analyzed prior to the Committee's spring 2013 meeting – all objector appeals were voluntarily dismissed prior to resolution on the merits, and many of those appeals were voluntarily dismissed before the appellant had filed a merits brief.[12] Docket research does not make clear the reason for these dismissals, but anecdotal evidence indicates that when an objector voluntarily dismisses an appeal, the dismissal often comes in exchange for a monetary payment. Professor Fitzpatrick reported to the Committee that he has heard informally from class-action lawyers of payments that range from $ 50,000 to $ 1 million per objector. These data suggest two problems: First, by filing appeals, objectors may be extracting large payments from named parties and/or their counsel, in amounts not commensurate with the merits of their objections or, indeed, what they would receive if their objections were vindicated on appeal. Second, to the extent that some of the appeals do have merit, the objectors' dropping of their appeals in exchange for personal payments deprives the court of appeals of the opportunity to review challenges that should be found meritorious and should benefit other class members.

Why are the named parties and their counsel willing to pay an objector to drop even a non-meritorious appeal? The reason is that, in practice, the pendency of the appeal delays the implementation of the settlement. One might initially wonder why this should be so, as a legal matter: outside the context of class actions, an appeal from a final judgment does not automatically stay the judgment. The answer appears to be that, typically, the class settlement agreement itself provides that the settlement does not become final until the disposition of any appeal from the order approving the settlement.[13] That is hardly surprising. Defendants who wish to achieve global (or even partial) peace through a settlement will not wish to pay out monies (either to class members or to class counsel) until any appellate challenges to the settlement have been resolved, if only because an appellate challenge, if successful, might make the settlement no longer worthwhile and thus lead defendants (or others) to withdraw their consent. Thus, an appeal typically delays both payment of attorney fees to class counsel and

[11] Civil Rule 23(e)(4) provides: "If the class action was previously certified under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."

[12] This is not always the case. For example, Professor Marcus has pointed out that the Supreme Court's decisions in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp*., 527 U.S. 815 (1999), were both the result of objector appeals.

[13] *See* Lopatka & Smith, *supra* note 3, at 916 ("[T]he delay in execution of a judgment approving a class settlement does not arise because of entry of a judicial stay. After all, the defendants have agreed to their liability under the settlement. Rather, the delay during the pendency of the appeal arises because of the terms of the settlement."). *See, e.g.*, In re Cardizem CD Antitrust Litig., 391 F.3d 812, 818 (6th Cir. 2004) ("[T]he pursuit of [appellant's] objections has the practical effect of prejudicing the other injured parties by increasing transaction costs and delaying disbursement of settlement funds."); Vaughn v. Am. Honda Motor Co., Inc., 507 F.3d 295, 299 (5th Cir. 2007) (describing a class action settlement that "does not become effective, by its terms, until any appeals are concluded").

payment of settlement funds to class members. The hardship that this imposes gives the objector leverage to extract a payment in exchange for dropping the appeal.

What can be done to address these two problems (extortionate, non-meritorious appeals, and the dropping of valid appeals)? And can measures that address those problems do so without deterring meritorious appeals? In the Committee's inquiries thus far, each potential option on which we have focused appears to pose difficulties. In this memo, I will group those options in four categories,[14] which I will call the "Objector-Exclusion Approach," the "Settlement-Implementation Approach," the "Appeal-Hurdle Approach," and the "Dismissal-Hurdle Approach." The Objector-Exclusion Approach is simple and appropriate, but likely to be of limited usefulness. The Settlement-Implementation Approach can be (in fact, is being) employed without any rule changes, but is hardly a complete solution. The Appeal-Hurdle Approach runs the risk of chilling meritorious appeals and – in one of its forms – would likely require legislative action. And the Dismissal-Hurdle Approach may overstep the limits set by mootness doctrine.

I. The Objector-Exclusion Approach

Only a person bound by a class action judgment may appeal that judgment under *Devlin*. Suppose that an objector cavils, at the settlement stage, on the ground that he and others similarly situated ought not to be lumped into the class. Suppose that the district court agrees, and that the district court therefore redefines the class to exclude a subset of persons that includes the objector. So long as the redefined class meets the requirements of Rule 23, this approach validly excludes the objector (and anyone who resembles him in the relevant ways) from the ambit of the class. Because the objector will not be bound by the judgment, it would seem that *Devlin* would ordinarily provide him with no basis for taking an appeal.[15] However, I speculate that the universe of cases in which this approach solves the problem will be relatively limited. Many instances will remain in which the class cannot usefully be redefined to exclude the objector and those similarly situated to the objector.

Some commentators might be tempted to argue that *Devlin* itself should be narrowed to those instances in which the objector lacks the ability to opt out of the class. If the objector has the ability to exclude *himself* from the class, this argument would assert, then he should not be heard to complain – by means of an appeal – if he decides to

[14] This list does not, of course, exhaust the possibilities. Professor Lopatka and Judge Smith discuss others as well. *See* Lopatka & Smith, *supra* note 3, at 890-903 (discussing the possibilities of limiting *Devlin* to non-opt-out actions; requiring intervention as a prerequisite to appeal; imposing sanctions on objectors; and expediting appeals).

[15] *Cf.* AAL High Yield Bond Fund v. Deloitte & Touche LLP, 361 F.3d 1305, 1309-10 & n.6 (11th Cir. 2004) (holding that *Devlin* did not provide a right to appeal to persons who merely "claim[ed] they fit the class definition until it was redrafted to exclude them at the time of class certification and settlement"). The *AAL High Yield Bond* court stated that the would-be appellants would not have met the requirements for intervention as of right, and left open the possibility that the analysis might differ if they had met those requirements. It concluded: "The Objectors do not seek to protect their own property, their allotment from an award or settlement, or any other cognizable legal right or interest. They are simply potential plaintiffs who have yet to litigate any claims." *Id.* at 1310-11.

stay in the class and be bound by the judgment. However, as I noted above, the weight of authority appears to be heading in the opposite direction; four circuits, thus far, have applied *Devlin* to opt-out actions, while I found only one circuit and a state high court that took a contrary view.[16] It seems to me that the developing majority view is sound. In a negative-value class action,[17] opting out is not a realistic possibility; class members will obtain relief as part of a class or not at all. Moreover, concluding that an opt-out opportunity removes an objector's right to appeal the class-settlement approval would foreclose objectors in opt-out class actions from bringing valid objections to the attention of the appellate court. Unless we are willing to assume that district courts always take proper account of all valid objections, closing off an objector's chance to appeal seems undesirable.

II. The Settlement-Implementation Approach

As noted above, the feature that gives objectors leverage to extract payments in exchange for dropping appeals is that – as a practical matter – the pendency of the appeal delays the implementation of the settlement. Because that delay arises from the terms of the settlement itself – rather than from a nonwaivable legal requirement – it is possible to imagine a settlement that provides for full or partial implementation of the settlement notwithstanding the pendency of an appeal.

There would seem to be two main reasons why a defendant would be reluctant to implement the settlement until all appellate challenges have been adjudicated. If the appeal results in the invalidation of the settlement, the defendant may want its money back. One risk is payment risk: The recipients may have spent the money in the meantime. That risk, presumably, could be insured against. The other risk is administrative cost: As to the class members, both paying out the money and recovering the money will impose very large administrative costs. Those administrative costs, as well as the self-interest of class counsel, might explain why the main observed settlement-implementation measure to date is the "quick-pay provision," which focuses on up-front partial payment of class counsel fees (rather than up-front distributions to class members). Professor Fitzpatrick has explained that a "quick-pay provision" in a settlement entitles class counsel to receive their fees upon settlement approval despite the pendency of an appeal (but subject to the return of the fees if the order is reversed on appeal). He reports that quick-pay provisions can immunize class counsel against pressure to pay off objector-appellants, but also that defendants are reluctant to agree to such provisions unless they receive security that assures the repayment of the fees if the judgment is reversed on appeal.

Apart from a quick-pay provision, one could imagine a settlement provision that presumptively defined the "final settlement date" as occurring only after resolution of all appeals, but that permitted the named parties to move the final settlement date earlier by

[16] *See supra* note 10.

[17] This term denotes a class action in which no class member's claim is large enough to warrant individual litigation.

later agreement.[18] With such a provision in the settlement agreement, the named parties could commence settlement implementation despite a pending appeal. If all the named parties and their counsel were confident that the appeal lacked merit, one might expect them to take advantage of such a provision (if present) and commence settlement implementation notwithstanding the objector's appeal. That would deprive the objector of most of her leverage, because the only cost that the objector could threaten to impose would be the cost of defending the settlement on appeal – not a negligible cost, to be sure, but significantly less than the objector could impose by delaying settlement implementation. Why would the named parties not employ this strategy? If we are not seeing the use of this strategy, perhaps that is because some uncertainty exists as to the merits of the objector's appeal. After all, if the named parties were sure the appeal would be rejected, there would seem to be no downside to calling the objector's bluff, litigating the appeal, and implementing the settlement in the meantime.

In some recent cases, class counsel have proposed a creative but (in my view) dubious alternative strategy that appears to be designed to achieve settlement implementation notwithstanding the pendency of an objector appeal. In *Hitch Enterprises, Inc. v. Cimarex Energy Co.*, No. 5:11-cv-00013-W (W.D. Okla.), after an objector challenged the amount of attorney fees (to be paid to class counsel) and incentive payments (to be awarded to the class representatives), the class representatives moved "to sever the approximately $25 claim of the lone Objector Katherine Riesen Lathrop from the $16.4 million Settlement Fund for the benefit of the 29,689 member Settlement Class, or, in the alternative, to require a $3.1 million appeal bond for delay damages, increased costs of administration, and costs of appellate briefing, if she files an appeal from the final judgment in this case."[19] The motion papers proposed that

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[18] The Amended Settlement Agreement and Release in *Fraley v. Facebook, Inc.*, provides an example. Under the Agreement,

> The term "Final Settlement Date" means two Court days after the Final Order and Judgment become "final." For the purposes of this Section 1.13, "final" means (a) if no appeal from the Final Order and Judgment is filed, the expiration of the time for the filing or noticing of any appeal from the Final Order and Judgment; (b) if an appeal from the Final Order and Judgment is filed, the date on which all appeals therefrom, including but not limited to petitions for rehearing or reargument, petitions for rehearing en banc, and petitions for certiorari or any other form of review, have been finally disposed of in a manner that affirms the Final Order and Judgment; or (c) if the Class Counsel and Facebook's Counsel agree in writing, "Final Settlement Date" can occur on any other agreed upon date.

Amended Settlement Agreement and Release ¶ 1.13, *Fraley v. Facebook, Inc.*, Doc. 235-1, Case No. CV-11-01726 RS (N.D. Cal.). The settlement agreement sets the timing of settlement implementation by reference to the Final Settlement Date. *See, e.g., id.* ¶ 2.3(d) ("The Net Settlement Fund shall be distributed to Authorized Claimants between thirty (30) and forty-five (45) calendar days after the Final Settlement Date."). (The *Fraley* documents are available at http://www.fraleyfacebooksettlement.com/court .)

I do not attempt, for purposes of this memo, to determine whether there would ever be reasons for a district court to refuse to approve a settlement provision that provided for pre-appeal-resolution implementation of the settlement. (Might there, in some instances, be a legitimate concern that an unrecoverable payout to class members might, de facto, prejudice any right to fair treatment that an objector establishes on appeal, whether through a revised settlement or otherwise?)

[19] Plaintiff Class's Motion to Sever Objector's Claim, or Alternatively, Require an Appeal Bond and Brief in Support at 1, Hitch Enter., Inc. v. Cimarex Energy Co., No. 5:11-cv-00013-W (W.D. Okla. Apr. 11, 2013), ECF No. 136.

> The Court may sever Objector's claims from the remaining Settlement Class Members under Rule 54(b), and enter a final judgment for the other 29,688 non-objecting Settlement Class Members. Objector may then separately appeal the Court's ruling on her attorneys' fee and incentive award determination (and/or Class Counsel could simply choose to confess judgment for the entire amount of Objector's claim).[20]

The court never ruled on this proposal in *Hitch Enterprises*, because the objector subsequently obtained the court's approval to withdraw her objections.[21] But a similar strategy appears to have gained the court's approval in another case, *Chieftain Royalty Co. v. QEP Energy Co.*, No. 5:11-cv-00212-R (W.D.Okla.). In *Chieftain Royalty*, the district court's order granting final approval of the class settlement concluded as follows:

> 29. There is no reason for delay in the entry of this Final Approval Order and immediate entry by the Clerk of the Court is directed pursuant to Federal Rule of Civil Procedure 54(b).
>
> 30. Further, to the extent any objector attempts to file an appeal as to this Order, such objection shall be severed for purposes of appeal and an appropriate cash bond shall be posted, pursuant to paragraphs 10.1 and 10.2 of the Stipulation, to which there were no objections.[22]

A motion subsequently filed by counsel for the named parties indicates that they understood this order as a mechanism for preventing any objector appeal from holding up the settlement implementation.[23] But the mechanism was never tested: The court denied the motion as unripe (because the objector had not filed a notice of appeal),[24] and no notice of appeal had been filed when I looked at the docket on August 25, 2013.

This strategy seems to me to misconstrue the purpose of Civil Rule 54(b). As the Committee knows, the purpose of Civil Rule 54(b) is to permit an immediate appeal of an order disposing of fewer than all claims or parties in a complex case. No such exigency presents itself in the class-settlement context; in that context, the order approving the class settlement disposes of all claims by and against all parties,[25] so there is no need to

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[20] *Id*. at 8.
[21] *See* Hitch Enter., Inc. v. Cimarex Energy Co., No. 5:11-cv-00013-W (W.D. Okla. Apr. 22, 2013), ECF Nos. 139 & 140.
[22] Order Granting Final Approval of Class Action Settlement, Form and Manner of Notice, and Plan of Allocation at 37, Chieftain Royalty Co. v. QEP Energy Co., No. 5:11-cv-00212-R (W.D. Okla. May 31, 2013), ECF No. 183.
[23] *See* Motion to (1) Effectuate Severed Objection of Objector Crain in New Case File, and (2) Require Objector Crain to Show Cause for Staying Distribution to Other Class Members Pending Appeal, Chieftain Royalty Co. v. QEP Energy Co., No. 5:11-cv-00212-R (W.D. Okla. Aug. 2, 2013), ECF No. 199.
[24] *See* Order Denying Motion to Sever, Denying Motion for Hearing, Chieftain Royalty Co. v. QEP Energy Co., No. 5:11-cv-00212-R (W.D. Okla. Aug. 5, 2013), ECF No. 201.
[25] Unnamed class members who never intervened in the action and who opt out have no claims pending in the action after they opt out.

enter a *partial* final judgment under Rule 54(b).[26] Given that the goal of the exercise appears to be to separate the objector's claim from the rest of the suit – so that the appeal by the objector can be said to leave unaffected the implementation of the settlement as to the remaining class members – I would have thought that this should be viewed as a joinder question, not a partial-final-judgment question. Civil Rule 21 provides: "Misjoinder of parties is not a ground for dismissing an action. On motion or on its own, the court may at any time, on just terms, add or drop a party. The court may also sever any claim against a party." It seems to me that Rule 21 is more closely on point than Rule 54(b) in this context. But stating the problem in those terms brings to light the problem: Once the question is viewed as one of joinder and severance, one wonders why the question is not governed by Rule 23 rather than Rule 21.[27] And if the question is governed by Rule 23, then it restates the question I treated in Part I above: When can the class validly be redefined to exclude the objector? I do not think that the answer can be that the class can be redefined to exclude unnamed class members whose only distinguishing feature is that they object to the proposed settlement.

In sum, a district-court order purporting to "sever" an objector merely in order to assure the named parties that the settlement can safely be implemented despite the pendency of the objector's appeal seems highly dubious. The objector is objecting to the resolution of the claims of other parties as well as his own. The objector's objection isn't solely about his own separate claim; rather, the objection is to the judgment proposed to be entered on the claims of the entire class (because that judgment affects him). If an objector were to press his appeal despite such a purported "severance"[28] and if the appeal succeeded on the merits, I would expect the court of appeals to direct that the district court, on remand, must vacate the settlement as to *all* class members despite the purported severance. The Tenth Circuit's observations, regarding a similar tactic attempted on appeal, seem equally apposite here:

> Plaintiffs seek dismissal of the appeals as to all class members other than Objectors because, inasmuch as the settlement agreement provides that there shall be no distributions as long as there are appeals pending, the pendency of Objectors' appeals prevents any distribution.
>
> While we are sympathetic to Plaintiffs' plight, we can see no practical way to separate Objectors' individual interests from those of the other class members without upsetting the entire settlement fund. Moreover, in *Devlin v. Scardelletti*, 536 U.S. 1, 122 S.Ct. 2005, 153 L.Ed.2d 27 (2002), in which the Supreme Court held that nonnamed non-intervening class members objecting to the approval of a settlement may

[26] This is not to say that Civil Rule 54(b) has no application in the class-action context. For instance, it can be used to enter final judgment as to class claims against one defendant even though class claims against another defendant have not been finally resolved. *See* Nat'l Ass'n of Chain Drug Stores v. New England Carpenters Health Benefits Fund, 582 F.3d 30, 38 (1st Cir. 2009).

[27] *See* 4 NEWBERG ON CLASS ACTIONS § 11:69 (4th ed.) ("In a class action context, Rule 21, governing misjoinder of parties, is aimed at misjoinder of named parties and not unnamed absent class members.").

[28] I would think that the objector would be well advised to amend his notice of appeal to include the severance order.

> appeal that approval even though they were not permitted to intervene, the Court noted that such an objector "will only be allowed to appeal that aspect of the District Court's order that affects him." Id. at 2013, 2010. The Court described that "aspect," however, as "the District Court's decision to disregard his objections." Id. at 2010. Objectors' objections were directed at the entire settlement. We therefore deny Plaintiffs' motion to partially dismiss the appeals.[29]

One further topic bears mention in this context. Note that the motion in *Hitch Enterprises* suggested that "Class Counsel could simply choose to confess judgment for the entire amount of Objector's claim." The implication is that such an offer would render the objector's appeal moot even if the objector refused the offer. Last Term, in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), the Supreme Court noted but did not resolve a circuit split concerning "whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the claim moot." *Id*. at 1528-29. The four dissenting Justices in *Genesis Healthcare* made clear that in their view, "an unaccepted offer of judgment cannot moot a case." *Id.* at 1533 (Kagan, J., joined by Ginsburg, Breyer, & Sotomayor, JJ., dissenting).

It may be relevant, in this context, to recall Justice Rehnquist's concurrence in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). Explaining why he joined in the majority's ruling that (on the facts of the case) "a tender to named plaintiffs in a class action of the amounts claimed in their individual capacities, followed by the entry of judgment in their favor on the basis of that tender, over their objection" did not "moot[] the case and terminate[] their right to appeal the denial of class certification,"[30] Justice Rehnquist observed:

> The distinguishing feature here is that the defendant has made an *unaccepted* offer of tender in settlement of the individual putative representative's claim. The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (i.e., relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable.[31]

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[29] Rutter & Wilbanks Corp. v. Shell Oil Co., 314 F.3d 1180, 1183 n.1 (10th Cir. 2002); *see also* Lopatka & Smith, *supra* note 3, at 891 n.113 ("[O]bjections if successful on appeal would typically result in a benefit to at least a group of class members including the objector, and so the appeal would necessarily be undertaken on behalf of multiple class members, with a resolution affecting potentially the entire class.").
[30] *Roper*, 445 U.S. at 327 (majority opinion).
[31] *Id.* at 341 (Rehnquist, J., concurring).

The situation of an objector is not identical to that of a class representative. If the objector is asking only for relief for himself, an offer of that relief (in full) does not leave out some requested relief, unlike the offer to a class representative that Justice Rehnquist noted was insufficient to moot the class representative's claim. But there is a related concern about named parties' picking off objectors simply by offering them a payment equivalent to the amount of their individual share of the class's claims.

III. The Appeal-Hurdle Approach

Another sort of approach seeks to remove objectors' leverage by making it harder for them to take appeals, either by making appeals more expensive or by imposing a merit-screening mechanism. In Part III.A I discuss the possible use of appeal bonds for this purpose, while in Part III.B I discuss the possibility of requiring objectors to obtain a "certificate of appealability" in order to appeal.

A. Appeal bonds

Traditionally, appeal bonds were modest in amount and were designed to secure the appellee against the possibility that an appellant – ordered at the end of an appeal to pay the appellee's costs – might not have the money to do so. In recent years, some enterprising courts have imposed very large appeal bond requirements as a condition of an objector's appeal from a judgment approving a class action settlement.[32] But caselaw interpreting Appellate Rule 7 will not always justify the inclusion of attorney fees and/or settlement-implementation-delay costs in a Rule 7 cost bond required of an objector-appellant.

1. Practice under current Rule 7

Appellate Rule 7 provides that "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal." Rule 7 does not define "costs on appeal"; neither does Appellate Rule 39 (which sets the framework for the allocation of costs on appeal).[33] 28 U.S.C. § 1920 authorizes the taxation of certain items as costs, but none of

[32] The findings in Marie Leary's informative exploratory study included the following: "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))." Marie Leary, Federal Judicial Center Exploratory Study of the Appellate Cost Bond Provisions of Rule 7 of the Federal Rules of Appellate Procedure 5 (FJC 2008). "Targets of motions in class actions were most often interveners or objectors (80% (N=8))." *Id*. "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." *Id*. at 6. "In one class action appeal, an objector voluntarily dismissed the appeal after being ordered to pay a $1,240,500 bond." *Id*.

[33] Rule 39(a) sets general default rules for allocating appellate costs. Rule 39(b) addresses cost awards for or against federal government litigants. Rule 39(c) addresses copying costs. Rule 39(d) covers the procedure for requesting and objecting to costs and for including costs in the mandate. Rule 39(e) lists "costs on appeal [that] are taxable in the district court … : (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal."

those items could be read to encompass attorney fees or damages caused by delay in implementation of a settlement.[34]

The Supreme Court has not addressed the interpretation of "costs" in Appellate Rule 7, but *Marek v. Chesny*, 473 U.S. 1 (1985), decided an arguably analogous question. In *Marek*, the Court held that Civil Rule 68's reference to "costs"[35] includes attorney fees where there is statutory authority for the award of attorney fees and the relevant statute "defines 'costs' to include attorney's fees." *Marek*, 473 U.S. at 9. The Court explained that because neither Rule 68 nor its Note defined "costs," and because the drafters of the original Rules were aware of the existence of fee-shifting statutes, "the most reasonable inference is that the term 'costs' in Rule 68 was intended to refer to all costs properly awardable under the relevant substantive statute or other authority." *Id.*

It might be difficult, though, to ascribe to the drafters of Appellate Rule 7's cost-bond provision an awareness of the costs of appeal-related delay in implementing class action settlements. The notion of requiring security for costs on appeal can be traced back to the First Judiciary Act.[36] The Revised Statutes carried forward the security requirement,[37] and Civil Rule 73 as initially adopted reflected that statutory backdrop. Original Civil Rule 73(c) provided:

> Bond on Appeal. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal

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[34] Section 1920 authorizes taxation of:

> (1) Fees of the clerk and marshal;
> (2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;
> (3) Fees and disbursements for printing and witnesses;
> (4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;
> (5) Docket fees under section 1923 of this title;
> (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

[35] If a Rule 68 offer of settlement is not accepted, and "[i]f the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." Fed. R. Civ. P. 68(d).

[36] Section 22 of the Act provided for certain civil appeals and required that "every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good." Judiciary Act of 1789, ch. 20, § 22, 1 Stat. 73, 85.

[37] Section 1000 of the Revised Statutes provided: "Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any Department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid." 1 Rev. Stat. 187 (1878).

> is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk.

The following decade, Congress enacted the 1948 Judicial Code and repealed the statutory appeal bond requirement, evidently because it was thought that this requirement should instead be implemented through the Rules.[38] Accordingly, the 1948 amendment to Civil Rule 73 altered Rule 73(c)'s first sentence to read as follows: "Unless a party is exempted by law, a bond for costs on appeal shall be filed with the notice of appeal."[39] Civil Rule 73(c) – as amended in 1966[40] – formed the basis for Appellate Rule 7, which, as originally adopted, read as follows:

> Unless an appellant is exempted by law, or has filed a supersedeas bond or other undertaking which includes security for the payment of costs on appeal, in civil cases a bond for costs on appeal or equivalent security shall be filed by the appellant in the district court with the notice of appeal; but security shall not be required of an appellant who is not subject to costs. The bond or equivalent security shall be in the sum or value of $ 250 unless the district court fixes a different amount. A bond for costs on appeal shall have sufficient surety, and it or any equivalent security shall be conditioned to secure the payment of costs if the appeal is finally dismissed or the judgment affirmed, or of such costs as the court of appeals may direct if the judgment is modified. If a bond or equivalent security in the sum or value of $ 250 is given, no approval thereof is necessary. After a bond for costs on appeal is filed, an appellee may raise for determination by the clerk of the district court objections to the form of the bond or to the sufficiency of the surety. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

The 1979 amendments deleted most of the text of original Rule 7 and substituted the following:

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[38] *See, e.g.*, Thrift Packing Co. v. Food Machinery & Chemical Corp., 191 F.2d 113, 114 n.3 (5th Cir. 1951) ("Title 28 U.S.C. § 869 (1940), which provided that a bond for costs on appeal must be given by an appellant, was repealed by the 1948 revision because its provisions covered a subject more appropriately regulated by rule of court.").

[39] *See* 1948 Committee Note to Civil Rule 73(c) ("R.S. § 1000, Title 28, U.S.C., § 869 (1946), which provided for cost bonds, is repealed and its provisions are not included in revised Title 28. Since the Revisers thought that this should be controlled by rule of court as in the case of supersedeas bond, see subdivision (d), no amendment to Title 28 will be proposed to restore the omission. The requirement of a cost bond should, therefore, be incorporated in the rule, and the amendment so provides.").

[40] *See* 1966 Committee Note to Civil Rule 73(c) ("The additions to the first sentence permit the deposit of security other than a bond and eliminate the requirement of security in cases in which the appellant has already given security covering the total cost of litigation at an earlier stage in the proceeding (a common occurrence in admiralty cases) and in cases in which an appellant, though not exempted by law, is nevertheless not subject to costs under the rules of the courts of appeals.").

> The district court may require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case. The provisions of Rule 8(b) apply to a surety upon a bond given pursuant to this rule.

As the 1979 Committee Note explained:

> The amendment would eliminate the provision of the present rule that requires the appellant to file a $ 250 bond for costs on appeal at the time of filing his notice of appeal. The $ 250 provision was carried forward in the F.R.App.P. from former Rule 73(c) of the F.R.Civ.P., and the $ 250 figure has remained unchanged since the adoption of that rule in 1937. Today it bears no relationship to actual costs. The amended rule would leave the question of the need for a bond for costs and its amount in the discretion of the court.

The 1998 restyling, which was intended to produce no change in substance, gave Rule 7 its current wording.

The substance of Rule 7's cost bond requirement, thus, was adopted at latest in 1979 – before the Court decided *Marek*. As of 1979, it seems doubtful that the rulemakers would have had occasion to consider the possibility that settlement-implementation-delay costs would be includable in the bond.[41] In fact, the available evidence suggests that the rulemakers regarded the 1979 elimination of the presumptive $ 250 bond amount as a relatively trivial change.[42]

The text of Rule 7 thus leaves unresolved two issues that are important in determining the amount of a cost bond in connection with an objector's appeal: Should the bond include attorney fees, and should the bond include the projected costs of delay in implementation of the settlement?

In two circuits – the Third and the D.C. Circuits – the answer appears to be no, because applicable caselaw[43] limits the costs for which a Rule 7 bond can be required to

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[41] Minutes of the Appellate Rules Committee meeting(s) at which the 1979 amendment of Rule 7 would have been discussed are not currently available on the uscourts.gov website.

Admittedly, the deletion of the presumptive $ 250 bond amount stemmed from the rulemakers' view that this amount "bears no relationship to actual costs." 1979 Committee Note to Appellate Rule 7. But there is a great deal of difference between deciding that $ 250 did not reflect actual costs on appeal and deciding that costs on appeal should include hundreds of thousands of dollars' worth of delay costs.

[42] On the topic of the proposed amendment to Rule 7, the minutes of the 1978 Standing Committee meeting state merely: "This rule was not submitted to the bench and bar, however, the members agreed the change is not significant. The amendment was approved as printed in the deskbook." Committee on Rules of Practice and Procedure, Minutes of the Meeting of July 17-18, 1978, at 3.

[43] Admittedly, in one of those circuits, the applicable caselaw is an unpublished nonprecedential opinion, *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777 (3d Cir. June 10, 1997).

those that are awardable under Rule 39.[44] But five other circuits – the First,[45] Second,[46] Sixth, Ninth,[47] and Eleventh[48] Circuits – have concluded that attorney fees can be

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[44] In *In re American President Lines, Inc.*, 779 F.2d 714, 719 (D.C. Cir. 1985) (per curiam), the D.C. Circuit ordered a $10,000 appeal bond requirement to be reduced to $450. The court rejected the district court's justifications for the larger bond amount, including the district court's prediction that the appeal likely would be found frivolous (occasioning an award of damages and costs under Rule 38). Rule 7 "costs," the court explained, "are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal." *Id*. at 716. (However, a later D.C. Circuit opinion held that for purposes of Rule 39(d)'s 14-day time limit on filing the bill of costs, "costs" does include attorney fees. *See* Montgomery & Assocs., Inc. v. Commodity Futures Trading Comm'n, 816 F.2d 783, 785 (D.C. Cir. 1987) (concluding that a "motion for attorneys' fees was subject to Rule 39(d)'s 14-day time limit").) Though *American President Lines* was decided some six months after *Marek*, the D.C. Circuit did not discuss *Marek*'s possible relevance to the Rule 7 question.

By contrast, when the Third Circuit followed the *American President Lines* approach in *Hirschensohn*, the court took pains to distinguish *Marek*'s treatment of Civil Rule 68 costs from the question of Appellate Rule 7 costs. The *Hirschensohn* court followed the D.C. Circuit's lead, stating that Rule 7 costs "are those that may be taxed against an unsuccessful litigant under Federal Rule of Appellate Procedure 39." *Hirschensohn*, 1997 WL 307777, at *1. The court reasoned that because "[a]ttorneys' fees are not among the expenses that are described as costs for purposes of Rule 39," such fees are likewise not within the scope of Rule 7 costs. *Id*. (The *Hirschensohn* court relied on its prior holding in *McDonald v. McCarthy*, 966 F.2d 112, 118 (3d Cir. 1992), that Rule 39 "costs" do not include attorney fees.) The court relied on Rule 39's references to particular types of costs as a means of distinguishing *Marek*: "[U]nlike Rule 68, which does not define costs, Rule 39 does so in some detail. Therefore, *Marek* does not require a different result ...." *Hirschensohn*, 1997 WL 307777, at *2. (The Rule 7 holding in *Hirschensohn* was an alternative holding; an "additional ground" for the result in that case was the court's holding that "the statutory source cited by defendants for an allowance of counsel fees" – namely, a provision of the Virgin Islands Code – "does not apply to appeals in this Court so as to make attorneys' fees recoverable as Rule 39 costs." *Hirschensohn*, 1997 WL 307777, at *3.)

[45] The First Circuit has adopted the majority view, although – somewhat oddly – it chose to do so in a nonprecedential opinion. *Int'l Floor Crafts, Inc. v. Dziemit*, 420 F. App'x 6, 17, 2011 WL 1499857, at *10 (1st Cir. April 21, 2011) ("[W]e endorse the majority view that a Rule 7 bond may include appellate attorneys' fees if the applicable statute underlying the litigation contains a fee-shifting provision that accounts for such fees in its definition of recoverable costs and the appellee is eligible to recover them.").

[46] The Second Circuit, affirming an order requiring (under Rule 7) a $35,000 bond in a copyright case, reasoned as follows:

> The Copyright Act, first adopted in 1909, contained section 40, the predecessor to section 505, which similarly provided for attorney's fees as part of the costs .... Thus, the drafters of Rule 7 ... – like the drafters of Rule 68, discussed in *Marek* – were equally aware of the Copyright Act's provision for the statutory award of attorney's fees "as part of the costs" when drafting Rule 7 and not defining costs therein. See 17 U.S.C. § 505. *Marek* provides very persuasive authority for the proposition that the statutorily authorized costs may be included in the appeal bond authorized by Rule 7.

Adsani v. Miller, 139 F.3d 67, 73 (2d Cir. 1998). The *Adsani* court noted that neither *American President Lines* nor *Hirschensohn* involved a type of case in which a federal statute would authorize an award of attorney fees, see *Adsani*, 139 F.3d at 73-74, but the *Adsani* court's more central point was that it disagreed with those decisions' view of the interaction between Rules 39 and 7:

> Rule 39 does not define costs for all of the Federal Rules of Appellate Procedure. Rule 39 is divided into five sections. These provide: (a) against whom costs will be taxed, (b) the taxability of the United States; (c) the maximum rate for costs of briefs, appendices and copies of records, (d) the procedure by which a party desiring "such costs" may claim them, and (e) that costs incurred in the preparation and transmission of the record on appeal will be taxed in the district court. See Fed.R.App.P. 39(a)-(e). None of these provisions purports to define costs: each concerns procedures for taxing them. Specific

> costs are mentioned only in the context of how that cost should be taxed, procedurally speaking.

Adsani, 139 F.3d at 74. Thus, the *Adsani* court concluded that "Rule 7 does not have a pre-existing definition of costs any more than Fed.R.Civ.P. 68, the rule interpreted in *Marek*, had its own definition." *Id*.

[47] The Ninth Circuit has held that "a district court may require an appellant to secure appellate attorney's fees in a Rule 7 bond, but only if an applicable fee-shifting statute includes them in its definition of recoverable costs, and only if the appellee is eligible to recover such fees." Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950, 953 (9th Cir. 2007). The *Azizian* court cited four reasons for its holding:

> First, Rule 7 does not define "costs on appeal." At the time of its adoption in 1968, however, a number of federal statutes-including the Clayton Act-had departed from the American rule by defining "costs" to include attorney's fees. *Marek*, 473 U.S. at 8-9....
>
> Second, Rule 39 does not contain any "expression[] to the contrary." *See id*. at 9. There is no indication that the rule's drafters intended Rule 39 to define costs for purposes of Rule 7 or for any other appellate rule. The 1967 Rules Advisory Committee note to Rule 39(e) states that "[t]he costs described in this subdivision are costs of the appeal and, as such, are within the undertaking of the appeal bond." Fed. R.App. P. 39(e) advisory committee's note (1967 adoption). We read this language to mean that the costs identified in Rule 39(e) are among, but not necessarily the only, costs available on appeal. Further, Rule 38 provides that the court of appeals may award "damages and ... costs," which include, according to that rule's advisory committee note, "damages, attorney's fees and other expenses incurred by an appellee." Fed. R.App. P. 38; id. advisory committee's note (1967 adoption). The discrepancy between the use of the term "costs" in Rule 39 and its use in Rule 38 strongly suggests that the rules' drafters did not intend for Rule 39 to create a uniform definition of "costs," exclusive of attorney's fees....
>
> Third, while some commentators have criticized *Adsani* and *Pedraza* for "attach[ing] significant consequences to minor and quite possibly unintentional differences in the wording of fee-shifting statutes," 16A Wright, Miller & Cooper ... § 3953, *Marek* counsels that we must take fee-shifting statutes at their word. 473 U.S. at 9....
>
> Fourth, allowing district courts to include appellate attorney's fees in estimating and ordering security for statutorily authorized costs under Rule 7 comports with their role in taxing the full range of costs of appeal. In practice, district courts are usually responsible at the conclusion of an appeal for taxing all appellate costs, including attorney's fees, available to the prevailing party under a relevant fee-shifting statute.

Azizian, 499 F.3d at 958-59.

The *Azizian* court also addressed a related question, holding that "a district court may not include in a Rule 7 bond appellate attorney's fees that might be awarded by the court of appeals if that court holds that the appeal is frivolous under Federal Rule of Appellate Procedure 38." *Azizian*, 499 F.3d at 954. In reaching this conclusion, the *Azizian* court disagreed with the First Circuit, which in a brief per curiam opinion had upheld the imposition of a $5,000 Rule 7 bond (in a case where the motion for the bond relied on Rules 38 and 39) based on the district court's implicit finding "that the appeal might be frivolous and that an award of sanctions against plaintiff on appeal was a real possibility." *Sckolnick v. Harlow*, 820 F.2d 13, 15 (1st Cir. 1987) (per curiam). As the *Azizian* court explained:

> Award of appellate attorney's fees for frivolousness under Rule 38 is highly exceptional, making it difficult to gauge prospectively, and without the benefit of a fully developed appellate record, whether such an award is likely.... Moreover, a Rule 7 bond including the potentially large and indeterminate amounts awardable under Rule 38 is more likely to chill an appeal than a bond covering the other smaller, and more predictable, costs on appeal. Finally, in contrast to ordinary fee-shifting and cost provisions, Rule 38 authorizes an award of appellate attorney's fees not simply as incident to a party's successful appellate defense or challenge of a judgment below, but rather as a sanction for improper conduct on appeal....

included in a Rule 7 cost bond if an underlying statute provides in appropriate language for an award of such fees. The Sixth Circuit decision, *In re Cardizem CD Antitrust Litigation*, is particularly notable because it involved the imposition of a cost bond in connection with a class-action-objector appeal.[49]

Azizian, 499 F.3d at 960. Thus, the *Azizian* court agreed with *American President Lines*' reasoning that "the question of whether, or how, to deter frivolous appeals is best left to the courts of appeals, which may dispose of the appeal at the outset through a screening process, grant an appellee's motion to dismiss, or impose sanctions including attorney's fees under Rule 38." *Azizian*, 499 F.3d at 961 (citing *American President Lines*, 779 F.2d at 717).

[48] In *Pedraza v. United Guaranty Corp.*, 313 F.3d 1323 (11th Cir. 2002), the Eleventh Circuit ruled:

> Federal Rule of Appellate Procedure 7 does not differ from Federal Rule of Civil Procedure 68 in any way that would lead us to adopt a different interpretive approach in this case than was embraced by the Supreme Court in *Marek*. Quite the contrary, close scrutiny reveals that there are several substantive and linguistic parallels between Rule 68 and Rule 7. Both concern the payment by a party of its opponent's "costs," yet neither provision defines the term "costs."... Moreover, just as the drafters of Rule 68 were aware in 1937 of the varying definitions of costs that were contained in various federal statutes, the same certainly can be said for the authors of Rule 7, which bears an effective date of July 1, 1968. As such, the reasoning that guided the *Marek* Court's determination that Rule 68 "costs" are to be defined with reference to the underlying cause of action is equally applicable in the context of Rule 7.

Pedraza, 313 F.3d at 1332. The *Pedraza* court held, however, that the attorney fees authorized under the Real Estate Settlement Procedures Act did not qualify for inclusion in a Rule 7 bond, because RESPA's language – "costs of the action *together with* reasonable attorneys fees" – treated attorney fees as a separate item rather than a subset of costs. *Pedraza*, 313 F.3d at 1334 (quoting 12 U.S.C. § 2607(d)(5); emphasis in case); *see also id*. ("Each and every statute cited in *Marek* as including attorneys' fees within the definition of allowable costs features either the words 'as part of the costs' or similar indicia that attorneys' fees are encompassed within costs."). More recently, the Eleventh Circuit refined its Rule 7 doctrine in the context of civil rights cases, holding that "a district court [may] require ... that a losing plaintiff in a civil rights case post a Fed. R.App. P. 7 bond that includes the defendant's anticipated appellate attorney's fees" only if the district court makes "a finding ... that the would-be appeal is frivolous, unreasonable, or groundless." Young v. New Process Steel, LP, 419 F.3d 1201, 1202 (11th Cir. 2005).

[49] *See* In re Cardizem CD Antitrust Litigation, 391 F.3d 812, 815, 818 (6th Cir. 2004) (with respect to class action settlement objector's appeal, upholding imposition of $174,429 appeal bond that included "prospective administrative costs and attorneys' fees"). Though the *Cardizem* court generally adopted the same reasoning as the *Adsani* and *Pedraza* courts (*see supra* notes 46 and 48), it did diverge from *Pedraza* in one respect: The *Cardizem* court rejected the contention that the statutory authority for the attorney fee must define the fee as part of the costs. Although the state statute at issue in *Cardizem* (a diversity case) authorized an award of "any damages incurred, including reasonable attorney's fees and costs," the court rejected the appellant's contention that the linguistic distinction between fees and costs barred inclusion of the fees in the Rule 7 bond: "*Marek* does not require that the underlying statute provide a definition for 'costs.' Rather, *Marek* requires a court to determine which sums are 'properly awardable' under the underlying statute, and to include those sums as 'costs' under the procedural rule. *Marek*, 473 U.S. at 9." *Cardizem*, 391 F.3d at 817 n.4.

The Sixth Circuit, like a number of other circuits, has held that attorney fees do not count as "costs" for purposes of Rule 39: "As appellate Rule 39 specifically delineates the 'costs' to which it applies, i.e. the 'traditional' costs of printing briefs, appendices, records, etc., the pronouncements of Marek render it inappropriate for this court to judicially-amend Rule 39's cost provisions to include § 1988 attorney's fees." Kelley v. Metro. Cnty. Bd. of Educ., 773 F.2d 677, 682 n.5 (6th Cir. 1985) (holding that a failure to award costs on appeal to a plaintiff does not preclude an award of attorney fees under 42 U.S.C. § 1988). The *Cardizem* court did not explicitly address the possible tension between the view that Rule 39 costs do not include attorney fees and the view that Rule 7 costs can include attorney fees. *Cardizem* cited much of *Pedraza*'s reasoning with approval, so perhaps the *Cardizem* court implicitly adopted the Eleventh

There is less appellate caselaw on the question of whether class-settlement-implementation-delay costs are includable in a Rule 7 cost bond. The Sixth Circuit in *Cardizem* concluded that settlement-administration costs were includable in the Rule 7 cost bond because an applicable state statute in that diversity case provided for the shifting of "any damages incurred, including reasonable attorney's fees and costs."[50] In *Vaughn v. American Honda Motor Co., Inc.*, the Fifth Circuit avoided deciding whether settlement-delay costs can ever be included in a Rule 7 bond amount, and rested its decision instead on its conclusion that in the particular case at hand, the settlement agreement contemplated that the plaintiff class members would not be compensated for delay in receiving the settlement funds.[51]

Stepping back from the details of existing caselaw, one can see that there is likely to be variation from circuit to circuit as to when, if ever, a class-action objector can be required to post a Rule 7 cost bond that includes attorney fees and/or settlement-implementation-delay costs. Even in a circuit where courts typically are willing to include anticipated appellate attorney fees in the bond amount when warranted by an underlying fee-shifting statute, there will be a question whether an *objector* (as distinct from a plaintiff or defendant) is among the types of parties who can be required to pay attorney fees under the relevant statute. Some courts might try to include attorney fees in the bond on the theory that such fees might be ultimately be awarded against the objector under Appellate Rule 38 – but the circuits have split on the includability of Rule 38 damages in an Appellate Rule 7 bond, and there are good reasons to doubt that such damages should be includable in the bond.[52] Moreover, it is unclear how an authorization

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Circuit's view that the definition of "costs" for purposes of Rule 7 can differ from the definition of "costs" for purposes of Rule 39.

[50] *Cardizem*, 391 F.3d at 817 (quoting Tenn. Code Ann. § 47-18-109; emphasis omitted); *id.* at 818 (supporting decision to dismiss appeal for failure to post bond partly on the basis that "the pursuit of [appellant's] objections has the practical effect of prejudicing the other injured parties by increasing transaction costs and delaying disbursement of settlement funds").

For a listing of district-court decisions that have included, in Rule 7 bonds, the "costs incurred by delays caused by objectors' appeals in a class action settlement.," see In re *Uponor, Inc., F1807 Plumbing Fittings Prods. Liability Litig.*, No. 11-MD-2247 ADM/JJK, 2012 WL 3984542, at *4 (D. Minn. Sept. 11, 2012). *See also id*. at *5-*6 (including in the amount of the bond $ 125,000 "to cover the costs of any additional class notice that may be required due to the delay caused by the appeal").

[51] The court explained:

> "[T]he costs of delay are adequately captured by the settlement. The settlement agreement makes no provision for the payment of pre-judgment interest on the benefits Honda has agreed to pay, and the settlement does not become effective, by its terms, until any appeals are concluded. The parties to the settlement thus agreed that the financial time-value of the benefits to be paid under the settlement is not to be awarded to the plaintiffs. To the extent that the district court found that interest should be secured as part of 'costs,' it was in error, assuming, without deciding, that interest accrued pending appeal can appropriately be included as part of a bond for costs on appeal.

Vaughn v. Am. Honda Motor Co., Inc., 507 F.3d 295, 299 (5th Cir. 2007) (per curiam); *see also id*. at 297 (reducing size of bond from $ 150,000 – the amount set by the district court – to $ 1,000).

[52] *See supra* note 47 (discussing the Ninth Circuit's decision in *Azizian* and the First Circuit's decision in *Sckolnick*). *See also* In re *Am. President Lines*, 779 F.2d at 717 ("It is … for the court of appeals, not the district court, to decide whether Rule 38 costs and damages should be allowed in any given case…. The

to award attorney fees would encompass authorization to award damages attributable to delay in implementing a settlement.[53] Professor Lopatka and Judge Smith provide a useful summary of these doctrinal intricacies;[54] their assessment is that "courts have disagreed on the legal constraints that affect the availability and magnitude of appeal bonds, and most courts have concluded that the amount of the bond is seriously constrained, undermining its capacity to curb extortionate behavior."[55]

2. The proposal advanced by Judge Smith and Professor Lopatka

To remedy this perceived shortcoming, Judge Smith and Professor Lopatka propose that the rulemakers 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.

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."

- 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

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District Court's bond order effectively preempts this court's prerogative to determine, should Safir's appeal be found to be frivolous, whether APL is entitled to a Rule 38 recovery.").

[53] *See, e.g.*, In re Navistar Diesel Engine Prods. Liability Litig., No. 11-C-2496, 2013 WL 4052673, at *2 (N.D. Ill. Aug. 12, 2013) (questioning "how a rule that expressly allows requiring a bond only to secure payment of recoverable costs (which, under some statutes, includes recoverable attorney's fees) can be read to authorize posting a bond to secure payment of expenses that are not recoverable costs").

[54] *See* Lopatka & Smith, *supra* note 3, at 909-18.

[55] *Id.* at 909.

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."[56]

The minutes of the Committee's spring meeting contain a detailed discussion of the merits and disadvantages of this proposal. It seems fair to say that a number of participants in the discussion thought that the requirement of a very large appeal bond might be a blunt tool and might chill some meritorious appeals. On the other hand, one could argue that the bond proposal is no more likely to chill meritorious appeals than is the certificate-of-appealability proposal discussed in Part III.B below. A prohibitively large bond would be no more restrictive than the denial of a required certificate of appealability. Indeed, in some instances even a large cost bond would be less restrictive, because in theory the objector could post the bond and, thus, proceed with the appeal. And just as an objector whose request for a certificate of appealability is denied by the district court could obtain (in effect) appellate review of that denial by requesting a certificate of appealability from the court of appeals, an objector could appeal the district court's order imposing a cost bond.

3. Attempts to draft around the limits of Rule 7

It appears that some class action lawyers are now attempting to draft around the possible limits on Rule 7 cost bonds by including in the class-settlement agreement a provision that purports to obligate any member of the class who wishes to appeal to post a bond covering delay costs. In *Hershey v. ExxonMobil Oil Corp.*, No. 07-1300-JTM, 2013 WL 66075 (D. Kan. Jan. 4, 2013), the district court relied on such a provision[57] in requiring objectors to file a more than $ 9 million appeal bond:

> Objectors … oppose the motion, contending that such a bond requirement is precluded by Fed.R.App.Pr. 7 and 39. However, the court finds that the

[56] Lopatka & Smith, *supra* note 3, at 928.

[57] The provision read: "Any Class Member wishing to remain a Class Member, but objecting to any part of the Settlement can do so only as set forth in the Class Notice …. Because any appeal by an objecting Class Member would delay the payment under the Settlement, each Class Member that appeals agrees to put up a cash bond to be set by the district court sufficient to reimburse Class Counsel's appellate fees, Class Counsel's expenses, and the lost interest to the Class caused by the delay." *Hershey*, 2013 WL 66075, at *1 (quoting Settlement Agreement).

> authorities relied upon by the objectors do not involve class actions in which the parties have, as here, allocated the risks and burden of an appeal by explicit agreement. Further, the objectors have failed to present any authority demonstrating that, pursuant to such an explicit fee-shifting agreement, the court may not enforce that agreement to the extent the appeal causes additional expenses and delays to the settlement class.

Id. at *2. The objectors appealed both the judgment approving the settlement and also the order requiring the appeal bond; those appeals were pending in the Tenth Circuit as of August 25, 2013.[58]

It seems hard to justify reliance on a provision in the class settlement agreement in order to authorize the imposition of a multimillion dollar appeal bond requirement when an objector seeks to appeal the judgment approving the settlement. Such an argument seems circular: how can a court rely on the challenged class settlement to justify a bond requirement that poses a barrier to appellate review of that very settlement?

B. Requiring a 'certificate of appealability'

During the spring 2013 meeting, a member suggested that another possible approach for addressing objector appeals would be to adopt a certificate-of-appealability ("COA") requirement like that which applies to appeals by habeas petitioners. Under 28 U.S.C. § 2253(c)(1), a habeas or Section 2255 petitioner must obtain a COA in order to appeal. Section 2253(c)(2) provides that the COA "may issue ... only if the applicant has made a substantial showing of the denial of a constitutional right." Section 2253(c)(3) provides that the COA "shall indicate which specific issue or issues satisfy the showing required by paragraph (2)."

Imposing a COA requirement could screen out truly meritless appeals. The standard for an objector-appeal COA might, for example, require that the objector who wishes to appeal make a substantial showing of the merit of the appeal. To flesh out that standard, one might require the objector to make a showing that reasonable jurists would find the district court's assessment of the class action settlement debatable or wrong.[59]

The objector would seek the COA, in the first instance, from the district judge. That could leverage the district judge's detailed knowledge of the settlement by producing a succinct opinion from the district court explaining why the court's approval of the challenged aspects of the settlement either is or is not debatable. Admittedly, a skeptic might ask whether a district judge would be willing to pronounce her own ruling debatable; but there is no doubt that some district judges would do so candidly and

[58] *See* Hershey, et al v. ExxonMobil Oil Corporation, No. 12-3309 (appeal from final judgment), and Hershey, et al v. ExxonMobil Oil Corporation, No. 13-3029 (appeal from bond order).

[59] *Cf.* Slack v. McDaniel, 529 U.S. 473, 484 (2000) ("Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.").

insightfully. (To assess the willingness of district judges to perform analogous self-assessment tasks, one could look at the rate at which district judges grant COAs to habeas petitioners.[60])

The timing of the district court's COA ruling, in this context, would present an interesting question. In habeas cases, the district judge must rule on the COA question at the time it denies the petition[61] rather than waiting to see whether the petitioner files a notice of appeal – a requirement that is designed both to "ensure prompt decision making when the issues are fresh" and to "help inform the applicant's decision whether to file a notice of appeal."[62] If a COA mechanism were to be adopted for class-action-objector appeals, it is possible that the calculus might come out differently due to a number of factors (such as the frequency of appeals, the incentives for possible appellants, and the amount of effort that would be required to draft the COA ruling).

Presumably, as with COAs in the habeas context, so too here it would be advisable to give the would-be appellant an alternative means for obtaining the COA if the district court denies it. If one were following the habeas model, one would enable the appellant to seek the COA from a circuit judge in the relevant court of appeals, and (if that request is denied) to seek rehearing in the court of appeals.

If the Committee were to conclude that it would be useful to require a certificate of appealability before an objector could appeal from a judgment approving a class action settlement, the next question would be whether such a requirement could be implemented by rule. As the Supreme Court observed in *Devlin*, "the right to appeal from an action that finally disposes of one's rights has a statutory basis." *Devlin*, 536 U.S. at 14 (citing 28 U.S.C. § 1291). Although Congress has authorized the rulemakers to adopt rules that "define when a ruling of a district court is final for the purposes of appeal under section 1291," 28 U.S.C. § 2072(c), as well as rules that "provide for an appeal of an interlocutory decision to the courts of appeals," 28 U.S.C. § 1292(e), Congress has not authorized the rulemakers to cut off or narrow the right to appeal "all final decisions of the district courts of the United States," 28 U.S.C. § 1291.

The presence in the national Rules of provisions that treat the COA requirement for habeas and Section 2255 matters does not demonstrate rulemaking authority to impose a COA requirement without a statutory mandate. The requirement that a state habeas petitioner obtain a certificate of probable cause in order to take an appeal from the denial of the habeas petition was originally adopted by statute in 1908.[63] Thus, when the

[60] One might also look at the rate at which district judges include, in their interlocutory orders in cases more generally, a statement that "such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation," 28 U.S.C. § 1292(b).
[61] *See* Rule 11 of the Rules governing Section 2254 and Section 2255 proceedings.
[62] *See* 2009 Committee Note to Rule 11 of the Rules governing Section 2254 and Section 2255 proceedings.
[63] *See* Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 Ohio St. L.J. 307, 314 (1983) ("Congress sought this new procedural obstacle to the right of an appeal from a denial of habeas to stem a

rulemakers adopted original Appellate Rule 22, its certificate-of-probable-cause provision was designed to dovetail with a long-preexisting statutory requirement.[64] In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which substituted the current COA requirement for the prior "certificate of probable cause" requirement and which extended the COA requirement to appeals by Section 2255 petitioners.[65] Only after that did the rulemakers amend Rule 22(b) to encompass Section 2255 petitioners.[66]

In sum, though a COA approach is worth exploring, it seems that the adoption of such a mechanism would require legislation.

IV. The Dismissal-Hurdle Approach

Rather than making it harder for an objector to appeal a judgment approving a class settlement, some approaches would instead make it harder for an objector to dismiss such an appeal once brought. One might at first think that limiting the dismissal of such appeals could address both of the problems identified near the outset of this memo (extortionate, non-meritorious appeals, and the dropping of valid appeals). But on closer inspection, a number of problems come to light.

A. Banning dismissals for value (the "inalienability" approach)

Professors Fitzpatrick, Wolfman, and Morrison have proposed 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.[67] This proposal would impose, at the appellate stage,

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perceived tide of state prisoners, already sentenced to death, who were evading execution with frivolous appeals.").

[64] The original Committee Note to Appellate Rule 22(b) stated in part:

> Title 28 U.S.C. § 2253 provides that an appeal may not be taken in a habeas corpus proceeding where confinement is under a judgment of a state court unless the judge who rendered the order in the habeas corpus proceeding, or a circuit justice or judge, issues a certificate of probable cause. In the interest of insuring that the matter of the certificate will not be overlooked and that, if the certificate is denied, the reasons for denial in the first instance will be available on any subsequent application, the proposed rule requires the district judge to issue the certificate or to state reasons for its denial.

[65] *See* 28 U.S.C. § 2253(c).

[66] The 1998 Committee Note to Rule 22(b) stated in part: "[P]aragraph [22(b)(1)] is made applicable to 28 U.S.C. § 2255 proceedings. This brings the rule into conformity with 28 U.S.C. § 2253 as amended by the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132." Likewise, Rule 11 of the Rules Governing Section 2255 Proceedings was amended in 2009 to mirror the statutory COA requirement.

[67] I enclose a copy of their August 2012 letter to Judge Sutton, as well as a representative letter of support from Vincent J. Esades, Esq., an attorney who commented on their proposal. A 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.

controls that are somewhat similar, but not identical, to those imposed by Civil Rule 23(e)(5) in the court below.[68]

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. However, participants in the Committee's discussions have noted some difficulties with the proposal.

First, the inflexible nature of the inalienability rule has costs as well as benefits. The benefits include ease of administration and predictability. A complete ban on the withdrawal of appeals in exchange for money would send a clear message to self-interested objectors and could be readily applied by the Circuit Clerk's office. But such a ban might sweep too broadly. For example, it would encompass appeals by objectors whose objection is specific to them (rather than generalizable to the class or a subclass) and who therefore might legitimately settle the objection in exchange for a side payment. This feature of the inalienability proposal has led the Committee to consider the possible alternative of requiring court permission but leaving the grant of permission within the court's discretion; I discuss that possibility in Part IV.B below.

Second, it would be unusual for a court of appeals to deny permission to withdraw an appeal. By denying permission, the court would be in the unusual position of forcing a now-unwilling appellant to maintain an appeal.[69] I have not found many cases in which a court did so.[70] Where an appellant has burdened an appellee, the court might deny the appellant's request for *voluntary* dismissal and instead dismiss the appeal by order with an award of costs.[71] Occasionally, the court of appeals has denied permission to dismiss a proceeding on the ground that one of the parties was attempting to manipulate the

[68] 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. Even more significantly, 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.

[69] As a point of comparison, Supreme Court Rule 46.1 provides: "At any stage of the proceedings, whenever all parties file with the Clerk an agreement in writing that a case be dismissed, specifying the terms for payment of costs, and pay to the Clerk any fees then due, the Clerk, without further reference to the Court, will enter an order of dismissal."

[70] For purposes of the present inquiry, I leave aside cases that involve a request to withdraw or vacate a previously issued decision. The issues posed by such requests for vacatur are distinct from the questions that would be raised in the context of class-action-objector appeals withdrawn before an appellate decision. *See generally* U.S. Bancorp Mort. Co. v. Bonner Mall P'ship, 513 U.S. 18 (1994).

[71] *See* Blount v. State Bank & Trust Co., 425 F.2d 266, 266 (4th Cir. 1970) (per curiam) ("[V]oluntary dismissal is not appropriate when the appellee has been put to trouble and expense because the appellant has not complied with the rules of court. Accordingly, the appellee's motion to dismiss is granted. Costs on appeal are taxed against … one of appellant's counsel, without contribution from the appellant or his other counsel.").

formation of precedent.[72] In some instances the court of appeals might take into account the fact that it has already invested effort in drafting an opinion prior to the parties' attempt to dismiss the appeal.[73] In one case the court denied the defendant-appellant's pro se motion to dismiss because the district court had found him "not competent to make that decision."[74] Among the cases where the court of appeals denied permission to dismiss an appeal, most were cases in which the motion to dismiss was opposed;[75] however, I did find one case in which a court of appeals denied an unopposed motion to

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[72] In *Khouzam v. Ashcroft*, 361 F.3d 161 (2d Cir. 2004), the government and the petitioner reached an agreement under which the petitioner would withdraw his petition for review of an order by the Board of Immigration Appeals if the court of appeals would vacate that order. The court of appeals refused to cooperate:

> [W]e are troubled by the government's tactics here. Khouzam's [Convention Against Torture] petition has been fully litigated by both sides. At oral argument, we expressed doubts as to the soundness of the Attorney General's definition of torture …. [T]his is clearly an issue of public importance. For the government to agree to a vacatur two weeks after oral argument suggests that it is trying to avoid having this Court rule on that issue. We therefore decline to grant the order that the parties have agreed to. Instead, we will review Khouzam's CAT petition and grant or deny it according to its merits.

Id. at 168.

In *Albers v. Eli Lilly & Co*., 354 F.3d 644 (7th Cir. 2004), the court of appeals refused to dismiss the appeal where (1) appellant's counsel "essentially conced[ed]" that he was "attempting to manipulate the formation of precedent by dismissing those proceedings that may lead to an adverse decision while pursuing others to conclusion," (2) "a draft of [the court's] opinion had been written" before appellant moved to dismiss, and (3) the appellee did not agree to the dismissal of the appeal. *Id*. at 646.

In *United States v. Hagerman*, 549 F.3d 536 (7th Cir. 2008), after its appeal was fully briefed, a limited liability company fired its lawyer, who was permitted to withdraw. The court of appeals ruled: "In this case, with the appeal fully briefed and the merits free from doubt, we would be mistaken to grant the (imputed) motion. For that would allow Wabash to argue in future regulatory proceedings that the merits of its defense had never been fully adjudicated. We have thought it best, therefore, to affirm the judgment of the district court in order to lay to rest any doubt about the company's guilt." *Id*. at 538.

[73] Thus, in *Telenor Mobile Communications AS v. Storm LLC*, 584 F.3d 396 (2d Cir. 2009), the court of appeals denied the parties' request – made three days before its opinion issued – "to 'withdraw [this appeal] from active consideration.'" *Id*. at 400 n.1 (citing *Khouzam*). *See also Albers*, *supra* note 72; Ford v. Strickland, 696 F.2d 804, 807 (11th Cir. 1983) (per curiam) (denying dismissal where request came only after panel decision, en banc briefing, lengthy oral argument, and "months of deliberation" by the en banc court).

A somewhat related rationale arose in a case where only one of two appellants sought to dismiss its appeal, and the two appellants were making the same arguments on appeal. Reasoning that it would be deciding the same issues either way, the court of appeals denied the request to dismiss. Benton Twp. v. Berrien Cnty., 570 F.2d 114, 119 (6th Cir. 1978).

[74] United States v. DeShazer, 554 F.3d 1281, 1285 n.1 (10th Cir. 2009).

[75] *See, e.g.*, *Albers*, *supra* note 72, at 646 ("When the parties do not agree on terms, dismissal is discretionary with the court. Doubtless there is a presumption in favor of dismissal, but the procedure is not automatic.").

In one case, the Seventh Circuit suggested that an appellee's opposition would foreclose a Rule 42(b) dismissal: "[D]ismissal is available under [Rule 42(b)] only on the parties' joint motion or, if the motion is solely the appellant's, on terms agreed by the parties." Hope Clinic v. Ryan, 249 F.3d 603, 605 (7th Cir. 2001). This view seems to me to be at odds with the text of the Rule, which states in part that "[a]n appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court." And, in fact, the *Hope Clinic* court phrased its denial of permission to dismiss the appeal in terms that made the decision sound more discretionary than the statement quoted above would suggest: "Given the lack of agreement among the parties, it is best to resolve the appeal on the merits and let the district court apply [42 U.S.C.] § 1988 on plaintiffs' request for costs and fees." *Hope Clinic*, 249 F.3d at 605.

dismiss.[76] Some of the decisions remark upon the awkwardness of denying an appellant permission to drop an appeal and raise concerns about the lack of adversary presentation by an unwilling appellant.[77] That concern shades into the third problem: the question of mootness.

At the Committee's spring meeting, a participant asked whether an objector might find a way around the proposed ban on appeal dismissals by arguing that, when and if class counsel pay the objector a satisfactory settlement, the objector's appeal becomes moot. There are precedents holding that when a district court certifies a class action (or erroneously denies such certification), the class gains its own legal status such that subsequent events mooting the individual plaintiff's claim do not thereby moot the class action.[78] However, the Court recently refused to apply those precedents in the context of a collective action brought by an employee under the Fair Labor Standards Act on behalf of similarly situated employees.[79]

None of the existing Supreme Court precedents directly addresses whether an *objector*'s appeal becomes moot once the objector voluntarily settles and seeks to withdraw the appeal. Even if it is possible to argue that there remains a case and controversy concerning the validity of the objection to the settlement,[80] it would seem that an objector who accepted (via settlement of the objection) payment in full of her substantive claim (and of any accompanying claim to attorney fees)[81] might lack the

[76] *See* Washington Legal Found. v. Texas Equal Access to Justice Found., 270 F.3d 180, 184 n.3 (5th Cir. 2001) (noting without further explanation that the court of appeals had denied an appellant's "unopposed … motion (post-oral argument) to dismiss his appeal"), *cert. granted and judgment vacated on other grounds sub nom.* Phillips v. Washington Legal Found., 538 U.S. 942 (2003).

[77] In *United States v. Washington Dep't of Fisheries*, 573 F.2d 1117 (9th Cir. 1978), two Native American tribes appealed an order ruling that the district court had jurisdiction to regulate tribes' on-reservation fishing. The court of appeals granted the tribes' motion to dismiss their appeal. Then-Judge Kennedy, writing for the court, noted that as of the date of the order, "no injunctions regulating on-reservation fishing were of current effect," and he observed: "We are reluctant to determine an issue presented in the abstract, and we should be especially cautious of doing so when it appears that one of the parties is not willing to fully contest the issue. Accordingly, we find no basis for exercising our discretionary authority to decline to grant the appellants' motion to dismiss." *Id*. at 1118.

In *In re Chicago, Milwaukee, St. Paul and Pacific R. Co.*, No. 80-1346, 1980 WL 324449 (7th Cir. Dec. 8, 1980), the appellants moved to dismiss their appeal on the day before argument. Over the objection of some of the appellees, the court of appeals granted the motion, reasoning that "[w]ith the appellant no longer desirous of pursuing this appeal, there is no longer the adversariness needed in order to find an ongoing controversy between the parties." *Id*. at *2.

[78] *See* Sosna v. Iowa, 419 U.S. 393 (1975), and U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980).

[79] *See* Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013).

[80] A certified class is a legal entity distinct from either the named class representative or any objector. It seems to me that the class members' interest in obtaining relief through a legally appropriate settlement would survive any particular objector's settlement of her individual claim.

[81] In *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), the named class representatives were permitted to appeal the denial of class certification despite the tender of payment in full on their individual claims; the representatives "asserted as their personal stake in the appeal their desire to shift to successful class litigants a portion of those fees and expenses that have been incurred in this litigation and for which they assert a continuing obligation." *Roper*, 445 U.S. at 334 n.6.

requisite personal stake in continuing to litigate the appeal.[82] It would be key, in this analysis, that the objector voluntarily settled and sought to dismiss the appeal. An instance where the named parties and their counsel sought to "pick off" an objector appeal by tendering a payment that the objector rejected should not, in my view, result in a finding that the appeal is moot.[83] But the instances on which the Committee is focusing are those in which the objector is a willing participant in the dismissal. In those instances, it seems difficult to argue that the appeal can continue, unless some other class member is willing to step into the objector's shoes and litigate the appeal. Because that is unlikely to occur in most instances, it seems that a Rule barring dismissal of an appeal would pose a serious problem of judicial administration, if not of Article III power.

B. Requiring discretionary court approval for dismissal of the appeal

As noted above, the possible disadvantages of a strict inalienability rule led some participants in the discussion to suggest an alternative approach: Appellate Rule 42 could be amended to require court approval for the dismissal of an appeal and could direct the court, in reviewing a request for approval, to consider whether the appellant received anything of value in exchange for seeking to dismiss the appeal. Admittedly, the court of appeals would not necessarily be well situated to scrutinize the events that led to a proposed withdrawal of an objector's appeal,[84] but it could remand to the district court for consideration of the motion.

This option is well worth considering. However, it seems to me that a discretionary-dismissal option faces the same basic problems as the inalienability rule discussed above. If the named parties and/or their counsel have paid the objector in full for the objector's claim and any possible attorney fees, and the objector has accepted the payment in exchange for a promise to withdraw the appeal, then the objector appears to lack the requisite personal stake in prosecuting the appeal. Unless another member of the class is willing to take over the prosecution of the appeal, sound judicial administration – if not Article III itself – would likely counsel against withholding permission to withdraw the appeal.[85]

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[82] In the analogous context of a named class representative's settlement of her individual claim, the question of whether that person was no longer suited to litigate on behalf of the class might be addressed, in the first instance, as a question of adequacy of representation under Civil Rule 23(a). However, no similar provision governs the role of objectors.

[83] *See supra* notes 30 - 31 and accompanying text.

[84] An example of the complexities that could ensue is provided by the majority and dissenting opinions in *Safeco Insurance Co. v. American Int'l Group, Inc*., 710 F.3d 754 (7th Cir. 2013) (a case previously brought to the Committee's attention by Marie Leary).

[85] The reader might, by this time, be wondering whether I think that a similar problem attends Civil Rule 23(e)(5)'s requirement of court permission for the withdrawal of objections in the district court. I do not think that the trial-level context presents the same set of issues. At the trial level, the district court will address the objections as part of its overall duty to assess the settlement's appropriateness under Civil Rule 23(e). The objections will simply form a component of that overall analysis, which will occur in any event. By contrast, when an objector appeals, the objector's appeal forms the only reason for continued judicial activity.

V. Conclusion

Objectors play an important role in class action litigation. Sometimes they provide needed information and raise valid arguments. At other times they press meritless objections in order to extract a payment. Adopting a rule amendment that curbs the latter sort of objection without chilling the former may prove challenging. However, in the light of the gravity of the charge that some objectors are exploiting federal class action litigation as an opportunity for extortionate behavior, the matter warrants serious consideration. I look forward to the Committee's further discussions of the topic.

Encls.

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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.

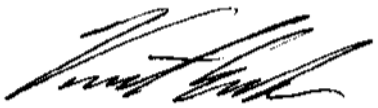
and that—consistent with the purposes underlying Rule 23—the terms of any agreement resolving the appeal will benefit the class as a whole.

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).

TAB 9

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TAB 9A

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MEMORANDUM

DATE: September 10, 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."[1] He emphasizes that he does not propose a Rule that would tell courts "*whether* to permit such filings,"[2] but rather a Rule that would "resolve questions of timing and length" in instances where such filings are permitted. Mr. Englert's letter persuasively articulates the case for such amendments; in the interests of brevity, this memo skips over the question of whether to adopt such amendments and instead focuses on how best to do so if the Committee is so inclined.

Part I draws upon existing local circuit provisions concerning amicus filings in connection with rehearing in order to consider the various approaches that a national rule might take. Part II sketches (for discussion purposes) a possible amendment to Appellate Rule 29.

I. Approaches that a national rule might take

Mr. Englert proposes that a national rule address length and timing of amicus filings in instances where they are permitted. Mr. Englert's letter focuses particularly on filings in support of a petition for rehearing, and that context seems likely to be the most common one in which questions about rehearing-related amicus filings might arise. Existing local circuit provisions illustrate that a rule might also address filings in opposition to a rehearing petition and filings after the grant of rehearing.[3] In this memo, I

[1] I enclose Mr. Englert's letter.

[2] As the Committee has previously noted, the circuits take widely divergent approaches to that question. The Fourth Circuit disfavors requests to file an amicus brief for the first time when a rehearing petition is pending, and the D.C. Circuit presumptively bars amicus filings while an en banc rehearing petition is pending. The Fifth and Ninth Circuits bar amicus filings that would cause a judge's disqualification. (So does the Second Circuit, but that provision is not specific to the rehearing context.) The Ninth and Eleventh Circuits have local provisions that permit amicus filings (in connection with rehearing) on terms roughly similar to Appellate Rule 29(a).

[3] For local rules that address filings after the grant of rehearing en banc, see Third Circuit Local Appellate Rule 29.1(a); Ninth Circuit Rule 29-2; Eleventh Circuit Rule 35-9.

will offer suggestions on how the proposed national rule might address filings in opposition to a rehearing petition, but I will not focus on filings after the grant of rehearing because that seems further afield from Mr. Englert's suggestion.

Using local provisions as examples, Part I.A surveys questions about length limits for amicus filings and Part I.B discusses questions about deadlines for such filings. Part I.C briefly notes other issues currently addressed by local rules.

A. Length limits

Appellate Rule 29(d) provides that amicus filings in connection with the merits briefing of an appeal are presumptively limited to half the length of "a party's principal brief." Appellate Rules 35(b) and 40(b) presumptively limit a party's rehearing petition to 15 pages; thus, if one were to apply the same half-length approach to amicus filings in support of a rehearing petition, such filings would be limited to 7 ½ pages.

The Tenth Circuit limits amicus filings "at the rehearing stage" to 3,000 words. The Federal Circuit limits such filings to 10 pages. The Ninth Circuit limits amicus filings "while a petition for rehearing is pending" to 15 pages (or 4,200 words or 390 lines); after the grant of en banc rehearing, it limits amicus filings to 25 pages (or 7,000 words or 650 lines). The Eleventh Circuit seems to presumptively give amicus filers the same limits as parties: It limits amicus filings in support of rehearing petitions to 15 pages, and subjects amicus filings after a grant of rehearing en banc to the form requirements (including length limits) applicable to the parties' briefs.

These provisions suggest a few questions for the Committee to consider when drafting a proposed national Rule:

- As to amicus filings in support of a rehearing petition, should the Committee follow Rule 29(d)'s half-length approach, or should it choose a length limit within the range specified by circuits that have local rules on point?
    - For discussion purposes, I will list the possibilities in terms of pages, on the theory that this would fit best with the existing length limit for a party's rehearing petition (which is expressed in pages).[4] As noted above, the half-length approach yields a length of 7 ½ pages, which would be very impractical to enforce; if the Committee wished to approximate that result, I would think that stating a limit of 8 pages would make more sense. It is notable that the four circuits that address the question have settled on a range of 10 to 15 pages;[5] thus, a limit longer than 8 pages might be appropriate.

[4] In connection with Item No. 12-AP-E, the Committee is considering whether to restate in type/volume terms the limits currently stated in pages. The choices the Committee makes in that project will presumably affect the way in which any new length limit for amicus filings is expressed.

[5] *See* Ninth Circuit Rule 29-2(c)(2) (15 pages, or 4,200 words, or 390 lines); Tenth Circuit Rule 29.1 (3,000 words); Eleventh Circuit Rules 35-6 and 40-6 (15 pages); Federal Circuit Rules 35(g) and 40(g) (10 pages).

- In the sketch shown in Part II, I include bracketed alternatives showing 8-, 10-, and 15-page limits.

· Should the proposed rule specify length limits for amicus filings in opposition to a rehearing petition?

- The Appellate Rules bar the winning party itself from filing a paper in opposition to the rehearing petition unless directed by the court.[6] It is hard to imagine that a court would permit amicus filings in opposition to a rehearing petition in cases where it does not direct the winning party to respond to the petition. So the universe of cases in which questions concerning length limits for such amicus filings would arise seems likely to be considerably smaller than the universe of cases in which questions would arise concerning length limits (or deadlines) for amicus filings in *support* of rehearing. One might argue that any details concerning amicus filings in opposition to a rehearing petition would appropriately be dealt with by order in the case. In such a view, there would not be a pressing need for a national rule concerning amicus *opposition* to rehearing.

- However, there are a few local circuit rules on point. The Ninth Circuit rule expressly contemplates amicus filings in opposition to a rehearing petition (and sets the same length limits for those filings as for filings in support of the petition);[7] so does the Federal Circuit.[8] The Tenth Circuit presumptively bars amicus filings in opposition to a rehearing petition; but if the court permits such a filing, the Tenth Circuit's length limit is drafted so that it would cover such a filing.[9] The relevant Eleventh Circuit rules do not appear to contemplate amicus filings in opposition to a rehearing petition.[10]

- The sketch in Part II sets a length limit that would apply to any amicus filing permitted while a rehearing petition is pending, including any filing that the court permitted an amicus to make in opposition to the petition. There does not appear to be any reason to set a different length limit for opposition amicus filings than for amicus filings in support.

B. Timing

Appellate Rule 29(e) currently provides a seven-day stagger for covered amicus filings – that is to say, an amicus files its brief and motion "no later than 7 days after the

[6] See Appellate Rule 35(e); Appellate Rule 40(a)(3).
[7] See Ninth Circuit Rule 29-2(c)(1) & (2).
[8] See Federal Circuit Rules 35(g) & 40(g).
[9] See Tenth Circuit Rule 29.1.
[10] See Eleventh Circuit Rule 35-6 (discussing amicus briefs "in support of a petition for rehearing en banc"); Eleventh Circuit Rule 40-6 (discussing amicus briefs "in support of a petition for panel rehearing").

principal brief of the party being supported is filed." The Appellate Rules set a presumptive deadline (in most cases) of 14 days (after entry of judgment) for a party to file a petition for hearing and/or rehearing en banc.[11] The Appellate Rules provide no deadline for a party's response to a rehearing petition – which is unsurprising given that, as noted above, they presumptively bar such a response.

The Tenth Circuit's rule addresses the timing of amicus briefs in connection with rehearing petitions, but does not address amicus filings *after* the grant of rehearing;[12] the same appears to be true of the Federal Circuit's rules.[13] The Eleventh Circuit rule addresses timing (1) for amicus filings in support of rehearing petitions[14] and (2) for amicus filings in support of either (or neither) party after en banc rehearing is ordered.[15] The Ninth Circuit rule addresses amicus filings in support of either (or neither) side both in connection with a rehearing petition[16] and after the grant of rehearing.[17] The Third Circuit's rule addresses briefing by both new and prior amici in the event that rehearing is ordered, and distinguishes between situations in which the court directs the parties to submit additional briefs and situations in which the court does not do so.[18]

When drafting a proposed national Rule on timing, the Committee may wish to consider the following questions:

- Should the rule address the timing of an amicus filing in support of a rehearing petition?
    - Presumably, if the rule addresses only one timing question, this is the one that it should address. How long a deadline should the rule set for such a filing, and should the deadline be pegged to the due date for the party's petition or to the filing date of the party's petition?
    - Three of the four local circuit rules that address the timing of such filings set the deadline solely by reference to the rehearing petition's *filing* date rather than the petition's *due* date.[19] That choice seems wise; a court faced with a rehearing petition is unlikely to desire to stay its hand to await

[11] See Rule 40(a)(1) (presumptive 14-day deadline for panel rehearing petitions; 45-day deadline in civil cases involving specified federal-government parties); Rule 35(c) (deadline for petition for rehearing en banc is that "prescribed by Rule 40 for filing a petition for rehearing").
[12] See Tenth Circuit Rule 29.1.
[13] See Federal Circuit Rule 35(g) (pegging amicus's timing to "the date of filing of the petition or response that the amicus curiae supports"); Federal Circuit Rule 40(g) (same).
[14] See Eleventh Circuit Rules 35-6 and 40-6.
[15] See Eleventh Circuit Rule 35-9.
[16] See Ninth Circuit Rule 29-2(e)(1).
[17] See Ninth Circuit Rule 29-2(e)(2).
[18] See Third Circuit Local Appellate Rule 29.1(a).
[19] See Tenth Circuit Rule 29.1; Eleventh Circuit Rules 35-6 & 40-6; Federal Circuit Rules 35(g) & 40(g). The exception is Ninth Circuit Rule 29-2(e)(1), which sets the amicus' deadline at "10 days after the petition or response of the party the amicus wishes to support is filed or is due."

amicus filings that lag far behind the losing party's petition.[20] Moreover, it seems advisable to parallel, to the extent possible, the approach taken in Appellate Rule 29 with respect to amicus filings in connection with an appeal's initial briefing.

- All four of the local circuit rules on point stagger the amicus filing, with the stagger ranging from 7 days to 14 days.[21] Arguments in favor of a stagger include the hope that a filing drafted by an amicus who had a chance to review the party's filing will be more succinct and less redundant.

- The rule sketched in Part II adopts a stagger for amicus filings in support of a rehearing petition, and offers two bracketed alternatives showing different lengths for the stagger.

· Should the rule address the timing of an amicus filing in opposition to a rehearing petition? If so, how should the deadline be set?

- The Tenth Circuit rule directs that an amicus filing in opposition to a rehearing petition may be filed only if the court directs a response to the petition, in which event the amicus' deadline is the same as the party who is directed to respond.[22]

- The Ninth Circuit sets the amicus' deadline at "10 days after the … response … is filed or is due."[23]

- The Federal Circuit rules set the amicus' deadline at "14 days [after] the date of filing of the … response."[24]

- I am hesitant to recommend nationalizing the deadline for amicus filings in opposition to a rehearing petition. The occasion for such filings is likely to be rare. As noted above, it is hard to imagine a court permitting an amicus to file a brief in opposition to a rehearing petition unless the court asks the party who won before the panel to file a response to the petition. Moreover, the wide divergence among the three local rules on point suggests that the optimal timing for such filings might vary according to a circuit's practices for handling rehearing petitions.

[20] Although the distinction might not be great in most cases (given Rule 40(a)(1)'s usual 14-day deadline for rehearing petitions), the difference between due date and filing date could be significant in civil cases where Rule 40(a)(1)'s 45-day deadline applies.
[21] See Ninth Circuit Rule 29-2(e)(1) (10 days); Tenth Circuit Rule 29.1 (7 days); Eleventh Circuit Rules 35-6 & 40-6 (10 days); Federal Circuit Rules 35(g) & 40(g) (14 days).
[22] See Tenth Circuit Rule 29.1.
[23] Ninth Circuit Rule 29-2(e)(1).
[24] Federal Circuit Rules 35(g) & 40(g).

- For illustrational purposes, the sketch in Part II offers bracketed language that would adopt, as the due date for opposition amicus filings, either a staggered deadline or the due date for the response.

· Should the rule address the timing of an amicus filing – in connection with a petition for rehearing – that supports neither party?

- The Ninth Circuit rule sets the amicus' deadline at "10 days after the petition is filed,"[25] while the Federal Circuit rules set the amicus' deadline at 14 days after the petition is filed.[26]

- It is unclear to me how often an amicus will wish to file while a rehearing petition is pending in order to voice its views without supporting either party.

- If the Committee were to wish to address this situation, the choice made by the two local rules on point – namely, applying the same deadline as for amicus filings in support of rehearing – seems sensible. The sketch in Part II offers bracketed language that would accomplish that.

C. Other issues

Local circuit provisions address a few other questions concerning amicus filings in connection with rehearing. These questions include:

· Whether an amicus will be permitted argument time if there is argument after rehearing is granted.[27]

· The amicus's disclosure obligations.[28]

· The color of the amicus brief's cover.[29]

· The number of copies of the brief.[30]

· The content of the motion for leave to file.[31]

· The judges to whom the motion for leave to file will be circulated.[32]

[25] Ninth Circuit Rule 29-2(e)(1).
[26] See Federal Circuit Rules 35(g) & 40(g).
[27] See Third Circuit IOP 2.2.
[28] See Seventh Circuit Rule 35.
[29] See Eleventh Circuit Rules 35-6 & 40-6.
[30] See Ninth Circuit Rule 29-2(d).
[31] See Ninth Circuit Rule 29-2(b).
[32] See Ninth Circuit Rule 29-2(f).

Existing Rule 29's provisions concerning amicus filings in connection with initial merits briefing address a number of these topics. *See* Rule 29(b) (content of motion for leave to file); 29(c) (requirements of disclosure and form); 29(g) (oral argument). The topic of oral argument by amici in connection with rehearing does not appear to call for treatment in a national rule; it seems likely that relevant local practices on this point would vary by circuit. However, as noted below, it may be advisable for the rule to incorporate, as default provisions, some or all of Rules 29(a) – (c).

II. A sketch of a possible rule amendment

Part I demonstrated the range of choices that face the Committee, should it decide to propose a national rule concerning the timing and length of amicus filings in connection with rehearing petitions. I sketch below a possible rule amendment that would address that topic. Obviously, many other choices could be made, but I hope that this will provide a useful basis for discussion.

I propose to place the new provisions in Rule 29, because I think that it would be most helpful to would-be amici if they could find all of the amicus-specific provisions in one rule. The alternative would be to add new provisions to Rules 35 and 40, but that could cause some redundancy and would, in my view, be somewhat less user-friendly. The main downside of placing the new rules in Rule 29 is that this would be most readily accomplished by placing the existing provisions in a new Rule 29(a); that, in turn, would occasion the re-numbering of all the existing portions of Rule 29. However, this would not be as troublesome as other instances where a Rule is re-numbered. There is not a large amount of caselaw on Rule 29, so it is unlikely that re-numbering that Rule's subdivisions would create major problems for researchers.

The sketch includes, in the proposed length limits, bracketed language specifying what can be excluded for purposes of determining the amicus brief's length. (Such language seems less necessary for current Rule 29(d); by pegging the amicus brief's limit to the limit for the party's brief, Rule 29(d) can be read to incorporate (mutatis mutandis) the exclusion (for type-volume calculations) set out in Rule 32(a)(7)(B)(ii).)

The sketch includes provisions presumptively subjecting amicus briefs in connection with rehearing to some or all of the provisions now set forth in Rules 29(a) – (c). Although Mr. Englert's proposal does not suggest that matters of form and disclosure should be nationalized for amicus filings in connection with rehearing, it would seem undesirable to exempt later amicus filings from the disclosure requirements set by Rule 29(c). It may be less urgent to address matters of form than matters of disclosure; but I am guessing that the application of Rule 32's form requirements to amicus filings in connection with rehearing would be relatively uncontroversial. The national rule could also state default rules to make clear whether an amicus must obtain court permission in order to file a brief. In proposed Rule 29(b)(1), I have included two bracketed options. One option would apply current Rule 29(a) (or renumbered Rule 29(a)(1)), thus allowing certain governmental amici to file without party consent or court leave and allowing any amicus to file without court leave if the parties consent. The

other option would require all amici to obtain court leave in order to file a brief in connection with a rehearing petition.

The opening language of the proposed Rule 29(b) sketched below would permit a circuit to opt out of any of that Rule's provisions by local rule or by order in a case. I am cognizant of the Rules Committees' general reluctance to encourage local rulemaking. But in this instance, there may well be reasons for local variation, given that rules concerning amicus filings need to mesh with the rules and practices concerning the parties' filings and with the court's internal practices in connection with rehearing petitions.

Rule 29. Brief of an Amicus Curiae

(a) During Initial Consideration of a Case on the Merits. The following rules govern amicus filings during a court's initial consideration of a case on the merits.

~~(a)~~ **(1) When Permitted.** The United States or its officer or agency or a state may file an amicus-curiae brief without the consent of the parties or leave of court. Any other amicus curiae may file a brief only by leave of court or if the brief states that all parties have consented to its filing.

~~(b)~~ **(2) Motion for Leave to File.** The motion must be accompanied by the proposed brief and state:

~~(1)~~ (A) the movant's interest; and

~~(2)~~ (B) the reason why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

~~(c)~~ **(3) Contents and Form.** An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

~~(1)~~ (A) if the amicus curiae is a corporation, a disclosure statement like that required of parties by Rule 26.1;

~~(2)~~ (B) a table of contents, with page references;

~~(3)~~ (C) a table of authorities--cases (alphabetically arranged), statutes, and other authorities--with references to the pages of the brief where they are cited;

~~(4)~~ (D) a concise statement of the identity of the amicus curiae, its interest in the case, and the source of its authority to file;

~~(5)~~ (E) unless the amicus curiae is one listed in the first sentence of Rule 29(a), a statement that indicates whether:

~~(A)~~ (i) a party's counsel authored the brief in whole or in part;

~~(B)~~ (ii) a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief; and

~~(C)~~ (iii) a person--other than the amicus curiae, its members, or its counsel--contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person;

~~(6)~~ (F) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review; and

~~(7)~~ (G) a certificate of compliance, if required by Rule 32(a)(7).

~~(d)~~ (4) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief. If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

~~(e)~~ (5) Time for Filing. An amicus curiae must file its brief, accompanied by a motion for filing when necessary, no later than 7 days after the principal brief of the party being supported is filed. An amicus curiae that does not support either party must file its brief no later than 7 days after the appellant's or petitioner's principal brief is filed. A court may grant leave for later filing, specifying the time within which an opposing party may answer.

~~(f)~~ (6) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

~~(g)~~ (7) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

(b) During Consideration of Whether to Grant Rehearing. The following rules govern amicus filings during a court's consideration of whether to grant panel rehearing or rehearing en banc, unless the court prohibits such filings or provides otherwise by local rule or an order in a case.

(1) When permitted; motion for leave; contents; form. [An amicus curiae may file a brief only by leave of court. Rules 29(a)(2) – (3) apply.] [Rules 29(a)(1) – (3) apply].

(2) Length. An amicus brief may be no more than [8] [10] [15] pages[, excluding disclosure statements and material not counted under Rule 32].

(3) Time for Filing. An amicus curiae supporting the petitioner [or supporting neither party] must file its brief, accompanied by a motion for filing [when necessary], no later than [3] [7] days after the petition for rehearing is filed. [An amicus curiae opposing the petitioner must file its brief, accompanied by a motion for filing [when necessary], no later than [the due date for the response] [[3] [7] days after a response to the petition for rehearing is filed].]

Committee Note

Rule 29 is amended to address amicus filings in connection with requests for panel rehearing and rehearing en banc. Existing Rule 29 is renumbered Rule 29(a), and language is added to that subdivision (a) to state that its provisions apply to amicus filings during the court's initial consideration of a case on the merits. New subdivision (b) is added to address amicus filings in connection with a petition for panel rehearing or rehearing en banc. Subdivision (b) sets default rules that apply when a court does not provide otherwise by local rule or order in a case. A court remains free to adopt different rules governing whether amicus filings are permitted in connection with petitions for rehearing, and governing the procedures when such filings are permitted.

III. Conclusion

Providing clarity and nationally uniform ground rules for would-be amici is a worthwhile goal. A FRAP amendment concerning amicus filings in connection with rehearing seems most likely to succeed if it focuses on commonly arising occasions for such filings and if it addresses only length and timing, and not other matters.

Encl.

Appendix I: Local provisions (other than the Ninth Circuit's)[33]

Circuit	Provisions regarding amicus briefs with respect to rehearing?
First	No local rule or other provision.
Second	No local rule or other provision.
Third	Third Circuit Local Appellate Rule 29.1(a) provides: "In a case ordered for rehearing before the court en banc or before the original panel, if the court permits the parties to file additional briefs, any amicus curiae must file its brief in accordance with Rule 29(e) of the Federal Rules of Appellate Procedure. In a case ordered for rehearing in which no additional briefing is directed, unless the court directs otherwise, any new amicus must file a brief within 28 days after the date of the order granting rehearing, and any party may file a response to such an amicus brief within 21 days after the amicus brief is served. Before completing the preparation of an amicus brief, counsel for an amicus curiae must attempt to ascertain the arguments that will be made in the brief of any party whose position the amicus is supporting, with a view to avoiding any unnecessary repetition or restatement of those arguments in the amicus brief." Third Circuit IOP 2.2 provides: "Determination in Cases En Banc. There is oral argument in an en banc case if it is requested by at least one judge of the en banc court…. Ordinarily, thirty (30) minutes per side will be allocated and an amicus will not argue unless at least four (4) members of the en banc court vote otherwise."
Fourth	No local rule or other provision. The Fourth Circuit stated in 2006 that it would "henceforth ... disfavor[]" requests to file an amicus brief in the first instance at the stage of a request for rehearing: "Federal Rule of Appellate Procedure 29(e) directs the filing of an amicus brief 'no later than 7 days after the principal brief of the party being supported is filed.' Fed. R.App. P. 29(e) (emphasis added). The term 'principal brief' would appear to refer to the lead brief filed by a party in anticipation of argument (either before a panel or the en banc court) and not to something such as a reply brief or petition for rehearing. The language of that rule sets forth no exceptions. While a court is not precluded from granting leave to file an amicus brief in other circumstances, see id. advisory committee's note, waiting until a petition for rehearing has been filed is a disfavored litigation tactic and fails to serve the litigants' interest in having all views considered thoroughly at the initial briefing and argument stage…. See Sup.Ct. R. 44(5) ('The Clerk will not file any brief for an amicus curiae in

[33] In the interests of brevity, I list in this chart only provisions that specifically address amicus filings in connection with panel rehearing or rehearing en banc, and not provisions that address amicus filings more generally.

Circuit	Provisions regarding amicus briefs with respect to rehearing?
	support of, or in opposition to, a petition for rehearing.'); D.C.Cir. R. 35(f) ('No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court.')." LaRue v. DeWolff, Boberg & Associates, Inc., 458 F.3d 359, 361 (4th Cir. 2006).
Fifth	Fifth Circuit Rule 29.4 states: "After a panel opinion is issued, amicus curiae status will not be permitted if the allowance would result in the disqualification of any member of the panel or of the en banc court."[34]
Sixth	No local rule or other provision.
Seventh	Seventh Circuit Rule 35 provides: "Every petition for rehearing en banc, and every brief of an amicus curiae supporting or opposing a petition for rehearing en banc, must include a statement providing the information required by Fed. R. App. P. 26.1 and Circuit Rule 26.1 as of the date the petition is filed."
Eighth	No local rule or other provision.
Ninth	Ninth Circuit Rule 29-2 provides the most detailed local-rule treatment of the topic in any circuit. Rather than reproducing the Rule in this chart, I reproduce it in Appendix II.
Tenth	Tenth Circuit Rule 29.1 provides: "The court will receive but not file proposed amicus briefs on rehearing. Filing will be considered shortly before the oral argument on rehearing en banc if granted, or before the grant or denial of panel rehearing. Except by the court's permission, an amicus brief filed at the rehearing stage may be no more than 3,000 words in length and shall include a certification of the word count in conformance with Fed. R. App. P. 32(a)(7)(C). Proposed amicus briefs in support of the petition must be tendered within 7 days from the date the rehearing petition is filed. Proposed amicus briefs in opposition to rehearing are not allowed unless the court has directed that a response be filed. See Fed. R. App. P. 40(a)(3). In that event, any proposed amicus brief must be tendered on the due date for the response."
Eleventh	Eleventh Circuit Rule 27-1(d) provides: "Under FRAP 27(c), a single judge may, subject to review by the court, act upon any request for relief that may be sought by motion, except to dismiss or otherwise determine an appeal or other proceeding. Without limiting this authority, a single judge is authorized to act, subject to review by the court, on the following motions: …. (10) to file briefs as amicus curiae prior to issuance of a panel opinion."

[34] The Second Circuit has a somewhat analogous rule. Second Circuit Rule 29.1(a) provides: "The court ordinarily will deny leave to file an amicus brief when, by reason of a relationship between a judge assigned to hear the proceeding and the amicus curiae or its counsel, the filing of the brief might cause the recusal of the judge." I omitted that provision from the chart because it does not specifically discuss the context of rehearing.

Circuit	Provisions regarding amicus briefs with respect to rehearing?
	Eleventh Circuit Rule 35-6 provides: "The United States or its officer or agency or a state may file an amicus brief in support of a petition for rehearing en banc without the consent of the parties or leave of court. Any other amicus curiae must request leave of court to file an amicus brief in support of a petition for rehearing en banc. The request must be made by motion accompanied by the proposed brief in conformance with 11th Cir. R. 35-5, except that subsections (f) and (k) may be omitted. The proposed amicus brief must not exceed 15 pages, exclusive of items required by 11th Cir. R. 35-5(a), (b), (c), (d), and (j). The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than 10 days after the petition for rehearing en banc being supported is filed." Eleventh Circuit Rule 35-9 provides: "The United States or its officer or agency or a state may file an en banc amicus brief without the consent of the parties or leave of court. Any other amicus curiae must request leave of court by filing a motion accompanied by the proposed brief in conformance with FRAP 29(b) through (d) and the corresponding circuit rules. An amicus curiae must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the principal en banc brief of the party being supported. An amicus curiae that does not support either party must file its en banc briefs, accompanied by a motion for filing when necessary, no later than the due date of the appellant's or petitioner's principal en banc brief. An amicus curiae must also comply with 11th Cir. R. 35-8." Eleventh Circuit Rule 40-6 provides: "The United States or its officer or agency or a state may file an amicus brief in support of a petition for panel rehearing without the consent of the parties or leave of court. Any other amicus curiae must request leave of court to file an amicus brief in support of a petition for panel rehearing. The request must be made by motion accompanied by the proposed brief in conformance with FRAP 29(b) and (c) and the corresponding circuit rules. The proposed amicus brief must not exceed 15 pages, exclusive of items that do not count towards page limitations as described in 11th Cir. R. 32-4. The cover must be green. An amicus curiae must file its proposed brief, accompanied by a motion for filing when necessary, no later than 10 days after the petition for panel rehearing being supported is filed."
D.C.	D.C. Circuit Rule 35(f) provides: "No amicus curiae brief in response to or in support of a petition for rehearing en banc will be received by the clerk except by invitation of the court."
Federal	Federal Circuit Rule 35(g) provides: "Except by the court's

Circuit	Provisions regarding amicus briefs with respect to rehearing?
	permission or direction, an amicus curiae brief submitted in connection with a petition for hearing en banc, a petition for rehearing en banc, or a combined petition for panel rehearing and rehearing en banc, must be accompanied by a motion for leave and must not exceed 10 pages. Except by the court's permission or direction, any brief amicus curiae or any motion for leave to file a brief amicus curiae must be filed within 14 days of the date of filing of the petition or response that the amicus curiae supports. If the amicus curiae does not support either party, then the brief or motion for leave to file the brief must be filed within 14 days of the date of filing of the petition." Federal Circuit Rule 40(g) provides: "Except by the court's permission or direction, an amicus curiae brief submitted in connection with a petition for panel rehearing must be accompanied by a motion for leave to file and must not exceed 10 pages. Except by the court's permission or direction, any brief amicus curiae or any motion for leave to file a brief amicus curiae must be filed within 14 days of the date of filing of the petition or response that the amicus curiae supports. If the amicus curiae does not support either party, then the brief or motion for leave to file the brief must be filed within 14 days of the date of filing of the petition." Federal Circuit IOP 14.1(e) provides that after a grant of hearing en banc, "[t]he clerk will enter the order for the court granting the petition for hearing en banc and setting forth the schedule for additional briefing, if any, by the parties and by amici curiae, and for oral argument, and any questions the court may wish the parties and amici to address." Federal Circuit IOP 14.2(f) provides that after a grant of rehearing en banc, "[t]he clerk will enter the order for the court granting the petition for rehearing en banc and setting forth the schedule for additional briefing by the parties and by amici curiae and for additional oral argument, if any, and any questions the court may wish the parties and amici to address." Federal Circuit IOP 14.3(c) provides that after a sua sponte grant of hearing en banc, "[t]he clerk shall provide notice that a majority of the judges in regular service has acted under 28 U.S.C. § 46 and Fed. R. App. P. 35(a) to order the appeal to be heard en banc, and indicate any questions the court may wish the parties and amici to address…. Additional briefing and oral argument will be ordered as appropriate."

Circuit	Provisions regarding amicus briefs with respect to rehearing?
	Federal Circuit IOP 14.4(b) provides that after a sua sponte grant of rehearing en banc, "[t]he clerk shall provide notice that a majority of the judges in regular active service has acted under 28 U.S.C. § 46(c) and Fed. R. App. P. 35(a) to order the appeal to be heard en banc, enter an order for the court vacating the judgment and withdrawing the opinion(s) filed by the panel that heard the appeal, and indicate any questions the court may wish the parties and amici to address…. Additional briefing and oral argument will be ordered as appropriate." The Federal Circuit's Administrative Order Regarding Electronic Case Filing addresses (in ECF-10(B)) the number of paper copies of briefs, including amicus briefs. ECF-10(D) addresses the number of paper copies of filings (including amicus filings) in connection with "Petitions for Rehearing or En Banc Hearing or Rehearing." ECF-10(E) addresses the number of paper copies of filings (including amicus filings) when "an appeal is to be heard or reheard by the court en banc."

Appendix II: Ninth Circuit Rule 29-2.

Ninth Rule 29-2. Brief Amicus Curiae Submitted to Support or Oppose a Petition for Panel or En Banc Rehearing or During the Pendency of Rehearing

(a) When Permitted. An amicus curiae may be permitted to file a brief when the court is considering a petition for panel or en banc rehearing or when the court has granted rehearing. 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. Subject to the provisions of subsection (f) of this rule, 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.

(b) Motion for Leave to File. The motion must be accompanied by the proposed brief and include the recitals set forth at FRAP 29(b).

(c) Format/Length.

(1) A brief submitted while a petition for rehearing is pending shall be styled as an amicus curiae brief in support of or in opposition to the petition for rehearing or as not supporting either party. A brief submitted during the pendency of panel or en banc rehearing shall be styled as an amicus curiae brief in support of appellant or appellee or as not supporting either party.

(2) A brief submitted while a petition for rehearing is pending shall not exceed 15 pages unless it complies with the alternative length limits of 4,200 words or 390 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(3) Unless otherwise ordered by the court, a brief submitted after the court has voted to rehear a case en banc shall not exceed 25 pages unless it complies with the alternative length limits of 7,000 words or 650 lines of monospaced text. Motions for leave to file an oversize brief are disfavored.

(d) Number of Copies.

(1) If a petition for rehearing en banc has been granted and the brief is not required to be submitted electronically, an original and 20 copies of the brief shall be submitted.

(2) For all other briefs described by this rule that are not required to be submitted electronically, an original shall be submitted.

The Clerk may order the submission of paper copies or additional copies of any brief filed pursuant to this rule.

(e) Time for Filing.

(1) Brief Submitted to Support or Oppose a Petition for Rehearing. An amicus curiae must serve its brief along with any necessary motion no later than 10 days after the petition or response of the party the amicus wishes to support is filed or is due. An amicus brief that does not support either party must be served along with any necessary motion no later than 10 days after the petition is filed. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(2) Briefs Submitted During the Pendency of Rehearing. Unless the court orders otherwise, an amicus curiae supporting the position of the petitioning party or not supporting either party must serve its brief, along with any necessary motion, no later than 21 days after the petition for rehearing is granted. Unless the court orders otherwise, an amicus curiae supporting the position of the responding party must serve its brief, along with any necessary motion, no later than 35 days after the petition for panel or en banc rehearing is granted. Motions for extensions of time to file an amicus curiae brief submitted under this rule are disfavored.

(f) Circulation. Motions for leave to file an amicus curiae brief to support or oppose a petition for panel rehearing are circulated to the panel. Motions for leave to file an amicus curiae brief to support or oppose a petition for en banc rehearing are circulated to all members of the court. Motions for leave to file an amicus curiae brief during the pendency of en banc rehearing are circulated to the en banc court.

(Eff. July 1, 2007. As amended eff. Dec. 1, 2009.)

CIRCUIT ADVISORY COMMITTEE NOTE TO RULE 29-2

Circuit Rule 29-2 only concerns amicus curiae briefs submitted to support or oppose a petition for panel or en banc rehearing and amicus curiae briefs submitted during the pendency of rehearing. The court considers the filing of amicus curiae briefs related to petitions for rehearing or en banc review to be appropriate only when the post-disposition deliberations involve novel or particularly complex issues.

The court will ordinarily deny motions and disallow stipulations for leave to file an amicus curiae brief where the filing of the brief would result in the recusal of a member of the en banc court. Any member of the court who would be subject to disqualification in light of the amicus curiae brief may, of course, voluntarily recuse, thereby allowing the filing of the amicus curiae brief.

(Eff. July 1, 2007.)

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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.

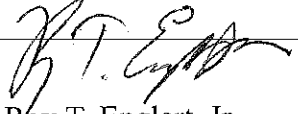
Despite the analysis of *Fry* – analysis that I personally find unassailable – it is not unusual to find that a Clerk's Office or a Local Rule either limits the length of rehearing-stage

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.

TAB 10

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TAB 10A

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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 10B

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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).

TAB 11

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N.B.: There are no materials for Item No. 13-AP-E.

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TAB 12

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TAB 12A

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Supreme Court of the United States
Charles L. RYAN, Director, Arizona Department of Corrections, Petitioner
v.
Edward Harold SCHAD.

No. 12–1084.
June 24, 2013.

***2549**

PER CURIAM.

Respondent Edward Schad was convicted of first-degree murder and sentenced to death. After an extensive series of state- and federal-court proceedings concluded with this Court's denial of respondent's petitions for certiorari and for rehearing, the Ninth Circuit declined to issue its mandate as normally required by Federal Rule of Appellate Procedure 41(d)(2)(D). The Ninth Circuit instead, *sua sponte*, construed respondent's motion to stay the mandate pending the Ninth Circuit's decision in a separate en banc case as a motion to reconsider a motion that it had denied six months earlier. Based on its review of that previously rejected motion, the court issued a stay a few days before respondent's scheduled execution. Even assuming, as we did in *Bell v. Thompson*, 545 U.S. 794, 125 S.Ct. 2825, 162 L.Ed.2d 693 (2005), that Rule 41(d)(2)(D) admits of any exceptions, the Ninth Circuit did not demonstrate that exceptional circumstances justified withholding its mandate. As a result, we conclude that the Ninth Circuit's failure to issue its mandate constituted an abuse of discretion.

I

In 1985, an Arizona jury found respondent guilty of first-degree murder for the 1978 strangling of 74–year–old Lorimer Grove.[FN1] The court sentenced respondent to death. After respondent's conviction and sentence were affirmed on direct review, see *State v. Schad*, 163 Ariz. 411, 788 P.2d 1162 (1989), and *Schad v. Arizona*, 501 U.S. 624, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), respondent again sought state habeas relief, alleging that his trial counsel rendered ineffective assistance at sentencing by failing to discover and present sufficient mitigating evidence. The state courts denied relief.

> FN1. A state habeas court vacated an earlier guilty verdict and death sentence due to an error in jury instructions. See *State v. Schad*, 142 Ariz. 619, 691 P.2d 710 (1984).

In August 1998, respondent sought federal habeas relief. He again raised a claim of ineffective assistance at sentencing for failure to present sufficient mitigating evidence. The District Court denied respondent's request for an evidentiary hearing to present new mitigating evidence, concluding that respondent was not diligent in developing the evidence during his state habeas proceedings. *Schad v. Schriro*, 454 F.Supp.2d 897 (D.Ariz.2006). The District Court alternatively held that the proffered new evidence did not demonstrate that trial counsel's performance was deficient. *Id.*, at 940–947. The Ninth Circuit affirmed in part, reversed in part, and remanded to the District Court for a hearing to determine whether respondent's state habeas counsel was diligent in developing the state evidentiary record. *Schad v. Ryan*, 606 F.3d 1022 (2010). Arizona petitioned for certiorari. This Court granted the petition, vacated

the Ninth Circuit's opinion, and remanded for further proceedings in light of *Cullen v. Pinholster*, 563 U.S. ——, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). See *Ryan v. Schad*, 563 U.S. ——, 131 S.Ct. 2092, 179 L.Ed.2d 886 (2011). On remand, the Ninth Circuit affirmed the District Court's denial of habeas relief. *Schad v. Ryan*, 671 F.3d 708, 726 (2011). The Ninth Circuit subsequently denied a motion for rehearing and rehearing en banc on February 28, 2012.

On July 10, 2012, respondent filed in the Ninth Circuit the first motion directly at issue in this case. This motion asked the court to vacate its judgment and remand to the District Court for additional proceedings in light of this Court's decision in ***2550***Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012).[FN2] The Ninth Circuit denied respondent's motion on July 27, 2012. Respondent then filed a petition for certiorari. This Court denied the petition on October 9, 2012, 568 U.S. ——, 133 S.Ct. 432, 184 L.Ed.2d 264, and denied a petition for rehearing on January 7, 2013. 568 U.S. ——, 133 S.Ct. 922, 184 L.Ed.2d 713.

FN2. *Martinez*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272, was decided on March 20, 2012. We are unaware of any explanation for respondent's delay in bringing his *Martinez*-based argument to the Ninth Circuit's attention.

Respondent returned to the Ninth Circuit that day and filed a motion requesting a stay of the mandate in light of a pending Ninth Circuit en banc case addressing the interaction between *Pinholster* and *Martinez*. The Ninth Circuit denied the motion on February 1, 2013, "declin[ing] to issue an indefinite stay of the mandate that would unduly interfere with Arizona's execution process." Order in No. 07–99005, Doc. 102, p. 1. But instead of issuing the mandate, the court decided *sua sponte* to construe respondent's motion "as a motion to reconsider our prior denial of his Motion to Vacate Judgment and Remand in light of *Martinez*," which the court had denied on July 27, 2012. *Id.*, at 2. The court ordered briefing and, in a divided opinion, remanded the case to the District Court to determine whether respondent could establish that he received ineffective assistance of postconviction counsel under *Martinez*, whether he could demonstrate prejudice as a result, and whether his underlying claim of ineffective assistance of trial counsel had merit. No. 07–99005 (Feb. 26, 2013), App. to Pet. for Cert. A–13 to A–15, 2013 WL 791610, *6. Judge Graber dissented based on her conclusion that respondent could not show prejudice. *Id.*, at A–16 to A–17, 2013 WL 791610, *7. Arizona set an execution date of March 6, 2013, which prompted respondent to file a motion for stay of execution on February 26, 2013. The Ninth Circuit panel granted the motion on March 1, 2013, with Judge Graber again noting her dissent.

On March 4, 2013, Arizona filed a petition for rehearing and rehearing en banc with the Ninth Circuit. The court denied the petition the same day, with eight judges dissenting in two separate opinions. 709 F.3d 855 (2013).

On March 4, Arizona filed an application to vacate the stay of execution in this Court, along with a petition for certiorari. This Court denied the application, with Justices SCALIA and ALITO noting that they would grant it. 568 U.S. ——, 133 S.Ct. 2548, 186 L.Ed.2d 644, 2013 WL 3155269 (2013). We now consider the petition.

II

Federal Rule of Appellate Procedure 41(d)(2)(D) sets forth the default rule that "[t]he court of appeals *must issue the mandate immediately* when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." (Emphasis added.) The reason for this Rule is straightforward: "[T]he stay of mandate is entered solely to allow this

Court time to consider a petition for certiorari." *Bell*, 545 U.S., at 806, 125 S.Ct. 2825. Hence, once this Court has denied a petition, there is generally no need for further action from the lower courts. See *ibid.* ("[A] decision by this Court denying discretionary review usually signals the end of litigation"). In *Bell*, Tennessee argued that Rule 41(d)(2)(D) "admits of no exceptions, so the mandate should have issued on the date" the Court of Appeals received notice of the Supreme Court's denial of certiorari. *Id.*, at 803, 125 S.Ct. 2825. There was no ***2551** need to resolve this issue in *Bell* because we concluded that the Sixth Circuit had abused its discretion even if Rule 41(d)(2)(D) authorized a stay of the mandate after denial of certiorari. *Id.*, at 803–804, 125 S.Ct. 2825. As in *Bell*, we need not resolve this issue to determine that the Ninth Circuit abused its discretion here.

Bell recognized that when state-court judgments are reviewed in federal habeas proceedings, "finality and comity concerns," based in principles of federalism, demand that federal courts "accord the appropriate level of respect to" state judgments by allowing them to be enforced when federal proceedings conclude. *Id.*, at 812–813, 125 S.Ct. 2825. As we noted, States have an " ' "interest in the finality of convictions that have survived direct review within the state court system." ' " *Id.*, at 813, 125 S.Ct. 2825 (quoting *Calderon v. Thompson*, 523 U.S. 538, 555, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998), in turn quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). Elsewhere, we explained that " 'the profound interests in repose' attaching to the mandate of a court of appeals" dictate that "the power [to withdraw the mandate] can be exercised only in extraordinary circumstances." *Calderon*, *supra*, at 550, 118 S.Ct. 1489 (quoting 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3938, p. 712 (2d ed.1996)). Deviation from normal mandate procedures is a power "of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon*, *supra*, at 550, 118 S.Ct. 1489. Even assuming a court of appeals has authority to do so, it abuses its discretion when it refuses to issue the mandate once the Supreme Court has acted on the petition, unless extraordinary circumstances justify that action.

Applying this standard in *Bell*, we found no extraordinary circumstances that could constitute a miscarriage of justice. There, a capital defendant unsuccessfully alleged in state postconviction proceedings that his trial counsel had been ineffective by failing to introduce sufficient mitigating evidence in the penalty phase of trial. 545 U.S., at 797, 125 S.Ct. 2825. On federal habeas review, he made the same argument. *Id.*, at 798, 125 S.Ct. 2825. After the Sixth Circuit affirmed, the defendant filed a petition for rehearing that "placed substantial emphasis" on his argument that the Sixth Circuit had overlooked new psychiatrist evidence. *Id.*, at 800, 125 S.Ct. 2825. While the Sixth Circuit denied the petition, it stayed the issuance of its mandate while the defendant sought certiorari and, later, rehearing from the denial of the writ. *Ibid.*

When this Court denied the petition for rehearing, the Sixth Circuit did not issue its mandate. Instead, the Sixth Circuit waited five months (and until two days before the scheduled execution) to issue an amended opinion that vacated the District Court's denial of habeas and remanded for an evidentiary hearing on the ineffective-assistance-of-counsel claim. *Id.*, at 800–801, 125 S.Ct. 2825. This Court reversed that decision, holding that the Sixth Circuit had abused its discretion due to its delay in issuing the mandate without notifying the parties, its reliance on a previously rejected argument, and its disregard of comity and federalism principles.

In this case, the Ninth Circuit similarly abused its discretion when it did not issue the mandate. As in *Bell*, the Ninth Circuit here declined to issue the mandate based on an argument it had considered and rejected months earlier. And, by the time of the Ninth Circuit's February 1, 2013, decision not to issue its mandate, it had been over 10 months

since we decided *Martinez* and nearly 7 months since respondent***2552** unsuccessfully asked the Ninth Circuit to reconsider its decision in light of *Martinez*.[FN3]

> FN3. Respondent did not even present the motion that the Ninth Circuit ultimately reinstated until more than 4 months after the Ninth Circuit denied respondent's request for panel rehearing and rehearing en banc and more than 3 1/2 months after *Martinez* was decided.

Further, there is no doubt that the arguments presented in the rejected July 10, 2012, motion were identical to those accepted by the Ninth Circuit the following February. Respondent styled his July 10 motion a "Motion to Vacate Judgment and Remand to the District Court for Additional Proceedings in Light of *Martinez v. Ryan*." No. 07–99005(CA9), Doc. 88, p. 1. As its title suggests, the only claim presented in that motion was that respondent's postconviction counsel should have developed more evidence to support his ineffective-assistance-of-trial-counsel claim. Here, as in *Bell*, respondent's July 10 motion "pressed the same arguments that eventually were adopted by the Court of Appeals." 545 U.S., at 806, 125 S.Ct. 2825. These arguments were pressed so strongly in the July 10 motion that "[i]t is difficult to see how ... counsel could have been clearer." *Id.*, at 808, 125 S.Ct. 2825. The Ninth Circuit had a full "opportunity to consider these arguments" but declined to do so, *id.*, at 806, 125 S.Ct. 2825, which "support[s] our determination that the decision to withhold the mandate was in error." *Id.*, at 806–807, 125 S.Ct. 2825. We presume that the Ninth Circuit carefully considers each motion a capital defendant presents on habeas review. See *id.*, at 808, 125 S.Ct. 2825 (rejecting the notion that "judges cannot be relied upon to read past the first page of a petition for rehearing"). As a result, there is no indication that there were any extraordinary circumstances here that called for the court to revisit an argument *sua sponte* that it already explicitly rejected.

Finally, this case presents an additional issue not present in *Bell*. In refusing to issue the mandate, the Ninth Circuit panel relied heavily upon *Beardslee v. Brown*, 393 F.3d 899, 901 (C.A.9 2004) (*per curiam*), *Beardslee*, which precedes our *Bell* decision by more than six months, asserts the Ninth Circuit's inherent authority to withhold a mandate. See App. to Pet. for Cert. A–3 to A–4, 2013 WL 791610, *1. But *Beardslee* was based on the Sixth Circuit's decision in *Bell*, which we reversed. See *Beardslee*, *supra*, at 901 (citing *Thompson v. Bell*, 373 F.3d 688, 691–692 (C.A.6 2004)). That opinion, thus, provides no support for the Ninth Circuit's decision.

In light of the foregoing, we hold that the Ninth Circuit abused its discretion when it neglected to issue its mandate. The petition for a writ of certiorari and respondent's motion to proceed *in forma pauperis* are granted. The Ninth Circuit's judgment is reversed, the stay of execution is vacated, and the case is remanded with instructions to issue the mandate immediately and without any further proceedings.

It is so ordered.

U.S.,2013.
Ryan v. Schad
133 S.Ct. 2548, 186 L.Ed.2d 644, 81 USLW 4568, 81 USLW 3697, 81 USLW 3701, 13 Cal. Daily Op. Serv. 6509, 2013 Daily Journal D.A.R. 8083, 24 Fla. L. Weekly Fed. S 397

TAB 12B

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Supreme Court of the United States
Ricky BELL, Warden, Petitioner,
v.
Gregory THOMPSON.

No. 04-514.
Argued April 26, 2005.

Decided June 27, 2005. Rehearing Denied Aug. 22, 2005. See 545 U.S. 1158, 126 S.Ct. 24.

373 F.3d 688, reversed.

KENNEDY, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and THOMAS, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post,* p. 2837.

Paul G. Summers, Attorney General, State of Tennessee, Michael E. Moore, Solicitor General, Gordon W. Smith, Associate Solicitor General, Jennifer L. Smith, Associate Deputy Attorney General, Counsel of Record, Angele M. Gregory, Assistant Attorney General, Nashville, Tennessee, for Petitioner.

Daniel T. Kobil, Capital Univ. Law School, Columbus, OH, Walter Dellinger, Counsel of Record, Matthew M. Shors, Charles E. Borden, Scott M. Hammack (admitted only in New York), O'Melveny & Myers, LLP, Washington, D.C., for Respondent.

For U.S. Supreme Court briefs, see:2005 WL 435904 (Pet.Brief)2005 WL 760329 (Resp.Brief)2005 WL 916158 (Reply.Brief)

Justice KENNEDY delivered the opinion of the Court.

***796** This case requires us to consider whether, after we had denied certiorari and a petition for rehearing, the Court of Appeals had the power to withhold its mandate for more than five months without entering a formal order. We hold that, even assuming a court may withhold its mandate after the denial of certiorari in some cases, the Court of Appeals' decision to do so here was an abuse of discretion.

I

In 1985, Gregory Thompson and Joanna McNamara abducted Brenda Blanton Lane from a store parking lot in Shelbyville, Tennessee. After forcing Lane to drive them to a remote location, Thompson stabbed her to death. Thompson offered ****2828** no evidence during the guilt phase of trial and was convicted by a jury of first-degree murder.

Thompson's defense attorneys concentrated their efforts on persuading the sentencing jury that Thompson's positive ***797** qualities and capacity to adjust to prison life provided good reasons for not imposing the death penalty.

Before trial, Thompson's counsel had explored the issue of his mental condition. The trial judge referred Thompson to a state-run mental health facility for a 30-day evaluation. The resulting report indicated that Thompson was competent at the time of the offense and at the time of the examination. The defense team retained their own expert, Dr. George Copple, a clinical psychologist. At sentencing Copple testified that Thompson was remorseful and still had the ability to work and contribute while in prison. Thompson presented the character testimony of a number of witnesses, including former high school teachers, his grandparents, and two siblings. Arlene Cajulao, Thompson's girlfriend while he was stationed with the Navy in Hawaii, also testified on his behalf. She claimed that Thompson's behavior became erratic after he suffered head injuries during an attack by three of his fellow servicemen. In rebuttal the State called Dr. Glenn Watson, a clinical psychologist who led the pretrial evaluation of Thompson's competence. Watson testified that his examination of Thompson revealed no significant mental illness.

The jury sentenced Thompson to death. His conviction and sentence were affirmed on direct review. *State v. Thompson*, 768 S.W.2d 239 (Tenn.1989), cert. denied, 497 U.S. 1031, 110 S.Ct. 3288, 111 L.Ed.2d 796 (1990).

In his state postconviction petition, Thompson claimed his trial counsel had been ineffective for failing to conduct an adequate investigation into his mental health. Thompson argued that his earlier head injuries had diminished his mental capacity and that evidence of his condition should have been presented as mitigating evidence during the penalty phase of trial. Under Tennessee law, mental illness that impairs a defendant's capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law is a mitigating factor in capital sentencing. Tenn.CodeAnn. ***798** § 39-2-203(j)(8) (1982) (repealed); § 39-13-204(j)(8) (Lexis 2003). The postconviction court denied relief following an evidentiary hearing, and the Tennessee Court of Criminal Appeals affirmed. *Thompson v. State*, 958 S.W.2d 156 (1997). The Tennessee Supreme Court denied discretionary review.

Thompson renewed his ineffective-assistance-of-counsel claim on federal habeas. Thompson's attorneys retained a psychologist, Dr. Faye Sultan, to assist with the proceedings. At this point, 13 years had passed since Thompson's conviction. Sultan examined and interviewed Thompson three times, questioned his family members, and conducted an extensive review of his legal, military, medical, and prison records, App. 12, before diagnosing him as suffering from schizoaffective disorder, bipolar type, *id.*, at 20. She contended that Thompson's symptoms indicated he was "suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law." *Ibid.* Sultan prepared an expert report on Thompson's behalf and was also deposed by the State.

In February 2000, the United States District Court for the Eastern District of Tennessee granted the State's motion for ****2829** summary judgment and dismissed the habeas petition. The court held that Thompson failed to show that the state court's resolution of his claim rested on an unreasonable application of Supreme Court precedent or on an unreasonable determination of the facts in light of the evidence presented in state court. See 28 U.S.C. § 2254(d). The District Court also stated that Thompson had not presented "any significant probative evidence that [he] was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation." No. 4:98-cv-006 (ED Tenn., Feb. 17, 2000), App. to Pet. for ***799** Cert. 270. Sultan's deposition and report, however, had apparently not been included in the District Court record.

While Thompson's appeal to the Court of Appeals for the Sixth Circuit was pending, he filed a motion in the

District Court under Federal Rule of Civil Procedure 60(b) requesting that the court supplement the record with Sultan's expert report and deposition. Thompson's habeas counsel at the time explained that the failure to include the Sultan evidence in the summary judgment record was an oversight. Thompson also asked the Court of Appeals to hold his case in abeyance pending a ruling from the District Court and attached the Sultan evidence in support of his motion.

The District Court denied the Rule 60(b) motion as untimely, and the Court of Appeals denied Thompson's motion to hold his appeal in abeyance. On January 9, 2003, a divided panel of the Court of Appeals affirmed the District Court's denial of habeas relief. *Thompson v. Bell*, 315 F.3d 566. The lead opinion, authored by Judge Suhrheinrich, reasoned that there was no ineffective assistance of counsel because Thompson's attorneys were aware of his head injuries and made appropriate inquiries into his mental fitness. *Id.*, at 589-592. In particular, Thompson's attorneys had requested that the trial court order a competency evaluation. A team of experts at the Middle Tennessee Mental Health Institute, a state-run facility, found "no mental illness, mental defect, or insanity." *Id.*, at 589. Dr. George Copple, the clinical psychologist retained by Thompson's attorneys, also "found no evidence of mental illness." *Ibid.* Judge Suhrheinrich emphasized that none of the experts retained by Thompson since trial had offered an opinion on his mental condition at the time of the crime. *Id.*, at 589-592. The lead opinion contained a passing reference to Thompson's unsuccessful Rule 60(b) motion, but did not discuss the Sultan deposition or expert report in any detail. *Id.*, at 583, n. 13. Judge Moore concurred in the result based on Thompson's failure to present "evidence that his counsel ***800** knew or should have known either that Thompson was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime." *Id.*, at 595.

Thompson filed a petition for rehearing. The petition placed substantial emphasis on the Sultan evidence, quoting from both her deposition and expert report. The Court of Appeals denied the petition for rehearing and stayed the issuance of its mandate pending the disposition of Thompson's petition for certiorari.

This Court denied certiorari on December 1, 2003. 540 U.S. 1051, 124 S.Ct. 804, 157 L.Ed.2d 701. The following day, Thompson filed a motion in the Court of Appeals seeking to extend the stay of mandate pending disposition of his petition for rehearing in this Court. The Court of Appeals granted the motion and "ordered that the mandate be stayed to allow appellant time to file a petition for rehearing from the denial of the writ of certiorari, and thereafter until the Supreme Court ****2830** disposes of the case." App. to Pet. for Cert. 348. On January 20, 2004, this Court denied Thompson's petition for rehearing. 540 U.S. 1158, 124 S.Ct. 1162, 157 L.Ed.2d 1058. A copy of the order was filed with the Court of Appeals on January 23, 2004. The Court of Appeals, however, did not issue its mandate.

The State, under the apparent assumption that the federal habeas corpus proceedings had terminated, filed a motion before the Tennessee Supreme Court requesting that an execution date be set. The court scheduled Thompson's execution for August 19, 2004.

From February to June 2004, there were proceedings in both state and federal courts related to Thompson's present competency to be executed under *Ford v. Wainwright*, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed.2d 335 (1986). The state courts, after considering Sultan's testimony (which was based in part on followup observations after her initial 1998 examination) as well as that of other experts, found Thompson competent to be executed. *Thompson v. State*, 134 S.W.3d 168 (Tenn.2004). Thompson's *Ford* claim was still pending before the Federal District ***801** Court when on

June 23, 2004, some seven months after this Court denied certiorari, the Court of Appeals for the Sixth Circuit issued an amended opinion in Thompson's initial federal habeas case. 373 F.3d 688. The new decision vacated the District Court's judgment denying habeas relief and remanded the case for an evidentiary hearing on Thompson's ineffective-assistance-of-counsel claim. *Id.*, at 691-692. The Court of Appeals relied on its equitable powers to supplement the record on appeal with Sultan's 1999 deposition after finding that it was "apparently negligently omitted" and "probative of Thompson's mental state at the time of the crime." *Id.*, at 691. The court also explained its authority to issue an amended opinion five months after this Court denied a petition for rehearing: "[W]e rely on our inherent power to reconsider our opinion prior to the issuance of the mandate, which has not yet issued in this case." *Id.*, at 691-692. Judge Suhrheinrich authored a lengthy separate opinion concurring in part and dissenting in part, which explained that his chambers initiated the *sua sponte* reconsideration of the case. He agreed with the majority about the probative value of the Sultan deposition, referring to the evidence as "critical." *Id.*, at 733. Unlike the majority, however, Judge Suhrheinrich would have relied upon fraud on the court to justify the decision to expand the record and issue an amended opinion. *Id.*, at 725-726, 729-742. He found "implausible" the explanation offered by Thompson's habeas counsel for his failure to include the Sultan deposition in the District Court record, *id.*, at 742, and speculated that counsel "planned to unveil Dr. Sultan's opinion on the eve of Thompson's execution," *id.*, at 738, n. 21.

We granted certiorari. 543 U.S. 1042, 125 S.Ct. 823, 160 L.Ed.2d 609 (2005).

II

At issue in this case is the scope of the Court of Appeals' authority to withhold the mandate pursuant to Federal Rule of Appellate Procedure 41. As relevant, the Rule provides:

***802** "(b) When Issued. The court's mandate must issue 7 calendar days after the time to file a petition for rehearing expires, or 7 calendar days after entry of an order denying a timely petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, whichever is later. The court may shorten or extend the time.

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

****2831** "(d) Staying the Mandate.

"(1) On Petition for Rehearing or Motion. The timely filing of a petition for panel rehearing, petition for rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion, unless the court orders otherwise.

"(2) Pending Petition for Certiorari.

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

"(B) The stay must not exceed 90 days, unless the period is extended for good cause or unless the party who

obtained the stay files a petition for the writ and so notifies the circuit clerk in writing within the period of the stay. In that case, the stay continues until the Supreme Court's final disposition.

. . . . .

"(D) The court of appeals must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed."

Tennessee argues that the Court of Appeals was required to issue the mandate following this Court's denial of Thompson's petition for certiorari. The State's position rests on Rule 41(d)(2)(D), which states that "[t]he court of appeals ***803** must issue the mandate immediately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed." This provision, the State points out, admits of no exceptions, so the mandate should have issued on the date that a copy of this Court's order denying certiorari was filed with the Court of Appeals, *i.e.*, December 8, 2003.

The State further contends that because the mandate should have issued in December 2003, the Court of Appeals' amended opinion was in essence a recall of the mandate. If this view is correct, the Court of Appeals' decision to revisit its earlier opinion must satisfy the standard established by *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998). *Calderon* held that "where a federal court of appeals *sua sponte* recalls its mandate to revisit the merits of an earlier decision denying habeas corpus relief to a state prisoner, the court abuses its discretion unless it acts to avoid a miscarriage of justice as defined by our habeas corpus jurisprudence." *Id.*, at 558, 118 S.Ct. 1489. See also *Schlup v. Delo*, 513 U.S. 298, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995); *Sawyer v. Whitley*, 505 U.S. 333, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

Thompson counters by arguing that Rule 41(d)(2)(D) is determinative only when the court of appeals enters a stay of the mandate to allow the Supreme Court to dispose of a petition for certiorari. The provision, Thompson says, does not affect the court of appeals' broad discretion to enter a stay for other reasons. He relies on Rule 41(b), which provides the court of appeals may "shorten or extend the time" in which to issue the mandate. Because the authority vested by Rule 41(b) is not limited to the period before a petition for certiorari is denied, he argues that the Court of Appeals had the authority to stay its mandate following this Court's denial of certiorari and rehearing. Although the Court of Appeals failed to issue an order staying the mandate after we denied rehearing, Thompson asserts that the court exercised its Rule 41(b) powers by simply failing to issue it.

To resolve this case, we need not adopt either party's interpretation of Rule 41. Instead, we hold that-assuming, ****2832 *804** *arguendo*, that the Rule authorizes a stay of the mandate following the denial of certiorari and also that a court may stay the mandate without entering an order-here the Court of Appeals abused its discretion in doing so.

III

We find an abuse of discretion for the following reasons.

Prominent among our concerns is the length of time between this Court's denial of certiorari and the Court of Appeals' issuance of its amended opinion. We denied Thompson's petition for certiorari in December 2003 and his

petition for rehearing one month later. From this last denial, however, the Court of Appeals delayed issuing its mandate for over five months, releasing its amended opinion in June.

The consequence of delay for the State's criminal justice system was compounded by the Court of Appeals' failure to issue an order or otherwise give notice to the parties that the court was reconsidering its earlier opinion. The Court of Appeals had issued two earlier orders staying its mandate. The first order stayed the mandate pending disposition of Thompson's petition for certiorari. The second order extended the stay to allow Thompson time to file a petition for rehearing with this Court and "thereafter until the Supreme Court disposes of the case." So by the express terms of the second order the mandate was not to be stayed after this Court acted; and when we denied rehearing on January 20, 2004, the Court of Appeals' second stay dissolved by operation of law. Tennessee, acting in reliance on the Court of Appeals' earlier orders and our denial of certiorari and rehearing, could assume that the mandate would-indeed must-issue. While it might have been prudent for the State to verify that the mandate had issued, it is understandable that it proceeded to schedule an execution date. Thompson, after all, had not sought an additional stay of the mandate, and the Court of Appeals had given no indication that it might be revisiting its earlier decision.

***805** This latter point is important. It is an open question whether a court may exercise its Rule 41(b) authority to extend the time for the mandate to issue through mere inaction. Even assuming, however, that a court could effect a stay for a short period of time by withholding the mandate, a delay of five months is different in kind. "Basic to the operation of the judicial system is the principle that a court speaks through its judgments and orders." *Murdaugh Volkswagen, Inc. v. First National Bank of South Carolina*, 741 F.2d 41, 44 (C.A.4 1984). Without a formal docket entry neither the parties nor this Court had, or have, any way to know whether the court had stayed the mandate or simply made a clerical mistake. Cf. *Ballard v. Commissioner*, 544 U.S. 40, 59-60, 125 S.Ct. 1270, 1282-1283, 161 L.Ed.2d 227 (2005). The dissent claims "the failure to notify the parties was likely due to a simple clerical error" on the part of the Clerk's office. *Post*, at 2843 (opinion of BREYER, J.). The record lends no support to this speculation. The dissent also fails to explain why it is willing to apply a "presumption of regularity" to the panel's actions but not to the Clerk's. *Ibid.*

The Court of Appeals could have spared the parties and the state judicial system considerable time and resources if it had notified them that it was reviewing its original panel decision. After we denied Thompson's petition for rehearing, Tennessee scheduled his execution date. This, in turn, led to various proceedings in state and federal court to determine Thompson's present competency to be executed. See, ****2833** *e.g.*, *Thompson v. State*, 134 S.W.3d 168 (Tenn.2004). All of these steps were taken in reliance on the mistaken impression that Thompson's first federal habeas case was final. The State had begun to "invok[e] its entire legal and moral authority in support of executing its judgment." *Calderon v. Thompson*, *supra*, at 556-557, 118 S.Ct. 1489.

The parties' assumption that Thompson's habeas proceedings were complete was all the more reasonable because the Court of Appeals' delay in issuing its mandate took place ***806** after we had denied certiorari. As a practical matter, a decision by this Court denying discretionary review usually signals the end of litigation. While Rule 41(b) may authorize a court to stay the mandate after certiorari is denied, the circumstances where such a stay would be warranted are rare. See, *e.g.*, *First Gibraltar Bank, FSB v. Morales*, 42 F.3d 895 (C.A.5 1995); *Alphin v. Henson*, 552 F.2d 1033 (C.A.4 1977). In the typical case, where the stay of mandate is entered solely to allow this Court time to consider a petition for certiorari, Rule 41(d)(2)(D) provides the default: "The court of appeals must issue the mandate immedi-

ately when a copy of a Supreme Court order denying the petition for writ of certiorari is filed."

By providing a mechanism for correcting errors in the courts of appeals before Supreme Court review is requested, the Federal Rules of Appellate Procedure ensure that litigation following the denial of certiorari will be infrequent. See Fed. Rule App. Proc. 40(a) ("Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment"). See also Fed. Rules App. Proc. 35 (rehearing en banc), 40 (panel rehearing).

Indeed, in this case Thompson's petition for rehearing and suggestion for rehearing en banc pressed the same arguments that eventually were adopted by the Court of Appeals in its amended opinion. The Sultan evidence, first presented to the Court of Appeals as an attachment to Thompson's motion to hold his appeal in abeyance, was quoted extensively in the petition for rehearing to the Court of Appeals. Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 00-5516(CA6), pp. 12-20, 28-31. After the request for rehearing was denied, the State could have assumed with good reason that the Court of Appeals was not impressed by Thompson's arguments based on the Sultan evidence. The court's opportunity to consider these arguments at the rehearing stage is yet another factor supporting ***807** our determination that the decision to withhold the mandate was in error. Cf. *Calderon v. Thompson*, 523 U.S., at 551-553, 118 S.Ct. 1489 (questioning whether a "mishandled law clerk transition" and the "failure of another judge to notice the action proposed by the original panel" would justify recalling the mandate in a non habeas case).

The dissent's explanation of how the Sultan evidence was overlooked is inaccurate in several respects. For example, the statements that the "Sultan documents were not in the initial record on appeal," *post*, at 2841, and that "the panel previously had not seen these documents" before the rehearing stage, *id.*, at 2842, convey the wrong impression. Although the Sultan evidence was not part of the District Court's summary judgment record, the documents were included in the certified record on appeal as attachments to Thompson's Rule 60(b) motion. Record 133; Docket Entry 4/5/02 in No. 4:98-cv-006 (ED Tenn.); Docket Entry 4/10/02 in No. 00-5516(CA6). The dissent also argues the petition for rehearing did not adequately bring the Sultan evidence to the attention of the Court of Appeals. ****2834** *Post*, at 2841-2842, 2844. This is simply untrue. The original panel opinion, which did not discuss the Sultan evidence in any detail, emphasized that Thompson had failed to produce any evidence that he was mentally ill at the time of his offense. 315 F.3d, at 590; *id.*, at 595-596 (Moore, J., concurring in result). The petition for rehearing attacked this conclusion in no uncertain terms and placed the Sultan evidence front and center. Here, for example, is an excerpt from the petition's table of contents:

"II. THE CONCLUSION THAT THERE IS NO EVIDENCE PRESENTED IN THE RECORD OF THOMPSON'S MENTAL ILLNESS AT THE TIME OF THE CRIME IS WRONG

"A. Thompson Has Set Forth Above The Record Facts Demonstrating His Mental Illness At The Time Of The Crime

***808** "B. The Majority Overlooks The Facts And Expert Opinion Set Forth In Dr. Sultan's Report And Deposition." Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 00-5516(CA6), p. ii.

See also *id.*, at 1 (mentioning the Sultan evidence in the second paragraph of the statement in support of panel

rehearing). The rehearing petition did not explain why Sultan's deposition and expert report had been omitted from the summary judgment record, but that is beside the point. The petition acknowledged that the Sultan evidence was first presented to the District Court as an attachment to the Rule 60(b) motion, *id.*, at 29, and gave the Sultan evidence a prominent and explicit mention in the table of contents. It is difficult to see how Thompson's counsel could have been clearer in telling the Court of Appeals that it was wrong. The dissent's treatment of this issue assumes that judges forget even the basic details of a capital case only one month after issuing a 38-page opinion and that judges cannot be relied upon to read past the first page of a petition forrehearing. The problem is that the dissent cannot have it both ways: If the Sultan evidence is as crucial as the dissent claims, it would not easily have been overlooked by the Court of Appeals at the rehearing stage.

Our review of the Sultan deposition reinforces our conclusion that the Court of Appeals abused its discretion by withholding the mandate. Had the Sultan deposition and report been fully considered in the federal habeas proceedings, it no doubt would have been relevant to the District Court's analysis. Based on the Sultan deposition, Thompson could have argued he suffered from mental illness at the time of his crime that would have been a mitigating factor under Tennessee law and that his trial attorneys were constitutionally ineffective for failing to conduct an adequate investigation into his mental health.

Relevant though the Sultan evidence may be, however, it is not of such a character as to warrant the Court of Appeals' ***809** extraordinary departure from standard appellate procedures. There are ample grounds to conclude the evidence was unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim. Sultan examined Thompson for the first time on August 20, 1998, App. 37, some 13 years after Thompson's crime and conviction. She relied on the deterioration in Thompson's present mental health-something that obviously was not observable at the time of trial-as evidence of his condition in 1985. (Indeed, there was a marked decline in his condition during the 6-month period between Sultan's first two visits. *Id.*, at 51-58.) Sultan's findings regarding Thompson's condition in 1985 are contradicted by the testimony of two experts who examined ****2835** him at the time of trial, Dr. Watson and Dr. Copple. Watson performed a battery of tests at the Middle Tennessee Mental Health Institute, where Thompson was referred by the trial court for an examination, and concluded that Thompson " '[did] not appear to be suffering from any complicated mental disorder which would impair his capacity to appreciate the wrongfulness of the alleged offenses, or which would impair his capacity to conform his conduct to the requirements of the law.' " 19 Tr. 164. Indeed, Watson presented substantial evidence supporting his conclusion that Thompson was malingering for mental illness. *Id.*, at 151-152; 20 *id.*, at 153-160. For example, Thompson claimed he could not read despite a B average in high school and one year's college credit. 19 *id.*, at 137; 20 *id.*, at 151. Thompson's test scores also indicated that he was attempting to fake schizophrenia. 20 *id.*, at 153-154. Copple, the psychologist retained by Thompson's defense team, agreed with Watson that Thompson was not suffering from mental illness. 19 *id.*, at 58. Had the Sultan deposition been included in the District Court record, Thompson still would have faced an uphill battle to obtaining federal habeas relief. He would have had to argue that his trial attorneys should have continued to investigate his mental***810** health even after both Watson and Copple had opined that there was nothing to uncover.

Sultan's testimony does not negate Thompson's responsibility for committing the underlying offense, but it does bear upon an argument that Thompson's attorneys could have presented at sentencing. Sultan's ultimate conclusion-that Thompson's mental illness substantially impaired his ability to conform his conduct to the requirements of the law-is couched in the language of a mitigating factor under Tennessee law. Tenn.Code Ann. § 39-2-203(j)(8) (1982). See also § 39-13-204(j)(8) (Lexis 2003). Thompson's trial attorneys, however, chose not to pursue a mitigation

strategy based on mental illness, stressing instead character evidence from family and friends and expert testimony that he had the capacity to adjust to prison. *Thompson v. State*, 958 S.W.2d, at 164-165. This strategic calculation, while ultimately unsuccessful, was based on a reasonable investigation into Thompson's background. Sultan relied on three witnesses in preparing her report: Thompson's grandmother, sister, and ex-girlfriend. These witnesses not only were interviewed by the defense attorneys; they testified at sentencing. Consultation with these witnesses, when combined with the opinions of Watson and Copple, provided an adequate basis for Thompson's attorneys to conclude that focusing on Thompson's mental health was not the best strategy. As the Tennessee Court of Criminal Appeals noted, "Because two experts did not detect brain damage, counsel cannot be faulted for discarding a strategy that could not be supported by a medical opinion." *Id.*, at 165.

Without a single citation to the record, the dissent suggests that Thompson's attorneys failed to conduct adequate interviews of the defense witnesses on whom Sultan relied in her report. *Post*, at 2844-2845. Most of the information on Thompson's childhood was provided to Sultan by Nora Jean Wharton, Thompson's older sister. App. 16-18. Setting***811** aside the fact that Thompson did not argue in state court that his counsel's interview of Wharton was inadequate, *Thompson v. State*, *supra*, at 160-169, Thompson's attorneys cannot be faulted for failing to elicit from her any details on Thompson's difficult home life. After all, Wharton testified at trial that Thompson's childhood was "poor," but "very happy." 18 Tr. 3. The dissent also ****2836** implies that the experts who examined Thompson lacked information necessary to reach an accurate assessment. The record refutes this assertion. In conducting his examination, Watson had access to Thompson's social history and military records. 19 *id.*, at 149; 20 *id.*, at 186 (Exh. 102, pp. 11, 27-28). Watson was also aware of the prior head injuries as well as Thompson's claim that he heard voices. 19 *id.*, at 152; 20 *id.*, at 154-155. Nevertheless, Watson, whose evaluation was contemporaneous with the trial, found no evidence that Thompson was mentally ill at the time of the crime. Watson's report was unequivocal on this point:

> " 'Mr. Thompson's speech and communication were coherent, rational, organized, relevant, and devoid of circumstantiality, tangentiality, looseness of associations, paranoid ideation, ideas of reference, delusions, and other indicators of a thought disorder. His affect was appropriate to his thought content, and he exhibited no flight of ideas, manic, depressed, or bizarre behaviors, and his speech was not pressured nor rapid. He exhibited none of the signs of an affective illness. His judgment and insight are rather poor. Psychological testing revealed him to be functioning in the average range intellectually, to exhibit no signs of organicity or brain damage on the Bender-Gestalt Test and the Bender Interference Procedure. Personality profiles revealed no evidence of a psychosis, but indicated malingering in the mental illness direction. (For example, the schizophrenic score was at T 120, while clinical observations***812** revealed no evidence of a thought disorder.) Mr. Thompson's memory for recent and remote events appeared unimpaired.' " 20 *id.*, at 159-160.

Sultan's testimony provides some support for the argument that the strategy of emphasizing Thompson's positive attributes was a mistake in light of Thompson's deteriorated condition 13 years after the trial. This evidence, however, would not come close to satisfying the miscarriage of justice standard under *Calderon* had the Court of Appeals recalled the mandate. Neither, in our view, did this evidence justify the Court of Appeals' decision to withhold the mandate without notice to the parties, which in turn led the State to proceed for five months on the mistaken assumption that the federal habeas proceedings had terminated. The dissent suggests that failing to take account of the Sultan evidence would result in a "miscarriage of justice," *post*, at 2837-2838, 2845, but the dissent uses that phrase in a way that is inconsistent with our precedents. In *Sawyer v. Whitley*, 505 U.S., at 345-347, 112 S.Ct. 2514, this Court held that additional mitigating evidence could not meet the miscarriage of justice standard. Only evidence that affects

a defendant's eligibility for the death penalty-which the Sultan evidence is not-can support a miscarriage of justice claim in the capital sentencing context. *Id.*, at 347, 112 S.Ct. 2608; *Calderon*, 523 U.S., at 559-560, 118 S.Ct. 1489.

One last consideration informs our review of the Court of Appeals' actions. In *Calderon*, we held that federalism concerns, arising from the unique character of federal habeas review of state-court judgments, and the policies embodied in the Antiterrorism and Effective Death Penalty Act of 1996 required an additional presumption against recalling the mandate. This case also arises from federal habeas corpus review of a state conviction. While the State's reliance interest is not as strong in a case where, unlike *Calderon*, the mandate has not issued, the finality and comity concerns that animated *Calderon* are implicated here. Here a dedicated judge discovered what he believed to have been an error, ***813** and we are respectful of ****2837** the Court of Appeals' willingness to correct a decision that it perceived to have been mistaken. A court's discretion under Rule 41 must be exercised, however, in a way that is consistent with the " 'State's interest in the finality of convictions that have survived direct review within the state court system.' " *Id.*, at 555, 118 S.Ct. 1489 (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993)). Tennessee expended considerable time and resources in seeking to enforce a capital sentence rendered 20 years ago, a sentence that reflects the judgment of the citizens of Tennessee that Thompson's crimes merit the ultimate punishment. By withholding the mandate for months-based on evidence that supports only an arguable constitutional claim-while the State prepared to carry out Thompson's sentence, the Court of Appeals did not accord the appropriate level of respect to that judgment. See *Calderon v. Thompson*, *supra*, at 554-557, 118 S.Ct. 1489.

The Court of Appeals may have been influenced by Sultan's unsettling account of Thompson's condition during one of her visits. She described Thompson as being in "terrible psychological condition," "physically filthy," and "highly agitated." App. 51. This testimony raised questions about Thompson's deteriorating mental health and perhaps his competence to be executed, but these concerns were properly addressed in separate proceedings. Based on the most recent state-court decision, which rejected the argument that Thompson is not competent to be executed, it appears that his condition has improved. *Thompson v. State*, 134 S.W.3d, at 184-185. Proceedings on this issue were underway in the District Court when the Court of Appeals issued its second opinion. If those proceedings resume, the District Court will have an opportunity to address these matters again and in light of the current evidence.

Taken together these considerations convince us that the Court of Appeals abused any discretion Rule 41 arguably granted it to stay its mandate, without entering a formal ***814** order, after this Court had denied certiorari. The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

This capital case arises out of unusual circumstances-circumstances of a kind that I have not previously experienced in the 25 years I have served on the federal bench. After an appellate court writes and releases an opinion, but before it issues its mandate, the writing judge, through happenstance, comes across a document that (he reasonably believes) shows not only that the court's initial decision is wrong but that the decision will lead to a serious miscarriage of justice. What is the judge to do?

What the judge did here was to spend time-hundreds of hours (while a petition for certiorari was pending before

this Court and during the five months following our denial of the petition for rehearing)-reviewing the contents of the vast record with its many affidavits, reports, transcripts, and other documents accumulated in the course of numerous state and federal proceedings during the preceding 20 years. The judge ultimately concluded that his initial instinct about the document was correct. The document was critically important. It could affect the outcome of what is, and has always been, the major issue in the case. To consider the case without reference to it could mean a miscarriage of justice.

****2838** The judge consequently wrote a lengthy opinion (almost 30,000 words) explaining what had happened. The other members of the panel did not agree with everything in that opinion, but they did agree that their initial decision must be vacated.

The Court commendably describes what occurred as follows: A "dedicated judge discovered what he believed to have been an error, and we are respectful of the Court of Appeals' willingness to correct a decision that it perceived ***815** to have been mistaken." *Ante*, at 2836-2837. The Court, however, does not decide this case in a manner consistent with that observation. A somewhat more comprehensive account of the nature of the "error"-of the matter at stake, of the importance of the document, of the mystery of its late appearance, of the potential for a miscarriage of justice-should help make apparent the difficult circumstance the panel believed it faced. It will also explain why there was no "abuse" of discretion in the panel's effort to "correct a decision that it perceived to have been mistaken."

I

Judge Suhrheinrich, the panel member who investigated the record, is an experienced federal judge, serving since 1984 as a federal trial court judge and since 1990 as a federal appellate judge. He wrote a lengthy account of the circumstances present here. To understand this case, one must read that full account and then compare it with the Court's truncated version. I provide a rough summary of the matter based upon my own reading of his opinion. 373 F.3d 688, 692-742 (C.A.6 2004) (opinion concurring in part and dissenting in part).

A

The panel's initial decision, issued on January 9, 2003, focused upon an issue often raised when federal habeas courts review state proceedings in a capital case, namely, the effectiveness of counsel at the original trial. *Thompson v. Bell*, 315 F.3d 566, 587-594. See *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In this instance, the federal ineffective-assistance claim was that state trial counsel had not sufficiently investigated the background of the defendant, Gregory Thompson. Thompson claimed that an adequate investigation would have shown, to the satisfaction of testifying experts, that he suffered from episodes of schizophrenia at the time of the crime. The schizophrenia-though episodic ***816** would have proved a mitigating circumstance at the penalty phase. 373 F.3d, at 697-698, and n. 4.

Thompson's trial took place in a Tennessee state court, where he was found guilty of murder and sentenced to death. His state-appointed counsel put on no defense at trial. At sentencing, however, counsel sought to show that Thompson was schizophrenic. State forensic psychologists examined Thompson and concluded that Thompson, probably "malingering," did not show genuine and significant symptoms of schizophrenia at that time and was not mentally ill. A clinical psychologist hired by Thompson's counsel examined Thompson for eight hours and reached approximately the same conclusion: He said that Thompson was not *then* mentally ill. *Id.*, at 692, 694-695.

Thompson raised the issue of his mental condition in state postconviction proceedings, which he initiated in 1990. His expert witness, Dr. Gillian Blair, testified (with much supportive material) that Thompson was by that time clearly displaying serious schizophrenic symptoms-voice illusions, attempts at physical self-mutilation, and the like. Indeed, the State conceded that he was under a regime of major antipsychotic medication. But Dr. Blair said that she could not determine ****2839** whether Thompson had been similarly afflicted (*i.e.*, suffering from episodes of schizophrenia) at the time of the crime without a thorough background investigation-funds for which the state court declined to make available. The state court then ruled in the State's favor. *Id.*, at 694-695.

Thompson filed a habeas petition in Federal District Court about eight months after the state court's denial of postconviction relief became final. As I said above, see *supra*, at 2838, he claimed ineffective assistance of counsel. The Federal District Court appointed counsel, an assistant federal public defender. Counsel then obtained the services of two experts, Dr. Barry Crown and Dr. Faye Sultan. Both examined Thompson, and the latter, Dr. Sultan, ***817** conducted the more thorough background investigation that Dr. Blair had earlier sought. The State, after deposing Dr. Sultan, moved for summary judgment. 373 F.3d, at 696, 700-704, 711.

The District Court granted that motion on the ground that "Thompson has not provided this Court with anything other than factually unsupported allegations that he was incompetent at the time he committed the crime," nor "has Thompson provided this Court with any significant probative evidence that [he] was suffering from a significant mental disease that should have been presented to the jury during the punishment phase as mitigation evidence." *Id.*, at 712-713 (quoting District Court's memorandum opinion; emphasis and internal quotation marks omitted).

Thompson (now with a new public defender as counsel) appealed the District Court's grant of summary judgment in the State's favor. (A little over a year later, while the appeal was still pending, Thompson's new counsel, apparently having discovered that Dr. Sultan's deposition and report had not been included in the record before the District Court, filed a motion in that court for relief from judgment under Federal Rule of Civil Procedure 60(b), seeking to supplement the record with those documents. Counsel also filed a motion in the appellate court, with the Sultan deposition attached, requesting that the appeal be held in abeyance while the District Court considered the Rule 60(b) motion. Both motions were denied, and Thompson's counsel did not take an appeal from the District Court's denial of the Rule 60(b) motion.) 373 F.3d, at 714-715, and n. 10, 724-725.

The Court of Appeals reviewed the District Court's grant of summary judgment. In doing so, the appellate panel examined the record before that court. It noted that Thompson's federal habeas counsel had hired two experts (Crown and Sultan), and had told the court (in an offer of proof) that they would provide evidence that Thompson suffered from mental illness *at the time of the crime.* But the appellate ***818** panel found that neither expert had done so. Indeed, said the panel, Thompson had "never submitted to any court *any* proof that he suffered from severe mental illness at the time of the crime." 315 F.3d, at 590 (emphasis altered). Though Thompson's several attorneys had made the same allegation for many years in several different courts (said the panel), "at each opportunity, counsel fail[ed] to secure an answer to the critical issue of whether Thompson was mentally ill at the time of the crime." *Ibid.* That fact, concluded the panel (over a dissent), was fatal to Thompson's basic ineffective-assistance-of-counsel claim. Obviously "trial counsel cannot be deemed ineffective for failing to discover something that does not appear to exist." *Ibid.*; see also *id.*, at 595 (Moore, J., concurring in result) ("Thompson has presented no evidence that his [trial] counsel knew or

should have known either that Thompson**2840 was mentally ill or that his mental condition was deteriorating at the time of his trial or at the time of his crime"). The dissenting judge thought Thompson had made out an ineffective-assistance claim by showing that his trial counsel had relied on an inadequate expert, that is, an expert without the necessary qualifications to counter the State's experts' conclusions. *Id.*, at 599-605 (opinion of Clay, J.).

The appeals court issued its opinion on January 9, 2003. Thompson's appointed federal appeals counsel filed a rehearing petition, which the court denied on March 10, 2003. See App. to Pet. for Cert. 346 (Order in No. 00-5516(CA6)). Thompson's counsel then sought Supreme Court review. This Court denied review (and rehearing) about one year later. 540 U.S. 1051, 124 S.Ct. 804, 157 L.Ed.2d 701 (2003) (denying certiorari); 540 U.S. 1158, 124 S.Ct. 1162, 157 L.Ed.2d 1058 (2004) (denying rehearing).

B

The Court of Appeals, following ordinary appellate-court practice, withheld issuance of its mandate while the case was under review here, namely, during calendar year 2003. During**819 that time and in the months that followed, something unusual happened. Judge Suhrheinrich realized that the panel, in reaching its decision, seemed to have overlooked documents provided by Dr. Sultan that likely were relevant. In September 2003, the appellate court called for the entire certified record. Upon reviewing that record, Judge Suhrheinrich found Dr. Sultan's deposition and accompanying report. 373 F.3d, at 692-693; App. to Pet. for Cert. 347-348; see also Appendix, *infra*.

The Sultan documents filled the evidentiary gap that underlay the District Court's and the appellate panel's determinations. These documents made clear that Dr. Sultan had investigated Thompson's background in depth and that in her (well-supported) opinion, Thompson *had* suffered from serious episodic bouts of schizophrenia *at the time the crime was committed.* Clearly the documents contained evidence supporting Thompson's claim regarding his mental state at the time of the offense. Why had the District Court denied the existence of *any* such evidence? Why had Judge Suhrheinrich, and the other members of the panel (and the State, which took Dr. Sultan's deposition) done the same?

Judge Suhrheinrich then drafted an opinion that sought to answer three questions:

Question One: Do these documents actually provide strong evidence that Thompson was schizophrenic (and seriously so) at the time of the crime?

Question Two: If so, given the many previous opportunities that Thompson has had to raise the issue of his mental health, to what extent would these documents be likely to matter in respect to the legal question raised in Thompson's federal proceedings, *i.e.*, would they likely lead a federal habeas court to hold that Thompson's trial counsel was ineffective for failing to undertake a background investigation akin to that performed by Dr. Sultan?

Question Three: How did these documents previously escape our attention?

***820** 1

The panel answered the first question-regarding the importance of the documents-unanimously. Dr. Sultan's report and deposition were critically important. As Judge Suhrheinrich's opinion explains, these documents detail Thompson's horrendous childhood, his family history of mental illness, his self-destructive schizophrenic behavior

(including auditory hallucinations)****2841** as a child, his mood swings and bizarre behavior as a young adult, and a worsening of that behavior after a serious beating to his head that he suffered while in the Navy. For example, Dr. Sultan's examination of Thompson and her interviews with Thompson's family members and others revealed that as a child Thompson would repeatedly bang his head against the wall to "knock the Devil out" after his grandmother yelled at him, "You have the Devil in you." 373 F.3d, at 716 (internal quotation marks omitted). These documents explain how Thompson, as a young adult, would talk to himself and scream and cry for no apparent reason. They suggest that he had bouts of paranoia.

The documents provide strong support for the conclusion that Thompson suffered from episodes of schizophrenia at the time of the offense. And they thereby offer significant support for the conclusion that, had earlier testifying experts had this information, they could have countered the State's experts' conclusion that Thompson was malingering at the time of trial. Thus, the Sultan materials seriously undermined the foundation of the State's position in respect to Thompson's mental condition.

The Sultan materials also revealed that trial counsel failed to discover other mitigating evidence of importance. Interviews with family members revealed repeated incidents of violence in the family, including an episode in which, as a young boy, Thompson witnessed his father brutally beat and rape his mother. His grandmother, with whom Thompson ***821** and his siblings lived after their mother died, subjected them to abuse and neglect. She would forget to feed the children, leaving them to steal money from under her bed to buy food. These and other circumstances are detailed in sections of the Sultan report and deposition reproduced in the Appendix, *infra*.

2

The panel also responded unanimously and affirmatively to the second question: Would federal-court access to the Sultan documents likely have made a significant difference in respect to the federal legal question at issue in Thompson's habeas petition, namely, the failure of Thompson's trial counsel to investigate his background? Trial counsel had had important indications that something was wrong. Indeed, counsel himself had sought an evaluation of Thompson's mental condition. He also was aware of Thompson's violent behavior in the military, and knew that Thompson had said he had had auditory hallucinations all his life. He was aware, too, of the changes in Thompson's behavior. Should counsel not then have investigated further?

The Sultan documents make clear that, had he done so, he would have had a strong answer to the State's experts. Thus the documents were relevant to the outcome of the federal habeas proceedings. The Federal District Court based its grant of summary judgment on the premise that there was *no* evidence supporting Thompson's claim. The documents showed that precisely such evidence was then available.

3

The panel (while disagreeing about how to allocate blame) agreed in part about the answer to the third question: how these documents previously had escaped the panel's attention. The judges agreed that the Sultan documents were not in the initial record on appeal. The panel's original opinion,***822** while mentioning both Dr. Sultan and Dr. Crown, assumed that neither expert had addressed Thompson's mental condition at the time of the crime. ****2842**315 F.3d, at 583, n. 13 ("Sultan's affidavit does not discuss Thompson's mental state *at the time of the offense* " (emphasis added)); *ibid.* (explaining that Thompson filed a Rule 60(b) motion to supplement the record with Dr. Sultan's report, but

not mentioning that the report addressed Thompson's mental condition at the time of the offense); see also *supra*, at 2839-2840.

How had the panel overlooked the copies of the Sultan deposition attached to (1) the rehearing petition and (2) the (Rule 60(b)-related) motion to hold the appeal in abeyance? As for the rehearing petition, the reason could well lie in the petition's (incorrect) suggestion that the panel had already considered the appended document as part of the original record. See Pet. for Rehearing and Suggestion for Rehearing En Banc in No. 00-5516(CA6), p. 1 ("A majority of this panel overlooked other proof in the record, including but not limited to, the expert opinion of Dr. Faye E. Sultan"); see also *id.*, at 28-32. While the petition explains the importance of the documents, it does not explain the circumstances, namely, that the panel previously had not seen these documents. Instead, it gives the impression that counsel was simply reemphasizing a matter the panel had already considered. To that extent, the petition reduced the likelihood that the panel would make the connection it later made and fatally weakened its argument for *re*-hearing.

As for the motion to hold the appeal in abeyance, the panel's failure to recognize the significance of the appended Sultan materials is also understandable. The motion gives the impression that the appellate court would have been able to handle any problem arising from the exclusion of these materials in an appeal taken from the District Court's Rule 60(b) decision. The appellate court, however, never had any such opportunity because counsel did not appeal the District Court's denial of the Rule 60(b) motion.

***823** C

Once the panel understood the significance of the Sultan report, it had to decide what to do. An appellate court exists to correct legal errors made in the trial court. What legal error had the District Court committed? The appeal concerned its grant of summary judgment in the State's favor. The District Court made that decision on the basis of the record before it, and that record apparently lacked the relevant documents. How then could an appeals court say that the District Court was wrong to grant the summary judgment motion?

The panel answered this question by *not* holding that the District Court had erred. Finding that the Sultan documents had been "apparently negligently omitted" from the record, it exercised its equitable powers to supplement the record with the deposition. 373 F.3d, at 691. It also found that, since the State itself had helped to create that document (because the State had taken Dr. Sultan's deposition), the District Court's reconsideration of the matter would not unfairly prejudice the State. And it noted that this case is a death case. Then, relying on its "inherent power to reconsider" an opinion "prior to the issuance of the mandate," the court issued a new opinion, vacating the District Court's grant of summary judgment to the State and remanding the case to the District Court for further proceedings on the matter. *Ibid.*

II

The question before us is not whether we, as judges, would have come to the same conclusions as did the panel of the Court of Appeals. It is whether the three members of the appellate panel abused ****2843** their discretion in reconsidering the matter and, after agreeing unanimously that they would have reached a different result had they considered the overlooked evidence, vacating the District Court's judgment and remanding the case.

***824** The Court concludes that the panel's reconsideration of the matter and decision to vacate the District Court's

judgment amounted to an "abuse of discretion." *Ante,* at 2827. It therefore reverses the panel's unanimous interlocutory judgment remanding a capital case to the District Court for an evidentiary hearing. The Court lists five reasons why the Court of Appeals "abused its discretion." *Ante,* at 2832. None of these reasons, whether taken separately or considered together, stands up to examination.

Reason One. During the 5-month period after this Court denied rehearing of Thompson's certiorari petition, during which time the Court of Appeals was reconsidering the matter, it gave "no indication that it might be revisiting its earlier decision." Had it "notified" the parties, the court "could have spared the parties and the state judicial system considerable time and resources." Ante, at 2832.

If this consideration favors the Court's conclusion, it does so to a very modest degree. For one thing, the Federal Rules themselves neither set an unchangeable deadline for issuance of a mandate nor require notice when the court enlarges the time for issuance. Compare Fed. Rule App. Proc. 41(b) (2005) ("The court may shorten or extend the time") with Rule 41(a) (1968) (mandate "shall" issue "unless the time is shortened or enlarged *by order* " (emphasis added)). The Advisory Committee Notes to Rule 41 expressly contemplate that the parties will themselves check the docket to determine whether the mandate has issued. See Advisory Committee's 1998 Note on subd. (c) of Rule 41 ("[T]he parties can easily calculate the anticipated date of issuance and verify issuance of the mandate[;] the entry of the order on the docket alerts the parties to that fact"). And Sixth Circuit Rules require the Circuit Clerk to provide all parties with copies of the mandate. See Internal Operating Procedure 41(a) (CA6 2005) ("Copies of the mandate are distributed to all parties and the district court clerk's office"). Thus, the State's attorneys knew, or certainly should have known, that ***825** the mandate had not issued, and, as experienced practitioners, they also knew, or certainly should have known, that a proceeding is not technically over until the court has issued its mandate. And if concerned by the delay (and some delay in such matters is not uncommon), they could have asked the Circuit Clerk why the mandate had not issued. If necessary, they could have filed a motion seeking that information or seeking the mandate's immediate issuance.

For another thing, since notification is a clerical duty, the panel may have thought the parties *had* been notified. One of the judges on the panel could well have instructed the Circuit Clerk not to issue the mandate, and then simply have assumed that the Clerk would notify the parties of that fact (though the Clerk, perhaps inadvertently, did not do so). Why would the court want to hide what it was doing from the parties? Once we apply a presumption of regularity to the panel's actions, we must assume that the failure to notify the parties was likely due to a simple clerical error.

Further, the prejudice to the State that troubles the Court was likely small or nonexistent. The need to reset an execution date is not uncommon, and the state court's execution order explicitly foresaw that possibility. See 373 F.3d, at 692 (Tennessee Supreme Court order set ****2844** Thompson's execution date for August 19, 2004, "unless otherwise ordered by this Court or other appropriate authority" (internal quotation marks omitted)). Moreover, the State has not even argued-despite ample opportunity to do so-that the further proceedings ordered by the panel would actually have required it to set a new date.

Finally, the State did not, by way of a petition for rehearing, make any of its "failure to notify" arguments to the Court of Appeals. Although the law does not require the State to seek rehearing, such a petition would have permitted the panel to explain why the State was not notified and possibly to explore the matter of prejudice. There is no rea-

son***826** to reward the State for not filing a petition by assuming prejudice where none appears to exist.

Given the State's likely knowledge that the mandate had not issued, the existence of avenues for resolving any uncertainty, and the small likelihood of prejudice, the lack of notice does not significantly advance the Court's "abuse of discretion" finding. Indeed, if the Court believes that the Court of Appeals could have issued a revised opinion correcting its earlier judgment *if only it had given notice to the parties*, the sanction it now imposes-outright reversal-is far out of proportion to the crime.

Reason Two. The court's "opportunity to consider" the Sultan evidence "at the rehearing stage is yet another factor supporting" the abuse-of-discretion "determination." Ante, at 2833. I agree that it is unfortunate that, upon review of the rehearing petition, the panel failed to make the connection that would have allowed it, at that time, to reach the same conclusion it reached later. Still, the petition wrongly implied that the Sultan documents were part of the original appeal. Because it did not request rehearing on the ground that the documents were *not* in the record, it did not offer a genuine "opportunity to consider" the Sultan evidence.

Under these circumstances, I cannot agree that the court's opportunity to consider these documents at the rehearing stage should militate in favor of finding an abuse of discretion. To the contrary, I believe we should encourage, rather than discourage, an appellate panel, when it learns that it has made a serious mistake, to take advantage of an opportunity to correct it, rather than to ignore the problem.

Reason Three. The "Sultan evidence ... is not of such a character as to warrant [a] departure from standard appellate procedures" because "the evidence was unlikely to have altered the District Court's resolution of Thompson's ineffective-assistance-of-counsel claim." Ante, at 2834. *That is to say, given the expert testimony in the trial court, the Sultan evidence is unlikely meaningfully to have* ****827*** *strengthened Thompson's claim before the Federal District Court. Ante,* at 2834-2835.

This conclusion is wrong. The Court argues the following: (1) Dr. Sultan's conclusion rests in significant part upon interviews with three witnesses, Thompson's grandmother and sister (with whom Dr. Sultan spoke directly) and his girlfriend (whose interview with a defense investigator Dr. Sultan reviewed); (2) since all three of these witnesses testified at sentencing, Thompson's counsel must have consulted them at the time; and (3) "[c]onsultation with these witnesses, when combined with the opinions of [the State's expert] and [Thompson's expert], provided an adequate basis for Thompson's attorneys to conclude that focusing on Thompson's mental health was not the best strategy." *Ante,* at 2835. The Court then says that trial counsel's "strategy" may have ****2845** been "a mistake," *ante,* at 2836, but apparently not enough of a mistake to amount to inadequate assistance of counsel.

But how do the Court's conclusions follow from the premises? Dr. Sultan's interview of the three witnesses apparently turned up new information, indeed, crucial information. Why does that fact not tend to show that trial counsel's own "consultation" with those witnesses was inadequate? Or, if trial counsel was aware of the information, why does that not tend to show that trial counsel hired an expert who was not qualified to assess Thompson's mental condition, or that counsel failed adequately to convey the critical information to that expert? This Court in *Wiggins v. Smith*, 539 U.S. 510, 523-525, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), found trial counsel inadequate for failing to conduct a reasonable investigation, given notice that such an investigation would likely turn up important mitigating

evidence. See also *Rompilla v. Beard*, *ante*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360. Why is the same not true here, where Thompson's trial counsel was fully aware of the need for a background investigation, and then either did not ask the right questions, or did not hire the right expert, or did not convey the right information ***828** to that expert? At the least, is there not a good argument to this effect-an argument that the Sultan documents significantly strengthened? All three judges on the panel thought so: They concluded that they would have reached a different result on Thompson's ineffective-assistance-of-counsel claim had they been aware of the Sultan documents. The Court does not satisfactorily explain its basis for second-guessing the panel on this point.

Reason Four. The Sultan evidence does "not come close to satisfying the miscarriage of justice standard der Calderon." Ante, at 2836 (referring to *Calderon v. Thompson*, 523 U.S. 538, 118 S.Ct. 1489, 140 L.Ed.2d 728 (1998)). As the Court apparently agrees, see *ante*, at 2831-2832, *Calderon* does not apply here. And the panel's basic conclusion-that consideration of Thompson's ineffective-assistance-of-counsel claim without the benefit of the Sultan evidence would constitute a grave miscarriage of justice-survives *any* plausible standard of review. I can find nothing in the Court's opinion that explains why the panel's conclusion is wrong.

Reason Five. The Court of Appeals "did not accord the appropriate level of respect" to the State's "judgment." Ante, at 2837. If by "judgment" the Court means to refer to the state court's original judgment of conviction, this reason simply repeats Reason Four. The panel carefully examined the entire record and determined that there is a significant likelihood the Sultan evidence would demonstrate a violation of the Federal Constitution.

If the Court means to refer to the state court's judgment not to set aside the conviction in state postconviction proceedings, the Court is clearly wrong. The state court on collateral review refused to authorize funds for a background investigation, one for which Thompson's expert then showed a strong need, and which Thompson's expert now shows could well have demonstrated a significantly mitigating mental condition. How is it disrespectful of the State for a federal habeas court to identify a constitutional error that ***829** occurred in state-court proceedings in a capital case, by taking account of a key piece of evidence, mistakenly omitted from the record?

If the Court means to refer to the State's decision to proceed with the execution, I cannot possibly agree. The Court could not mean that *any* exercise by a federal court to correct an inadvertent, ****2846** and important, evidentiary error is "disrespectful" of a State's effort to proceed to execution. But if it does not mean "any" exercise at all, then how can it say the present exercise is disrespectful? The present exercise embodies as thorough an examination of the record and as significant a piece of evidence as one is likely to find. The process-the detail and care with which the Court of Appeals combed the record-does not show "disrespect." It shows the contrary.

The upshot is that the Court's five reasons are unconvincing. The Court simply states those reasons as conclusions. It fails to show how, or why, the unanimous panel erred in reaching diametrically opposite conclusions, all supported with detailed evidence set forth in Judge Suhrheinrich's opinion. It does not satisfactorily explain the evidentiary basis for its own conclusions. And, in the process, it loses sight of the question before us: again, *not* whether we, as judges, would have reached the same conclusion that the three judges on the panel reached, but rather whether they, having unanimously agreed that their earlier decision was wrong, abused their discretion in setting it right.

III

Ultimately this case presents three kinds of questions. The first is a narrow legal question. Has the Court of Appeals abused its discretion? For the reasons I have set forth, the answer to that question, legally speaking, must be "no."

The second is an epistemological question. How, in respect to matters involving the legal impact of the Sultan ***830** report and deposition, can the Court replace the panel's judgment with its own? Judge Suhrheinrich's opinion demonstrates why any assessment of that legal impact must grow out of thorough knowledge of the record. He spent hundreds of hours with its numerous documents in order to make that assessment. Those of his conclusions that were shared by the other members of the panel are logical, rest upon record-based facts, and are nowhere refuted (in respect to those facts) by anything before us or by anything in the Court's opinion. How can the Court know that the panel is wrong?

The third question is about basic jurisprudence. A legal system is based on rules; it also seeks justice in the individual case. Sometimes these ends conflict. To take account of such conflict, the system often grants judges a degree of discretion, thereby providing oil for the rule-based gears. When we tell the Court of Appeals that it cannot exercise its discretion to correct the serious error it discovered here, we tell courts they are not to act to cure serious injustice in similar cases. The consequence is to divorce the rule-based result from the just result. The American judicial system has long sought to avoid that divorce. Today's decision takes an unfortunate step in the wrong direction.

APPENDIX TO OPINION OF BREYER, J.

Excerpts from the Gregory Thompson Psychological Report prepared by Dr. Faye E. Sultan at the Riverbend Maximum Security Institution (RMSI) (July 22, 1999), App. 11-20.

"REFERRAL QUESTIONS:

"Mr. Gregory Thompson was referred for psychological evaluation in July, 1998 by attorney Mr. Stephen M. Kissinger of the Federal Defender Services of Eastern Tennessee Incorporated. Mr. Thompson was convicted of murder in 1985. This evaluation was requested to address the following questions:

****2847 *831** "1. Mr. Thompson's current psychological status[.]

"2. Mr. Thompson's likely psychological status and mental state before and surrounding the time of the 1985 offense.

"3. Social, environmental, psychological, and economic factors in the life of Mr. Thompson which might have be[en] considered to be mitigating in nature at the time of his trial.

"PROCEDURE:

"Psychological evaluation of Mr. Thompson was initiated on August 20, 1998. This first evaluation session extended over a period of approximately four hours and consisted of clinical interview and the administration of the Minnesota Multiphasic Personality Inventory-2 (MMPI-2). Some review of prior psychological evaluation records was conducted to establish what formal psychological and neuropsychological testing had been administered to Mr.

Thompson. Levels of current intellectual and neuropsychological functioning had been recently assessed by neuropsychologist, Barry Crown, Ph.D., so no attempt was made to replicate this type of assessment.

"Following the 8-20-98 initial evaluation session, a very extensive review of legal, military, medical, prison and psychiatric/psychological records was initiated. A list of the documents examined is attached to this report.

. . . . .

" ... Two further interviews were conducted with Mr. Thompson for [the] limited purpose [of determining Thompson's competence to participate in habeas proceedings], on 2-2-99 and 4-7-99, totaling approximately six hours of additional observation. Voluminous Tennessee Department of Corrections mental health, medical, and administrative records were reviewed at this time as well.

. . . . .

***832** "[T]he extensive record review conducted, the ten hours of clinical observations made of Mr. Thompson during the preceding eleven months, the interviews conducted with collateral informants, and the recent and past psychological testing which had been administered provide enough data to make it possible to render professional opinions about Mr. Thompson's mental state at and around the time of the 1985 offense.

"CLINICAL OBSERVATIONS:

"Mr. Gregory Thompson was cooperative with the assessment procedure. He answered all questions posed to him and appeared to be alert, watchful and interested in the interview process. His speech was sometimes tangential and rambling. Although motor behavior appeared controlled there was a manic quality to his verbalizations. Mr. Thompson was oriented as to person, place and time, but he repeatedly expressed his firm belief that he had written each and every song which played on the radio.

"Mr. Thompson displayed symptoms of psychosis during the two subsequent meetings. The details of these sessions will not be reviewed here.

"FORMAL PSYCHOLOGICAL TESTING:

"The Minnesota Multiphasic Personality Inventory-2 (MMPI-2) was administered to Mr. Thompson on 8-20-98. It had been determined in other examination settings that Mr. Thompson's level of reading competence exceeded the necessary level of 8th grade ability required for proper administration of this test.

****2848** "The MMPI-2 profile produced by Mr. Thompson is considered valid and appropriate for interpretation. Individuals producing similar profiles are described as experiencing significant psychological difficulties and chronic psychological maladjustment. Such individuals are considered to be highly suspicious of others, often displaying paranoid features.***833** There is indication in this profile of the presence of a thought disorder and the inability to manage emotions. The world is perceived as a threatening and dangerous place and fears are viewed as externally generated and reality-based rather than as a product of an internally generated state. The behavior of such individuals is often described as hostile, aggressive, and rebellious against authority. Poor impulse control, lack of trust in others, and low frustration tolerance may result in such individuals displaying rage in interpersonal relationships.

"Individuals producing this testing profile are also described as experiencing depressed mood. There is the strong possibility that such individuals have contemplated suicide and report preoccupation with feeling guilty and unworthy. Testing items were endorsed which suggest memory and concentration problems, and an inability to make decisions.

"RELEVANT PSYCHOLOGICAL/PSYCHIATRIC DATA CONTAINED IN RECORDS:

"The[re] is substantial documentation throughout the Tennessee Department of Corrections records that Mr. Greg Thompson has suffered from significant mental illness since at least the time of ... his incarceration in 1985. He has been treated almost continuously with some combination of major tranquilizer and/or anti-depressant and/or anti-anxiety medications. He has received a variety of diagnostic labels including Psychosis, Psychosis Not Otherwise Specified, Paranoid Schizophrenia, Mania, Mixed Substance Abuse, Schizophrenia, BiPolar Affective Disorder, Schizoaffective Disorder, Malingering, and Adult Antisocial Behavior. This is clearly indicative of the Tennessee DOC mental health staff's view that Mr. Thompson has experienced major mental illness throughout at least most of his period of incarceration. Further, there is extensive documentation contained in these records of many episodes of bizarre aggressive and/or self-destructive behavior.

***834** "INTERVIEWS WITH COLLATERAL WITNESSES:

"Five individuals were interviewed (either by telephone or face-to-face) who provided significant supplemental information about the life circumstances and past/present psychological functioning of Mr. Gregory Thompson.

"Ms. Maybelle Lamar

"Ms. Lamar is Mr. Thompson's maternal grandmother. She was interviewed by telephone on July 21, 1999. Ms. Lamar assumed total responsibility for the care and rearing of Mr. Thompson and his two older siblings after his mother was killed when Mr. Thompson was approximately five years old. Mr. Thompson remained in her home until he entered the military as a young adult.

"Ms. Lamar recalls the period following her daughter's fatal automobile accident as one of tremendous strain and disruption for her. She was unable to describe the reaction of the three young children to their mother's death because she 'took to my bed' for approximately five or six weeks following the accident. Ms. Lamar was unable to attend to these children in any way at that time. She did not recall ****2849** how they obtained food or clothing, or whether they were in any distress. Ms. Lamar reported that she was drinking alcohol quite heavily during this period and that she left her bed to resume household activities only because the children contracted a serious medical illness.

"Ms. Lamar described Mr. Thompson as displaying significantly 'different' behavior when he returned to visit her following his discharge from the U.S. Navy. 'Greg didn't act the same'. Unlike the 'eager to please', passive, sometimes funny, gentle boy who she had reared, Mr. Thompson was 'angry', 'sometimes sad'. 'I don't think he wanted me to know what was going on with him. He mostly just stayed away from me.' Ms. Lamar reported that she noticed Mr. Thompson sometimes 'staring off into space' or 'talking to himself'. She would ask him about these behaviors. ***835** 'He'd deny it. He acted like he didn't know what I was talking about.' Ms. Lamar recalls being quite concerned about her grandson's mental state during this time. She did not recall ever being asked these questions at any time before or during Mr. Thompson's trial.

"Ms. Nora Jean Hall Wharton

"Nora Jean Wharton is Mr. Thompson's older sister. A lengthy telephone interview was conducted with her on July 21, 1999. She grew up in the same home as Mr. Thompson and had continuous contact with him throughout his childhood. Mr. Thompson lived briefly in the home of his sister following his discharge from the military.

"Ms. Wharton described Mr. Greg Thompson as a highly sensitive, passive, timid, emotionally vulnerable child. She described a childhood of great hardship. According to her report, their grandmother, Ms. Maybelle Lamar [,] was verbally abusive, neglectful of the children's basic daily needs, highly critical, and unable to care properly for the children. Ms. Wharton described many instances of such abuse and neglect. She described the period following their mother's death as particularly chaotic and neglectful, recalling that often there was no food in the home and that the children would take money from under their grandmother's mattress to go and buy food. In the period following their mother's death, Ms. Wharton reported that her grandmother was continuously drunk and unable to care for her grandchildren. According to Ms. Wharton, Greg Thompson frequently witnessed his sister Nora being beaten by their grandmother.

"Ms. Wharton further recalled that she and her younger brother had witnessed the brutal beating and rape of their mother by their biological father. She recalls Greg standing in the scene screaming and sobbing uncontrollably.

"Ms. Wharton reported that Greg would frequently cry at school during the early school years, and, as a result, was often the victim of intense mockery from his classmates. ***836** Because Ms. Wharton was in the same classroom as her brother she observed these behaviors and often intervened on her brother's behalf. She described Mr. Thompson's response to this abuse as quite passive.

"Of particular significance is Ms. Wharton's recollections about Mr. Thompson repeatedly banging his head against the wall of their home on many occasions during their early childhood. This behavior frequently followed their grandmother yelling at Greg 'You have the Devil in you.' Mr. Thompson would tell his sister that he was attempting to 'knock the Devil out' of his head in this way. Ms. Wharton recalls believing that this behavior was quite odd.

****2850** "Following his discharge from military service, Ms. Wharton described Mr. Thompson's behavior as significantly different than his prior conduct and attitude. She reported several episodes of bizarre behavior which included a sudden intense emotional reaction without obvious external provocation. Mr. Thompson would become extremely angry, would cry and scream for a len[g]thy period of time, would appear as if he might or actually become quite physically violent or aggressive, and then would suddenly retreat. Ms. Thompson reported this behavior and her concerns about it to her grandmother. Ms. Lamar suggested that Ms. Wharton take her brother to the psychiatric unit of the local hospital for treatment. Ms. Wharton did not attempt to get any treatment for Mr. Thompson and reports feeling quite guilty about this.

"Nora Jean Wharton described her own struggles with mental illness throughout the past fifteen years. She has received counseling to assist her in coping with the effects of her abusive childhood and she has been treated with a combination of a major tranquilizer (Stellazine) and anti-depressant medications. She reported that her younger half-sister Kim has also suffered from significant mental illness.

***837** "CUSTODY OFFICERS AT RMSI

"Following the second interview conducted with Mr. Thompson on 2-2-99, I informally interviewed two custody officers who escorted Mr. Thompson back to his cell. These officers have not as yet been identified by name. Both reported that they were aware that Mr. Thompson was quite mentally ill and that they were concerned about him. They further reported that they believed it would be in his best interest to be housed in a prison facility better equipped to deal with individuals experiencing severe mental illness.

"MICHAEL CHAVIS

"Federal Defender Services of Eastern Tennessee investigator, Mr. Michael Chavis, was interviewed about his July 29 through August 2, 1998 interview with Ms. Arlene Cajulao in Honolulu, Hawaii. Ms. Cajulao and Mr. Thompson had an intimate relationship and lived together for approximately four years, from 1980 to 1984.

"Mr. Chavis reported that Ms. Cajulao described Mr. Thompson as displaying increasingly bizarre behavior during the latter part of their relationship. Similar to descriptions prov[ided] by Ms. Nora Wharton, Ms. Cajulao reported several episodes of 'paranoid' and aggressive behavior which had no apparent external antecedent. She reported that Mr. Thompson sometimes thought that people were 'after' him. He would close all the curtains in the house because he did not want the person who was 'looking' for him to see him through the curtains. She remembers being quite concerned about Mr. Thompson's mental state.

"SUMMARY AND CONCLUSIONS:

"Mr. Gregory Thompson has experienced symptoms of major mental illness throughout his adult life. Indeed, there is information available which suggests that Mr. Thompson was displaying significant signs of mental illness from the time he was a small child. Self-injurious behavior is reported as ***838** early as six years old. There is extensive documentation contained within the records reviewed for this evaluation that Mr. Thompson has experienced a thought disorder and/or an affective disorder of some type for many years.

****2851** "It is my opinion that Mr. Gregory Thompson is most appropriately diagnosed, according to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, as having Schizoaffective Disorder, Bipolar Type. As is typical of this illness, symptoms became apparent in early adulthood. Mr. Thompson was suffering serious mental illness at the time of the 1985 offense for which he has been convicted and sentenced. This mental illness would have substantially impaired Mr. Thompson's ability to conform his conduct to the requirements of the law.

"Further, Mr. Thompson was the victim of severe childhood emotional abuse and physical neglect. His family background is best described as highly neglectful and economically deprived. Mr. Thompson repeatedly witnessed episodes of violence during his childhood in which one family member assaulted or brutalized another. There are significant aspects of Mr. Thompson's social history that have been recognized as mitigating in other capital cases.

"It is important to note that all of the information related to Mr. Thompson's early mental illness and social history was available at the time of his 1985 trial.

"[signed]

"Faye E. Sultan, Ph.D."

* * *

Excerpts from the Deposition of Dr. Faye E. Sultan (July 22, 1999), *id.*, at 71-73, 76-80.

"Q. What indicates to you or what indicia are there for you that suggest Mr. Thompson was displaying significant signs of mental illness from the time he was a small child? How do you arrive at that conclusion?

***839** "A. . . . .

"By the time of the first grade, Mr. Thompson, when he was being yelled at by his grandmother, she was reportedly verbally abusive in the following fashion: She would yell at him you have the devil in you, boy. [His sister, Ms. Wharton] would then observe Mr. Thompson standing or sitting beside a wall repeatedly banging his head into the wall. She, in her role as protector of him, would ask him what was going on, and he would tell her he was trying to knock the devil out of his head. She recalls at the time, although she was quite young herself, being worried about his behavior and thinking of it as very odd.

. . . . .

"Q. Sort of a self-punishment or a self-exorcism type thing?

"A. A self-injurious behavior is what we would call it I think. Mr. Thompson, when he was Greg, in the first and second and third grade had rather frequent hysterical crying episodes in classrooms that Ms. Wharton recalls also as very unusual in the context of his schoolroom situation. She describes him as being the subject of torment on the part of the students because he behaved in an odd fashion. Sometimes he would simply begin to cry and wail and scream and apparently made a sound like a fire engine when he was sobbing and developed the nickname Fire Engine. That's reported in the trial transcript. She told me much more detail about actually the extent of those kind[s] of emotional outbursts.

"At home it was rather common for Mr. Thompson to begin to cry and scream during times when Ms. Wharton herself was being beaten by their grandmother. Ms. Wharton was the victim of physical abuse on the part of the grandmother. Mr. Thompson observed much of this since they were together virtually all of the ****2852** time, and Nora Wharton was not really permitted much interaction outside of their home.

. . . . .

***840** "Q. Your diagnosis for Mr. Thompson is schizoaffective disorder, comma, bipolar type. What leads you to that diagnosis from what you've reviewed and your testing results?

"A. What leads me to the diagnosis is that there is a long history, perhaps at this point almost a 20-year history, of

simultaneous thought disorder on the part of Mr. Thompson documented throughout all the records, and affective disorder, emotional disorder, being unable to regulate his emotions, sometimes falling into the pits of despair and becoming suicidal, sometimes becoming highly agitated and manic and having too much energy, too much exuberance, and grandiose thinking. The thought disorder is manifested in persecutory ideas, delusions of grandeur-lots of different kinds of delusions actually-auditory hallucinations that he sometimes admits to, sometimes suspected by the doctors who are doing the examination.

"The psychological testing early on in Mr. Thompson's incarceration confirm[s] the presence of a psychotic process. There was an MMPI administered to him by a prison psychologist in 1990 that is described as valid and indicative of psychotic process, and throughout the prison record he receives a variety of diagnoses that take into account both thought disorder and affective illness.

"The very best diagnosis to describe all of the complex of symptoms that I just talked to you about is schizoaffective disorder, bipolar type.

"Q. You note in your report Mr. Thompson was observed having a significant change in behavior after he was discharged from the Navy. What significance do you attach to that fact?

"A. Well ... prior to his entry into the military Mr. Thompson is described almost uniformly ... as passive, as compliant, as eager to please, as gentle, as timid, as eager to run from attacks.

"At some point ... he began to notice that people were trying to hurt him all the time, that officers and other people ***841** of his rank and slightly above his rank attempted to provoke him, that they sometimes physically assaulted him, that he thought he was being followed a lot, and that he sometimes struck out in what he thought was defense and then later found out from other people who he knew and trusted that there wasn't anything to defend against or that there might not have been anything to defend against.

"Q. This is what he related to you during your interview last August?

"A. Right. The people who saw him after the military each were struck by how very different he seemed. That was the word that kept being used, 'different.' Sometimes the people I was speaking to were not able to describe what different meant, but, for example, the grandmother said that he was different as in not right, that he wasn't himself. Ms. Wharton tells me that the grandmother was very well aware that he was in deep psychological distress, and, in fact, the grandmother suggested that he be taken to the psychiatric unit at Grady Hospital in Atlanta, I believe, for treatment. The grandmother observed him staring off into space for long periods of time. She observed him mumbling to himself. When she asked him what he was doing, he told her he had no idea what she was talking about. She said that was very different from the boy who left her to go into service.

****2853** "The sister has even a better glimpse of him than that, because he actually went to live with her for a while, and she said he was bizarre. She described him as paranoid. She said that he would explode for no reason at all, that she was afraid of him for the very first time in her life, that they had always been terribly close, the sort of close where if there was only one piece of bread to eat they would share it, that they always looked out for one another, and

that suddenly he was behaving in ways that she simply could not identify. She described three very serious episodes of aggression and emotional upset that she said are what led her ***842** to approach her grandmother about what to do for treatment for him.

. . . . .

"Q. You state that the schizoaffective disorder, bipolar type, would substantially impair Mr. Thompson's ability to conform his conduct to the requirements of the law. How so?

"A. There are points in time when Mr. Thompson is out of contact with reality. He is responding to situations that simply don't exist or that he perceives in extremely exaggerated or different form. A person is not able to conform one's conduct to the law if you are frankly delusional or hallucinating in some way. Mr. Thompson over the years has had both of those symptoms.

"Q. So it's this delusional aspect of this disorder that is the main factor that would keep him from having the ability to conform his conduct to the requirements of law, if I understand you correctly?

"A. Is it the main factor? Let me say that I think it's at least as potent a factor if not more as the other aspect of his mental illness, which is that he has emotional disregulation.

"Q. Meaning?

"A. Meaning Mr. Thompson often is not in control of his emotions. He has episodes of rage, of aggression, that he doesn't understand or relate to very well. He's told about them later. Sometimes he remembers them, sometimes he doesn't. He is often embarrassed about his behavior afterwards, but there are points at which I believe he's not in control of what he's doing.

"Q. When you say 'he's not in control of what he's doing,' are you saying that it's impulsive behavior?

"A. If I am emotionally disregulated, if I'm over-aroused and overreactive and I operate out of a faulty belief system, so that not only do I have the impulse to do things that I ordinarily wouldn't, but I also think things are going on that aren't, I have a combination in which yes, I suppose you ***843** could call it impulse, but you also have to take the notion into account that it might be an impulse to do something that doesn't make any sense.

"Q. Does this disorder prevent Mr. Thompson from planning his activities?

"A. Sometimes, yes, it does.

"Q. And so the inability to plan, would that be a factor that would prevent him from conforming his conduct to the requirements of the law?

"A. If that were in operation at some time. In the history of the Department of Corrections' mental health records, when he's properly medicated I don't think that's true about him.

"Q. Is it your professional opinion, then, that when he is medicated he has the ability to plan, but when he is not medicated****2854** he does not always have the ability to plan?

"A. Those two things are true. It's also true that if he's inadequately medicated or improperly medicated he doesn't have the ability to plan anything. I don't know whether he has impulses. I think he's all impulse, so to have impulses implies that there's a part of you that's not impulsive. For example, when Mr. Chavis and I saw him during my second interview with him, he could not have planned anything at all, not beyond the nanosecond in which he was experiencing the world. But he was receiving psychotropic medications at the time, so that's why I have to put that qualifier in there."

U.S.,2005.
Bell v. Thompson
545 U.S. 794, 125 S.Ct. 2825, 162 L.Ed.2d 693, 73 USLW 4624, 05 Cal. Daily Op. Serv. 5595, 05 Daily Journal D.A.R. 7681, 18 Fla. L. Weekly Fed. S 521

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COMMENT

TO RESTORE A RELATIONSHIP BETWEEN CLASSES AND THEIR ACTIONS: A CALL FOR MEANINGFUL REFORM OF RULE 23

to

THE CIVIL RULES ADVISORY COMMITTEE
and its
RULE 23 SUBCOMMITTEE

On Behalf of
LAWYERS FOR CIVIL JUSTICE
FEDERATION OF DEFENSE & CORPORATE COUNSEL
DRI – THE VOICE OF THE DEFENSE BAR
INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL

August 9, 2013

Lawyers for Civil Justice (LCJ), the Federation of Defense & Corporate Counsel (FDCC), DRI – The Voice of the Defense Bar (DRI) and the International Association of Defense Counsel (IADC) respectfully write to urge the Advisory Committee on Federal Rules of Civil Procedure ("Committee") and its Rule 23 Subcommittee to examine how the relationship between class members and their cases have changed since 1966, and to take much-needed action to reform Rule 23 in light of modern practices.

INTRODUCTION

Rule 23, and particularly subsection (b)(3), has become something that was not envisioned when adopted. The class action mechanism was intended to be a device for efficient litigation when the rights of the parties could be fully adjudicated in a single binding lawsuit, with representative members serving as the champions of the class members' interests. Today, however, a significant fraction of class action cases demonstrates that the Rule has fostered a type of lawsuit that differs in fundamental ways from what existed in our legal culture prior to 1966. Some common features of today's class action cases include: (1) very large classes whose members may not even know whether they have been injured; (2) class members who, despite receiving notice, have very little if any idea what is happening to their legal rights; (3) lawyers who make decisions about prosecuting and resolving cases without any meaningful input from any actual client; (4) lawyers whose focus is trained on the entrepreneurial aspects of their cases rather than on the objective of making their clients whole; (5) sparse and inconsistent judicial review (and therefore case law) concerning class certification decisions, which are often the most important legal determination in the case; (6) insufficient judicial scrutiny of settlements and fee requests to

The second alternative addresses the controversy over cy pres settlements by ensuring judicial attention to the issues that could pose the most danger. Such settlements would be available only in cases of impossibility, not merely impracticability due to cost. Recognizing that funds transferred to non-class members are not "common funds" that benefit the class, the second alternative precludes consideration of cy pres payments in the calculation of attorneys' fees under Rule 23(h).[40] Because governments acting in their formal parens patriae capacity are typically recognized as acting on behalf of the public, such as members of a putative class, an exception is provided for payments to such governmental entities. Finally, the second alternative incorporates conflict-of-interest provisions to ensure that entities chosen to receive cy pres payments are not selected due to their ties to the parties or to the court and that cy pres funds are not diverted to the facilitation of future litigation. We respectfully suggest the Committee review these proposals.

III. Rule 23(f) Should Be Amended to Provide a Right to Interlocutory Appeal of Decisions to Certify, Modify or De-Certify a Class.

The current Rule 23(f) was adopted in 1998 to provide increased opportunity for an immediate appeal to supplement the previously existing mechanisms (mainly mandamus) for obtaining appellate review of the all-important decision to certify a class action.[41] Rule 23(f) has now been in existence long enough that it would be appropriate for the Committee to consider whether it has achieved its intended goal of increasing uniformity of district court practice regarding certification decisions.

Analytical data indicates that the number of petitions filed is relatively modest and that the number of actual written opinions is very small.[42] For instance, one study indicates that only 476 petitions required decision over the almost seven years of data (thus an average of 5.2 petitions per Circuit per year).[43] Only a fraction of those petitions accepted for review ultimately result in opinions (a total of 47 opinions over almost 7 years – or, on average, less than a single opinion per Circuit). Notably these numbers indicate that only 28 percent of those petitions actually accepted result in an opinion (47 opinions out of 169 petitions granted over all Circuits over the nearly 7 year time period). These data demonstrate not only how little judicial review is occurring, but also indicate why there is a paucity of meaningful case law being developed to provide clear and uniform standards.

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[40] *See Baby Prods.,* 708 F.3d at 178 ("awarding attorneys' fees based on the entire settlement amount rather than individual distributions creates a potential conflict of interest between absent class members and their counsel").

[41] Certification decisions, although vitally important, are not subject to immediate appellate review. The courts have deemed "final" only a slim set of "collateral orders" that share these characteristics: They "are conclusive, [they] resolve important questions separate from the merits, and [they] are effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 601 (2009) (quoting *Swint v. Chambers Cnty Comm'n*, 514 U.S. 35, 42 (1995)). "[O]rders relating to class certification" in federal court, it is settled, do not fit that bill. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 470 (1978).

[42] Barry Sullivan & Amy Kobelski Trueblood, *Rule 23(1): A Note on Law and Discretion in the Courts of Appeal*, 246 F.R.D. 277, 290 (2008).

[43] *Id.*

A. The Committee's Purpose in Drafting Rule 23(f) Was to Provide Greater Uniformity in Certification Decisions.

During the early 1990s, the Advisory Committee proposed reform to permit interlocutory appeals because it recognized that the certification ruling is often the crucial ruling in a case filed as a class action.[44] According to the Committee Note submitted with the proposed rule change to the Standing Committee in May of 1993, the severe consequences to be expected from a certification decision "justify a special procedure allowing early review of this critical ruling."[45] The Committee's proposal was limited because of concern over "the disruption that can be caused by piecemeal reviews."[46] But the initial proposal required certification by the trial court, as well as agreement to hear the case by the appellate court.

In 1995, after further discussion and study, the Advisory Committee revised the initial proposal to eliminate the requirement that the district court certify the request for an immediate appeal. The Partial Draft Advisory Committee Note of December 12, 1995, noted that the expansion of "appeal opportunities affected by subdivision (f) is indeed modest."[47] The note further mentioned the drafters' view that the most suitable questions for immediate appeal would be those turning on "novel or unsettled" questions of law.[48] And in the drafters' view, "[s]uch questions are most likely to arise during the early years of experience with new class-action provisions as they may be adopted within Rule 23 or enacted by legislation."[49] The drafters also thought that permission would likely be denied when "certification decisions turn on case-specific matters of fact and district court discretion."[50]

In a 1997 report of the Advisory Committee, Chair Niemayer noted that the proposed Rule 23(f) "has persisted virtually unchanged through the many alternative Rule 23 drafts that have been prepared by the Advisory Committee over the last six years."[51] Chair Niemayer explained that the rule was intended to address the "widespread observations that it is difficult to secure

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[44] Scholars and courts have regularly characterized the decision whether to certify a class as a key turning point in litigation. Such rulings "have enormous practical impact; a grant may impel the defendant to settle and a denial leaves only the named plaintiff's claim which often saps the plaintiff's lawyer of incentive to proceed." Richard D. Freer, *Interlocutory Review of Class Action Certification Decisions: A Preliminary Empirical Study of Federal and State Experience*, 35 W. ST. U. L. REV. 13, 13 (2007-2008). Few decisions are more significant to the litigants than a district court decision granting or denying class certification.

[45] Letter (and attachments) from Sam C. Pointer, Jr., Chairman, Advisory Committee on Civil Rules, to Honorable Robert E. Keeton, Chairman, Standing Committee on Rules of Practice and Procedure (May 17, 1993) (citing (attached) Proposed Amendments to the Federal Rules of Civil Procedure, at 11 (May 1993)), *available at* http://www.uscourts.gov/RulesAndPolicies/rules/archives/advisory-committee-reports/advisory-committee-rules-civil-procedure.aspx.

[46] *Id.*

[47] Letter (and attachments) from Patrick E. Higginbotham to Members of the Standing Committee on Rules of Practice and Procedure (Dec. 13, 1995) (citing Partial Draft Advisory Committee Note Draft Rule 23 at 10), *available at* http://www.uscourts.gov/RulesAndPolicies/rules/archives/advisory-committee-reports/advisory-committee-rules-civil-procedure.aspx.

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Memorandum from Paul V. Niemayer, Chair, Advisory Committee on Civil Rules, to Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure (May 21, 1997).

effective appellate review of class certification decisions and that increased appellate review would increase the uniformity of district-court practice."[52]

B. Rule 23(f) Has Not Delivered Uniformity in Certification Decisions Because It Is Highly Discretionary.

Interlocutory review is available under Rule 23(f) in the "sole discretion of the court of appeals."[53] The Committee Note characterizes the discretion vested in the courts of appeals about whether to hear the appeal as "unfettered."[54] The Note suggests that the appellate courts would likely "develop standards for granting review that reflect the changing areas of uncertainty in class litigation."[55] But no standards were included in the rule – the appellate courts could grant or deny petitions for leave to appeal on "any consideration that the court of appeals finds persuasive."[56]

The federal appellate courts have, as the drafters of Rule 23(f) anticipated, sought to cabin their completely free discretion by adopting lists of criteria for determining whether or not to grant certification appeals. But the criteria adopted continue to be so "flexible" as to allow for virtually "unfettered" decision-making as is evident from review of the following cases:

Blair v. Equifax Check Services, Inc., 181 F.3d 832, 834-35 (7th Cir. 1999) (Declining to adopt a bright-line approach, but instead focuses on whether an appeal is important because class certification is likely to be outcome-determinative or "may facilitate the development of the law. . . .")

Waste Mgmt. Holdings, Inc. v. Mowbray, 208 F.3d 288, 293-94 (1st Cir. 2000) (Recognizing three categories of cases that warrant the exercise of discretionary appellate jurisdiction: (1) when a denial of class status effectively ends the case; (2) when the grant of class status raises the stakes of the litigation so substantially that the defendant likely will feel irresistible pressure to settle; (3) when granting class status will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case.)

Prado-Steiman ex rel. Prado v. Bush, 221 F.3d 1266, 1274-76 (11th Cir. 2000) (In determining whether to grant interlocutory appellate review of class certification, a court should consider, (1) whether the district court's ruling is likely dispositive of the litigation by creating a "death knell" for either plaintiff or defendant; (2) whether the petitioner has shown a substantial weakness in the class certification decision, such that the decision likely constitutes an abuse of discretion; (3) whether the appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself; (4) the nature and status of

[52] *Id.*
[53] FED. R. CIV. P. 23(f) advisory committee's note (1998).
[54] *Id.*
[55] *Id.*
[56] *Id.*

litigation before the district court; and (5) the likelihood that future events may make appellate review more or less appropriate.)

Sumitomo Copper Litig. V. Credit Lyonnais Rouse, Ltd., 262 F.3d 134 (2d Cir.2001) (petitioners seeking leave to appeal pursuant to Rule 23(f) must demonstrate either (1) that the certification order will effectively terminate the litigation and there has been a substantial showing that the district court's decision is questionable, or (2) that the certification order implicates a legal question about which there is a compelling need for immediate resolution.)

Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 164 (3d Cir. 2001) (although not entirely restricting grant of class status to these three categories, the Court cited "(1) when denial of certification effectively terminates the litigation because the value of each plaintiff's claim is outweighed by the costs of stand-alone litigation; (2) when class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability; and (3) when an appeal implicates novel or unsettled questions of law; in this situation, early resolution through interlocutory appeal may facilitate the orderly development of the law.")

Lienhart v. Dryvit Sys., Inc., 255 F.3d 138, 145-46 (4th Cir. 2001) (The court adopted the five-factor of *Prado-Steima,* adding that "the 'substantial weakness' prong operates on a sliding scale to determine the strength of the necessary showing regarding the other factors.")

In re Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 105 (D.C. Cir. 2002) (Interlocutory review of class certification decisions is appropriate when (1) when there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable, taking into account the district court's discretion over class certification; (2) when the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; and (3) when the district court's class certification decision is manifestly erroneous."); *In re Delta Air Lines*, 310 F.3d 953, 959 (6th Cir. 2002) (The Sixth Circuit "eschew[s] any hard-and-fast test in favor of a broad discretion," but is guided by the relevant factors articulated in other circuits.)

Chamberlan v. Ford Motor Co., 402 F.3d 952, 959 (9th Cir. 2005) ("Review of class certification decisions will be most appropriate when: (1) there is a death-knell situation for either the plaintiff or defendant that is independent of the merits of the underlying claims, coupled with a class certification decision by the district court that is questionable; (2) the certification decision presents an unsettled and fundamental issue of law relating to class actions, important both to the specific litigation and generally, that is likely to evade end-of-the-case review; or (3) the district court's class certification decision is manifestly erroneous.")

Vallario v. Vandehey, 554 F.3d 1259 (10th Cir. 2009) (Interlocutory review of district court's class certification order is generally appropriate: (1) in "death knell" cases, when questionable class certification order is likely to force either party to resolve case based on considerations independent of the merits; (2) certification decision involves unresolved issue of

law relating to class actions that is likely to evade end-of-case review, significant to instant case as well as class action cases generally; or (3) decision is manifestly erroneous.)[57]

These cases demonstrate that the criteria applied in numerous appellate decisions continue to be so "flexible" as to allow for virtually "unfettered" decision-making.

C. Unfettered Decision-Making Has Resulted in Seemingly Arbitrary and Highly Inconsistent Results.

The empirical data on immediate appeals under Rule 23(f) raises grave concerns about how it is working. One scholar commented that "between the courts' 'unfettered discretion' and their opaque decision-making processes, what happens behind the courts' closed doors has been something of a mystery…."[58] After examining available data, Sullivan and Trueblood concluded that "[a]t best, the circuits may be described as inconsistent – in terms of petition volume, as to whether the court of appeals adheres to an articulated standard of review, the frequency with which the circuits publish their opinions explaining why they accept or deny Rule 23(f) petitions, and of course, the frequency with which Rule 23(f) petitions are granted."[59] In fact, as of the date of their data (December, 1998 - October 2006), one Circuit had failed to grant even a single Rule 23(f) petition and another Circuit had granted only five. The grant percentages for the Circuits varied wildly from 0% to 86% even though the data covered almost seven total years. Further, there was not much middle ground – six Circuits were 28% or below and four Circuits were 54% or higher.[60]

Even more troubling, available data suggested inconsistent success rates between plaintiffs' petitions and those brought by defendants.[61] These inconsistencies raise concern about whether litigants are being provided a process that conforms to traditional notions of due process and judicial decision-making. Those concerns are necessarily heightened by the staggering consequences that flow from the decision to certify or deny certification. The importance of this decision point was acknowledged when Rule 23(f) was enacted. But the reform made interlocutory appellate review so discretionary as to invite arbitrary decision-making. Unlike the Supreme Court's certiorari discretion to which it has been analogized, Rule 23(f) does not empower a single national body to accept cases to establish national law; it empowers twelve circuits to decide complex, and often fact-based decisions about whether a case will proceed as a class or not. And further, unlike the Supreme Court's certiorari discretion, Rule 23(f) considerations are not examining whether there is a circuit split to ensure a consistent national rule of law but are "at least as much concerned with deciding actual disputes as with clarifying the law…."[62] These distinctions are important, and they underscore the necessity for appeals of certification decisions as a matter of right.

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[57] Neither the Fifth Circuit, *see, e.g. Anderson v. U.S. Dept. of Hous. & Urban Dev.*, 554 F.3d 525, 527 (5th Cir. 2008), nor the Eighth Circuit, *Liles v. Del Campo*, 350 F.3d 742, 746 n, 5 (8th Cir. 2003), has adopted specific standards regarding when the court will hear an interlocutory appeal of a class certification order.
[58] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 280-81.
[59] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 284.
[60] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 290.
[61] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 286.
[62] Barry Sullivan & Amy Kobelski Trueblood, *supra* note 32, at 288.

D. Uncertainty About Class Certification Decision Standards Creates Difficulty for Bench and Bar, and It Undermines the Litigants' Faith in the Judicial System.

The inconsistency in certification decisions creates uncertainty for the parties, renders it difficult for lawyers representing the parties to properly advise their clients, and undermines respect for the judiciary as an institution adhering to the rule of the law. For many years, great jurists and scholars of the past criticized the equitable courts for equitable power resulting in rulings as uncertain as the length of the Chancellor's foot, which might be long, or short, or somewhere in between.[63] The lack of predictability that made equity a "roguish thing" exists today in class certification decisions.[64] When judges employ different standards for the right of appellate review – let alone the standards for such review – the process inevitably departs from what has traditionally been considered the rule of law. Like cases are not treated alike. Litigants find it impossible to navigate such unpredictability, and frustration feeds the pressure to settle a case, not because it is weak on the merits, but to avoid the costs and vagaries of judicial system.

E. Amending Rule 23(f) to Provide Immediate Appeal Would Remove Uncertainty.

Adoption of a rule allowing for an immediate appeal of decisions to certify, de-certify or modify a class would end the arbitrary "unfettered" decision-making about when an interlocutory appeal can be taken and would foster the development of more case law on certification standards. Many states have adopted legislation providing for an immediate right of appeal from the certification decision of the trial court.[65] Ample precedent exists for the Committee's power to provide exceptions to the "final-decision" rule.[66] For the parties, the certification decision can

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[63] John Seldon's oft-quoted comment about the problems created by unfettered discretion in the courts of equity applies here with even more force. He said:

> Equity is a roguish thing. For Law we have a measure, know what to trust to; Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'T is all one as if they should make the standard for the measure we call a "foot" a Chancellor's foot; what an uncertain measure would this be! One Chancellor has a long foot, another a short foot, a third an indifferent foot. 'T is the same thing in the Chancellor's conscience.

John Bartlett, *Familiar Quotations,* (10th ed, rev. and enl. by Nathan Haskell Dole. Boston: Little, Brown, 1919; Bartleby.com, 2000) (quoting John Selden) *available at* http://www.bartleby.com/100/155.html .

[64] *See generally*, Freer, *supra* at 20-22 (showing that different circuits accept review at different rates and on appeal affirm or reverse certification decisions at different rates).

[65] *See, e.g.,* ALA. CODE § 6-5-642 (1975) ("court's order certifying a class or refusing to certify a class action shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from the final order in the action"); GA. CODE ANN. § 9-11-23 (g) (West 2012) ("court's order certifying a class or refusing to certify a call shall be appealable in the same manner as a final order to the appellate court which would otherwise have jurisdiction over the appeal from a final order in the action"). Some states have embodied this right of immediate appeal in court rules. *See, e.g.,* N. D. R. CIV. P. 23; OHIO REV. CODE ANN. § 2505.02(B)(5) (West 2012); Pa. R. Civ. P. 1710; TEXAS INS. CODE ANN. Art. 541.259. Florida's appellate rules likewise permit an appeal as a matter of right by an aggrieved party of orders either granting or denying class certification. Fla. R. App. P. 9.130. *See also* I.C.A. Rule 1.264/1.264(3)(making an order certifying or refusing to certify an action as a class action as appealable); LSA-C.C.P. Art. 592 (Louisiana's provision allowing for an appeal to be taken as a matter of right from an order that an action should be maintained as a class action). Many other states provide for discretionary appeals of certification decisions.

[66] *See* FED. R. CIV. P. 23(f) (pursuant to § 1292(e), accords Courts of Appeals discretion to permit appeals from district court orders granting or denying class-action certification); FED. R. CIV. P. 54(b) (providing for "entry of a

mean the death knell of the litigation – either because a denial makes the lawsuit too expensive to pursue or because a grant threatens litigation costs or risks that will be ruinous to the defendant thus forcing settlement. In either case, under our current system, the party who has been unsuccessful at the certification stage of the lawsuit is relegated to an extraordinary discretionary process that does not offer sufficient safeguards to assure that the decision is correct. It is time to re-write the rule.

IV. The Committee Should Adopt an "Opt-In" Rule for Rule 23(b)(3) Class Actions to Ensure a Meaningful Connection Between Class Members and the Case.

Rule 23(b)(3) permits representative plaintiffs to seek damages on behalf of all plaintiffs who have been certified as class action members. Because Rule 23(b)(3) actions are governed by Rule 23(c)(2)(B)(v)'s "opt-out" mechanism, the legal rights and interests of millions of people are determined in Rule 23(b)(3) cases each year where they are represented, often without their knowledge or consent, by attorneys they do not choose. The dramatic expansion of classes and the resulting changing nature of class action cases has led to a widespread view that many class members are so unconnected to the action that they have no idea whether class attorneys are conducting the action and handling the terms and conditions of settlement in the best interests of the class members. To address these problems, the Committee should consider amending Rule 23 by replacing the "opt-out" provision found in Rule 23(c)(2)(B)(v) and (vi) and 23(c)(3)(B) with an "opt-in" provision to ensure that every individual that becomes a certified class member has a meaningful right to decide whether to join a class action and choose his or her own lawyer.

The 1966 amendments authorized courts to certify as a class all persons who received actual or constructive notice of a certain type of class action (a Rule 23(b)(3) class action) and failed to take affirmative steps to withdraw from the class upon receipt of class notice. Under this system, unless a person within that class takes affirmative action to "opt-out" of the class, they are deemed class members and are bound by the outcome of the case. This is true regardless of whether they received or understood the class notice, and regardless of whether they wanted to be a member of the class.

To recipients, a class notice can be a complex legal document whose implications are unclear. As a result of this uncertainty, the common response of doing nothing has the incongruous effect of converting the recipient of the notice into a class member, often unwittingly. The effect is the creation of massive classes comprised of many members who do not understand the implications of class membership. These class members often do not understand that they have consented to be represented by class counsel who will effectively make all key decisions in the case, including the terms and conditions of any settlement that, if approved by the court, will be binding on all class members.

Equally important, a class member who passively fails to "opt-out" often does not understand the relationship between his or her inclusion in the class and class counsel's compensation. As a

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final judgment as to one or more, but fewer than all, of the claims or parties"). Congress has authorized the promulgation of rules defining finality and allowing for immediate appeal. Prescriptions in point include 28 USC § 1292 (immediately appealable "[i]nterlocutory decisions"); 28 USC § 2072(c) (authorizing promulgation of rules defining when a district court ruling is final for purposes of appeal under § 1291).