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

I. Introductions

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

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

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

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

II. Presentations by Professor Burbank and Professor Wolff

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

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

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

When the first Advisory Committee began meeting in the 1930s, questions arose with respect to the scope and limits of the rulemaking power. The major question at the time concerned the meaning of "general rules." Ultimately, the Advisory Committee almost backed into the idea that their task was to create trans-substantive rules.

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

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

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

Professor Burbank next highlighted the politics of rulemaking during different time periods. Initially, there was a long honeymoon (punctuated occasionally by dissents – by Justices Black and Douglas – from the Court's orders promulgating a proposed rule). In the 1980s, Representative

Kastenmeier began engaging in oversight of issues relating to the Civil Rules – such as offers of judgment under Civil Rule 68. Congress itself has acknowledged the power of procedure; for instance, in the Private Securities Litigation Reform Act it ratcheted up the pleading standard. As the power of procedure to affect the operation of the substantive law became more widely recognized, the topic attracted interest, and also interest groups. Meanwhile, during the 1980s the rulemaking process became more transparent. Chief Justice Burger oversaw the creation of a legislative affairs office within the AO.

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

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

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

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

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

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

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

Mr. Rose stated that a classmate of his who is a district judge has commented on the difference between managerial judges who seek to avert trial through case management and summary judgment, and others who are more traditionalist about the idea that scheduling trials itself constitutes effective case management. He asked the presenters if they had suggestions for changing the way that the AO collects statistics. Professor Burbank noted that he had been involved in the ABA's project on the "vanishing trial" and, in connection with that, he wrote two articles about

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

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

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

Judge Sutton asked Professors Burbank and Wolff for their views on whether it is better for procedural reforms to come about through judicial decisions or by means of a Rule amendment. Professor Burbank noted that the idea of "uniform rules" is appealing, but that a facially uniform rule

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

Judge Sutton thanked Professors Burbank and Wolff for their presentations.

III. Approval of Minutes of April 2012 Meeting

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

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

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

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

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

V. Discussion Items

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

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

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

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

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

In sum, Judge Dow concluded, each circuit that was canvassed seems happy with its own procedures for dealing with sealed appellate filings. To achieve nationwide adoption of an approach

similar to the Seventh Circuit's might take a Supreme Court decision or legislation. Failing that, the best course may be to try to generate dialogue among the circuits concerning best practices. The CM/ECF system, Judge Dow noted, has the capacity to handle sealed filings.

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

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

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

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

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

An appellate judge member asked whether the letter should take a policy position on which approach is best. Another participant asked whether such a letter might cause readers to wonder why the Committee is not moving forward with a rulemaking proposal. An appellate judge observed that, even if a provision were to be adopted that imposed a nationally uniform presumption in favor of unsealing on appeal (i.e., an approach similar to the Seventh Circuit's), this would not ensure that the resulting *decisions* on motions to seal achieved uniform results. The Reporter observed that if the Committee were to decide to take a strong policy position, consultation with other interested Judicial Conference committees (such as the Judicial Conference Committee on Court Administration and Case Management ("CACM")) might be advisable. Mr. Rose said that advance coordination would not be necessary if the Committee's letter were informational.

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

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

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

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

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

government to decide whether to appeal. And there is ordinarily a time lapse between conviction and sentencing, so that (except as to sentencing issues) defendants tend to have more than 14 days within which to consider possible bases for appeal.

Judge Fay noted that the agenda materials for the current meeting included some figures concerning the rate at which federal criminal defendants appeal; he stated that he was surprised by the low proportion of such defendants who appeal. The agenda materials also indicated that the choice of deadlines for criminal defendants' appeals is not likely to have major implications for speedy trial requirements. It appears, Judge Fay noted, that relatively few appeals are dismissed on untimeliness grounds. District courts are likely to grant extensions where warranted. After *Bowles v. Russell*, 551 U.S. 205 (2007), courts are unlikely to regard a criminal defendant's appeal deadline as jurisdictional. The DOJ has opposed altering criminal defendants' appeal time limit, and has pointed out that there are big differences between the government and criminal defendants in terms of the time needed to decide whether to appeal. In sum, Judge Fay suggested, the current Rule works well and there is no reason to change it.

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

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

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

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

Judge Sutton invited the Reporter to introduce these items, which concern the possibility of amending the Appellate Rules to account for the shift to electronic filing, service, and transmission. The Committee last discussed this set of issues at its fall 2011 meeting. At this point, the Advisory Committees may not be ready to take joint action to further adjust the Rules in light of electronic filing. Given that fact, the Committee may wish to consider whether it wishes to proceed with such updates to the Appellate Rules outside the context of a joint project. There have been some relevant

developments since the fall 2011 meeting. In the interim, the Eleventh and Federal Circuits have instituted electronic filing. The Bankruptcy Rules Committee has published for comment proposed amendments to Part VIII of the Bankruptcy Rules, which deal with appellate practice and which reflect the early adoption, in bankruptcy practice, of electronic filing and service. There are a variety of adjustments that might eventually be made to the Appellate Rules in light of the shift to electronic filing; one of the questions before the Committee is how to time those adjustments. One approach would be to propose such revisions only when the Committee is proposing to amend a particular Rule for other reasons. But, the Reporter suggested, it makes sense for the Committee to consider whether there are any such revisions that are worth proposing earlier than that, as stand-alone amendments.

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

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

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

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

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

The Reporter noted that there are a variety of ways in which one might try to secure review of the central claim. First, a straightforward way is to dismiss the peripheral claims with prejudice; there is consensus that such action produces a final, appealable judgment. Second, at the other end of the spectrum, if the peripheral claims are dismissed without prejudice, roughly half the circuits have made clear that this does not produce an appealable judgment; but there are some decisions in a few circuits taking a different view. The Ninth Circuit has a test that examines whether the would-be appellant tried to manipulate appellate jurisdiction. Third, when the dismissal of the peripheral

claims was nominally without prejudice but those claims can no longer be asserted due to some practical impediment, there is a growing consensus that such a dismissal does create an appealable judgment. Fourth, in the Eighth and Ninth Circuits an appealable judgment results when the dismissal of the peripheral claims without prejudice completely removes a defendant from the suit. Fifth, the Second Circuit takes the view that an appealable judgment results if the appellant conditionally dismisses the peripheral claims with prejudice – i.e., commits not to re-assert the peripheral claims unless the appeal results in the reinstatement of the central claim. However, some four circuits disagree with this view. Most recently, in *SEC v. Gabelli*, 653 F.3d 49 (2d Cir. 2011), the Second Circuit applied the conditional-prejudice doctrine to permit an appeal, but refused to extend the doctrine to the attempted cross-appeal in the same case.

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

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

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

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

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

VI. Additional Old Business and New Business

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

Judge Sutton invited the Reporter to introduce this item, which arises from a comment that the National Association of Criminal Defense Lawyers ("NACDL") submitted on the pending amendment to Form 4 (concerning applications to proceed *in forma pauperis* ("IFP")). The pending amendments – which are on track to take effect on December 1, 2013 if the Supreme Court approves them and Congress takes no contrary action – make certain technical changes to the Form and revise the current Form's detailed questions about the applicant's payments for legal and other services.

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

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

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

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

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

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

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

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

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

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

Judge Chagares noted that it is very frustrating to read briefs that lack citations to the record. The amendment proposed by the Council, he suggested, might raise awareness (among less experienced lawyers) about the requirement of citations to the record. However, an attorney member asked what the Council's proposed amendment would change. Another attorney member observed that Appellate Rule 28(a)(9)(A) already requires "citations to the authorities and parts of the record

on which the appellant relies." Professor Coquillette argued that one should not propose a rule amendment for the purpose of educating lawyers. A member suggested that lawyers should not need further instruction concerning the requirement of citations to the record. Judge Jordan observed that the Bankruptcy Rules Committee has had a similar discussion about whether to amend the Rules in order to address lawyers' failure to comply with existing requirements; some rules, he noted, are disobeyed frequently. Good lawyers will comply with the rules and bad lawyers will not.

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

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

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

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

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

An attorney member observed that this topic seems to fall largely within the jurisdiction of the Civil Rules Committee. Judge Sutton asked for Judge Dow's views. Judge Dow responded that

the appeal-bond requirement can be a big problem when things go wrong. He suggested that the Reporter discuss the matter with Professor Cooper.

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

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

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

Professor Katyal observed that he has seen a lot of manipulation of length limits that are set in pages. People waste time altering fonts and line spacing. The 1998 amendments to the Appellate Rules set type-volume length limits for merits briefs, but limits denoted in pages remain in Rules 5, 21, 27, and 35. The time may have come to reconsider that choice. Technological developments have made it much easier to count words. The type-volume limit is harder to manipulate. On the other hand, the type-volume limit does entail an added item – a certificate of compliance. And some pro se litigants continue to file handwritten briefs. But on balance, Professor Katyal suggested, it would be worthwhile to denote length limits in a consistent fashion. An attorney member agreed with this view.

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

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

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

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

Judge Sutton invited the Reporter to introduce this item, which arises from a suggestion by Professors Brian T. Fitzpatrick, Brian Wolfman, and Alan B. Morrison that Appellate Rule 42 be

amended to require approval from the court of appeals for any dismissal of an appeal from a judgment approving a class action settlement or fee award, and to bar such dismissals absent a certification that no person will give or receive anything of value in exchange for dismissing the appeal.

The Reporter observed that the backdrop for this proposal is the debate over the role of objectors in class actions. That debate played a part in the Civil Rules Committee's discussions, during the early 2000s, of the proposals that ultimately gave rise to the 2003 amendments to Civil Rule 23. The 2003 amendments, among other things, revised Rule 23(e) in order to intensify judicial scrutiny of proposed class settlements. In considering ways to better inform the district judge about the merits of such a proposed settlement, the Civil Rules Committee had discussed possible ways to facilitate a role for objectors in generating information about a proposed settlement. Participants discussed – but the Committee ultimately rejected – the possibility of amending Rule 23 to, for example, provide for discovery conducted by objectors, or provide ways to remunerate objectors and their counsel. Participants noted that objectors may have varying motives and that it could be problematic to give all such objectors undue sway. Ultimately the Committee moved in a different direction; the 2003 amendments to Rule 23 use other means to try to improve the settlement approval process – such as providing the possibility of a second round of opting out.

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

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

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

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

The Reporter suggested that the proposal is an elegant one in the sense that its goal is to craft a Rule that would cause undesirable objectors to self-select out of the appellate process. If they anticipate that they can get no personal benefit from the appeal, then they will not appeal. But the Reporter noted a few questions about the proposal. One concerns the possibility that the Rule's existence might not deter all such objectors from appealing. If an objector did in fact take an appeal, and then receive something of value in exchange for dropping the appeal, the court would be in the unusual position of forcing a now-unwilling appellant to maintain an appeal. There are not very many cases that interpret and apply Appellate Rule 42, but among those scattered cases are at least some that remark upon the awkwardness of denying an appellant permission to drop an appeal. Perhaps it would be less awkward in the case of a class action objector's appeal, to the extent that one could view the objector as having a duty to act in the interests of the class when objecting. One question is whether the proposal could be modified to provide the court of appeals with discretion whether to permit the dropping of an appeal – along the lines of the discretion that Civil Rule 23(e)(5) accords to the district court. The decision whether to permit the withdrawal of the appeal would fall to the court of appeals, unless that court decided to remand to the district court for a resolution of that question. Court of appeals judges may not be as well situated as the district court to assess the validity of the objector's reasons for seeking to withdraw the appeal.

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

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

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

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

VII. Adjournment

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

Respectfully submitted,

Catherine T. Struve
Reporter